IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ANDREW S. ANDERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D11-0707

Opinion filed August 9, 2012.

An appeal from the Circuit Court for Bay County.
Elijah Smiley, Judge.

Nancy A. Daniels, Public Defender, and Robert S. Friedman, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Thomas H. Duffy, Assistant Attorney General, Tallahassee, for Appellee.

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SWANSON, J.

This is an appeal from an involuntary civil commitment order under the Jimmy Ryce Act.[1] We have never reversed a commitment order entered under the Jimmy Ryce Act after trial on account of a delay in the start of the trial, and

[1] Appellant raises two points in arguing for reversal. We affirm his first point without further comment.

decline to do so today, in the absence of any claim or "demonstration of an impact on the fairness of the trial itself." Boatman v. State, 77 So. 3d 1242, 1251 (Fla. 2011). Here, as in Morel v. Wilkins, 37 Fla. L. Weekly S161 (Fla. Mar. 8, 2012), the delay that occurred is properly attributed to Appellant. "[B]ecause the delay in [Anderson's] commitment trial has been made for tactical reasons at his own request, his detention did not result in a constitutional violation." Id. at S161.

We are asked to decide whether the trial court lacked jurisdiction to proceed with the case when the Amended Petition was filed because, Appellant asserts, he was not in lawful custody at that time, relying on our decision in Taylor v. State, 65 So. 3d 531 (Fla. 1st DCA 2011). On this record, we find Appellant was in lawful custody at the times the Original and Amended Petitions were filed. Just prior to the State's filing of the Amended Petition, the trial court entered a stay that lawfully precluded Appellant's release from custody. As a result, the trial court had jurisdiction over him at all pertinent times. See Larimore v. State, 2 So. 3d 101, 114 (Fla. 2008). Therefore, Taylor is distinguishable, and we conclude any error in procedure of which Appellant now complains falls squarely within the invited error rule.[2] "Under the invited error rule, a party cannot successfully

[2] The minority would have us recede from our recent decision in Taylor, but we decline to reach Taylor and decide this case on the narrow ground of invited error. See PDK Labs., Inc. v. United States D.E.A., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) ("This is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint – if it is not necessary to decide more, it

complain about an error for which he or she is responsible or of rulings that he or she invited the court to make." Muina v. Canning, 717 So. 2d 550, 553-54 (Fla. 1st DCA 1998) (citing Gupton v. Village Key & Saw Shop, Inc., 656 So. 2d 475 (Fla. 1995)). Consequently, we affirm.

Facts

In 2005, Appellant, Andrew Anderson, was adjudicated delinquent after pleading no contest to two counts of lewd and lascivious molestation involving his seven- and nine-year-old cousins. Appellant was fourteen years old at the time. He was placed in a facility operated by the Department of Juvenile Justice. During his time at the facility, Appellant was diagnosed with pedophilia. Two psychologists examined Appellant. In their written evaluations, the psychologists

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is necessary not to decide more – counsels us to go no further."). See, e.g., State v. Mozo, 655 So. 2d 1115, 1117 (Fla. 1995) (adhering "to the settled principle of constitutional law that courts should endeavor to implement the legislative intent of statutes and avoid constitutional issues"). See also Leslie v. Carnival Corp., 22 So. 3d 567, 582 n.16 (Fla. 3d DCA 2009) (citing PDK Labs., 362 F.3d at 799). In response to Judge Wetherell's concurring opinion, which states in pertinent part, that the invited error doctrine cannot be applied to this case "because the effect of doing so would be to confer jurisdiction on the trial court that it does not have[,]" we emphasize we are not using the invited error doctrine to confer jurisdiction on the court; in this case, it had jurisdiction because Appellant was in lawful custody. Instead, the invited error doctrine overcomes the mandatory time requirements set forth in section 394.916, Florida Statutes (2009). The Florida Supreme Court has made it clear; the statutory time requirements are mandatory, not jurisdictional. See, e.g., Osborne v. State, 907 So. 2d 505, 507-08 (Fla. 2005). Moreover, the restraint exercised by the majority herein is consistent with the Florida Supreme Court's manifestation of restraint on the same issue. See Boatman, 77 So. 3d at 1251 n.11.

reported Appellant admitted having sexual fantasies involving young children, including an infant. On October 14, 2009, a few months before Appellant's scheduled release from custody, the State filed a petition to involuntarily commit him as a sexually violent predator. Two days later, on October 16, 2009, the trial court found probable cause that Appellant met the criteria for commitment, triggering section 394.916, Florida Statutes (2009), which requires a trial occur within thirty days, absent a continuance. The court did not immediately set a trial date.

Instead, the trial court held a status conference on November 12, 2009, in which Appellant participated telephonically. At that conference the State announced it was ready to proceed, but Appellant's counsel requested additional time to have a doctor evaluate Appellant. Counsel stated she had not yet had the opportunity to have an examination completed. The trial court explicitly recognized the failure of Appellant's counsel to have the evaluation completed constituted "grounds to continue the matter beyond the time set forth in the rule[.]" Appellant – on the record – acknowledged this made sense to him. Appellant's counsel agreed to prepare an order appointing a doctor. Appellant later said he did not want to have the evaluation completed, stating "I already know what they said. I already know the reason why I'm over here, there's no reason in trying to get me out." Appellant said he would talk to his lawyer about reaching an agreement with

the State and processing the case without adversarial proceedings. The court informed Appellant that adversarial proceedings would resume if no agreement could be reached. The conference ended with Appellant's counsel announcing she would call Appellant to discuss his options.

Nine months later, on August 16, 2010, the trial court held another status conference. At some date between this status conference and the earlier conference on November 12, 2009, Appellant's first attorney left the Public Defender's Office and another assistant public defender was assigned. At the conference held on August 16, 2010, the court noted the clerk's file reflected the request of Appellant's previous assistant public defender for a continuance in order to have a doctor examine Appellant. The court said the Public Defender's Office was to have prepared an order, but never did. The State indicated it had initiated discussions with Appellant's former assistant public defender about reaching an agreement, but no progress was made. Towards the end of the conference on August 16, 2010, Appellant's new assistant public defender said she would prepare an order to have a doctor appointed.

On September 14, 2010, having still not been brought to trial, Appellant filed a motion to dismiss the State's petition. Appellant claimed he was entitled to a dismissal and immediate release from custody since he had not been brought to trial within thirty days of the probable cause determination. The trial court granted

the motion to dismiss without prejudice at a hearing held on January 3, 2011, but stayed the release for ten days to allow the State to appeal. The State did not appeal; instead, that same day – January 3, 2011 – it filed an amended petition. The trial court entered a new probable cause order the following day and set trial for January 31, 2011. Ten days following the hearing on January 3, 2011, Appellant was released from custody pending trial. On January 25, 2011, the trial court heard a defense Motion for Continuance. According to Appellant's attorney, she now sought additional time because Appellant "had some defenses that hadn't been explored before[.]" The State, however, pointed out:

> [T]he [Appellant] had filed a motion which resulted in him getting what he asked for, an immediate court date, and we, you know, were able to accommodate that, and now the public defender's been assigned to this case for 15 months, and it's hard for the state to understand or believe that on the eve of trial, the week before is the first time any work's been done on this case to prepare a defense. And, you know, we should have been talking about this a year ago or six months ago.

The trial court denied this final defense Motion for Continuance and a bench trial was held on January 31, 2011. The trial court found Appellant to be a sexually violent predator and ordered his commitment. He was immediately detained and committed, and remains in custody. This appeal follows.

Analysis

In Jimmy Ryce proceedings, after the State files a petition for commitment and the trial court determines probable cause exists to classify a respondent as a

sexually violent predator, the respondent must be brought to trial within thirty days, unless a continuance is granted. Specifically, section 394.916 provides:

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

Rule 4.240(a) of the Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators provides that "[t]he trial . . . shall be commenced within 30 days . . . unless the respondent waives the 30 day time period in writing . . . or on the record in open court." See also Morel, 37 Fla. L. Weekly at S167.

Based on the record, it is evident Appellant actively sought and intended his case to be continued on three occasions. The transcripts from the 2009 and 2010 status conferences, as well as the transcript from the January 25, 2011, hearing on Appellant's Motion for Continuance, reflect Appellant's clear and repeated attempts to have his case continued.

A continuance was initially requested and granted at the 2009 status conference, thereby obviating the thirty day trial requirement. The trial court found Appellant was not ready for trial or yet in a position to make a knowing stipulation to the State's "Petition for Declaration and Commitment of [Appellant]

as a Sexually Violent Predator." Additional time was sought by Appellant, whose attorney made it clear she wanted a continuance to have a doctor examine Appellant. The trial court recognized her request to have Appellant examined was grounds for a continuance, which Appellant acknowledged made sense to him. Furthermore, Appellant and his attorney also sought time to discuss a settlement with the State before electing to proceed with the adversarial process. An order continuing the matter was to have been prepared by Appellant's attorney, who failed to do so. While no definitive waiver in "writing" existed at this point, the status conference transcript shows the lawyers, the judge, and Appellant all understood a continuance was to occur.

Additionally, at the conclusion of the 2010 status conference, Appellant's new attorney stated she would submit an order to the judge to have a doctor appointed. The record does not indicate this ever happened. Instead, she filed a motion to dismiss the State's Petition on September 14, 2010, less than one month after the 2010 status conference. The motion to dismiss was granted without prejudice on January 3, 2011, at which time the State filed its Amended Petition.

Appellant's attorney then filed a formal Motion for Continuance directed to the State's Amended Petition. The hearing on this Motion for Continuance occurred on January 25, 2011, at which time Appellant's attorney asserted a need to explore new defenses. At this point, the Public Defender's Office had been

appointed to represent Appellant for over fifteen months. The record establishes a pattern followed by both assistant public defenders in seeking continuances and delaying the trial, thereby undermining any claim that Appellant did not invite error.

The mandatory legislative time requirements and the requirements set forth in the rules were waived in this case due to the continuances sought. Appellant cannot now "cry foul" and benefit from this invited error.

> "Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal." Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990). In the instant case, if any error was committed in honoring the defendant's demand for speedy trial, the defendant clearly invited the error. Therefore, the defendant cannot take advantage on appeal of the situation he created at trial. White v. State, 446 So. 2d 1031, 1036 (Fla. 1984); McCrae v. State, 395 So. 2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1041, 102 S. Ct. 583, 70 L. Ed. 2d 486 (1981).

Ashley v. State, 642 So. 2d 837, 838 (Fla. 3d DCA 1994).[3] Counsel cannot

[3] See also Universal Ins. Co. of N. Am. v. Warfel, 82 So. 3d 47, 65 (Fla. 2012) ("Fundamental error is waived where defense counsel requests an erroneous instruction. Fundamental error is also waived where defense counsel affirmatively agrees to an improper instruction."); Sheffield v. Superior Ins. Co., 800 So. 2d 197, 202 (Fla. 2001) ("Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal."); Goodwin v. State, 751 So. 2d 537, 544 (Fla. 1999) ("If the error is 'invited,' or the defendant 'opens the door' to the error, the appellate court will not consider the error a basis for reversal."); Thomas v. State, 730 So. 2d 667, 668-69 (Fla. 1998) ("Where counsel communicates to the trial judge his acceptance of the procedure employed, the issue will be considered waived. In the present case, defense counsel told the judge he had no objection—thus, the . . . violation was not reversible error."); Norton v. State, 709 So. 2d 87, 94 (Fla. 1997) ("Furthermore, a party may not invite error

"sandbag [a] trial judge by requesting and approving [something] they know . . . will result in an automatic reversal, if given." Rosen v. State, 940 So. 2d 1155, 1161 (Fla. 5th DCA 2006) (quoting Weber v. State, 602 So. 2d 1316, 1319 (Fla. 5th DCA 1992)).

Based on the record, we find Appellant and his attorney invited error, which they cannot now complain of on appeal. As in Tonnelier Construction Group, Inc. v. Shema, 48 So. 3d 163 (Fla. 1st DCA 2010), "the trial court did exactly what Appellant asked it to do[.]" Id. at 165. Even though the trial court did not grant Appellant's final request for a continuance, doing so would have reinforced the conclusion that strict compliance with the thirty-day trial requirement was waived.

Accordingly, we AFFIRM.

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during the trial and then attempt to raise that error on appeal."); Terry v. State, 668 So. 2d 954, 962 (Fla. 1996) ("Most importantly, a party may not invite error and then be heard to complain of that error on appeal."); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983) ("A party may not invite error and then be heard to complain of that error on appeal. We therefore find no merit in this point of appellant's appeal."); Muina, 717 So. 2d at 553-54.

BENTON, C.J., DAVIS, VAN NORTWICK, PADOVANO, LEWIS, CLARK, MARSTILLER, and MAKAR, JJ., CONCUR.

PADOVANO, J., CONCURS IN AN OPINION WITH WHICH DAVIS, VAN NORTWICK, and CLARK, JJ., CONCUR.

WETHERELL, J., CONCURS IN RESULT ONLY IN AN OPINION WITH WHICH WOLF, THOMAS, ROBERTS, ROWE, and RAY, JJ., CONCUR

ROWE, J., CONCURS IN RESULT ONLY IN AN OPINION WITH WHICH WOLF, THOMAS, ROBERTS, WETHERELL, and RAY, JJ., CONCUR.

MAKAR, J., CONCURS IN AN OPINION WITH WHICH MARSTILLER, J., CONCURS.

PADOVANO, J., concurring.

I concur in all respects with the decision by the majority but wish to emphasize that the decision was based on the narrow ground of invited error and that it does not call into question the validity of our prior decision in Taylor v. State, 65 So. 3d 531 (Fla. 1st DCA 2011). Some of the judges of this court believe that the Taylor case is controlling here and they have expressed the view that the court should recede from it. I write to express my disagreement on both of these points.

This court held in Taylor that a dismissal without prejudice for failure to meet the mandatory time limit for conducting a trial on a petition for involuntary commitment cannot be cured as a matter of course by filing an amended petition after the time has expired. In this context, the term "without prejudice" could only signify that the state is free to initiate a commitment proceeding in the future if the respondent is in lawful custody once again. In other words, the dismissal does not operate as res judicata on any element of proof necessary to support an involuntary commitment. To interpret the phrase "without prejudice" to mean that the state may restart the time period simply by refiling the petition would effectively nullify the mandatory time limit in the statute.

The majority correctly declined to revisit the Taylor decision, inasmuch as the precedent set by the court in that case has no bearing on the issue in this case.

The prosecutor and the judge in the present case were both prepared to afford Mr. Anderson a trial within the time period set by the statute. The delay in the trial was caused entirely by Mr. Anderson's own request for additional time to obtain another psychological evaluation. He understood that the trial judge could not grant his request for additional time without also setting the trial date beyond the statutory time limit. Because Mr. Anderson essentially asked the court for a continuance, he is in no position to complain about the delay in the trial.

In contrast, the delay in the Taylor case was caused by years of neglect and, in the end, a motion for a continuance filed by the state. Mr. Taylor did not waive his right to a speedy trial in writing and, unlike Mr. Anderson, he did not waive his right to a speedy trial in open court by requesting additional time.[4] This significant difference between the present case and the Taylor case did not become apparent to this court until after the court voted to hear the present case en banc. It became known only because the en banc court requested the transcript of a hearing not previously provided by the parties. The supplemental record plainly revealed that it was Mr. Anderson who had requested the delay in the trial.

[4] Judge Wetherell states in his concurring opinion that Mr. Taylor "agreed to an indefinite waiver of the statutory trial period for strategic reasons," but that is not correct. The state's response in the Taylor case states that the lawyers had an informal off-the-record agreement for a brief delay of no more than 30 days. The petitioner's lawyer acknowledges that such an agreement may have been made, but if that is the case, the agreement is not a matter of record. Mr. Taylor did not waive the time period in writing or in open court. Nor is there any evidence that he was even aware of the informal agreement to which the prosecutor is referring.

Those of my colleagues who wish to recede from Taylor now minimize this major difference between the two cases by pointing out that the respondents were entitled to be released in both cases because the motions to dismiss were granted in both cases. The fallacy in this argument is that the motion to dismiss in Taylor was properly granted whereas the motion in this case should have been denied.

Mr. Taylor was held in custody on the strength of an automatic stay the state had obtained by filing an appeal from the order dismissing the petition. He moved to vacate the stay in the trial court on the ground that the state had no reasonable likelihood of success on appeal. The trial judge denied the motion but this court never had an opportunity to review the stay, because the state did not transmit a copy of the notice of appeal to this court or otherwise inform this court that it had filed an appeal. Instead, the state filed an "amended" petition that was identical in all respects to the original and then voluntarily dismissed the appeal. In these circumstances, it would be very difficult to make a plausible argument that Mr. Taylor was in lawful custody during the brief period of time in which the state's appeal was pending.

That Mr. Taylor was entitled to a dismissal was never in question. He had been held in custody for more than ten years and he had never waived his right to a speedy trial. The case against Mr. Anderson is very different in that he was not entitled to a dismissal. This court has now held in its en banc decision that Mr.

Anderson waived his right to rely on the time limitation in the statute. If the trial court had denied the motion, as it should have, Mr. Anderson would have been in lawful custody under the original petition. Thus, the decision this court made in Taylor is not controlling here for the simple reason that Mr. Anderson waived his right to a trial within the time limit in the statute, whereas Mr. Taylor did not.

If the Taylor decision were applicable here, I certainly would not recede from it, as Judge Rowe and other judges who have joined her opinion are advocating. In my view, the conclusion the court reached in Taylor is correct. Moreover, I believe that the alternative interpretation set out in Judge Rowe's opinion would expose the involuntary commitment statute to a viable constitutional challenge.

It appears to me now, as it did then, that the conclusion the court reached in Taylor is one that is required by the plain language of the statute. Section 394.916(1), Florida Statutes (2009), states, "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.) This statute is not ambiguous; it sets a mandatory time limit for conducting a trial. The time period in the statute is measured from the date of the order finding probable cause, not from the date of the petition. I do not believe that the state should be permitted to restart the running of the time by filing an amended petition in the same case and obtaining a

new order finding probable cause. There is nothing in the text of the statute to suggest that the mandatory time limit can be extended or circumvented in this way.

Rule 4.240(a) of the Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators also sets a mandatory time limit for conducting a trial. This rule states that "[t]he trial to determine if the respondent is a sexually violent predator shall be commenced within 30 days after the summons has been returned served and filed with the clerk of the court, unless the respondent waives the 30 day time period in writing." The Fourth District Court of Appeal held in Tedesco v. State, 62 So. 3d 1252 (Fla. 4th DCA 2011) that the rule takes precedence over the statute, but this has no effect on the present disagreement within our court.

The significant point is that the time limit was designed to apply to the entire proceeding. I do not read the statute or the rule to mean that the time limit applies to a particular petition for commitment or, as in this case, a particular version of the same petition. The statute does not state that the time periods can be applied sequentially to individual petitions, beginning once with a given petition and then starting anew with another. Nor is there anything in the statute or the rule to suggest that the time periods can be revived once they have expired.

Judge Rowe concludes that the state has a right to proceed after the deadline, so long as the respondent is released from custody. This conclusion effectively

replaces the strict requirement in the text of the statute with a more lenient rule made entirely by the court. Section 394.916(1) states that the "court shall conduct a trial" within 30 days of the order determining probable cause. The statute sets a maximum time for conducting a trial, not a maximum time to hold the respondent in custody. To conclude that the statute merely governs the issue of custody not only reads something into the text that is not there, it would also create a host of new problems for the court to resolve. Would there be any time constraint on the state's ability to revive a case by filing a new or amended petition and, if so, what would it be? How many times can the state revive the case by filing new or amended petitions?

It is no answer to say that section 95.11(p) provides a four-year statute of limitations for civil actions not governed by a more specific statute. It is doubtful that the statute of limitations can be applied at all in a Jimmy Ryce Act proceeding, as there is no point at which the action can be said to have accrued. But there is a more serious problem with the argument that section 95.11(p) provides an outer time limit. Section 394.916(1) sets a time limit to conduct a trial, not to initiate the case. In that respect, it functions more like the speedy trial rule in criminal cases than a statute of limitations. If the state violates a criminal defendant's right to a speedy trial, it cannot proceed with the trial, despite the violation, merely because there is still time left on the statute of limitations. By the same reasoning, the state

should not be entitled to proceed to a commitment trial in a Jimmy Ryce Act case after the mandatory time limit for conducting the trial has expired, merely because there is time left on a general statute of limitations that would otherwise apply to unspecified civil actions.

The notion that release is the sole consequence of a failure to meet the deadline for trial is also unsupported by the rules of procedure. Rule 4.240(a) states that the "trial shall be commenced" within 30 days of the service of the summons. It does not state that the defendant shall be released from custody if the state fails to meet the deadline for trial but that the state is otherwise free to proceed. Whether this would be a good policy is a question for either the Florida Supreme Court or the Florida Legislature to decide.

I acknowledge that there may be some circumstances in which the state could continue with a Jimmy Ryce Act proceeding after the respondent has been released. However, it does not follow from this proposition that the state is entitled to continue with an untimely Ryce Act proceeding merely because the respondent has been released. Certainly, the state is not entitled as a matter of right to proceed in the face of its own failure to meet the mandatory time limits. To the contrary, there must be some extraordinary circumstance that would justify the continuation of a prosecution after the statutory time limit for trial has expired.

The procedure Judge Rowe proposes would entitle the state to proceed as a matter of course after the running of the time limit, provided the respondent is released from custody. In effect, the rule she advocates would create a new class of Ryce Act respondents: those who are alleged to be extremely dangerous and yet are allowed to remain at large in society while the state is pursuing a commitment proceeding. I doubt that this was the intent of the legislature. A procedure that substitutes the release of the respondent for a prompt trial and final resolution of the case would be contrary to the main objective of the statute.

The purpose of the Jimmy Ryce Act is to isolate and treat persons who are presently dangerous. As explained in section 394.910, Florida Statutes, the Ryce Act is aimed at "a small but extremely dangerous number of sexually violent predators." The point of the Act is to detain these predators in order to protect society. It would make little sense to release them pending trial, as we would a criminal defendant who is eligible for pretrial release. The trial of a Ryce Act petition takes place much faster than the trial in a criminal case.[5] If the charge is proven, the respondent is committed at that time. If the charge is not proven, the respondent is released at that time. However, the respondent is not released

[5] Rule 3.191(a) of the Florida Rules of Criminal Procedure provides that the defendant shall be brought to trial on a felony charge within 175 days of the arrest. In contrast, a person facing involuntary commitment under the Ryce Act must be brought to trial within 30 days.

pending the outcome, because the very danger the court is trying to prevent could occur in the meantime.

Our decision in Taylor is compelled not only by the plain language of the statute but also by judicial precedents we are bound to follow. The Florida Supreme Court held in Osborne v. State, 907 So. 2d 505 (Fla. 2005) that if the respondent is not brought to trial within thirty days of the probable cause hearing, as required by law, the petition for involuntary commitment must be dismissed, and the respondent must be released from custody. Subsequently, in Larimore v. State, 2 So. 3d 101 (Fla. 2008), the Florida Supreme Court held that the respondent must be in lawful custody when the process of involuntary commitment is initiated.

If we consider the precedents set by the court in Osborne and Larimore together, we must conclude that the state has no authority to file a new or amended petition in the same proceeding once the original petition has been dismissed for failure to meet the statutory deadline for conducting a trial. The respondent would be released from custody as required by Osborne, and the state would be unable to initiate a proceeding against him under Larimore, because he would no longer be in custody. The only way to avoid this result would be to conclude that the custody requirement in Larimore applies only when the case is originally processed and filed. That is not a viable option, however, as it would require the court to treat a subsequent dismissal for failure to meet the deadline as if it were irrelevant.

The supreme court did not explain precisely what it meant by a dismissal "without prejudice" in the context of a Jimmy Ryce Act proceeding, but it is clear from the language of the pertinent opinions that the court meant that the dismissal was without prejudice to file a new commitment petition at some point in the future. The court stated in Osborne, "[W]here a respondent has completed his criminal sentence and is being detained awaiting a Ryce Act trial and the trial period has exceeded thirty days without a continuance for good cause, the respondent's remedy is release from detention and a dismissal without prejudice of the pending proceedings." 907 So. 2d at 509 (emphasis added). The court is plainly referring to the entire proceeding, not merely the petition for involuntary commitment. The court is stating that another case can be filed at some point, not that the state can revive the existing case by filing a new petition.

The Second District has also concluded that the effect of a dismissal without prejudice is to enable the state to file another case at a later point in time. As the court explained in In re Commitment of Goode, 22 So. 3d 750, 752 (Fla. 2d DCA 2009),

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

The Second District assumed that the phrase "without prejudice" signifies that the dismissal does not operate as res judicata. A failure to meet the mandatory time limit cannot be corrected by filing a new or amended petition in the pending case. However, as the court explained, the state is free to file a "new petition for civil commitment" if "the detainee is subsequently imprisoned for another offense."

This interpretation is consistent with the procedures that apply in civil cases in comparable situations. The court may properly look to the Florida Rules of Civil Procedure for guidance on this issue, because the civil rules are incorporated by reference into both the Ryce Act and the rules governing Ryce Act proceedings. See § 394.9155(1), Fla. Stat.; Fla. R. Civ. P. – S.V.P., 4.440(a)(1). The civil rules apply in Ryce Act proceedings to the extent that they are not in conflict with more specific rules or statutes.

When a case is dismissed without prejudice for failure to meet a time limit in the civil rules, the phrase "without prejudice" means that the plaintiff can assert the claim once again in another case. It does not mean the plaintiff can file a new complaint in the same case. For example, a dismissal without prejudice for failure to make service of process within 120 days means that the plaintiff may start over with a new lawsuit. See Carlton v. Wal-Mart Stores, Inc., 621 So. 2d 451 (Fla. 1st DCA 1993). The plaintiff cannot cure the problem simply by filing an amended

complaint in the same lawsuit. Likewise, a dismissal without prejudice for failure to prosecute within one year means that the plaintiff has a right to initiate the action once again. See Houswerth v. Neimiec, 603 So. 2d 88 (Fla. 5th DCA 1992). It does not mean that the plaintiff may proceed in the same action as if the time had not run.

We must be careful not to confuse the dismissal without prejudice that occurs when the plaintiff fails to meet one of these time limits with the dismissal without prejudice that occurs when a complaint is dismissed on the ground that it fails to state a cause of action. That is a dismissal of the complaint, not a dismissal of the case. Both are referred to as dismissals without prejudice but they are very different. A failure to meet a mandatory time limit cannot be cured simply by filing an "amended" complaint in the same case. Yet that is precisely what the state attempted to do in the Taylor case.

Judge Rowe points out that a dismissal for failure to meet the mandatory time limit for conducting a trial is not jurisdictional. However, the fact that the court has judicial power to continue with a case does not mean that the court should continue with the case. And the fact that the court has jurisdiction certainly does not mean that the state is entitled to proceed with the case, notwithstanding its failure to meet the mandatory time limit. The supreme court concluded that trial courts retain jurisdiction following a dismissal, to account for the possibility that

there may be some exceptional circumstances that justify continued prosecution beyond the time limit for conducting a trial. The court explained in State v. Goode, 830 So. 2d 817, 828 (Fla. 2002) that it did not regard the time limit as a jurisdictional bar, because there may be "limited instances where the court would retain jurisdiction beyond the thirty-day time period, most notably where a continuance, for good cause or in the interest of justice, has been granted under section 394.916 (2)."[6]

Finally, our interpretation of the statute in Taylor was necessary in order to avoid future challenges to the constitutionality of the Jimmy Ryce Act. Whether the involuntary civil confinement of a person alleged to be dangerous violates an individual's substantive right of due process is a close question. In the leading case of Kansas v. Hendricks, 521 U.S. 346 (1997), the United States Supreme Court upheld the Kansas Sexually Violent Predator statute by a vote of five to four. The majority held that the statute did not violate substantive due process rights because it was not punitive and because it contained a number of procedural safeguards. Justice Breyer dissented. He reasoned that the Kansas commitment statute was not designed to facilitate a civil commitment, but rather that it simply enabled the state to "inflict further punishment" on the respondent. Hendricks, 521

[6] In Goode, the supreme court affirmed the dismissal of the petition, and the respondent was released. The state did not attempt to file a new or amended petition in that case following the expiration of the time limit.

U.S. at 373 (Breyer, J., dissenting). Three other justices joined in Justice Breyer's dissent.

Justice Kennedy joined the majority but wrote a separate concurring opinion in which he emphasized that the constitutionality of the statute depends on the way in which it is employed by the state. Justice Kennedy's concurring opinion contains the following warning to those who would misuse the commitment statutes:

> On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

Hendricks at 373 (Kennedy, J., concurring). It is clear from this statement and the series of other opinions in the case that the United States Supreme Court would not invariably uphold an involuntary commitment statute. Whether a particular statute is constitutionally valid depends in large measure on the safeguards in the statute and on the way in which the statute is enforced by the state.

Florida's sexually violent predator statute is similar in many respects to the Kansas statute approved by the Court in Hendricks. The Florida Supreme Court upheld our state's statute in Westerheide v. State, 831 So. 2d 93 (Fla. 2002) and, in so doing, it relied heavily on the analysis in Hendricks. Our supreme court held that the statute satisfies the requirements of substantive due process but

emphasized that its decision was based in part on the procedural safeguards in the statute. Since then, the court has consistently explained that the procedural safeguards in the Jimmy Ryce Act are essential to the validity of the involuntary commitment process. See Larimore, 2 So. 3d at 107 (noting that, in Westerheide, the court had "specifically relied on the 'range of procedural safeguards to the individuals'" in upholding the Jimmy Ryce Act); Kephart v. Hadi, 932 So. 2d 1086, 1093 (Fla. 2006) (stating that "confinement under the Act did not violate an individual's right to due process 'provided that the confinement takes place pursuant to proper procedure and evidentiary standards'").

The mandatory time limit for bringing the respondent to trial is one of the essential procedural safeguards in the statute. It ensures that the determination leading to either involuntary confinement or release will be made expeditiously. If the courts allow the right created by this statute to become illusory, the entire process will be exposed to a serious constitutional challenge. The fear Justice Kennedy expressed in Hendricks that a statute, constitutionally valid on its face, might become unconstitutional by the manner in which it is employed, will have been realized.

For these reasons, I believe that our prior decision in Taylor is not controlling here. If it were controlling, I would not recede from it.

WETHERELL, J., concurring in result only.

I concur in the decision to affirm the order committing Appellant as a sexually violent predator under the Jimmy Ryce Act,[7] but I agree with Judge Rowe that we have to recede from Taylor to reach this result. I write separately to address the various contentions that Taylor is distinguishable from this case.

The majority asserts that Taylor is distinguishable because, unlike the respondent in Taylor, Appellant was in "lawful custody" when the amended petition was filed since there was a stay in effect at the time precluding his release. But, as explained by Judge Rowe, the same was true in Taylor.

Judge Padovano's concurring opinion expands on this assertion by implying that the State's appeal of the dismissal order in Taylor was a pretext to keep the respondent in custody until the State filed its amended petition. This contention finds no support in the Taylor opinion. The court did not hold in Taylor that the State's failure to prosecute the appeal was the reason the respondent was not in

[7] There is no question that Appellant is precisely the type of individual the Jimmy Ryce Act is intended to involuntarily commit for treatment in order to protect the public. He was convicted of molesting his cousins, ages 7 and 9, and he admitted to the multi-disciplinary team psychologists who evaluated him in September 2009 before his scheduled release from juvenile detention that he "like[s] having sex with children" and that he continues to have sexually deviant fantasies about children. He candidly acknowledged at trial that he needs additional sex offender treatment and he testified that there is a 40 percent chance that he will reoffend, which is only slightly better than what he told the psychologists in September 2009, when he rated his likelihood of committing a sexual offense in the future as a "5 to 6, maybe higher" on a scale of 1 to 10.

lawful custody when the amended petition was filed; rather, the court held that the respondent was not in lawful custody when the amended petition was filed because, under Osborne, he was entitled to immediate release upon his motion to dismiss being granted. See Taylor, 65 So. 3d at 536 ("In summary, we conclude that Mr. Taylor was entitled to be released when the court dismissed the original petition. . . . . The dismissal without prejudice left open the possibility of a new commitment proceeding in the future but it did not give the state the right to refile the petition in the commitment proceeding in this case. For these reasons, we hold that Mr. Taylor was not in lawful custody when the amended petition for involuntary commitment was filed and that the trial court is without jurisdiction to proceed on the amended petition.") (emphasis added).

Furthermore, even if the appeal filed in Taylor was merely a pretext to give the State time to file an amended petition while the automatic stay was in effect (thereby rendering Appellant's custody unlawful "during the brief period of time in which the state's appeal was pending" as Judge Padovano contends), the same is true of the stay entered by the trial court in this case. The record reflects that the trial court stayed Appellant's release for 10 days in order to give the State an opportunity to appeal the dismissal order, but the prosecutor made clear at the hearing on the motion to dismiss that he did not intend to appeal the dismissal order and instead was going to serve Appellant with an amended petition before his

release from the commitment center, which is precisely what the prosecutor did.

Judge Padovano's concurring opinion also contends that Taylor is distinguishable because "the motion to dismiss in Taylor was properly granted whereas the motion to dismiss in this case should have been denied." The Taylor opinion provides no support for this assertion; the opinion did not address the merits of the dismissal one way or the other because that issue was not before the court, a point I emphasized in my concurring opinion in Taylor. See id. at 537 (Wetherell, J., concurring) ("I do not read the majority opinion to approve the trial court's dismissal of the original petition . . . . Indeed, the propriety of that decision is not squarely before the court because the state did not pursue its appeal of the dismissal order.").

Not only was this issue not decided in Taylor, but the Florida Supreme Court's recent Morel decision undermines any view that the dismissal order in Taylor was unquestionably correct.[8] Like the respondent in Morel, the respondent in Taylor "agreed to an indefinite waiver of the statutory trial period for strategic

[8] The assertion in Judge Padovano's concurring opinion that Mr. Taylor's "entitle[ment] to a dismissal was never in question" is refuted by the fact that the trial court initially denied the motion to dismiss on the basis that the respondent had implicitly waived his right to a trial within the statutory period. See Taylor, 65 So. 3d at 533. Also, I specifically stated in my concurring opinion that "I disagree with the trial court that [this court's decision in] Boatman compelled dismissal of the original petition." Id. at 537 (Wetherell, J., concurring) (noting that "[t]here is persuasive authority suggesting that dismissal is not required under these circumstances").

reasons and then did not object to his continued confinement for nearly five years before filing a motion to dismiss."[9] Id. at 537 n.2 (Wetherell, J., concurring);

[9] Contrary to the assertion in Judge Padovano's concurring opinion, this statement is an accurate summary of the record in Taylor. Although the record did not reflect why the trial in Taylor was not set within 30 days after the December 2002 adversarial probable cause hearing in accordance with the parties' "informal off-the-record agreement," the respondent did not raise any objection when the case was finally set for trial on September 26, 2005. That trial date was continued at the State's request because one of its evaluators changed his opinion as to whether the respondent should be committed. The respondent, through his attorney, agreed to the continuance at a hearing held on September 15, 2005. There, in response to the trial court's question as to whether the case should be reset for trial at that time, the respondent's attorney stated that "we should probably just continue it and then [the prosecutor] and I can get together and figure out the course we're going to take on this one." The prosecutor agreed, and the trial court granted the continuance through a notation on the motion stating that the trial was "to be set upon proper motion." This ruling predated the 2006 amendment to section 394.916(2), Florida Statutes, that limited continuances to "not more than 120 days" absent a manifest injustice and it also predated the rules adopted by the Florida Supreme Court in 2009 that require a new trial date to be set when a continuance is granted. The trial court's notation that the trial was "to be set upon proper motion" is consistent with the prosecutor's testimony at the 2010 evidentiary hearing on the respondent's motion to dismiss that it was her understanding that respondent's attorney agreed to an open-ended waiver of the statutory trial period and would let her know when the case should be reset for trial. At no point prior to filing his motion to dismiss in February 2010 did the respondent request that the case be set for trial and, as noted by the State in its response to the petition for writ of prohibition in Taylor, during this five-year period, the respondent "took actions typical of someone defending against commitment, such as seeking discovery; responding to State discovery; and noticing/taking depositions." Thus, Judge Makar's concurring opinion is incorrect when it states that the respondent in Taylor only agreed to the delays "early on in his civil commitment proceeding" and that he did not acquiesce in "an indefinite delay and the five-year gap" preceding the filing of the motion to dismiss and the petition for writ of prohibition. Additionally, the fact that the respondent in Taylor did not personally execute a waiver or agree to a continuance on the record is no different than this case where it was Appellant's attorney who requested a continuance in November 2009 in order to have Appellant evaluated

accord Morel, 84 So. 3d at 247 (rejecting argument that respondent was entitled to dismissal because the record reflected that he "acquiesced to the indefinite postponement of trial and never once sought to recapture his right to be brought to trial in a timely manner"). Thus, even if it was debatable at the time Taylor was decided whether the original petition in that case was properly dismissed, it is now clear based on Morel that the dismissal order in Taylor was erroneous, just as it was in this case.

The majority and Judge Padovano make a strong case that the trial court erred in granting Appellant's motion to dismiss. However, as was the case in Taylor, the propriety of the trial court's ruling on the motion to dismiss is not before the court because the State did not appeal the dismissal order.[10] Thus, even

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by another doctor. In fact, after the trial court told Appellant that it would not be feasible to get him evaluated and have the case set for trial within 30 days, Appellant effectively objected to the continuance by telling the trial court "[w]ell, if that's the case, then just forget about the doctor." The trial court responded, "[w]ell, it doesn't work that way" and continued the case despite Appellant's objection. The fact that Appellant later expressed an interest in resolving the case without a trial does not change the fact that Appellant personally made clear to the trial court his desire for a speedy trial, something the respondent in Taylor never did.

[10] On this point, it is noteworthy (and somewhat ironic in light of the analysis in the majority opinion) that had the State appealed the dismissal order, it likely would have been met with an argument that it invited the trial court's erroneous ruling on the motion to dismiss because the record reflects that, at the hearing on the motion, the prosecutor agreed with Appellant that the trial court was required by Osborne to grant the motion and release Appellant. Indeed, at no point below did the prosecutor argue that dismissal was improper because Appellant had waived his right to trial within the statutory period by requesting a continuance.

if the trial court erred in granting Appellant's motion to dismiss, we cannot apply the "invited error" doctrine to affirm the commitment order in this case without receding from Taylor.

The invited error doctrine is particularly inapplicable here because Appellant did not invite the error he challenges on appeal through his actions preceding the motion to dismiss, as the majority contends. The only ruling that Appellant asked the trial court to make that could be subject to an invited error analysis is the court's ruling on his motion to dismiss. The motion only asked the trial court to dismiss the original petition under Osborne because Appellant had not been brought to trial within the statutory time period; it did not ask the trial court to allow the State to file and proceed on an amended petition in response to the dismissal order, which is the error that Appellant challenges on appeal.[11]

The only conceivable way that Appellant could be viewed as having invited the error he challenges on appeal is by answering the amended petition and proceeding to trial. However, if Taylor was correct that the dismissal of the original petition under Osborne deprives the trial court of jurisdiction to proceed on an amended petition unless and until the respondent is in custody on a subsequent offense, the invited error doctrine cannot be applied here because the

[11] The issue on appeal, as framed by Appellant in his brief, is: "[WHETHER] THE TRIAL COURT ERRED IN TRYING APPELLANT WHEN IT LACKED JURISDICTION TO PROCEED WITH THE CASE."

effect of doing so would be to confer jurisdiction on the trial court that it does not have. See Akins v. State, 691 So. 2d 587, 589 (Fla. 1st DCA 1997) (holding that, where the trial court lacked jurisdiction because the indictment charged a non-existent crime and the parties' stipulation to amend the indictment to charge a different crime was ineffective, "[a]n 'invited error' analysis is inapplicable . . . because jurisdiction cannot be conferred on the court by agreement of the parties"); Evans v. State, 647 So. 2d 180 (Fla. 1st DCA 1994) ("It is well settled that [a] defendant cannot confer jurisdiction on the trial court by waiver, acquiescence, estoppel, or consent since jurisdiction is established solely by general law.") (quoting White v. State, 404 So. 2d 804, 805 (Fla. 2d DCA 1981)).

Taylor made clear that "[t]he state was entitled to appeal [the dismissal] order and perhaps to have the respondent held in custody during the appeal, but the state was not entitled to cure the failure to meet the time limit simply by filing another version of the same petition." 65 So. 3d at 536; see also id. ("The dismissal of the original petition without prejudice left open the possibility of a new commitment proceeding in the future but it did not give the state the right to refile the petition in the commitment proceeding in this case."). Judge Padovano reiterates this very point in his concurring opinion when he asserts that "the state has no authority to file a new or amended petition in the same proceeding once the original petition has been dismissed for failure to meet the statutory deadline for

conducting a trial." The majority, however, approves precisely what the court held to be impermissible in Taylor – the State's refiling of a nearly identical amended petition in the same proceeding after the original petition was dismissed under Osborne.

It makes no difference, as Judge Padovano contends, that Appellant would have been in lawful custody under the original petition if the trial court had denied the motion to dismiss "as it should have." The trial court did not deny the motion and, although it could have, the State did not appeal the dismissal order. Had the State appealed and had this court reversed, the State could have proceeded on the original petition. See Taylor, 65 So. 3d at 536. But because none of this happened, Appellant's commitment cannot be justified based on the original petition. Nor can a ruling not made by the trial court be the basis to conclude that Appellant was in lawful custody at the time the amended petition was filed.

That said, because the present procedural posture of this case is similar to Boatman, there is no question that if we were writing on a blank slate, we could simply affirm the commitment order in this case on the authority of Boatman. In that case, the Florida Supreme Court held that when a Jimmy Ryce Act respondent waits until after trial to seek review of the State's failure to bring him to trial within 30 days, the respondent is not entitled to release unless he can demonstrate that the fairness of the trial was impacted by the delay. See Boatman, 77 So. 3d at

1251. Although Boatman involved a situation where the trial court continued the trial beyond the 30-day period over the respondent's objection without a proper legal basis for doing so, id. at 1245-46, there is no reason that the rule announced in Boatman should not also apply where, as here, the trial court grants the respondent's motion to dismiss under Osborne but then, without any objection from the respondent, the case proceeds to trial on the amended petition filed by the State in response to the dismissal order. In both situations, by the time appellate review is sought, the relief to which the respondent is entitled under Osborne is no longer available.

The problem, however, is that we are not writing on a blank slate. Taylor held that the trial court lacks jurisdiction to proceed on an amended petition filed after the order dismissing the original petition under Osborne unless and until the respondent is in custody on a subsequent offense. The rule announced in Boatman cannot overcome the jurisdictional defect resulting from the holding in Taylor simply by characterizing the decision as "outlier."[12] Thus, without receding from

[12] Judge Makar's concurring opinion makes a compelling argument that Taylor is merely an "outlier" that should be "confined to its unusual facts and procedural posture" and that it "should not . . . be read to permit compulsory release under facts like those presented here . . . ." The problem, however, is that the holding in Taylor was not as narrow as Judge Makar suggests. The basis of the court's decision to grant the writ of prohibition in Taylor had nothing to do with the length or propriety of the delay in the proceedings; rather, the decision was based on an express holding that the trial court lacked jurisdiction to proceed on the amended petition filed after the original petition was dismissed under Osborne because, at

Taylor, the court cannot rely on Boatman to affirm to commitment order in this case.

That, however, is precisely what the majority opinion purports to do through its statement that this court will not reverse "a commitment order entered under the Jimmy Ryce Act after trial on account of a delay in the start of the trial . . . in the absence of any claim or 'demonstration of an impact on the fairness of the trial itself'" (quoting Boatman). Because this statement and the decision in this case cannot be squared with Taylor, it follows that despite what the majority and Judge Padovano claim, the court has implicitly receded from Taylor in this case.

The en banc court is, of course, free to recede from Taylor. But it should do so explicitly in order to provide clear guidance to the Bench and Bar. Here, by leaving the erroneous impression that Taylor remains good law, the majority confuses the law rather than clarifying it. This result is unfortunate, particularly after the court took the extraordinary step of convening en banc to decide this case.

For these reasons, I concur in result only.

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that point, the respondent was no longer in lawful custody. See Taylor, 65 So. 3d at 536. That holding, if correct and still good law, squarely applies here and would require reversal.

ROWE, J., concurs in result only.

I concur in the result reached by the majority in this case. I write only to express my view that in order to achieve this result, this court must recede from Taylor v. State, 65 So. 3d 531 (Fla. 1st DCA 2011).

Just as in Taylor, the particular issue raised in this case is whether the state may continue proceedings against a respondent under the Jimmy Ryce Act where the trial court has dismissed without prejudice the state's original petition for failure to bring the respondent to trial within thirty days of the trial court's probable cause determination when the respondent is no longer in lawful custody at the time the new petition is filed. The majority attempts to distinguish Taylor, suggesting that Anderson invited error in this case. However, the majority's reliance on the invited-error doctrine is misplaced.

The majority suggests that after the original petition was filed, Anderson waived his right to be brought to trial within thirty days of the trial court's probable cause determination. However, that Anderson may have waived the thirty-day rule with regard to the original petition is of no legal consequence because the trial court dismissed that petition and the state did not appeal the dismissal. Instead, the state filed an amended petition, and the case proceeded to trial on the amended petition. Thus, the question presented here is whether the trial court properly exercised jurisdiction over the amended petition when the respondent was not in

"lawful custody" at the time the amended petition was filed, not whether the trial court improperly dismissed the original petition.[13]

The majority also concludes that "Anderson was in lawful custody at the times the original and amended petitions were filed" because "at the time of the amended petition, a stay had been entered which lawfully precluded [Anderson's] release from custody." However, the same was true in Taylor. In Taylor, following the dismissal order, the state filed a notice of appeal which triggered the automatic stay authorized under Florida Rule of Appellate Procedure 9.310(b)(2). The state did not pursue the appeal, but rather filed an amended petition. The stay remained in effect at the time the amended petition was filed.

In this case, simultaneously with its issuance of the dismissal order, the trial court entered a ten-day stay of its order to permit the state to appeal the court's ruling. The state did not appeal the dismissal order. However, the state filed an amended petition the very same day that the dismissal order was entered, while the ten-day stay remained in effect.

Accordingly, the majority's suggestion that Anderson was in "lawful custody" at the time the amended petition was filed directly contravenes our holding in Taylor. In Taylor, this court held that where the state's original petition

[13] Taylor, 65 So. 3d at 537 (Wetherell, J., concurring) ("I do not read the majority opinion to approve the trial court's dismissal of the original petition . . . the propriety of that decision is not squarely before [us] because the state did not pursue its appeal of the dismissal order.").

is dismissed and the state files an amended petition, lawful custody is determined with reference to the time that the amended petition was filed. Id. at 534-37. The Florida Supreme Court has held that "lawful custody" requires that the respondent be in total confinement. Larimore v. State, 2 So. 3d 101 (Fla. 2008). In both Taylor and this case, at the time that the amended petitions were filed by the state, the respondents had already been released from total confinement and had been transferred to the Florida Civil Commitment Center to await civil commitment proceedings under the Jimmy Ryce Act.

Thus, this case presents precisely the same jurisdictional question presented in Taylor and the result in this case is controlled by our decision in Taylor. For this reason, I cannot concur in the reasoning employed by the majority to affirm the trial court's order committing Anderson as a sexual violent predator. I would, however, affirm the trial court's order on the basis that our holding in Taylor was erroneous. Having considered this case en banc as a matter of great public importance, I conclude that we should expressly recede from Taylor because the holding in that case is inconsistent with the legislative intent, the express statutory directives, and Florida Supreme Court precedent construing the Jimmy Ryce Act.

In Taylor, this court held that in proceedings initiated under the Jimmy Ryce Act, where the state fails to bring a respondent to trial within thirty days after the trial court's determination that probable cause exists for the commitment of the

respondent as a sexually violent predator, the state's petition must be dismissed without prejudice. Id. However, the Taylor decision went beyond Florida Supreme Court precedent by further holding that if the respondent is not in lawful custody when the state files an amended (or new) petition, the trial court lacks jurisdiction over further proceedings by the state unless and until the respondent is in custody for a new offense. Id. at 536-37; see State v. Goode, 830 So. 2d 817, 818, 828 (Fla. 2002); Osborne v. State, 907 So. 2d 505, 508 (Fla. 2005); Mitchell v. State, 911 So. 2d 1211, 1219 (Fla. 2005); Larimore v. State, 2 So. 3d 101, 117 (Fla. 2008); Boatman v. State, 77 So. 3d 1242, 1249 (Fla. 2011).

For the reasons that follow, I would recede from our holding in Taylor and find that a dismissal without prejudice of the state's petition for failure to comply with the thirty-day deadline does not divest the trial court of jurisdiction under the custody provision. Following a dismissal without prejudice, the state may continue commitment proceedings if the respondent was in lawful custody when the proceedings commenced, unless the respondent can demonstrate actual prejudice or a violation of the applicable statute of limitations.

Analysis

The Lawful Custody Requirement

Before the trial court may exercise jurisdiction to consider a petition for involuntary commitment, some "portion of the commitment proceedings" must be

initiated before the respondent is released from total confinement. See Larimore v. State, 2 So. 3d 101, 117 (Fla. 2008). The focal point for the determination of lawful custody is the point in time "when the State takes steps to initiate civil commitment proceedings." Larimore, 2 So. 3d at 103; accord State v. Goode, 830 So. 2d 817, 825 (Fla. 2002). The plain language of the Jimmy Ryce Act provides that a civil commitment proceeding may be initiated in one of two ways:

> by giving notice to the multidisciplinary team and state attorney under section 394.913(1), Florida Statutes (2004), which begins the detailed process under that section, see §§ 394.913(1)-(4), or by transferring the individual to the custody of the Department of Children and Family Services upon that person's "immediate release from total confinement" under section 394.9135(1), Florida Statutes (2004).

Larimore, 2 So. 3d at 108.

Therefore, where the state initiates a civil commitment proceeding in either of the two ways provided by statute while the respondent is in lawful custody, the trial court's exercise of jurisdiction over a petition filed pursuant to that proceeding is proper. See Madison v. State, 27 So. 3d 61, 63 (Fla. 1st DCA 2009) ("[T]he trial court had subject-matter jurisdiction to adjudicate the commitment petition only if Appellant was in lawful custody when the State referred Appellant to the multidisciplinary team for evaluation . . . .").

The Thirty-Day Deadline

After the state attorney files the petition and the circuit court determines that probable cause exists to classify the respondent as a sexually violent predator, the

respondent must be brought to trial within thirty days, unless a continuance is granted by the trial court. Section 394.916, Florida Statutes (2009), provides:

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

Failure to bring the respondent to trial within the time periods prescribed by section 394.916 does not extinguish the trial court's jurisdiction over the proceeding. See, e.g., State v. Goode, 830 So. 2d 817, 818, 828 (Fla. 2002) (holding that the thirty-day deadline was mandatory, but "the expiration of the mandatory thirty-day period does not deprive the trial court of jurisdiction over the commitment proceedings"); Morel v. Wilkins, 37 Fla. L. Weekly S161, S167, available at 2012 WL 739209, at *15 (Fla. Mar. 8, 2012). Instead, the supreme court has consistently held the thirty-day deadline is mandatory, but not jurisdictional. Goode, 830 So. 2d at 830; Morel, 2012 WL 739209, at *15.

Nevertheless, failure to comply with the statutory deadline has consequences for both the state and the respondent: first, the state's petition must be dismissed without prejudice; and second, the respondent is entitled to release from detention. Boatman v. State, 77 So. 3d 1242, 1249 (Fla. 2011) (observing that "the proper

remedy when the State fails to timely try a case under the mandatory time provisions of the [Jimmy Ryce] Act is release of the respondent and dismissal of the State's petition without prejudice"); Osborne v. State, 907 So. 2d 505, 508 (Fla. 2005). This remedy, first articulated by the supreme court in Osborne and reaffirmed in Mitchell and Boatman, is intended to avoid the harsh result of a dismissal with prejudice, by balancing the liberty interests of the respondent with the authority of the state to continue proceedings under the Jimmy Ryce Act:

> In accordance with our holdings in Goode and Kinder[v. State, 830 So. 2d 832 (Fla. 2002)] that the thirty-day rule is mandatory but not jurisdictional, we find that a dismissal of a Ryce Act petition with prejudice for failure to try the case in the required time period would be incongruous with our prior interpretation of the thirty-day rule. A dismissal of a petition with prejudice would terminate the case on procedural grounds, essentially divesting the circuit court of jurisdiction. We, of course, have already held that the time period is not jurisdictional. Although the State must be held to the mandatory statutory time frames, we do not believe the Legislature intended that those time frames be used as vehicles by which to dispose of Ryce Act proceedings where the respondent suffers no prejudice. Rather, we conclude that absent a demonstration of prejudice, the dismissal should be without prejudice and the respondent should be released.

Osborne, 907 So. 2d at 508 (first and third emphasis supplied).

With regard to the remedy afforded to the respondent,[14] the release contemplated by Osborne and its progeny is not one of permanent discharge and

[14] The supreme court has stated that the remedy provided in Osborne does not apply where the trial court has granted a continuance for good cause or where the respondent consents to the delay. See Morel, 2012 WL 739209, at *16; Boatman, 77 So. 3d at 1249.

immunity, but rather temporary release from custody pending further proceedings by the state. In Mitchell v. State, 911 So. 2d 1211, 1219 (Fla. 2005), the supreme court observed that following a dismissal without prejudice, "the respondent may be entitled to his freedom," but acknowledged the state's ability to "continue the proceedings" against the respondent. The court has expressly declined the invitation to construe the thirty-day deadline to operate in a manner similar to the speedy trial rule in criminal cases. Boatman v. State, 77 So. 3d 1242, 1250 (Fla. 2011) ("The issue before us is unique—a direct analogy cannot be drawn to situations . . . involving either challenges to pretrial detention . . . or speedy trial violation claims . . . .") (footnote omitted). Instead, the court has determined that the thirty-day deadline is intended to minimize pretrial detention:

> Additionally, as stated by the First District: "The purpose of the thirty-day deadline is to minimize pretrial detention by requiring commitment trials to be held promptly, not to give respondents a proverbial 'second bite at the apple.' " Boatman, 39 So. 3d at 395 (emphasis added); see also Osborne, 907 So. 2d at 509 ("[T]he Legislature was concerned that a respondent not be indefinitely detained and that the State act promptly in bringing the matter to trial so that the respondent's detention after the criminal sentence expires be kept to a minimum.").

Id. at 1251 (alteration in original).

To interpret the release remedy in Osborne as one of permanent discharge, unless or until the respondent commits a new offense, does far more to undermine the comprehensive statutory scheme than the temporary remedy of pretrial release,

which is in fact provided for in section 394.9135(4), Florida Statutes. Instead, the remedy available to respondents who have been detained beyond the thirty-day deadline is one of release from detention pending continued proceedings by the state, not a prohibition of further state action.

This interpretation of the statute is grounded in Florida Supreme Court precedent. In approving the remedy of dismissal without prejudice, the supreme court observed in Osborne that the alternative remedy for noncompliance, a dismissal with prejudice, "would terminate the case on procedural grounds, essentially divesting the circuit court of jurisdiction." Osborne, 907 So. 2d at 508. Thus, the supreme court contemplated that in the context of civil commitment proceedings, a dismissal without prejudice does not terminate the case on procedural grounds. Nor does it give rise to a wholly new proceeding. Rather, following a dismissal without prejudice, the state may continue proceedings under the statute.

In Mitchell v. State, 911 So. 2d 1211 (Fla. 2005), the supreme court expressly recognized the state's ability to continue proceedings following a dismissal without prejudice:

> Importantly, in Osborne v. State, 907 So. 2d 505 (Fla. 2005), this Court has recently held, "[W]here a respondent has completed his criminal sentence and is being detained awaiting a Ryce Act trial and the trial period has exceeded thirty days without a continuance for good cause, the respondent's remedy is release from detention and a dismissal without prejudice of the pending proceedings." Id. at 509.

> Hence, we have already recognized an instance where the State may be entitled to continue the proceedings, but the respondent may be entitled to his freedom where the State has not scrupulously complied with the [Jimmy Ryce] Act's provisions."

Id. at 1219 (emphasis added). However, the supreme court cautioned that the state's authority to continue proceedings following a dismissal without prejudice is limited. In Osborne, the court determined that the applicable statute of limitations provides an appropriate limit on the state's ability to proceed:

> Although we have recognized that the mandatory thirty-day time period must be enforced, we conclude that a dismissal of the petition with prejudice in this case would run contrary to our previous holdings. FN4
>
> FN4. Of course, the State's ability to refile a Ryce Act petition is subject to the appropriate statutory limitation period. Our opinion should not be read as suspending or extending that requirement in any way.

Osborne v. State, 907 So. 2d 505, 508 (Fla. 2005) (emphasis added). The clear implication of the supreme court's holdings in Osborne, Mitchell, and Boatman is that following a dismissal without prejudice for failure to comply with the thirty-day deadline, the state may refile its petition and continue proceedings under the statute, absent a showing of actual prejudice by the respondent, and subject to the applicable statute of limitations.[15] I would, therefore, find that a dismissal

[15] Because the Jimmy Ryce Act provides no express limitation on the state's ability to file a commitment proceeding, a four-year limitations period applies pursuant to section 95.11(p), Florida Statutes.

without prejudice does not prevent the state from refiling its petition and continuing proceedings under the act.

However, what I believe to be the correct interpretation of the statute does not absolve the state from attending to prompt resolutions under the Jimmy Ryce Act. There are due process limitations to the state's right to amend or refile a commitment petition. The supreme court has acknowledged the Legislature's intent that there be scrupulous compliance with the procedural aspects of the Jimmy Ryce Act; this is because "there are significant and substantial liberty interests involved with the involuntary and indefinite detentions provided for under the Ryce Act." State v. Goode, 830 So. 2d 817, 823 (Fla. 2002). The interpretation advanced here does not detract from this mandate. Where the state fails to comply with the thirty-day deadline, those liberty interests are accommodated by the release of the respondent pending further commitment proceedings. Thus, the remedy of release pending trial satisfies the scrupulous compliance requirements of the Jimmy Ryce Act without restricting the state's authority to continue proceedings against the respondent. See Morel v. Wilkins, 37 Fla. L. Weekly S161, S167, available at 2012 WL739209, at *15 (Fla. Mar. 8, 2012) ("[T]he confinement of an individual past the expiration of his or her incarcerative sentence requires 'scrupulous compliance' with the Act's requirements." (quoting Kephart v. Hadi, 932 So. 2d 1086, 1092–93 (Fla. 2006))).

Receding from Taylor

Although the doctrine of *stare decisis* is the preferred course for courts to follow, the result reached by the majority requires us to recede from Taylor. In determining whether to recede from precedent, the Florida Supreme Court recently explained that *stare decisis* does not compel blind allegiance to precedent:

> "The doctrine of stare decisis counsels us to follow our precedents unless there has been 'a significant change in circumstances after the adoption of the legal rule, or . . . an error in legal analysis.' " Rotemi Realty, Inc. v. Act Realty Co., 911 So. 2d 1181, 1188 (Fla. 2005) (quoting Dorsey v. State, 868 So. 2d 1192, 1199 (Fla. 2003)). "Fidelity to precedent provides stability to the law and to the society governed by that law. However, the doctrine does not command blind allegiance to precedent. Stare decisis yields when an established rule of law has proven unacceptable or unworkable in practice." State v. Green, 944 So. 2d 208, 217 (Fla. 2006) (citations and internal quotation marks omitted).

State v. Sturdivant, 37 Fla. L. Weekly S127, available at 2012 WL 572977, at *5 (Fla. Feb. 23, 2012). Because the holdings in Taylor erroneously conflict with clear directives of the Jimmy Ryce Act and supreme court precedent construing the statute, I would recede from our decision in Taylor.[16]

In Taylor, this court considered whether a trial court could properly exercise

[16] Because less than a year has elapsed since the decision became final, there can certainly be no "reliance interests" at stake in preserving our decision in Taylor. See Citizens United v. Fed. Elections Comm'n, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring) ("[*S*]*tare decisis* is neither an 'inexorable command,' . . . nor a 'mechanical formula of adherence to the latest decision . . . .' " (citations omitted)).

jurisdiction over an amended petition filed by the state in a civil commitment proceeding, following a dismissal without prejudice for failure to comply with the thirty-day deadline, when the respondent was no longer in lawful custody at the time the amended petition was filed. Concluding that the date the amended petition was filed was "the operative" date for the determination of lawful custody under the statute, the Taylor court held that the trial court no longer had jurisdiction over the proceedings and that the state could not proceed against Taylor unless or until he was "taken into custody on another offense." Id. at 534-37. Thus, Taylor held that: (1) lawful custody under the Jimmy Ryce Act should be determined with reference to the filing of the commitment petition by the state; and (2) the state may not continue proceedings following a dismissal without prejudice of the state's petition for failure to comply with the thirty-day deadline, unless the respondent has been incarcerated for a new offense. In reaching these holdings, the Taylor court applied the principles of lawful custody and the thirty-day deadline in a manner inconsistent with the statute and supreme court precedent.

The first part of the Taylor court's holding is in direct conflict with the precedents from the supreme court in Larimore v. State, 2 So. 3d 101, 108 (Fla. 2008) and this court in Madison v. State, 27 So. 3d 61, 63 (Fla. 1st DCA 2009), which provide that the determination of lawful custody is fixed to the time that

civil commitment proceedings are initiated by the multidisciplinary team or transfer of the respondent to the custody of the Department of Children and Families. No other court interpreting the Jimmy Ryce Act has held that for purposes of determining the trial court's jurisdiction, lawful custody should be considered with reference to the filing of the state's petition (original or amended) rather than when the commitment proceedings are initiated in one of the two ways provided by statute.

Because the state was authorized to continue proceedings following the dismissal without prejudice of its original petition, the operative date for determining lawful custody was when the initial steps were taken to begin the commitment proceedings, not the date that the state filed the amended petition. By treating the filing of the amended petition as the initiation of a wholly new proceeding, the Taylor decision failed to follow the dictates of Osborne and Mitchell which expressly permit the state to continue proceedings after a dismissal without prejudice. Had the Taylor decision correctly assessed the lawful custody requirement in accord with Larimore and Madison, it would have necessarily concluded that the trial court properly exercised jurisdiction over the state's amended petition, because the respondent in Taylor was in lawful custody when the initial steps to begin civil commitment proceedings were taken, that is, the date the multidisciplinary referred Taylor for evaluation. See Larimore, 2 So. 3d at

110-11; Madison, 27 So. 3d at 63.

With respect to the second holding, Taylor is the only decision that requires that the respondent be incarcerated on a new offense before the state may lawfully continue a Jimmy Ryce proceeding following a dismissal without prejudice of the state's petition.[17] Taylor, thus, imposes a condition precedent on the state's ability to file a civil commitment petition that is not required by the statute or by prior precedent. By mandating that the respondent be incarcerated on a new offense before the state may continue proceedings against the respondent, the Taylor court has rendered a dismissal without prejudice indistinguishable from a dismissal with

[17] In reaching its holding, the court relied upon the Second District's decision in In re Commitment of Goode, 22 So. 3d 750 (Fla. 2d DCA 2009). However, In re Commitment of Goode does not stand for the proposition that as a result of a dismissal without prejudice for failure to comply with the thirty-day rule, the state may not continue the proceedings which have already been commenced under the Jimmy Ryce Act unless and until the respondent is again incarcerated for another offense. Rather, In re Commitment of Goode addressed whether the trial court's dismissal of an earlier petition brought by the state based upon its failure to bring the respondent to trial within thirty days barred the state on res judicata grounds from bringing a new petition for civil commitment when the respondent was convicted and reincarcerated for a new crime. Id. at 752. There, the Second District held that "a dismissal of a petition for civil commitment for failure to abide by the thirty-day rule is a procedural dismissal and that neither rule 1.420(b) nor the doctrine of res judicata are applicable." Id. Accordingly, the court observed that because the state is not barred by res judicata, if "the detainee is subsequently imprisoned for another offense, the State is free to file a new petition." Id.

Thus, the Second District did not hold as a matter of law that subsequent reincarceration is required before the state may proceed on a Ryce petition following a dismissal without prejudice, rather that was the procedural posture of the case before the court in Goode. Similar facts were not present in Taylor.

prejudice. This construction of the statute is in direct conflict with precedent construing the statute. See Osborne v. State, 907 So. 2d 505, 508 (Fla. 2005) ("[W]e find that a dismissal of a Ryce Act petition with prejudice for failure to try the case in the required time period would be incongruous with our prior interpretation of the thirty-day rule.").

The decision in Taylor also conflicts with the plain language of the statute. The state attorney's receipt of the report from the multi-disciplinary team – not the respondent's continued incarceration – is the only condition precedent to the state's ability to file a petition under the statute. § 394.914, Fla. Stat.

Finally, Taylor's suggested right of recourse for the state does not provide the state with any right to proceed under the Jimmy Ryce Act that the state would not already have upon the reincarceration of an individual who has been convicted of a sexually violent offense. See Ward v. State, 986 So. 2d 479, 481 (Fla. 2008) (holding that Jimmy Ryce Act applied to defendant who had been released from prison for sex offense but was subsequently reincarcerated for burglary offenses).

Because the construction of the Jimmy Ryce Act by the Taylor decision conflicts with the plain language of the statute and controlling precedent construing the statute, we should expressly recede from Taylor.

This Case

In this case, following the expiration of the thirty-day deadline, Anderson moved for and was granted a dismissal without prejudice of the state's petition to involuntarily commit him as a sexually violent predator. The state continued the proceedings against Anderson by filing an amended petition and Anderson was granted the remedy of pretrial release. That was precisely the relief to which Anderson was entitled, and precisely the relief prescribed by the Florida Supreme Court's decisions in Goode, Osborne, Mitchell, and Boatman. Anderson was not entitled to a permanent discharge following the dismissal without prejudice of the original petition or to be free from continued proceedings under the statute.

Thereafter, the trial court reviewed the petition, made a probable cause determination, and presided over the trial which resulted in Anderson's commitment as sexually violent predator. The trial court's exercise of jurisdiction over the amended petition and continued proceedings was proper because Anderson was in lawful custody when he was evaluated by the multidisciplinary team, which initiated proceedings under the statute. Accordingly, Anderson's argument that the trial court's order of commitment should be reversed based on a lack of jurisdiction must be rejected.

Finally, Anderson suffered no prejudice, as he was tried by the court very promptly after the dismissal without prejudice. Indeed, there has been no

allegation of the loss of favorable evidence, spoliation, or any other similar allegation of prejudice by virtue of the delay in bringing him to trial. Under these circumstances, Anderson "is not entitled to a reversal of his adjudication as a sexually violent predator" or release from commitment. See Boatman v. State, 77 So. 3d 1242, 1252 (Fla. 2011).[18] Accordingly, although I respectfully disagree

[18] Judge Makar writes that by viewing this case "through a pragmatic lens," one that focuses on the legislative history of the Jimmy Ryce Act and Florida Supreme Court precedent interpreting the Act, this court may affirm the order committing Anderson as a sexually violent predator. While I agree that the plain language of the Act and case law interpreting the Act strongly support affirmance in this case, I cannot conclude as Judge Makar does that we can avoid our precedent in Taylor to reach this result.

Judge Makar suggests that this case is distinguishable from Taylor based on "dramatic temporal differences, the different procedural posture (trial v. no trial), and the fact that Anderson agreed or acquiesced in the modest delays at issue in this case thereby extending jurisdiction under the Act." However, the factual differences identified by Judge Makar provide no basis for distinguishing this case from Taylor. The jurisdictional bar established in Taylor is one that cannot be circumvented under the facts of this case.

Taylor unambiguously holds that following dismissal of a Ryce petition for failure to comply with the thirty-day requirement, the respondent must be in lawful custody before the trial court may proceed on an amended petition. Taylor v. State, 65 So. 3d 531, 536-37 (Fla. 1st DCA 2011). Here, just as in Taylor, the respondent sought dismissal of the original petition for failure to comply with the thirty-day requirement, the trial court granted the dismissal, the state did not pursue an appeal, and when the state proceeded to file an amended petition, the respondent was no longer in lawful custody. At the time the amended petition was filed, Anderson (just like Taylor) had already been released from total confinement and was being detained at the Florida Civil Commitment Center for proceedings under the Act. Because Taylor compels us under these facts to find that the trial court lacked jurisdiction to hear the amended petition, it is of no consequence that Anderson may have agreed to or acquiesced to (and I agree with Judge Wetherell

with the majority's refusal to recede from our holding in Taylor, I concur in the majority's present holding affirming the trial court's order committing Anderson as a sexually violent predator under the Jimmy Ryce Act.

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that this point is fairly debatable) a continuance of the trial on the original petition, or that Anderson may have agreed to a continuance of the trial on the amended petition.

Further, the court's jurisdiction could not be "extended" by virtue of Anderson's acquiescence to the continuance of the trial on the original petition or his agreement to continue the trial on the amended petition. Despite his purported agreement to continue the trial on the original petition, Anderson ultimately moved to dismiss that petition. Under Taylor, the dismissal of the original petition and the state's failure to appeal that dismissal prevented the further exercise of jurisdiction by the court. The trial court, therefore, lacked jurisdiction to hear the amended petition. It logically follows that a commitment order issued by a trial court lacking jurisdiction is a nullity. Sessions v. State, 907 So. 2d 572, 573 (Fla. 1st DCA 2005) (providing that an order entered by a court without jurisdiction is a nullity); Dragomirecky v. Town of Ponce Inlet, 891 So. 2d 633, 634 (Fla. 5th DCA 2005) ("[A]n order entered without jurisdiction is a nullity, and cannot be considered harmless error."). Thus, despite Judge Makar's suggestion to the contrary, no logical basis exists to distinguish the cases on grounds that a trial occurred in this case while one did not occur in Taylor.

Similarly, that Anderson may have consented to a continuance on the amended petition matters not because the trial court lacked jurisdiction to proceed on that petition. Cf. Harrell v. State, 721 So. 2d 1185, 1187 (Fla. 5th DCA 1998) (stating that lack of jurisdiction cannot be cured by consent or waiver). Accordingly, while Judge Makar and I agree that the supreme court's decisions in Goode, Osborne, and Boatman provide a sound basis for affirming the trial court's order in this case, I cannot determine any legally relevant distinction that would allow this court to sidestep its precedent in Taylor to achieve this result.

MAKAR, J., concurring.

I fully concur and join in the majority opinion's invited error analysis, though not without pause given the other viewpoints of my colleagues. I view this case through a pragmatic lens, one that focuses on (a) the legislative intent of the Jimmy Ryce Act, whose text specifically permits continuances beyond the statutory thirty-day requirement for conducting trials after probable cause is found, and (b) the Florida Supreme Court's interpretations of the Act, which leave some room for judicial administration in specific cases based on the facts presented. Because the language of the Act provides for continuances, and because the Florida Supreme Court has avoided basing its Ryce Act decisions on inflexible principles that could produce harsh results where no manifest injustice is shown, I fully join the majority. I write supplementally because of the tension between a fixed versus flexible line for determining the extent to which continuances extend the Act's statutory grant of jurisdiction in civil commitment proceedings.

The question here is whether the detainee, Anderson, is entitled to release despite his acquiescence in continuances that resulted in his trial being conducted beyond the statutory thirty-day limit. See § 394.916(1), Fla. Stat. Under the Act, the thirty-day requirement for trial can be extended: (1) once by either party for up to 120 days for good cause; or (2) by the court for any length of time if "in the

interests of justice" and the detainee is not "substantially prejudiced."[19] The Act further contemplates that "additional continuances" are generally impermissible unless the court finds that "a manifest injustice would otherwise occur."[20] This latter provision envisions that additional continuances (of unspecified length) are not per se impermissible; instead, they are available to avoid "manifest injustice" in a particular case.

The upshot is that continuances of a trial are not inherently verboten under the Act, and are an integral part of the Act's statutory grant of jurisdictional authority for civil commitment cases. Continuances raise concerns, however, when they extend beyond 120 days (or 240 days if each side obtains a 120-day continuance) or result in "substantial prejudice" to a detainee's interest. Judicial concern for the detainee's interest in release from custody increases as time passes, particularly where delay cannot be attributed or apportioned to the detainee (see State v. Goode, 830 So. 2d 817 (Fla. 2002) (granting relief where detainee never sought or agreed to continuances)); this concern is lessened to a degree where the detainee contributes to the delay or agrees to continuances (see Boatman v. State,

[19] Section 394.916(2), Florida Statutes, provides that a "trial may be continued once upon the request of either party for not more than 120 days upon a showing of good cause, or by the court on its own motion in the interests of justice, when the person will not be substantially prejudiced. No additional continuances may be granted unless the court finds that a manifest injustice would otherwise occur." § 394.916(2), Fla. Stat.

[20] Id.

77 So. 3d 1242 (Fla. 2011) (denying relief where detainee agreed to continuances, trial was held, and detainee then lodged challenge on appeal)).

The Florida Supreme Court has chartered a facile course in deciding Ryce Act cases, recognizing the constitutional concerns associated with civil detention and commitment, but allowing for some flexibility in the application of the Act's statutory jurisdiction under the facts presented. As an example, the court in Goode dismissed the petition at issue in that case, holding that the thirty-day statutory period was mandatory; it held, however, that the period was not "intended as a rigid jurisdictional bar to further proceedings." Goode, 830 So. 2d at 828. Subsequently, in Osborne v. State the court clarified its decision in Goode by holding that dismissal for failure to comply with the thirty-day requirement was without prejudice. 907 So. 2d 505, 507-08 (Fla. 2005). In doing so, it noted that a dismissal with prejudice "would terminate the case on procedural grounds, essentially divesting the circuit court of jurisdiction," and that such a result would be contrary to its holding that the thirty-day period was mandatory, not jurisdictional. Id.

Further, as noted above, in Boatman the court denied release where a detainee agreed to continuances; once a fair trial is held, dismissal on jurisdictional grounds is unavailable. The court stated:

> We conclude that once a respondent has been tried and the respondent waits until after the trial to seek review of a continuance or denial of a

> motion to dismiss, a remedy requiring reversal of the trial, release, and dismissal of the Jimmy Ryce proceedings is not available where the claim pertains to the pretrial detention and there is no demonstration of an impact on the fairness of the trial itself.

77 So. 3d at 1251. The Boatman decision suggests that detainees should not sit on their rights; instead, they should seek immediate relief via habeas corpus, the "preferable method of challenging pretrial detention under the Act." Id. If they do not, detainees that agree to, acquiesce in, or seek continuances of trial, and then proceed to trial, cannot expect the remedy of permanent release to be available unless a continuance or denial of a motion to dismiss is shown to impact adversely the fairness of the trial. Id. at 1252.

Collectively, Goode, Osborne, and Boatman reflect that the Act's statutory grant of jurisdictional authority is not peremptorily terminated where continuances and trial delays occur. Jurisdiction under the Act exists when proceedings are initiated against a detainee in lawful custody; this jurisdiction continues so long as the proceedings fall within the parameters of the Act's provisions for continuances. Moreover, the court's adoption of rules of procedure in 2009 for proceedings under the Act reflect flexibility in judicial administration by providing for time periods (e.g., trial commences within 30 days after summons returned) and standards for continuances ("good cause") that can trump the more restrictive and conflicting

procedural provisions in the Act.[21] See Tedesco v. State, 62 So. 3d 1252, 1254 (Fla. 4th DCA 2011) (holding that return of summons under rule, versus finding of probable cause under statute, marks start of 30 day period).

Here, commitment proceedings were timely initiated against Anderson at a time when he was in lawful custody prior to his scheduled release. See Larimore v. State, 2 So. 3d 101, 113, 117 (Fla. 2008) (jurisdiction lacking where inmate "lawfully released" and "no steps have been taken in the commitment process"). Thereafter, an overall delay of approximately fourteen months in the trial proceedings resulted, due in large measure to Anderson and his counsel agreeing to continuances thereby extending jurisdiction under the Act; Anderson was even

[21] See In re Florida Rules of Civil Procedure For Involuntary Commitment of Sexually Violent Predators, 13 So. 3d 1025, 1031 (Fla. 2009). The rules related to continuances, though tracking the statutory language, both recite a "good cause" standard. Rule 4.260, titled "Continuance of Trial," provides that "[c]ontinuances should only be ordered upon a showing of good cause." Id. at 1031-32. Rule 4.240(a), in part, provides:

> The trial to determine if the respondent is a sexually violent predator shall be commenced within 30 days after the summons has been returned served and filed with the clerk of the court, unless the respondent waives the 30 day time period in writing, with a copy to the assigned judge, or on the record in open court. The court shall set a trial date not less than 90 days after the date of the waiver of the 30 day period. Further continuances shall be allowed only on good cause shown. A future trial date shall be set if a further continuance is allowed.

Id. at 1031. Notably, this last sentence envisions that indefinite continuances without a set trial date are not permitted.

granted pre-trial release and sought a further continuance on the eve of trial. While this overall time period is longer than that in Boatman (where the trial was held four and a half months after the probable cause determination), it is far shorter than in Taylor v. State, 65 So. 3d 531 (Fla. 1st DCA 2011) (which involved almost a ten year delay in the prosecution of the civil commitment trial of the detainee). Taylor can be viewed as an outlier due to its inordinate delay without a trial being held or a trial date set; the detainee also sought relief via prohibition before trial (no trial was ever held). While Taylor can be characterized as contributing or acceding to the delays early on in his civil commitment proceeding, nothing in that case reflects his acquiescence to an indefinite delay and the five-year gap thereafter when the state failed to prosecute the matter and no trial date was ever set; it was at the end of this latter time period when Taylor sought the writ of prohibition that this Court granted on the basis that jurisdiction was lacking for any further trial proceedings. Under these circumstances, the Act's statutory grant of jurisdictional authority to proceed was stretched too thin. Taylor, 65 So. 3d at 536 ("The state's failure to prosecute its petition for nearly five years after the court granted its motion for continuance could hardly be characterized as 'scrupulous compliance' with the time limitations for bringing the case to trial.").

Whether the holding of Taylor applies to this case is doubtful because of these dramatic temporal differences, the different procedural posture (trial v. no

trial), and the fact that Anderson agreed or acquiesced in the modest delays at issue in this case thereby extending jurisdiction under the Act. These differences put this case closer to the situation in Boatman. Although the trial was continued over the detainee's objection in Boatman, the Florida Supreme Court did not grant the detainee's requested relief (i.e., permanent release from custody) because the detainee failed to challenge the continuances via an immediate habeas petition; instead, the detainee waited until after his trial (and the determination that he was a sexually violent predator) to seek relief. The court concluded that "[a]lthough he did not waive his claim by doing so, [the detainee] is not entitled to relief because he alleges no effect on the fairness of the trial and no impeded ability to obtain witnesses or any other error flowing from the continuance." Boatman, 77 So. 3d at 1252. The Florida Supreme Court did not countenance the delay in Boatman, but it was unwilling to ignore that no manifest injustice resulted under the facts it was presented.[22]

As in Boatman, the relief that Anderson seeks is unavailable because he agreed to the continuances that lengthened his detention, a fair trial was held, and no manifest injustice resulted. He cannot benefit from trial delays to which he

[22] Of note, the Florida Supreme Court recognized that this Court's decision in Taylor had issued, and the decision presented a potential ground for Boatman's release. Boatman, 77 So. 3d at 1251 n.11. It declined to do so, stating the "issue is not squarely before us because we hold that the relief of release and dismissal of the Jimmy Ryce proceedings is not available under the facts of this case." Id.

contributed; nor can he be said to have shown any unfairness in his trial that would justify a result contrary to Boatman. While the continued vitality of Taylor reasonably might be questioned, this case can be decided narrowly within the existing framework the Florida Supreme Court has constructed. That no reported decision to date has cited Taylor (other than the Florida Supreme Court's footnote in Boatman) provides some degree of reassurance that it is confined to its unusual facts and its procedural posture. It should not be viewed as more than one case involving an extraordinarily and unacceptably long detention without trial for which judicial relief was warranted; nor should it be read to permit compulsory release under facts like those presented here involving modest and agreed upon continuances.