>> Please rise.
The Florida Supreme Court is
again in session.
>> We now gone to the second
case on our docket today,
boatman versus the state of
Florida.
>> May it please the court.
I am Gail Anderson, representing
petitioner, Rayvon Boatman.
In argument today would like to
emphasize a few points --
Is that better?
I would like to emphasize a few
points and of course I will be glad
to answer any questions from the court.
First, in the first DCA said it
was clear find a question which
is before the court, quote
because this issue appears to be
one of first impression, end of
quote.
This means that before the first
DCA's decision in Mr. Boatman's
case there were no clear rules
regarding preservation of a
claim that the trial court in a
civil commitment case improperly
continued the trail trial beyond
the 30 days mandated by the
statute.
That there were no clear rules
was also evident from the
state's brief and the appeal in
the first DCA for the state
raised no waiver issue.
>> Let me ask you this.
As I understand this case, the
probable cause -- well, the
state asked for a continuance of
the hearing that would take
place to determine if this
defendant was a sexual predator,

correct?
>> Correct.
>> And then the hearing on that was in fact held within 120 days?
>> It was scheduled for 120 days from the finding of probable cause.
It was actually put off one more week.
>> Put off one more week pursuant to the continuance?
>> Yeah, the continuance was for the 120 days and then there was a stipulation.
>> So I guess I'm at a loss as to why we even have this case since, under the rules, you can in fact ask for a continuance.
It seems to me that the case then went to hearing pretty expeditiously after that point, so why are we here?
>> Because there can be a continuance under the rules, under the statute of 120 days if the respondent is not substantially prejudiced.
>> But he was substantially presidents by an additional week?
>> No, he was substantially prejudiced by the additional 120 days.
>> How?
>> Because his prison sentence expired.
The state filed a petition on October 1 and Mr. Boatman's prison sentence expired on October 5.
This is exactly why the 30-day limit is in the statute, because to avoid holding people after

their prison sentence.
>> So are you equating substantial prejudice with the fact that person will be in custody after the expiration of the sentence?
>> Yes.
>> So that would not then be an discretionary call by the trial judge.
That is even though the statute makes the distinction between those who sentence would expire and those who sentences have not expired, they would be different standards for substantial prejudice, one, if their sentence has expired?
So if that is the case shouldn't the statue just spread that a person's sentence is expired, there shall be no -- for any reason?
>> I understand what you are saying and I understand with the first District a saying, but they first say there is discretion but really, you would be saying no matter what the reason whether there is good cause are not on the part of state, that there cannot be a continuance past 30 days if the person -- is that what you are advocating for?
>> In part.
I think there would be -- I mean there could be other circumstances.
>> Like what?
>> Weather person would be substantially prejudiced.
>> At their sentence is expired.
There then should never be an

extension beyond the 30 days?
>> Certainly not for 120 days.
>> I'm saying beyond the 30 days.
But you are saying -- the fourth District is -- seven days more is okay?
>> Right.
>> And this is one of the problems and I understand that this is a difficult case on many levels.
But I'm struggling with this, that the lawyer for Mr. Boatman asked for an adversarial probable cause hearing.
What is the purpose under the statute for the adversarial probable cause hearing?
>> It is for the state to present live testimony and for the dependents to be able to hear the testimony and cross-examine them.
>> So is it additional protection that somebody that ought to be free, but there is substantial evidence against that individual?
>> I think so.
>> So, my question then is, your lawyer asked for it but there is nothing in the record that there ever was one, and then they stipulated to an additional continuance to February.
They never said at the point when the judge was saying well I think there is a basis for continuing this and I'm going to ask the state.
I do have concerns about whether there is good cause.
If there is no good cause you

don't get the substantial
prejudice.
But as to then say well, give
us, you know, another 30 days
but don't give them 120 days.
So how does that work?
I mean your defense lawyer
didn't ask for something short
of 120 days, stipulated to the
additional week.
How does that fit in the next?
>> I think the defense attorney
was asking -- was doing what he
thought -- was asking for what
he thought he should ask for and
that is that the statute have a
trial within 30 days of the
finding of probable cause.
Once he lost that issue, what
else was he supposed to do?
I mean there were no rules
anywhere telling him.
>> But here's the problem is
that, because of the case that I
consented on but was the
majority that said the dismissal
was without prejudice, my
concern is that the right that
we would be vindicating, the
right to the out of custody
before there is a determination
that somebody is a sexually
violent predator, wait until
after the trial to vindicate a
free trial right and say the
remedy is that they now come
even though he has been declared
in all the evidence is and that
a jury unanimously found him to
be a sexually violent predator,
you would be asking us to
actually say no, he now gets to
be released and you get another
chance to have this case tried

while they have somebody who has already been declared a sexually violent predator out.
I have a real difficult time in terms of the fitness of that is the remedy when there is no issue as to the fairness of the trial, nothing where we were substantially prejudiced.
Like we had a case where someone had been for eight years and now has a different issue, where there is nothing in this case that says something unfair happened during the trial.
How is that an appropriate remedy on appeal?
>> Several points, Your Honor.
First, this particular case, the state took their writ.
They waited three months to file the petition.
They asked for the continuance.
Second, this has happened before and State v. Kinder.
They moved to dismiss in the trial court for violation of the 30 day limits.
The trial court did not emotion.
Kinder filed a petition for writ of prohibition in the second DCA.
But, while the second DCA was considering that position the trial went forward and so he was tried.
The second DCA said that the remedy for him, for that violation of the 30-day rule was released.
The case came up here in this court said the second DCA was right.
So there has already been a case

where this kind of thing
happened.
>> I guess I'm having trouble
with it making sense and the law
in this area is extremely, quite
complex, trying to balance
everything.
And I agree with you.
That is why I think that I agree
with the First District.
I'm not sure how the state shows
good cause in this situation to
get to the prejudice but in
terms of the remedy, the best
analogy that I was thinking of,
and I want to ask for you to
tell me why I am wrong, isn't it
analogous rights to pretrial
release on conditions for bail
bond.
That is raised traditionally as
a writ of habeas corpus.
Nobody would suggest that if we
wait until after trial, somehow
the remedy would be a retrial
with a person out on the proper
conditions.
And set aside the conviction.
Why is that a bad analogy and
what is wrong with that?
>> I think the analogy doesn't
work because, because of the
particulars of the Ryce Act,
which gets me to the sub issue
involved in this case, whether
once a Ryce Act respondent is
released, can the state file a
petition again?
Once the Ryce Act respondent is
at 30 days exceeded, Osborne
says the remedy is released from
detention and dismissal of the
petition without prejudice.
My position is, when the

petition is dismissed and the respondent is released, the state can't file another petition until that person comes back into custody.
>> Than you are asking us to recede from Osborne.
>> No.
>> Without prejudice it would be meaningless if the idea was you had to wait until he actually committed another sexual act to put himself back in prison.
>> Without prejudice, the way I read without prejudice and I think the second DCA has rated the same way, without prejudice means it is not a decision on the merits.
It does not form a res judicata proceeding somewhere down the line.
And that is what happened in commitment of Goode which is a second DCA case that followed this court's decision.
Goode was released while this court was deciding his first case, where the state had filed a petition.
He was released some point later.
He was arrested -- I'm not sure if it was violation of probation or a new crime.
In any event he was resentenced to prison.
The state then filed a second petition to commit him, and the circuit court dismissed that petition ruling that the prior dismissal was a decision on the merits.
The state appealed that to the

second DCA in the second DCA said no the prior dismissal was not a decision on the merits. So they were able to proceed against Goode on the second petition.
I think that case as is an example of how this procedure would work.
>> You are now down to about six and a half minutes.
Into your rebuttal time.
>> Thank you.
I do want to say that since the first DCA recognized its decision was one of first impression, if the court adopts some rules analogous to what the first DCA adopted, it shouldn't be applied in Mr. Boatman.
There are no clear rules about this right now.
And there has to be a clear rule in order for somebody to be able to weigh the claim and I will reserve the remainder of my time.
Thank you.
>> Good morning.
May it please the court, Council.
Tom Duffy on behalf of the state.
A couple of follow-up points that I would like to make.
Counsel, defense counsel was on notice from the Osborne opinion itself as to one way to proceed.
Osborne moved to dismiss.
>> Mr. Duffy this question as we go through.
Each time we have had one of these cases on first impression because this is a new concept,

many thought foreign to American jurisprudence but we have learned to the contrary.
And as we step forward, we have made some of these interim decisions, but as I see the case being, asking this court whether an extraordinary writ is the only way to get a review of the judicial act or of conduct.
Is there any other area of law that mandates an extraordinary writ is your only means to protect yourself?
>> Well, the first step is to file a motion to dismiss in the trial court.
That is Judge Wester's opinion.
>> That is what I'm saying.
Is there any area of the law as a lawyer, standing there practicing appellate law, are you aware of them because I don't know of anywhere any court anywhere in the universe has ever said or limited the right to an individual particularly under the American prudence system that an extraordinary writ is your only way that you can get review of this act you complain of.
>> I don't know that is presently true.
I suspect it was true before procedural law became common.
>> I'm asking a civil rule in Florida, civil rule anywhere, federal civil rules, any where.
>> No, maybe I didn't make my point clear Justice Lewis.
The civil rules make the writ practice unnecessary.
Once you have a rule of

procedure in place you don't need to go to an extraordinary writ.
The extraordinary writ here would only be in the way of taking an interlocutory appeal.
>> But that is not required in a place in any law that I'm aware of -- and correct me -- I'm really trying to understand this.
I know of no rule of law that if you don't take an interlocutory appeal to an adverse ruling you have waived everything.
Is there such a rule?
>> I suspect there is.
I can't think of anything off the top of my head.
>> I have looked and I don't find anything.
>> What you are saying is that you don't wave an interlocutory appeal.
>> You don't waive a final appeal by not taking some extraordinary, extraordinary interlocutor a kind of relief.
>> Let's take the case that Justice Pariente talked about, where there is bail.
>> Then is this one?
Is this like bail, and how does that operate?
>> Does not precisely like they'll but it is kind of like in some respects pretrial detention.
Which we normally stay away from because we don't want to mislead the court into thinking these are criminal actions but I believe they are 3.133 and 3.134 were a defendant has a procedure

whereby he can be released if the state doesn't file and information within X number of days and the two rules are really sort of complex in their interaction, but eventually, let's say a trial court did not release the guy under 3.134 after 40 days expired.
If he didn't appeal that, what is his remedy?
His remedy was to get out and that is what the remedy was here, to get out and to make the state start over with another petition.
>> And those are two rules of criminal procedure that you believe we could look to for guidance as to what should happen under the circumstances?
>> Well, if you are dissatisfied with Judge Webster's scholarly opinion that we wholeheartedly endorse.
>> What is the authority for saying you have to take an extraordinary writ or you have waited for other?
>> That is the only procedure available.
>> That that is not authority. Come on now.
When we are speaking of authority, a rule, case, decision, statute, some kind of authority for that.
Just because he says it doesn't make it right.
>> But there was no case of first impression doesn't have expressed authority.
That is what makes it law.
>> But the principle of law --

>> The principle of law is you defend and protect your own rights and in this case what he had a right to was to be released.
He did not pursue that right. The only way available for him to pursue that right, to get an immediate release with the to file a motion to dismiss and if that is denied, then seek habeas corpus release from the DCA.
>> That is because this course has held that any dismissal is without prejudice.
Is that where that flows?
>> It doesn't necessarily flow from that but that is what led to the state going forward. Otherwise it would just be in a motion to dismiss with prejudice.
>> Let me ask you this question.
>> Why should we not follow what she is suggested that has happened apparently already?
>> Are you speaking of the Osborne case?
>> This case.
>> Oh, Goode, Goode on remand case.
That is the way it happened there but that is not the way it had to happen.
That was a procedure that occurred.
In fact, and what Goode stands for, Goode on remand, the second DCA stood for is the second proposition that just because you have got a get out of jail free card one time doesn't mean you have been adjudicated on your merit.

But that is just the way it happened.
If somebody were released or potentially even found by a jury not to meet the criteria, if there's another event that occurs, presumably the state could go forward on that, specially if it was another.
>> Yes, of course.
You are free to do anything you want in society.
Certainly that is an absurd thought that again she is saying you have to come back into custody not necessary for sexual offense put back into custody.
>> But that makes it with prejudice.
You can't refile and apply the relation back doctrine until you file.
That make sit with prejudice, so that just eliminates Osborne.
>> I have just, in terms of the argument of that reason it had to be raised pretrial, here it appears that the basis for the substantial prejudice finding is that the sentence had already expired and therefore he was in custody solely on the civil commitment.
If his argument had been that the judge abused his discretion or her discretion in granting the continuance because they the substantial prejudice had to do with the ability are there to prepare for trial or something regarding the trial, would it need different in terms of the remedy?
Another where sometimes the

continuance, when we say the
judge are there deny the
continuance or granted a
continuance affects something in
the trial proceeding, and at
that point than you look and say
the remedy would be in a trial,
but and this is sort of a
friendly question.
Here where the only allegation
is not that the fairness of the
trial was affected but that they
had a right to be released from
custody, and again understanding
that this is something that
maybe there should be a rule to
address it like there is for
pretrial detention.
Is that different and is that
the reason we look to say you
really have to vindicate this
right pretrial?
So is there it distinction
between the reason that they are
alleging there was substantial
prejudice?
>> I think you made a valid
distinction there.
The substantial prejudice we
believe would be something that
prohibits you or restricts you
in your trial preparation.
That would be one example of
that.
Justice Quince had a good point
that I believe we also brought
up in our brief, which was that
if you have -- I am sorry.
I've lost my train of thought on
that.
Anyway, I would endorse it.
>> Okay, whatever her point was.
[LAUGHTER]
Our position here is what the

first DCA came up with on its own.
I would candidly admit that I wish I had thought of this brilliant ploy, but frankly I didn't.
That sexually violent predators and pretrial detainees waiver continuances unless they immediately seek some sort of release.
>> Is there a caveat then that if their only basis for the substantial prejudice is for their right to be out of custody?
I mean should that be a caveat?
>> Well, think this case stands for that proposition.
>> But that is not how the certified question reach.
>> No it is not do you can adjust the certified question.
>> Should we then really look for having a rule of procedure that is similar to pretrial detention so that it is clear?
>> Rules of procedure are very nice for that very reason and to get us around the problem that Justice Lewis mentioned.
>> I'm very concerned though. Let's go back to the states' actions here.
The state had the ability -- the multidisciplinary team was put into effect months before this defendant was due to be released.
By July there was already a report saying that they found that Boatman met the criteria for sexually violent predator and should not be released and

the state, for no apparent reason, waited from July until October.
Even if they thought he was going to be released in November, they waited three months to file this petition.
They filed the petition and then one week later they say Oh, Gee one of our experts is out of the country and they then say Oh and plus he needs more time, he the defendant, to prepare for trial.
Are you suggesting under those circumstances that the state made its good cause burden?
>> Yes.
We do because apparently the release date changed.
>> But how much did it change by?
>> Well at least a couple of months apparently.
One of the doctors had his release date as December 6.
The other one had the release date is November 24.
He was sentenced in 1994, so I suspect there was abundant gain time available.
>> Nevertheless if they would have filed it in October and thought he was going to be released in November and they were going to still ask for 120 days, he would be held after his release date under that scenario.
>> I don't think they necessarily new that the doctor in question was going to be.
>> I don't know how good cause can be that you just assume something that is really not

established in the record as a basis.
To make good cause would have been something that they could never have anticipated again because we want to make sure that the legislative right that has been established to be tried within 30 days unless, not a court rule.
This is a legislative mandate, that is vindicated in the way that we apply this.
So to me, I don't see a good cause.
>> The good cause in our mind was the fact that a crucial witness was unavailable.
That is the grounds the state argued at that the trial court.
>> And he was out of the country until February?
>> I don't know.
What the record shows is that once the continuance was granted, and I don't have that part of the record with me today, but once the continuance was granted, then the scheduling took place with a discussion between the lawyers and the judge, and at that point, the next date they could coordinate was in February, so it wasn't that the state asked for 120 days.
The state asked for up to 120 days and for the parties to get ready.
>> The defendant said December and the state said no, and so it was I thought over the defense objection in February.
>> I don't know if that was

objected to but I will take your word for it.
You have seen a record more recently than I.
>> Let me ask you about the sequence of events because I thought that the trial judge had a prehearing, pretrial hearing on this, and appoint counsel for the defendant and did he appoint experts, additional experts at the defendant's request?
>> That request was made.
I don't know when the experts were appointed or an expert was appointed.
>> So do you know in this record when we got any expert reports, expert examination of the defendant?
>> I don't know the answer to that question.
I know that the petition and the export to a probable cause were done on October 1.
On October 8, the parties were in court, and on October 10 the state move for a continuance apparently only then realizing that one of their crucial witnesses was unavailable in the 20 day -- I'm sorry, on the 8th also.
The October 20th trial date was established and agreed to.
>> Now, let's assume that good cause is met.
What is your argument as to the first districts error in finding that there was substantial prejudice?
How would the state define substantial prejudice for the purposes of the statutory

scheme?
>> Well I think you already beat me to that.
The trial preparation.
That would be the crucial thing for a case like this, is that the continuance will somehow, and I don't know how, but somehow influence or restrict or damage your pretrial preparation.
>> But they have an absolute right to the 30 days, so if the legislature meant for there to be an automatic additional 120 days, there wouldn't have been the term substantial prejudice.
I mean we always think the more time people have for a trial to prepare the better, but not for somebody who is under the otherwise can be released but for the state having filed this.
So I have a problem with defining substantial prejudice solely in terms of trial preparation because the defendant would never be able to establish that.
>> I think in the proper instance.
>> How?
The idea is the state says we need more time to prepare for trial.
The defendant goes well we need less time.
How would you establish substantial prejudice?
>> It might be a timing thing.
In other words the state wants -- let's say a trial is set for we will say hypothetically within the 30-day

period.
The state wants a continuance also within that period.
But during that period at the state wants the trial to be continued, defense experts are not going to be available for an important family member for the respondent is not going to be available, or there is some other event that would make it difficult for the trial counsel.
>> You would not consider any effect on the right of the defendant being released but for the state's institution of these proceedings to be at all within what the legislature would have intended in the fray substantial prejudice?
>> Well I think your Osborne decision indicates that will always be a factor to be considered, that you weigh and balance the interests of the defendant and in that case the length of the continuance would be a factor as well.
>> But isn't all of this confusion, the attempted complexities, the creation of rules of law that have never before existed all a product of the failure to follow the statutory plan and scheme which was that these are to be conducted before the end of a sentence?
>> We are visiting failure by whomever is supposed to do this on the shoulders of the court system, on the shoulders of people who are facing this lifetime imprisonment because

the failure of someone else and now we are looking back and we are trying to justify all that.
Is that really what is happening?
>> Not necessarily.
>> Every case we have seen so far that is the case.
>> That is how you have concerted but in this case look me just mention one facts that was in our brief that I discovered in preparing for oral argument.
The department of corrections refers they supposedly 545 days, in advance of release.
In this specific case, if you take the day that referral was that is in the record, that referral was on the 16th of October, 2007.
If you had 18 months of that, that shows the release date is May of 2009.
>> Well that wasn't Mr. Boatman's problem -- fault.
>> No, but it is not the states problem neither.
>> Wait, wait.
They are not doing what they're supposed to do.
Is that what caused his?
>> They didn't do what they were supposed to do.
>> Presumably, release dates, especially for people sentenced in 1994 release dates are volatile.
>> Isn't that again -- the people who have that person locked up have that knowledge?
>> Not necessarily.
They didn't presumably in 2007

because these things changed.
Gain time can be lost, gain time
can be lost.
>> But do these people know
this?
These are not rookie neophytes
that don't know what this is
about.
>> My point is they don't know
it at the time.
>> So that should be then
visited upon the person who is
subjected to the process, the
court system that tries to carry
out the intent of the Florida
legislature to the very
possible, as best possible.
It seems to me there has to come
a time when we interpret the
intent of the statute to mean
what it says and apply what it
says and maybe we will have some
clarity.
This is a haphazard application.
I read just as we are sitting
here again, there's not one
authority cited for the
principle of law.
>> You are right.
First impression.
>> First impression of any court
of any land of the United States
with says you lose all your
rights simply because you didn't
take an extraordinary step.
>> I'm not necessarily sure.
I'm no legal historian but I'm
not necessarily sure that wasn't
the case and say the 1920s.
My time by the time has long
since expired.
I ask that you affirm the
opinion below.
Thank you very much.

>> Justice Lewis, you are absolutely right.
The situation occurred because the intent of the statute was -- the statute says a year and a half before the person is released, DOC which should know when a person is going to be released, will send the records to the DOC.
>> Now Council says, in all fairness, that can't be done because our sentence scheme and incarceration scheme is so volatile and so confused and so complex that nobody ever knows when you are going to get out. That is his position.
>> I heard that, but I can agree that is the case because DOC knows how much gain time -- DOC certainly knows the maximum amount of gain time somebody can get probation, calculating their earliest possible release date. So I don't see that as a valid excuse.
>> Do you see this as a DOC, as the agency that is supposed to be doing these things, simply not caring out its statutory obligations?
>> Well, it keeps going down the line.
DOC sends the files again at ahead of time.
>> November the 16th, 2007 was when this case was sent to the disciplinary team, correct? That was not a year and a half before his scheduled release date of the time?
>> That is uncertain but it is at least only a month and a

couple for weeks -- I mean a year and a couple of weeks before their earliest date we know of.
One of the experts from DCF said in his report that he was sent to be released December 1, 2008. The other experts said November 24th or something like that -- 2008.
What I wanted to get to is that DOC sent the files, but DCF did not look at the files until May, 2008.
And then, DCF made their referral July 9.
>> But just going back to the statutory scheme, and I think what Justice Lewis said, which is to weigh the statutory -- [INAUDIBLE]
Because otherwise we have this issue of being held civilly, but on the other hand, our opinion in Goode and the statutory scheme itself contemplates that there will be continuance is passed that you are supposed to be tried within 30 days but there could be a one-time continuance up to another 120 days, which would be four months.
And so I am having trouble saying yes to statutory the statutory scheme contemplates that somebody would remain incarcerated but also we actually admitted or stated and Goode that there are two different burdens.
One is that the defendant is incarcerated and the other is if the defendant's sentence has

been expired so how do you resolve that?
That is, there is not an immediate right to release under the statute just because your prison sentence has expired.
>> No, because at that point the trial court presumably would have found probable cause.
>> And then your right to have an adversarial probable cause hearing to further show that this is not just pro forma.
There is really good reason to believe that this defendant will be found to be a sexually violent predator.
>> But the 30-day limit for the trial this court another courts have said the only thing in the statute that protects the individual's liberty interest.
>> But in those other cases come in fairness, the state hadn't even moved for a continuance.
I mean there was an issue about trying to even comply with the statute.
Here, they did and the way the challenge the continuance was in my view was an intrusion on his liberty, pretrial liberty interests would be to seek release pretrial.
>> But there are no rules.
>> Doesn't the adversarial probable cause in elimination also constitute protection?
>> It does, but the thing to remember about that is that once the judge again finds probable cause, the 30-day clock starts again.
So in this case, the court

granted the state's continuance
and in that order, the court set
the trial for February 2, 2009.
The court granted 120 days.
The court at that hearing said
that if the defense wanted an
adversarial probable cause
hearing it would be the next
week on October 20.
So, even if that hearing had
been held, the 30-day clock
would have started once again on
that day and still, still the
trial would have been held on
the 30 days.
>> And maybe I asked you this
and I see your time is up but
just tell me please, under the
statutory scheme what is the
purpose of the adversarial
droppable cause hearing if not
to protect a defendant from
being held unnecessarily by the
state?
[INAUDIBLE]
>> But when the defendant does
not avail himself of that,
shouldn't that bear on the whole
issue of whether the defendant
has been substantially
prejudiced?
>> I don't think so.
In this case, the defendant
asked for the adversarial
hearing.
We don't know why it wasn't
held.
>> But the trial judge did in
fact set it for the 20th?
It wasn't held on the 20th.
>> I don't know if it was
formerly said.
I don't know if there was like a
notice of the hearing.

She said at the hearing --
>> That is the hearing on the 13th, she actually said he could have a hearing on the 20th?
>> Correct.
>> I would ask the court to order the first DCA decision.
Thank you very much.
Order Mr. Boatman's release and order the state petition?
>> Again, your petition would be if it is without prejudice or further argument is that he wouldn't be able to be tried unless he is re-incarcerated?
>> Correct.
>> Alright, we thank you both for your arguments.
That concludes today's docket.
>> Please rise.
>> The court is now in recess until 9 a.m.