ORIGINAL

IN THE SUPREME COURT OF FLORIDA

SC01-613

TRAVIS TANGUAY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Senior 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

Other Authorities

STATEMENT OF THE CASE AND FACTS

Petitions to adjudicate Travis Tanguay delinquent were filed, in the 10th judicial circuit, in case numbers JL95-273400-LD, JL96-153500-LD, JL96-153600-LD, and JL96-153700-LD. (R. 42, 46-48, 140-42).[1] The 1995 case was based on charges of burglary and criminal mischief, committed on May 20, 1995, and resulted in Tanguay being placed on community control when adjudicated delinquent, in September, 1995. (R. 140-42). Between December 1, 1995 and January 20, 1996, Tanguay committed several sex offenses, which resulted in the 1996 delinquency petitions, as well as a community control violation proceeding from the 1995 juvenile adjudication. (R. 140-42).

The new delinquency petitions and the community control revocation proceeding resulted in an Order of Commitment to the Department of Juvenile Justice, dated April 25, 1996. (R. 46-48). That order provided, inter alia:

> IT IS ORDERED that the child is hereby committed to the Department of Juvenile Justice for an indeterminate period but not longer than the maximum sentence which an adult may serve for the same offense(s), or until the child's nineteenth (19th) birthday, whichever first occurs.

---

[1] "R." designates the record on appeal filed with this Court, arising out of Second District Court of Appeal Case No. 2D00-1424, which was an original writ proceeding in the Second District. "SR." refers to the supplemental record on appeal filed with this Court, which arises out of Second District Court of Appeal Case No. 99-4054, and which had been an appeal related to the same matter.

. . .

> IT IS FURTHER ORDERED that the child shall not be released from confinement without the concurrence of the Court, and the Department shall give the Court reasonable notice of its desire to discharge this child from commitment status. THE COURT DOES INTEND TO RESUME JURISDICTION.

(R. 48). Tanguay's date of birth is February 24, 1980 (R. 47), and his 19th birthday would therefore be February 24, 1999.

Florida's sexually violent predators involuntary civil commitment act went into effect on January 1, 1999. A commitment petition under the act was filed against Tanguay, in the 10th judicial circuit, on March 12, 1999. (R. 75-76). Two mental health professionals, Dr. Waldman, a psychiatrist, and Dr. Bursten, a psychologist, had evaluated Tanguay shortly prior to the filing of the commitment petition. Dr. Waldman's evaluation report is dated March 10, 1999, reflecting that he had met with Tanguay on March 4th and 8th. (R. 50). Dr. Bursten's report reflects an evaluation date of March 5th. (R. 57). Both evaluations concluded, based on Tanguay's mental condition and likelihood of sexually violent recidivism, that Tanguay was a sexually violent predator as defined in the commitment act. (R. 55, 72-73). On March 12, 1999, the trial court, in the commitment case, entered an order finding the existence of probable cause to believe that Tanguay was a sexually violent predator, and further

authorized the transfer of Tanguay to the custody of the Department of Children and Families, for Tanguay to be held in secure confinement, pending his sexually violent predators civil commitment trial. (R. 78-82).

On August 25, 1999, Tanguay filed a motion to dismiss the commitment petition. (R. 84). In that motion, Tanguay argued that his confinement with the Department of Justice should have terminated on his 19th birthday, February 24, 1999, that he was improperly held in custody by DJJ for an additional 16 days, and, as a result, the civil commitment petition was filed after the expiration of his juvenile confinement with DJJ and should therefore be dismissed as untimely. (R. 84-85). The State filed a written response to the motion to dismiss (R. 87), and, on September 8, 1999, the trial court entered an order denying the motion to dismiss. (R. 95-96).

In the aftermath of the order denying the commitment petition, Tanguay pursued three separate avenues seeking review by an appellate court. On October 18, 1999, Tanguay filed a petition for writ of habeas corpus in the Fourth District Court of Appeal, in case no. 99-3474. (R. 104). By order dated November 3, 1999, the Fourth District denied the petition as moot. (R. 132).

On or about September 24, 1999, Tanguay filed a notice of appeal, seeking review of the order denying the motion to dismiss, in the Second District Court of Appeal, case no. 2D99-4054. (SR. 95). That appeal was eventually dismissed, on

November 1, 2000.

Tanguay also filed a petition for writ of prohibition, in Second District Court of Appeal case no. 2D00-1424. (R. 1-19). On February 16, 2001, the court issued its opinion, on rehearing. (R. 175-79). First, the court held "that the trial court has jurisdiction to entertain the commitment petition and reject[ed] Tanguay's argument to the contrary without discussion." (R. 177).

Second, the court addressed Tanguay's claim that his illegal detention by the Department of Juvenile Justice, for an additional 16 days beyond the expiration of his juvenile sentence, required that the commitment petition be dismissed. On this issue, the court observed that the commitment act, as it existed at the time of the expiration of Tanguay's juvenile sentence "made no provision for holding a person beyond the expiration of his or her sentence." (R. 176-78). The court further noted that the commitment act was subsequently amended, in May, 1999, authorizing 120 hour extensions of juvenile detentions or DOC incarcerations, if needed, for the purpose of conducting evaluations under the commitment act. (R. 177).

After concluding that the State failed to release Tanguay upon the termination of his juvenile sentence, and held him thereafter without legal authority, the lower court concluded that dismissal of the commitment petition was not warranted, since the prior illegal detention by DJJ did not prejudice Tanguay with respect to the

commitment case. (R. 177-78). However, the court held that "the only adequate remedy to address the State's failure to comply with the requirements of the Act or to afford Tanguay even minimal constitutional protections is to order Tanguay's release from custody pending his commitment hearing." (R. 178). The prohibition petition was thus treated as a petition for writ of mandamus, and the Second District directed the trial court to order the release of Tanguay. (R. 178). The petition was denied in all other respects.

The Second District further certified to this Court the following question, as one of great public importance:

> WHEN THE STATE UNLAWFULLY DETAINS A PERSON BEYOND THE EXPIRATION OF HIS OR HER SENTENCE IN ORDER TO SEEK CIVIL COMMITMENT PURSUANT TO THE JIMMY RYCE ACT, SHOULD THAT COMMITMENT PETITION BE DISMISSED WITH PREJUDICE?

(R. 178-79).

SUMMARY OF ARGUMENT

Both the lower court and the trial court properly concluded that there was no basis for dismissing the sexually violent predators commitment petition. There is no statutory requirement that the commitment petition be filed prior to the expiration of an individual's incarcerative sentence or commitment, as a juvenile, with the Department of Juvenile Justice. Thus, even if Tanguay had improperly been held in his juvenile commitment for 16 days after the expiration of that juvenile sentence, that would not provide a basis for the dismissal of the sexually violent predators civil commitment petition.

Alternatively, the State argues herein that Tanguay's juvenile sentence did not, in fact, expire prior to the filing of the sexually violent predators commitment petition. According to the juvenile delinquency statutes in effect at the time of the commission of the juvenile offenses for which Tanguay was held by the Department of Juvenile Justice, a commitment to the Department of Juvenile Justice was mandatory, until either age 21 or discharge by the Department of Juvenile Justice.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISMISS THE SEXUALLY VIOLENT PREDATORS COMMITMENT PETITION BECAUSE (A) THERE IS NO REQUIREMENT THAT THE PETITION BE FILED PRIOR TO THE EXPIRATION OF A QUALIFYING DELINQUENT'S CONFINEMENT WITH THE DEPARTMENT OF JUVENILE JUSTICE, AND (B) THE PETITION WAS, IN FACT, FILED PRIOR TO THE EXPIRATION OF THE JUVENILE'S SENTENCE.

The Petitioner herein argues that under the original version of the sexually violent predators commitment act, §916.31, et seq., Florida Statutes (Supp. 1998), a commitment petition had to be filed prior to the expiration of an individual's incarcerative sentence with the Department of Corrections, or, in the case of juveniles, at the expiration of an individual's confinement with the Department of Juvenile Justice. Using that as the initial premise of the argument, the Petitioner then asserts that the State improperly held Tanguay for 12 days after the expiration of his juvenile sentence, and prior to the filing of the commitment petition. As a result, the Petitioner argues that the commitment petition was untimely filed and that the lower court's opinion should have ordered that the petition be dismissed.

A. A Commitment Petition May be Filed After Expiration of Sentence

The initial premise to the Petitioner's argument, however, is simply incorrect.

There is no requirement, tantamount to a statute of limitations, which required the commitment petition to be filed prior to the expiration of the juvenile sentence. Therefore, even if the detention of Tanguay, for 12 days, beyond the alleged expiration of his juvenile sentence was improper, it would not render the commitment petition untimely, and would not bar the commitment proceedings.

At the outset, the State would note that the argument herein is limited to the original version of the sexually violent predators commitment act, as it went into effect on January 1, 1999. Sections 916.31- 916.49, Florida Statutes (Supp. 1998). On May 26, 1999, the commitment act was substantially amended, and moved from chapter 916 to chapter 394. Section 394.9135, Florida Statutes (1999), which became operative approximately three months after the filing of the commitment petition in the instant case, includes express provisions which authorize the extended detention of an individual, for up to five days, at the expiration of an incarcerative sentence, to permit time for evaluations and decisions as to whether to file commitment petitions. That section further provides that even if the commitment petition is not filed within that extra five-day period, the State Attorney may subsequently file the petition, even after the individual has been released from the custody of the State. Section 394.9135(4), Florida Statutes. Those provisions were not in effect when the commitment petition herein was filed, and the Second District Court of Appeal, in its

opinion herein, noted that it was not addressing situations which would arise under those provisions of the act as amended. (R. 176-77). The State, in this proceeding, is not arguing that those provisions applied in the instant case, and they are beyond the scope of this case.

Turning to the act as it existed at the time of the filing of the commitment petition herein, it will be seen that there was no requirement mandating the filing of the commitment petition prior to the expiration of the individual's incarcerative sentence, with either the Department of Corrections or the Department of Juvenile Justice. Section 916.32(9)(a), Florida Statutes (Supp. 1998), defined "sexually violent predator," in part, as meaning a person who "has been convicted of a sexually violent offense." The phrase "convicted of a sexually violent offense," in turn, was defined to include those who had been adjudicated delinquent of a sexually violent offense. Section 916.32(2)(c), Florida Statutes (Supp. 1998).

With respect to the filing of the petition for commitment, the only provision in the commitment act was in §916.34, Florida Statutes (Supp. 1998):

> Following receipt of the written assessment and recommendation from the multidisciplinary team, the state attorney in the judicial circuit where the person committed the sexually violent offense may file a petition with the circuit alleging that the person is a sexually violent predator and stating facts sufficient to support such allegation.

There are no further requirements or limitations in the only statutory provision which addresses the filing of the commitment petition. Neither there, nor anywhere else, can a requirement be found that the petition be filed prior to the expiration of the incarcerative sentence.

The Petitioner's fallacious argument hinges on provisions pertaining to the time period in which the evaluations and recommendations regarding an individual potentially subject to the commitment act would be made. Once again, these are the original provisions of the act, and the time periods, among other provisions, have since been amended. Section 916.33(1)(a), Florida Statutes (Supp. 1998), required that the "agency with jurisdiction over a person who has been convicted of a sexually violent offense,"[2] give "written notice" to a "multidisciplinary team" and the appropriate state attorney, "180 days or, in the case of an adjudicated committed delinquent, 90 days before":

> (a) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense . . . .

The multidisciplinary team receiving such notice, would further receive relevant

---

[2] The "agency with jurisdiction" refers to either the Department of Corrections or the Department of Juvenile Justice, depending upon which of those departments has custody of the individual serving either a prison sentence or a juvenile detention. Section 916.32(1), Florida Statutes (Supp. 1998).

background documentation on the individual, and "[t]he team, within 45 days after receiving notice, shall assess whether the person meets the definition of a sexually violent predator and provide the state attorney with its written assessment and recommendation." Section 916.33(3), Florida Statutes (Supp. 1998).

None of the foregoing provisions mandate that the commitment petition be filed prior to the expiration of the incarcerative sentence.[3] The Petitioner heavily emphasizes the reference to 180 or 90 days prior to the "anticipated release from total confinement." "Total confinement" was further defined in the act as meaning "that the person is currently being held in any physically secure facility being operated or contractually operated for the Department of Corrections, the Department of Juvenile Justice, or the Department of Children and Family Services." Section 916.32(1), Florida Statutes (Supp. 1998).[4]

Although the act refers to 90 and 180 days periods preceding the expiration of

---

[3] The undersigned recognizes that the juvenile adjudication herein does not result in a prison "sentence." The phrase incarcerative sentence is used throughout this brief as a short-hand notation to designate both adult incarcerative sentences with the Department of Corrections, and juvenile delinquency commitments with the Department of Juvenile Justice.

[4] The latter reference to facilities of the Department of Children and Families, would be implicated only in the rare instances of commitment proceedings following the release of an individual from a commitment in a criminal case after a verdict of not guilty by reason of insanity. Section 916.32(2)(b), Florida Statutes (Supp. 1998).

incarcerative sentences - i.e., the release from total confinement - those references are not in conjunction with a time limit for the filing of the commitment petition. Rather, those time periods were concerned solely with when the multidisciplinary team would receive notice, and when the multidisciplinary team would conduct its evaluation and make its recommendation to the Office of the State Attorney. Once the recommendation is made to the State Attorney, there is no further provision stating that the commitment petition must be filed within any particular time, let alone prior to the expiration of the incarcerative sentence.

Several provisions, in fact, clearly compel a contrary conclusion. First, §916.33(2), Florida Statutes (Supp. 1998), provided:

> The provisions of this section are not jurisdictional, and the failure to comply with them in no way prevents the state attorney from proceeding against a person otherwise subject to the provisions of ss. 916.31 - 916.49.

(emphasis added). Although the quoted sentence appeared in subsection two of 916.33, it refers to the "provisions of this section," and not merely to the provisions of subsection (2).[5] Thus, the quoted jurisdictional disclaimer compels the conclusion

---

[5] The Preface to the annual publication of the Florida Statutes by the State of Florida includes an explanation of the "numbering system," which makes it clear that a section would refer to a "whole decimal number consisting of the chapter number followed by digits appearing to the right of the decimal point," using 16.01 as an example. "Subsection," in turn, are designated by "whole Arabic numbers enclosed by parentheses." The legislature is presumably aware of the numbering system of the

that the failure of a governmental agency to comply with the time period for the notice requirements would not bar the filing of a commitment petition, even though it would delay the evaluation and recommendation periods. Likewise, the failure of the multidisciplinary team to complete its evaluation and recommendation within 45 days would not be jurisdictional and would not bar the filing of the commitment petition. That would hold true even if the 45 day period ran beyond the expiration of the incarcerative sentence.

The only requirement, under the original act, which arguably might be jurisdictional would be the requirement, in §916.34, Florida Statutes (Supp. 1998), that the State Attorney file the petition "following receipt of the written assessment and recommendation from the multidisciplinary team." Thus, the written recommendation and assessment must first be received, but the time periods in which they had to be received were not jurisdictional and could conceivably extend beyond the expiration of the prior incarcerative sentence.

Furthermore, the policies behind the sexually violent predators commitment act were (a) the protection of the public, from those who were dangerous as a result of defined mental conditions, and (b) the provision of appropriate long-term treatment

---

statutes which it enacts, and it is therefore significant that the legislature, in section 916.33, referred to the provisions of "this section," not "subsection," as being non-jurisdictional in nature.

to those who needed it as a result of those conditions. Section 916.31, Florida Statutes (Supp. 1998). There is nothing in those goals which is in any way inconsistent with the filing of a commitment petition after the expiration of the prior incarcerative sentence. If anything, the contrary would have to be presumed true, given the goals of the legislature.

Thus, the only relevant determination regarding the time of the filing of the commitment petition, is whether the requisite mental condition and dangerousness exist as of that time.

The above-quoted provisions, as well as the additional requirement that the cases proceed to trial within 30 days of the determination of probable cause, absent continuances for good cause, §916.36(1) and (2), Florida Statutes (Supp. 1998), do suggest that the legislature desired that these commitment cases proceed expeditiously. However, there was no mandate that the petition be filed prior to the expiration of the incarcerative sentence. By proceeding within the last 180 or 90 days of the incarcerative sentence, significant costs may be avoided - e.g., the cost of additional, pre-commitment housing by the Department of Children and Families, the cost of pretrial adversarial probable cause hearings.[6] However, there is no indication in either the act, or its legislative history, that reflects a legislative intent for such

[6] See Valdez v. Moore, 745 So. 2d 1009 (Fla. 4th DCA 1999).

minimization of costs to prevail over the expressly stated policy of providing necessary protection to the public from those who are dangerous.

California case law has come to a conclusion consistent with the State's argument in this case. 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 Tanguay, her argued that he should not have been in custody at all at the time of the filing of the commitment petition, and that the commitment petition was therefore untimely.

The California appellate court noted that California's sexually violent predators statute specifically provided that a person is subject to commitment under the act if the person is "an individual who is 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, §6601(a). Thus, unlike Florida's act, the California act specifically provided that it was applicable only to those in custody of the state Department of

Corrections at the time of the filing of the petition. Nevertheless, the fact that that person might be detained unlawfully beyond the expiration of the incarcerative sentence with the State Department of Corrections did not deprive the State of the ability to file a commitment petition under the act:

> However, 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. As explained below, the 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.[7] The same reasoning would be applicable in the instant case. Indeed,

---

[7] As noted in Garcetti, subsequent to the acts at issue in that case, the California commitment act was expressly amended to provide that a commitment petition should not be dismissed based on a later judicial determination that the individual's custody had been unlawful, if the unlawful custody was the result of a mistake of fact or law. 80 Cal. Rptr. 2d at 732, n. 7. That statutory amendment, however, had no bearing on

if anything, the State's position in the instant case is stronger than that of the State in Garcetti. Whereas the California act had a clear requirement that incarcerative custody exist when filing a commitment petition, Florida's act most clearly does not.[8] Other California appellate court opinions came to the same conclusion. People v. Superior Court (Whitley), 81 Cal. Rptr. 2d 189 (Cal. App. 1999); People v. Hedge, 86 Cal. Rptr. 2d 52, 61 (Cal. App. 1999); People v. Hubbart, 88 Cal. App. 4thf 1202, 1228-29 (Cal. App. 2001); People v. Superior Court (Olmeda), 2001 WL 1299443 (Cal. App. Oct. 25, 2001). See also, Johnson v. Nelson, 142 F. Supp. 2d 1215 (S.D. Cal. 2001).

For the foregoing reasons, it should be concluded that the Florida statutory scheme does not contain any requirement that the commitment petition be filed on or before any particular date, let alone prior to the expiration of the incarcerative sentence which is being served. In this respect it would be comparable to the general civil commitment act, the Baker Act. There is no requirement that a general civil

---

the court's decision in Garcetti.

[8] Section 916.45, Florida Statutes (Supp. 1998), and its successor, section 394.925, Florida Statutes (1999), both provide that the commitment act applies "to all persons currently in custody. . . ." That provision refers to custodial status as of the effective date of the commitment act; it has no relevancy to the question of whether one must be in custody at the time of the filing of the commitment petition. Sections 916.45 and 394.925 are the subject of current litigation in this Court in the case of State v. Atkinson, SC01-1775.

commitment petition be filed on or before any particular date. The only relevant question at the time of the filing of the petition is whether the mental condition and related dangerousness exist at the time the action is filed.

Accordingly, the lower Court properly concluded that no basis existed for the dismissal of the sexually violent predators commitment petition. The case law upon which the Petitioner herein relies does not mandate any contrary conclusion. The primary authority relied upon by the Petitioner is State v. Brewer, 767 So. 2d 1249 (Fla. 5th DCA 2000), which is simply a per curiam affirmance, without opinion, and with no precedential value. The Petitioner herein cites extensively from what is merely the concurring opinion of one of the three judges on the panel.[9]

The Petitioner further relies on Johnson v. Department of Children and Family Services, 747 So. 2d 402 (Fla. 4th DCA 1999). That case was totally unrelated to the question of whether a commitment petition, under the original act, could be filed after the release of an individual from the previously served incarcerative sentence. Jonson

---

[9] The Petitioner's brief herein refers to (at page 5, note 2), and attaches, as Appendix B, the trial court order from In re the Commitment of Brewer, Fifth Judicial Circuit Case No. 99-555-CP-03-JF. That pleading is not a part of the record on appeal from either the Second District Court of Appeal, below, or the Tenth Judicial Circuit commitment proceedings regarding Tanguay. In short, the Petitioner's brief and appendix herein rely on what are clearly non-record materials which should be stricken, as they are improperly presented to this Court. See Thornber v. City of Fort Walton Beach, 534 So. 2d 754, 755 (Fla. 1st DCA 1988); Rosenberg v. Rosenberg, 511 So. 2d 593, 595 at n. 3 (Fla. 3d DCA 1987).

held that the report submitted by the multidisciplinary team had to be signed by all members of the team. In essence, the Court said that the report was a prerequisite under the commitment act, and that such a report meant a report signed by all members of the multidisciplinary team. While providing for the "release" of Johnson if the State did not comply with the submission of such a report signed by all members within 72 hours, the Court did not specify that the petition would have to be dismissed as well.

Furthermore, the question of whether dismissal would be warranted for the failure to submit a required report is not the same as the question of whether a commitment petition can be filed after the person has been released from incarcerative custody by either the Department of Corrections or the Department of Juvenile Justice. As opposed to the analysis of the question of the time of the filing of the commitment petition, which is set forth above, on the question of the submission of a written report to the State Attorney, a different answer might ensue. As detailed above, the time periods regarding notice to the multidisciplinary team and the submission of the team's evaluation and report are specifically stated to be nonjurisdictional in §916.33(2), Florida Statutes (1998 Supp.). By contrast, however, §916.34, Florida Statutes (1998 Supp.), provides that the State Attorney may file a commitment petition "following receipt of the written assessment and

recommendation from the multidisciplinary team." There is no jurisdictional disclaimer as to the need for the state attorney to have received the report and recommendation. Thus, without such a report - and, according to Johnson, a report does not exist unless it is signed by all members - no petition can be filed. However, if a report has been submitted, but in an untimely manner, the state attorney has received it, and can thus file the commitment petition, as the time periods for preparation and submission of the report are not jurisdictional and do not affect the ability to file once received. Thus, reliance on Johnson is misplaced because it deals with a very distinctive issue and is an irrelevancy to the question before this Court.

The State is aware, as a result of other oral arguments before this Court on other cases involving the sexually violent predators commitment act, that there may be some concerns about the limitations which exist when the State files a commitment petition after the incarcerative sentence has expired. Thus, it may be questioned whether the petition can be filed at any time - 5 days after the expiration of the sentence? 5 months? 5 years? Two limitations exist in such circumstances.

First, it has been held that due process does not require proof of a recent overt act, in the context of sexually violent predator civil commitments, because the individual has typically been incarcerated for years leading up to the civil commitment, with limited opportunity to perpetrate the sexually violent offenses

which could be perpetrated if the individual had been in the public community. See, e.g., In re Young, 857 P. 2d 989, 1008-1009 (Wash. 1993). However, where an individual has been released in the community, for a substantial period of time, with the full opportunity to perpetrate sexually violent offenses, a recent overt act will be constitutionally required, as a matter of due process. Id. See also, In re Harris, 654 P. 2d 109 (Wash. 1982). Thus, one of the two individuals whose cases had been addressed in Young, Vance Cunningham, had bee released from prison and living in the community for approximately 4 ½ months prior to the filing of the commitment petition. As a result, absent proof of a recent overt act, the court held that there was insufficient evidence for commitment as to Cunningham. The primary answer to any concerns which may exist is that substantive due process would limit such petitions, prohibiting them when substantial periods of time had elapsed without a recent overt act, permitting them when either the time periods were relatively minor, or where the time periods were substantial, but accompanied by a recent overt act.

The second, and interrelated reason why the State's ability to file petitions after release will be limited, is that the commitment petition must allege that the individual's mental condition and dangerousness exist as of the time of the filing of the commitment petition. When substantial periods of time elapse after release from incarceration, the State's ability to present such allegations becomes more difficult

as the passage of time increases. Evaluations which were done during the last year of incarceration become stale after the passage of substantial periods of time, and will reach a point where the psychologists who rendered the opinions may no longer be willing to abide by them absent a further clinical interview with updated background information as to the individual's behavior during the interregnum. This may hinge on questions such as the type of treatment the individual received while out in the community, as well as the commission or absence of new overt acts of sexual violence, with the latter providing an evidentiary limitation of relevance to the mental health experts, separate and apart from its significance in terms of substantive due process.

Thus, even though the State is not statutorily barred from filing a commitment petition after the release of the individual from prior incarceration or juvenile detention, the State's ability to do so will be severely limited due to both constitutional and evidentiary/factual constraints. The State is not obtaining an open door for the filing of such commitment petitions at any time it chooses to do so.

Accordingly, even if the Petitioner is correct, that his juvenile sentence ended 16 days prior to the filing of the commitment petition, that would not bar the filing

of the commitment petition.[10]

In the instant case, although the District Court of Appeal did not believe that Tanguay should have the commitment case dismissed, the Court concluded that the only remedy which would be appropriate would be the release of Tanguay from his pre-commitment-trial custody, pending the outcome of his commitment trial. The State would further suggest that the District Court of Appeal, in granting such relief, granted Tanguay more than he was entitled to.

Simply put, once the expiration of the incarcerative sentence was reached, Tanguay remained free to pursue habeas corpus relief if he was not, in fact released. Had he done so, and had the State thereafter filed its sexually violent predators commitment petition, upon the finding of probable cause for the commitment case, the commitment court would have been obligated to issue an order directing that Tanguay be taken into the custody of the Department of Children and Families pending his commitment trial. Section 916.35, Florida Statutes (Supp. 1998). Thus, the most that Tanguay should have been able to receive should have been 16 days of release, between the end of his juvenile sentence and the filing of the probable cause

---

[10] To the extent that it may be found that this Petitioner, or any similarly situated individual, has an incarcerative sentence which expired, or will expire, any such individual, who is not released when the appropriate time of expiration is reached, is obviously free to file a petition for writ of habeas corpus, alleging the entitlement to be released.

and concomitant order finding probable cause. As Tanguay has been released for a prolonged period of time, while his commitment case has remained pending, he has received more than he is entitled to already.

B. The Juvenile Sentence Did Not Expire Prior to the Commitment Petition

Lastly, the State would note that, contrary to Tanguay's argument, the juvenile sentence did not expire 16 days prior to the filing of the commitment petition. As detailed previously herein, Tanguay was born on February 24, 1980, and his 19th birthday was February 24, 1999. His juvenile sentence, dated April 25, 1996, provided for a commitment "not longer than the maximum sentence which an adult may serve for the same offense(s),or until the child's nineteenth (19th) birthday, whichever first occurs. The order further prohibited release from confinement without the concurrence of the trial court. (R. 47-48). This sentence had been imposed in four juvenile cases, all of which were filed in 1995 or 1996, and all of which were based on offenses committed between December 1, 1995 and January 20, 1996. (R. 42, 46-48, 140-42).

Prior to 1994, the standard juvenile commitment to the Department of Juvenile Justice (or its predecessor), terminated on the juvenile's 19th birthday, absent one of the limited exceptions. Section 39.054(1)(a)4., Florida Statutes (1993). However, that was amended in 1994. Chapter 94-209, s. 43, Laws of Florida. As of 1994,

§39.054(1)(c), Florida Statutes (Supp. 1994), provided the juvenile court with the power to:

> Commit the child to the Department of Juvenile Justice. Such commitment must be for the purpose of exercising active control over the child, including, but not limited to, custody, care, training, urine monitoring, and treatment of the child and furlough of the child into the community. Notwithstanding s. 743.07 and subsection (4), and except as provided in s. 39.058, the term of the commitment must be until the child is discharged by the department or until he reaches the age of 21.

(emphasis added). This remained the controlling statutory provision for basic commitments until further revisions, in 1997, when the juvenile delinquency provisions were moved to chapter 985 and significantly amended at that time. As such, the above-quoted provision applied to the dispositions in the instant cases, as the offenses which were charged in those cases had occurred between December, 1995 and January, 1996, after the effective date of the 1994 amendment. Thus, according to the controlling, mandatory statute, the commitment to DJJ was until Tanguay was either discharged by the Department or when he reached age 21.

Tanguay, in the lower courts, relied, in part, on §39.022(4)(a), Florida Statutes (1995), for the proposition that jurisdiction over Tanguay was lost when he turned 19. That statute however, did not deal with the jurisdiction of the agency with custody over the committed individual. Rather, §39.022(4)(a) addressed the jurisdiction of

a trial court to entertain juvenile delinquency proceedings after the child turned 19. If the juvenile was tried by the court prior to age 19, the court had jurisdiction. If the matter was not brought to trial by age 19, the juvenile court would lose jurisdiction. See R.H.S. v. State, 680 So. 2d 456 (Fla. 1st DCA 1996). That provision is therefore irrelevant to the question of the duration of the sentence with DJJ, when the disposition was timely entered prior to the 19th birthday. In such circumstances, the 1994 change in the law, applicable in the instant case, mandated that the commitment to DJJ be indefinite, until either the 21st birthday or the discharge from commitment by DJJ.

Under such circumstances, Tanguay was serving a statutorily mandated commitment until his 21st birthday or earlier discharge by DJJ. His commitment with DJJ did not end, as he maintains, on his 19th birthday.

The Petitioner herein might object that notwithstanding any statutory provision mandating juvenile delinquency commitment until age 21 or discharge by DJJ, the trial court's disposition specified Tanguay's 19th birthday as the outer limit of the juvenile commitment. While that is true, the commitment order also prohibited release form confinement without the concurrence of the trial court. Construing the trial court's disposition order as mandating discharge by age 19 would, as seen above, turn the disposition order into an illegal one, since such commitment were, at the

time, statutorily mandated to run until the 21st birthday. When the trial court's order based on the 19th birthday is read in conjunction with the caveat that the trial court must concur in any release from confinement, it becomes possible to construe the disposition order in a manner consistent with the law controlling at the time. Whenever it is possible to construe a trial court's order in a manner consistent with the law, such construction should prevail over one which would render a court's order illegal, as orders of trial courts are entitled to a presumption of correctness, Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979), and that presumption can endure, in the instant case, only by construing the trial court's juvenile disposition in light of the caveat requiring judicial consent for release from confinement - even if that release is after the 19th birthday.

Thus, based on the foregoing, even if the sexually violent predators commitment act, as originally enacted, is construed to require the filing of a commitment petition prior to the expiration of the incarcerative sentence, the juvenile disposition in this case did not expire prior to the filing of the commitment petition. The lower court, in the commitment case, therefore granted Tanguay partial relief, in the form of release from custody pending his commitment trial, and did so gratuitously, as no illegality had been committed by the State. Tanguay has therefore already received at least one benefit to which he was not entitled - release pending his

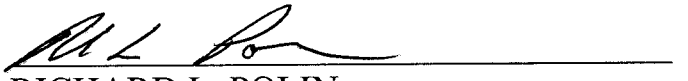
commitment trial. He may also have received a second benefit to which he had no legal entitlement - a trial court's juvenile disposition order setting termination at age 19 instead of the statutorily mandated age of 21. Such prior judicial errors should not now be compounded with a ruling which bars the State from seeking the commitment of one who may ultimately benefit from it and which commitment would protect the public.

CONCLUSION

Based on the foregoing, the petition for discretionary review should be denied, and the lower Court's opinion, solely with respect to the refusal to order the dismissal of the commitment petition, should be approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



RICHARD L. POLIN
Florida Bar No. 0230987
Senior 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)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondents on the Merits was mailed this 29th day of August, 2002, to DEBORAH K. BRUECKHEIMER, Assistant Public Defender, Office of the Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, FL 33831.

RICHARD L. POLIN