IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1775

THE STATE OF FLORIDA,

Petitioner,

vs.

DANIEL C. ATKINSON,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF THE PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

DYANN W. BEATY
Florida Bar No. 0866385
Assistant Attorney General
2002 N. Lois Ave.
Suite 700
Tampa, Florida 33607
(813) 801-0600
(813) 873-4771 (FAX)

RICHARD L. POLIN
Florida Bar No. 0230987
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

THE INVOLUNTARY CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS ACT, SECTION 394.910 ET SEQ., FLORIDA STATUTES (1999) APPLIES TO ATKINSON BECAUSE HIS CUSTODY, ALTHOUGH MODIFIED LATER, WAS LAWFUL ON THE EFFECTIVE DATE OF THE ACT. 6

CONCLUSION 19

CERTIFICATE OF SERVICE 20

TABLE OF CITATIONS

CASES

Cuthrell v. Patuxent Institution,
475 F.2d 1364 (4th Cir. 1973) 13

Garcetti v. Superior Court,
80 Cal. Rptr. 2d 724 (Cal. App. 1998) 10,11,12

Heggs v. State,
759 So. 2d 620 (Fla. 2000) 2,9

Hubbart v. Superior Court,
19 Cal. 4th 1138 (Cal. 1999) 7

In re the Matter of Leon G.,
26 P.3d 481 (Ariz. 2001) 7

In the Matter of the Care and Treatment of McCracken,
WL 823686 (S.C. 2001) 7

In re: Johnny Allen,
140 So. 2d 640 (Fla. 1st DCA 1962) 15

Kansas v. Hendricks,
521 U.S. 346 (1997) 7

Lawson v. State,
312 So. 2d 522 (Fla. 4th DCA 1975) 15

Melton v. Culver,
107 So. 2d 378 (Fla. 1958) 14

People v. Dias,
170 Cal. App. 3d 756 (1985) 12

People v. Hedge,
72 Cal. App. 4th 1466 (1999) 12

People v. Hubbart,
106 Cal. Rptr. 2d *490 (Cal.App. 2001)*, ... 12,13

People v. Superior Court (Whitley),
68 Cal. App. 4th 1383 (1999) 12

People v. Wakefield,
81 Cal. App. 4th 893 12

Rothrock v. Wainwright,
286 So. 2d 240 (4th DCA 1973) 15

State, ex rel. Wilson v. Culver,
110 So. 2d 674 (Fla. 1959) 14,15

Westerheide v. State,
767 So. 2d 637 (Fla. 5th DCA 2000) 7

STATUTES

Section 394.925, Florida Statutes (1999) 16

Section 394.912(10), Florida Statutes (2000) 8

Section 916.45, Florida Statutes (Supp. 1998) 8,9

Section 394.9135(3), Florida Statutes (1999) 13

Section 394.910, Florida Statutes (1999) 6,7

Section 394.912(10), Fla. Stat. (1999) 7

Section 394.9135, Florida Statutes (1999) 2

Section 394.925, Florida Statutes (2000) 8

California Welfare and Institutions Code, section 6601(a) . 12

STATEMENT OF THE CASE AND FACTS

The respondent here, Daniel Atkinson, is the respondent in a petition for civil commitment filed by the State of Florida, in Polk County, on June 8, 2000 (Petitioner/Atkinson App.3)[1]. According to the petition, Mr. Atkinson suffers from a mental abnormality or personality disorder which makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment. An order finding probable cause to believe that Mr. Atkinson is a sexually violent predator was entered on June 8, 2000 (Petitioner's/Atkinson App.4). The underlying basis for the filing of the petition for civil commitment included a certification for determination of probable cause filed by the State Attorney of the Tenth Judicial Circuit (Respondent/State App. A). In that document, the State refers to a previous conviction in Polk County case Number DF86-5981A1-XX. Atkinson, entered into a negotiated plea agreement in that case, on March 11, 1987 wherein he agreed to enter a plea of nolo contendere to a lesser included offense, i.e., sexual battery with slight force, a felony of the second degree (Respondent/State App. B). On May 7, 1987, Mr. Atkinson was sentenced to a period of fifteen (15) years in prison (Respondent/State App. C).

---

[1]Insofar as the record on appeal from the Second District is not due to be filed in this Court until October 29, 2001, and the briefing schedule set out by this Court requires that the State's initial brief be submitted on or before September 24, 2001, references to the appendices will be to the original appendices attached to the briefs submitted to the lower court.

In October, 1995 the petitioner was again incarcerated as a result of new offenses. Based on these charges, he was sentenced by the Circuit Court in Putnam County, Florida to sixty (60) months in prison (Petitioner/Atkinson App. 1). Mr. Atkinson was later resentenced, based on the Florida Supreme Court's decision in *Heggs v. State*, 759 so. 2d 620 (Fla. 2000). Accordingly, his sentence was reduced from the original sixty (60) months to a total of only twenty-one (21) months. The order states, in part:

> ORDERED AND ADJUDGED that the Motion to Correct Sentence be granted and the Defendant be resentenced to 21 months incarceration for Count I and II of Case Number 95-2041 to be served concurrently with the previous jail credit awarded nunc pro tunc to the date of the prior sentencing order. (Petitioner/Atkinson App. 1).

Atkinson was then scheduled for release on or about June 6, 2000 (Respondent/State App. D). Pursuant to Section 394.9135 Florida Statutes (1999) Mr. Atkinson was evaluated by Dr. Kevin Raymond June 7, 2000. Dr. Raymond concluded that Mr. Atkinson poses a "significant risk to sexually re-offend," and that "he does meet the criteria for civil commitment under the provisions of the Jimmy Ryce Act" (Respondent/State App. E, p.3). As noted above, a petition for civil commitment was filed on June 8, 2000, and a motion to dismiss the petition was filed by the petitioner on June 20, 2000 (Petitioner/Atkinson App. 7). In the motion to dismiss, Atkinson noted that his original sentence was imposed on September

25, 1996. Had he served every day of the later amended sentence he would have been released no later than June, 1998. Accordingly, Atkinson argued that he was not in legal custody on the effective date of the sexually violent predator's act, and therefore the act should not be applicable to him. On July 11, 2000 the state filed a response to the motion to dismiss (Respondent/State App. F), and on July 13, 2000 the lower court entered an order denying the motion to dismiss the petition (Respondent/State App. G).

On August 14, 2000, Atkinson filed a Petition for Writ of Prohibition in the Second District Court of Appeal. The State served a response to Atkinson's petition on September 1, 2000. The Second District Court of Appeal issued its opinion holding that the applicability of Florida's Involuntary Civil Commitment of Sexually Violent Predator's act is limited to those in lawful custody on the effective date of the statute. Therefore, because Atkinson's incarceration on January 1, 1999 was later determined to have been based on unconstitutional guidelines, and because his subsequent resentencing would have resulted in a release date prior to January 1, 1999, the lower court held that the act should not be applicable to Atkinson. In its order dated July 27, 2001, the Second District granted Atkinson's petition for writ of prohibition and certified the following question to raise an issue of great public importance:

> DOES THE JIMMY RYCE ACT APPLY TO PERSONS CONVICTED OF SEXUALLY VIOLENT OFFENSES BEFORE

THE EFFECTIVE DATE OF THE ACT WHO WERE NOT IN LAWFUL CUSTODY ON THE EFFECTIVE DATE OF THE ACT?

An emergency motion to stay the entry of the mandate in this cause was filed in the Second District, by the State on August 9, 2001. The State's request was denied by the Second District on August 14, 2001, and the mandate issued on August 15, 2001. A further request to stay or recall the entry of the mandate was filed in this Court, by the State, on August 14, 2001. An objection to the State's emergency motion was filed by Atkinson on August 16, 2001. This Court entered an order denying the requested relief on August 20, 2001.

On August 9, 2001, the State filed a notice to invoke the discretionary jurisdiction of this Court. This Court's order postponing decision on jurisdiction and briefing schedule was entered on August 28, 2001.

SUMMARY OF THE ARGUMENT

Florida's Involuntary Civil Commitment of Sexually Violent Predator's Act is designed to provide for the long-term care, control and treatment of those individuals who have been found to be suffering from a mental abnormality, or personality disorder which makes the person more likely to engage in acts of sexual violence in the future if not confined in a secure facility. By its plain language the statute is made applicable to anyone who was in custody on the effective date of the act, either January 1, 1999 or May 26, 1999. Atkinson was in the custody of the Department of Corrections on both of the pertinent dates. The fact that Atkinson's sentence was later reversed and then recalculated does not alter his need for long-term treatment, nor does it render him any less likely to commit a sexually violent act in the future. The legislature included no specific requirement that the requisite custody on the date of the statute's enactment, be found to be lawful at all times in the future. Instead, it is sufficient that the custody was presumed lawful on the specified dates, and there is no suggestion that a subsequent act of the legislature or the courts should be allowed to divest the state of the opportunity to go forward. The statute as it now appears, includes a provision allowing for the detention of an individual who is slated for immediate release, for any reason. Clearly, the legislature intended that the statute would apply to Atkinson, and it does just

that.

ARGUMENT

> THE INVOLUNTARY CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS ACT, SECTION 394.910 ET SEQ., FLORIDA STATUTES (1999) APPLIES TO ATKINSON BECAUSE HIS CUSTODY, ALTHOUGH MODIFIED LATER, WAS LAWFUL ON THE EFFECTIVE DATE OF THE ACT.

The Second District Court of Appeal has certified the following question to be of great public importance:

> DOES THE JIMMY RYCE ACT APPLY TO PERSONS CONVICTED OF SEXUALLY VIOLENT OFFENSES BEFORE THE EFFECTIVE DATE OF THE ACT WHO WERE NOT IN LAWFUL CUSTODY ON THE EFFECTIVE DATE OF THE ACT?

However, the State would suggest that the question would better reflect the issues involved here if it were reworded as follows:

> DOES FLORIDA'S INVOLUNTARY CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS ACT APPLY TO PERSONS CONVICTED OF SEXUALLY VIOLENT OFFENSES BEFORE THE EFFECTIVE DATE OF THE ACT WHOSE CUSTODY, ALTHOUGH PRESUMPTIVELY CORRECT ON THE EFFECTIVE DATE OF THE ACT IS LATER DETERMINED TO HAVE BEEN IMPROPER?

The purpose of Florida's sexually violent predators involuntary civil commitment act is to seek the involuntary civil commitment of those who, by virtue of their current mental conditions, and current and future dangerousness, are in need of such commitment, both for the remedial protection of the general public, and for their own appropriate treatment. Section 394.910,

Florida Statutes (1999).[2] Under Florida's Involuntary Civil Commitment of Sexually Violent Predators act, the state must prove more than the simple fact of a conviction, and subsequent incarceration. In addition, there is also the requirement that the person be found to be currently suffering from a mental abnormality or personality disorder that makes the person more likely to engage in acts of sexual violence if not confined in a secure facility for long-term treatment. Section 394.912(10)Fla. Stat. (1999). The Act is not simply incidental to the punishment already received by the individual who was originally incarcerated. The act is not punitive, nor should confinement under the act be considered punishment. Instead, confinement under the act is based on a person's current mental abnormality or personality disorder which renders them dangerous in that they are likely to commit a sexually violent act in the future if not confined for long-term care, control and treatment. *Kansas v. Hendricks,* 521 U.S. 346 (1997); *Westerheide v. State*, 767 So. 2d 637 (Fla. 5th DCA 2000); *See also Hubbart v. Superior Court*, 19 Cal.4th 1138, 1143-1144 (Cal. 1999); *In the Matter of the Care and Treatment of McCracken*, WL 823686 (S.C. 2001); *In re the Matter of Leon G.,* 26 P.3d 481 (Ariz. 2001).

---

[2]The sexually violent predators act initially became effective January 1, 1999. Laws of Florida, Chapter 98-64. Effective May 26, 1999, the act was both amended and moved from Chapter 916 to Chapter 394. Laws of Florida, Chapter 99-222; section 394.910, et seq., Florida Statutes (1999).

The act itself includes no time limits as to the filing of the petition for commitment. However, it is the individual's pending release from incarceration that triggers the evaluation, which may lead to the filing of a petition for commitment. Section 394.913 and 394.9135, Florida Statutes (1999). The act itself does not specify that any previous confinement must be "lawful" in order for the act to apply to a particular individual. Indeed, such a determination could be extremely difficult to make given the inability to predict future legislative and judicial changes effecting sentencing standards. Instead, the statute applies to all persons "currently in custody" at the time of the effective date. Section 394.925, Florida Statutes (2000).

The only consideration which is relevant at the time the petition is filed is whether the individual named in the petition qualifies as a sexually violent predator, in need of involuntary civil commitment. The term "sexually violent predator" is defined in section 394.912(10) Florida Statutes (2000), as a person who: "(a) Has been convicted of a sexually violent offense; and (b) Suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." The Second District determined that the Involuntary Civil Commitment of Sexually Violent Predators Act should not apply to Atkinson because he does not meet the criteria set out in

section 916.45, Florida Statutes (Supp. 1998), *see now* section 394.925, Florida Statutes (2000). Atkinson argued that because he was resentenced, pursuant to the Florida Supreme Court's decision in *Heggs*, to a period of incarceration which would have resulted in his release prior to the original effective date of the act, that he does not fall within the definition of "currently in custody," as required by the statute. The Second District agreed. The State respectfully submits that this is an incorrect interpretation of the statute, and of the legislative intent behind it.

Section 394.925, in its current version, which became effective May 26, 1999 (see Chapter 99-222, Laws of Florida), provides:

> This part applies to all persons <u>currently in custody</u> who have been convicted of a sexually violent offense, as that term is defined in s. 394.912(9), as well as to all persons convicted of a sexually violent offense and sentenced to total confinement in the future. (Emphasis supplied.)

The predecessor version of the statute, section 916.45, Florida Statutes (Supp. 1998), which was in effect from January 1, 1999 until May 26, 1999 (see Chapter 98-64, Laws of Florida), contained similar language:

> Sections 916.31-916.49 apply to all persons <u>currently in custody</u> who have been convicted of a sexually violent offense, as that term is defined in s. 916.32(8), as well as to all persons convicted of a

> sexually violent offense in the future. (Emphasis supplied.)

Consistent with the plain meaning of either of those provisions, on May 26, 1999, the day that section 394.925 went into effect, Mr. Atkinson was "currently in custody." Likewise, on January 1, 1999, the day that section 916.45 went into effect, Mr. Atkinson was again "currently in custody." Neither of the statutory provisions contain any language suggesting that a later modification of the custody, which was proper on either January 1, 1999 or May 26, 1999, would effect the applicability of the act. No subsequent determination that custody was "unlawful," by virtue of a reversal of a criminal conviction or sentence, will negate the fact that the person was "currently in custody" on the operative date of the above-quoted statutory provisions.

One California case, confronted with a virtually identical situation under that state's sexually violent predators commitment act, has come to a conclusion which is consistent with the State's argument in this brief. In *Garcetti v. Superior Court*, 80 Cal. Rptr. 2d 724 (Cal. App. 1998), the State filed a commitment petition against Lyles. At the time of the filing of the commitment petition, Lyles was in the custody of the State Department of Corrections, having had his parole recently revoked. Lyles claimed that his custodial status with the Department of Corrections, at the time of the filing of the commitment petition, was unlawful because his parole had been revoked for unlawful

reasons. Thus, like Mr. Atkinson, he argued that his custody at the time of the filing of the petition was "unlawful."

At the time the petition was filed in *Garcetti*, California's sexually violent predator statute required only that the person be " . . in custody under the jurisdiction of the Department . . . and who is either serving a determinate prison sentence or whose parole has been revoked. . . ." *Garcetti*, 80 Cal. Rptr. 2d at 729, quoting Cal. Welf. & Inst. Code, section 6601(a). Thus, the California act specifically provided that it was applicable *only* to those currently in the custody of the state Department of Corrections.

Nevertheless, the California appellate court determined that the fact that a person might be detained unlawfully beyond the expiration of an incarcerative sentence did <u>not</u> deprive the State of the ability to file a commitment petition under the act:

> . . .it does not inevitably follow from the SVP Act's element of custody that a determination of lawful custody is a jurisdictional prerequisite to the filing of a petition under the SVP Act for civil commitment. The question here is whether the fact Lyles's custodial status stemmed from an improper revocation of parole immunizes him from a petition for commitment as a sexually violent predator.. . .[T]he trial court erred in treating the improper revocation of parole as a jurisdictional defect barring the People's petition for commitment.

Id. at 729.

In reaching this conclusion, the court emphasized the act's

twin purposes of "public protection" and ensuring treatment to the dangerous mentally ill." 80 Cal. Rptr. 2d at 732. Those purposes "would not be advanced by treating the 'unlawful' revocation of parole as a jurisdictional barrier to a petition for commitment under the SVP Act." *Id.* The same reasoning can be applied in the instant case. *See also People v. Wakefield,* 81 Cal.App.4th 893, 898-899*; People v. Hedge*, 72 Cal.App.4th 1466, 1478-1479 (1999); *People v. Superior Court (Whitley)*, 68 Cal.App.4th 1383, 1389-1390 (1999).

The later California case of *People v. Hubbart, 106 Cal. Rptr. 2d 490 (Cal.App. 2001),* agreed with the analysis of the *Garcetti* court. In *Hubbart*, the California appellate Court determined that the California SVP statute imposed no explicit requirement that custody be lawful in order to allow for the filing of a petition for civil commitment as a sexually violent predator (SVP). Instead, the statute simply required that the person alleged to be an SVP must be "in custody under the jurisdiction of the Department of correction." *Hubbart* at 1229. (Citing California's Welfare and Institutions Code, section 6601(a)). Hubbart challenged the filing of the petition for commitment, because his incarceration, at that time, was based on a revocation of parole which was later determined to have been improper. *Hubbart* at 1228. In rejecting Hubbart's assertion, the appellate court found that the revocation of Hubbart's probation resulted from a mistake of law. The

Department of Corrections had relied on a regulation that was apparently valid, at the time, and there was no evidence of any negligence or intentional wrongdoing. *Hubbart* at 1229. *See also People v. Dias,* 170 Cal.App.3d 756 (1985). As a result, the Court in *Hubbart* found that at the time the petition for commitment was filed, Hubbart was in the custody of the Department of Corrections, as required under the statute.

In light of the analysis in *Garcetti* and *Hubbart*, and the language of the Florida statutory scheme itself, it is clear that no subsequent determination regarding the "lawful" or "unlawful" nature of the state's custody is relevant to a determination of whether the State has the right to file a commitment petition. The fact remains that Mr. Atkinson was in custody at the time the statute became effective, thereby causing him to become a member of a class of individuals who could potentially be considered for the designation sexually violent predator. *See Cuthrell v. Patuxent Institution*, 475 F.2d 1364(4th Cir. 1973).

The fact that Mr. Atkinson's custody was later determined to have been based on calculations which have since been found unconstitutional, does not preclude the state's filing of a commitment petition. In fact, the provisions of the immediate release section 394.9135, Florida Statutes (1999), seem tailored to allow for this situation, by specifically authorizing the filing of the commitment petition if the release of a person becomes

immediate *for any reason.* Section 394.9135(3), Florida Statutes (1999).

Atkinson, argued below that the statute should not be applicable to anyone who was not in "lawful" custody at the time of the statutes effective date, either May 26, 1999 or January 1, 1999. This argument attempts to expand the plain meaning of the statute to require that any individual who was "currently in custody" as of the statute's effective date, must be determined to have been in "lawful custody" at that time, based on a determination made at the time of the filing of the petition. The legislature intended no such reasoning to apply to a determination of whether an individual meets the criteria to be found to be a sexually violent predator.

The case of *State, ex rel. Wilson v. Culver*, 110 So. 2d 674 (Fla. 1959) is instructional here. In that case, the defendant filed a petition for writ of habeas corpus in this court stating that his confinement, pursuant to a conviction for escape, was improper. *Id.* This court previously determined that any indictment or information charging an escape must reflect the legality of the custody at the time the escape was committed and the nature of the confinement under which the individual is being held. *Melton v. Culver*, 107 So. 2d 378, 380 (Fla. 1958). After acknowledging the "legality of the custody" requirement as stated in *Melton*, this Court denied Wilson's petition for writ of habeas corpus, and

stated:

> The fact that petitioner has never been tried for the felony with which he was charged at the time of his escape or, even, that he is innocent of such charge. . .is of no legal consequence insofar as his incarceration under the escape conviction is concerned. . . Even though the indictment under which he was confined at the time of his escape is subsequently dismissed (citations omitted), or the conviction under which he was confined at the time of his escape is subsequently reversed or set aside on appeal (citations omitted), the prisoner must nevertheless bear the penalty for the separate and distinct offense of escape.

State ex rel. Wilson v. Culver, 110 So. 2d at 676.

In 1962 the First District Court of Appeal denied a petition for writ of habeas corpus under circumstances similar to those above. In the case of *In re: Johnny Allen*, 140 So. 2d 640 (Fla. 1st DCA 1962), Allen escaped from incarceration while serving a sentence based on a conviction that was later overturned. *Id.* The First District noted that the substantive crime of escape is subject to its own punishment, and that punishment is not simply incidental to the offense for which the prisoner was confined at the time of the escape. *Id.* Consequently, an appeal would have been the proper avenue to test the legality of the sentence imposed based on the subsequent escape. *Id.*

There can be no self-help by escape even from an incarceration which is later determined to be based on an improper conviction. It is not the subsequent invalidity of the conviction that is crucial. What is dispositive is the fact that the individual was

validly incarcerated under a presumably valid conviction and sentence at the time of the escape. *Rothrock v. Wainwright*, 286 So. 2d 240 (4th DCA 1973). Once under legal incarceration a defendant may only avail himself of assistance through the court system. There is no exception for one serving a sentence later determined to be invalid. *Lawson v. State*, 312 So.2d 522 (Fla. 4th DCA 1975).

It is the individual's position as confined, not a later determination that the confinement was improper, which determines if the substantive offense of escape has been committed. The determination of the violation of the escape statute is based simply on the presumptively valid confinement under which the individual is detained at the time of the escape. The offense was not negated simply because the confinement was later determined to have been improper.

As noted above, the involuntary commitment of sexually violent predators statute provides for the commitment of those who, by virtue of their current mental conditions and current dangerous states, are in need of commitment, both for their own treatment and for the protection of the public. It is not the individual's status as confined that makes the ultimate determination as to whether he should be considered to be a sexually violent predator. Instead, the focus of the statute is on the individual's current mental conditions and current need for treatment, as well as the

individual’s current and future dangerousness at the time of the filing of the commitment petition. Consequently, to focus on a court’s later determination altering a previous incarcerative sentence, and to suggest that this action should somehow remove the individual from consideration as a sexually violent predator, is utterly inconsistent with the legislative purpose.

The plain language of section 394.925 Florida Statutes (1999) indicates that the involuntary civil commitment of sexually violent predators act was intended, by the legislature, to apply to all persons who were in the custody of the state at the time of the statutes effective date. No mention is made of the effect of any subsequent rulings regarding the “lawful” nature of the custody on those dates. It is undisputed that Mr. Atkinson was in the custody of Florida’s Department of Corrections on both January 1, 1999 and May 26, 1999. Consequently, the statute is applicable to him.

The focus of the commitment petition is on the person’s *current* mental condition and *current* dangerousness. Whether or not the person is in the custody of the State of Florida, by virtue of a preexisting criminal conviction and sentence, does not render that person any less mentally ill, and does not render that person any less dangerous. Arguably, the person poses a greater threat to the public, by virtue of not being in the custody of the State. In any event, the person has the same demonstrable need for treatment, and the general public has the same need for protection.

In conclusion, the legislature created a statutory scheme to provide for the civil commitment of those with serious mental health problems, who pose significant dangers to the general public. The act was specifically made applicable to those individuals who were currently in custody at the time of the statute's enactment, i.e., January 1, 1999 and May 26, 1999, and to those who are in custody in the future. There is no doubt that Atkinson was in the custody of the State of Florida on both of those dates, and that on those dates his confinement was presumptively valid. Consequently, he falls within the class of individuals to whom the act applies. A court's later determination that his original sentence should be amended does not change the fact that Mr. Atkinson was in valid custody on the applicable dates. Furthermore, his resentencing had no retroactive effect. Instead, the effect was to place him in the category of persons subject to "immediate release" and his evaluation as well as the filing of the commitment petition were handled accordingly.

The legislative intent on which Florida's Involuntary Commitment of Sexually Violent Predators Act is based does not contemplate that individuals would slip through the commitment act by virtue of the reasoning adopted by the Second District in this case.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, the State respectfully requests that the certified question presented be answered in the affirmative, allowing the application of the sexually violent predator’s act to individuals who were currently in lawful custody on the date of the effective date of the act, even where that custody was later determined to have been improper.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DYANN W. BEATY
Florida Bar No. 0866385
Assistant Attorney General
2002 N. Lois Ave.
Suite 700
Tampa, Florida 33607
(813) 801-0600
(813) 873-4771 (FAX)

RICHARD L. POLIN
Florida Bar No. 0230987
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (Fax)

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Howard Dimmig, II, Assistant Public Defender, P.O. Box 9000-PD, Bartow, Florida 33831, on this the ______ day of September, 2001.

____
Assistant Attorney General

CERTIFICATE OF FONT COMPLIANCE

This brief was typed in Courier New, 12-point type.

____
Assistant Attorney General