IN THE SUPREME COURT OF FLORIDA

STEPHEN LLOYD OSBORNE, Appellant, vs. STATE OF FLORIDA, Appellee.	CASE NO. SC01-973

AN APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

AMENDED INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

On September 16, 1999, the state filed a petition for civil commitment seeking the involuntary commitment of appellant as a sexually violent predator pursuant to section 394.914 Fla. Stat. (1999), et seq. (R.55). In the state's petition for civil commitment, the state asserted the following regarding petitioner's release date from his term of imprisonment in the department of corrections: "DOC has established September 16, 1999, as the date Respondent's sentence will end and the date upon which he will be released from DOC custody." (R.61).

Based upon the commitment petition and its attachments, the circuit court, on September 16, 1999, the same day that the petition was filed, entered an order finding probable cause existed to believe that appellant met the statutory definition of a sexually violent predator. (R.104). The order further directed that appellant "should be detained for further proceedings under the Jimmy Ryce Act." (R.104). A warrant for custodial detention, issued that same day, directed that the Department of Corrections transfer appellant to the custody of the Department of Children and Families upon the expiration of his incarcerative sentence. (R.105).

On December 17, 1999, appellant filed a motion to dismiss state's petition for civil commitment as sexually violent predator. (R.123). In the "statement of facts" section of appellant's motion to dismiss, the appellant asserted the following regarding the date of appellant's release from prison:

> "1. On September 16, 1999 petitioner's prison sentence expired and he was released from the custody of the Florida Department of Corrections." (R.124).

The circuit court held a hearing on the motion to dismiss on February 14, 2000. (R.12-53). At that hearing, counsel for appellant summarized the factual history of the case:

> The facts are simple and uncontroverted. The State filed its petition, the Court entered an order finding probable cause that Mr. Osborne met the criteria for the statute. That probable cause order was filed on September sixteenth, 1999, the same day that Mr. Osborne was released from prison.
>
> On September twenty-second, 1999, Mr. Osborne was brought before the Court, Judge Burk presiding, for the appointment of counsel. At that hearing there was actually another one of these cases before Judge Burk as well, his name was Mr. Staton. At that hearing, myself pointed out to the Court that Mr. Staton had not even brought to court within thirty days of the order finding probable cause and that the Court did not have jurisdiction over him any longer and that I would file a - - some petition in the Supreme Court or the District Court of Appeal based on a violation of Section 394.196, Paragraph 1. So that statute was specifically argued and noted at that September twenty-second hearing.

> When Mr. Osborne's case was called up, counsel was appointed and absolutely no further action was taken. Another court date was not set. No party, either Respondent, the State or the Court, made any inquiry whatsoever about a trial date. No one made a motion for a continuance of the trial date.
>
> After the thirty days had expired, I filed this motion to dismiss State's petition. (R.16,17).

The State filed a response to the motion to dismiss. (R.141). Neither at the hearing held on the motion to dismiss nor in the state's written response to the motion to dismiss did the state ever allege that the appellant did not expire his prison sentence on September 16, 1999, the same day that the state filed its petition for civil commitment as a sexually violent predator.

After hearing argument from counsel at the hearing held on the motion to dismiss on February 14, 2000, the court granted the motion to dismiss and signed an order which dismissed the state's petition and which ordered the immediate release of the appellant from his civil incarceration. (SR.1-2)[1]

[1] "SR." refers to the supplemental record on appeal. Although appellant never actually received a copy of a supplemental record, appellant has reason to believe a supplemental record does exist because the state's motion to supplement record on appeal to include the written order of dismissal was granted in the district court of appeal.

The state appealed the dismissal of the petition to the Fifth District Court of Appeal. In State v. Osborne, 781 So.2d 1137 (Fla. 5th DCA 2001), the court rejected appellant's argument that the state lacked authority to appeal the dismissal because the Ryce Act does not provide that the state has a right to appeal. The district court's disposition of the appellant's argument reads as follows in its entirety:

> Before addressing the merits of the State's appeal, we must consider Osborne's contention that the State lacks authority to appeal the instant dismissal order because no such right of appeal is expressly provided for in the Act. We reject this contention as meritless because the State possesses the same right to appeal as any other party in a civil proceeding; therefore, an express grant is not necessary for each statutorily-created cause of action. *See* Art. V, § 4b, Fla. Const; *Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla.1996).

The Fifth District Court of Appeal in the Osborne decision reversed the trial court's dismissal of the petition. Appellant filed his notice of appeal in the district court of appeal and argued in his jurisdictional brief in the Supreme Court that the Fifth District's holding that a litigant in a civil case has a constitutional right to a direct appeal under Article V, § 4(b) of the Florida Constitution directly conflicts with the Court's decisions

in Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla. 1996) and State v. Creighton, 469 So.2d 735 (Fla. 1985). Appellant also argued in his jurisdictional brief that the Osborne decision expressly construed a provision of the Florida Constitution.

Pursuant to the order of the Supreme Court, proceedings in the Osborne case were stayed until the case of State v. Darren Jerome Goode, No. SC01-28, was decided in the Supreme Court. Appellant has thus been released from his civil incarceration by the Department of Children and Families since his release pursuant to the February 14, 2000 order of the circuit court.[2] In State v. Goode, 830 So.2d 817 (Fla. 2002), the court affirmed the trial court's dismissal of the state's petition for civil commitment and held that the 30 day trial period in the Ryce Act was mandatory but not necessarily jurisdictional. In Goode, the Court disapproved of the Osborne opinion to the extent that it is inconsistent with the Court's Goode opinion. Goode at 830.

On October 10, 2003 the Court accepted jurisdiction of appellant's case and ordered the parties to brief, "all relevant issues, including the proper remedy when there is a

[2] Appellant was arrested, on the state's ex parte application for warrant, and incarcerated for a few weeks in 2001 after the Osborne decision in the district court of appeal. Later, the circuit court released appellant due to the fact that the state did not appeal the order of release in the Osborne case before the district court of appeal.

violation of the thirty (30) day time period in accord with State v. Goode, 830 So.2d 817 (Fla. 2002), and State v. Kinder, 830 So.2d 832 (Fla. 2002).”

SUMMARY OF ARGUMENT

The state does not have the right to appeal the dismissal of its petition for commitment. The Ryce Act confers the right to appeal only upon the respondent and not the state. The district court of appeal in the instant case incorrectly held that the Florida Constitution confers the right to appeal upon the state. The Florida Supreme Court has never receded from its previous holdings that the right to appeal in civil cases in conferred by statute – and not by the Constitution.

If the Court decides that the state does have the ability to appeal, then the district court of appeal's opinion in the instant case should be reversed under the authority of State v. Goode, 830 So.2d 817 (Fla. 2002), which has the same facts as the instant case.

I.
THE FIFTH DISTRICT COURT OF APPEAL DID NOT HAVE JURISDICTION TO DECIDE THE INSTANT CASE BECAUSE NEITHER THE RYCE ACT NOR THE FLORIDA CONSTITUTION CONFER ANY APPEAL RIGHTS UPON THE STATE OF FLORIDA

The Fifth District Court of Appeal held in the instant case that a litigant in a civil case has a right to appeal guaranteed by the Florida Constitution. This holding directly contradicts the holdings of the Supreme Court in State v. Creighton, 469 So.2d 735 (Fla. 1985) and Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla. 1996). However, in reaching its decision in the instant case, the district court of appeal cited as authority, incorrectly appellant submits, the Supreme Court's holding in the Amendments case:

> Before addressing the merits of the State's appeal, we must consider Osborne's contention that the State lacks authority to appeal the instant dismissal order because no such right of appeal is expressly provided for in the Act. We reject this contention as meritless because the State possesses the same right to appeal as any other party in a civil proceeding; therefore, an express grant is not necessary for each statutorily-created cause of action. *See* Art. V, § 4(b), Fla. Const.; *Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla. 1996).

The district court of appeal's reliance on the Amendments decision is erroneous because the Amendments decision does not hold, or even imply, that a litigant in a civil case has a right to appeal guaranteed by the Florida Constitution. In the Amendments decision the Court held that the Florida Constitution does guarantee a citizen's right to appeal in a criminal case. The Supreme Court left intact its previous holding in State v. Creighton that the right of litigants to appeal in civil cases is governed by statute and is not guaranteed by the Florida Constitution. Creighton at 740.

The right to appeal is a matter of substantive law controlled by statute in both criminal and civil cases. See State v. Creighton, 469 So.2d 735, 739-740 (Fla. 1985); State v. Brown, 330 So.2d 535, 536 (Fla. 1st DCA 1976) ("Appellate review of any order or judgement entered by a trial court is not a right derived from the common law; it is derived from the sovereign."). Thus, it is the state,

through its promulgation of statutes, that determines whether or not an appeal will lie. The Ryce Act does not confer upon the state the right to appeal under any circumstances. The only right to appeal conferred by the act is the respondent's right to appeal a determination that the respondent is a sexually violent predator. See § 394.917(1) Fla. Stat. (1999) ("The determination that a person is a sexually violent predator may be appealed.").

A. The Florida Constitution Does Not Confer the Right to Appeal Upon the State.

The Florida Supreme Court has held that Article V, section 4(b) of the Florida Constitution does not confer appellate rights upon litigants in either criminal or civil cases. State v. Creighton, 469 So.2d 735, 739-740 (Fla. 1985)("But we must look at the language actually used, and that language indicates that the question of when an aggrieved litigant is entitled to an appeal is a matter to be determined by sources of authority other than the constitution. . .the present constitutional language merely allocates jurisdiction rather than conferring appeal rights. . . We note that the right of litigants to appeal in non-criminal cases is governed by statute as well. One would expect this as a matter of logical consistency.").

In Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla. 1996), the Court receded from its decision in Creighton to make it clear that the constitution would provide protection of the right to appeal if the legislature were ever to thwart a litigant's

legitimate appellate rights. The extent to which the Court receded from its decision in Creighton and the purpose of the Court's clarification of Creighton must be considered in light of the facts of the Amendments case. In the Amendments case, the Court was considering the Criminal Appeal Reform Act of 1996 which conflicted with the rules of appellate procedure. The rules of appellate procedure committee, as well as public defenders and others argued that the Act was procedural in nature and could not override the Court's rules of appellate procedure. On the other hand, the attorney general argued that the Act's provisions were substantive and therefore controlling. Amendments at 696.

The Court, in the Amendments decision, emphasized that the issue in Creighton was whether the state had a constitutional right to appeal: "However, the issue in *Creighton* was whether the *State* had a constitutional right to appeal." Amendments at 1104. Conversely, the Amendments case addressed a new limitation by the legislature which would restrict a citizen's right to appeal. When the Amendments decision is considered in its context, it is clear that the Court was eliminating any doubt as to its view that the constitution does protect a citizen's right to appeal. The Amendments decision cannot reasonably be read

to mean that the state ever has a constitutional right to appeal. Such an interpretation cannot be reconciled with the purpose of the Constitution which is to prescribe and limit government powers, and to secure individual rights. See Tibbetts v. Olson, 108 So. 679 (Fla. 1926); Getzen v. Sumter County, 103 So. 104 (Fla. 1925); Whitaker v. Parsons, 86 So. 247 (Fla. 1920). It must be remembered that Article I of the Florida Constitution – the Declaration of Rights – guarantees only persons – and not the state - inalienable rights. The constitution does not guarantee the state any rights to due process of law (art. I, § 9) or access to courts (art. I, § 21). The fact that the citizen only - and not the state - is the beneficiary of constitutional protections was recognized in Gardner v. State, 530 So.2d 404, 405 (Fla. 3d DCA 1988) where the court held it was reversible error for the trial court to apply the exclusionary rule to the defense and disallow the introduction of the defendant's evidence: "In this case, the assistant state attorney led the trial court to erroneously apply this principle of law to the defense. The State does not have constitutional due process rights to which the exclusionary rule applies." Gardner at 405.

It must also be remembered that there is no concept of "fundamental fairness" in the constitution that would in any

way confer a right to appeal upon the state in a Ryce Act case. It is the legislature's prerogative to enact legislation that the Court may believe is fundamentally unfair to the state.[3] It would be unconstitutional for the Court to rewrite the Ryce Act or "judicially add" provisions to the Act in an attempt to provide a degree of fairness to the state that the legislature decided would not be included in the Act.

In Amendments to the Florida Rules of Appellate Procedure, supra, the Court concluded that the constitution would provide protection to the right to appeal if the legislature were ever to thwart a "litigants'" legitimate appellate rights: "Therefore, we now recede from *Creighton* to the extent that we construe the language of article V, section 4(b) as a constitutional protection of the right to appeal. However, we believe that the legislature may implement this constitutional right and place reasonable

[3] On the other hand, because it was the legislature's prerogative to enact the Ryce Act and because the legislature decided to write it the way that it did, the court may not be concerned at all with the fact that the Ryce Act does not confer on the state the right to appeal dismissal of cases. In State v. J.P.W., 433 So.2d 616, 618 (Fla. 4th DCA 1983), the court stated, "The lack of recourse by the state to a right of review of final judgements in juvenile proceedings does not shock the judicial conscience of this court. Consequently, there is no incentive to grasp at straws in an attempt to remedy an untenable situation."

conditions upon it so long as they do not thwart the litigants' legitimate appellate rights.'" Creighton at 1104. (footnote omitted). In decisions subsequent to the Amendments opinion, the Court made it clear that the word "litigants'" in the Amendments decision referred to criminal defendants. In State v. Jefferson, 758 So.2d 661,664 (Fla. 2000), the Court made this abundantly clear:

> Article V, section 4(b), which grants the district courts' jurisdiction to hear criminal appeals, also grants criminal defendants a constitutional right to an appeal. *See id.; Amendments*, 696 So.2d at 1104. In a previous opinion upholding the Criminal Appeals Reform Act against constitutional attack, this Court stated that
>
> > we believe that the legislature may implement this constitutional right and place reasonable conditions upon it so long *as they do not thwart the litigants' legitimate appellate rights. Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals.*
>
> *Id.* At 1104-05 (emphasis supplied) (footnote omitted).

The Court, in Hall v. State, 823 So.2d 757, 762 (Fla. 2002), reiterated that the word "litigants'" in the Amendments decision referred to only criminal defendants and not the state:

> "Article V, section 4(b), which grants the district court's jurisdiction to hear criminal appeals, also grants criminal defendants a constitutional right to an appeal." *State v.*

Jefferson, 758 So.2d 661,664 (Fla.2000); *see Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla.1996)(construing "the language of article V, section 4(b) as a constitutional protection of the right to appeal"). However, "the legislature may implement this constitutional right and place reasonable conditions upon it so long as they do not thwart the litigants' legitimate appellate rights." *State v. Jefferson*, 758 So.2d 661,664 (Fla.2000).

The district courts of appeal have also held that the Court's reference to "litigants'" in the Amendments decision includes only the citizen and not the state:

1. Peterson v. State, 775 So.2d 376,378 (Fla. 4th DCA 2000)("Although a defendant has no federal constitutional right to state court appellate review of a criminal conviction, *Estelle v. Dorrough*, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975), Article V, section 4(b) of the Florida Constitution does grant criminal defendants such a right. *Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla.1996).[1]" (footnote omitted).

2. State v. Allen, 743 So.2d 532, 533-534 (Fla. 1st DCA 1998)("At the outset we acknowledge that the state's right to appeal depends entirely on the applicability of the statute. The supreme court held in *State v. Creighton,* 469 So.2d 735 (Fla. 1985), that the state's right to appeal an order in a criminal case is purely statutory. Although the court receded in part from *Creighton* in the opinion adopting the latest revision of the Florida Rules of Appellate Procedure, See *Amendments to Florida Rules of Appellate Procedure*, 685 So.2d 773 (Fla. 1996), that opinion does not expand the state's right to appeal. Rejecting dicta in *Creighton* to the contrary, the supreme court said that the right of a citizen to appeal a final order is derived from the Florida Constitution and that it does not depend on the existence of legislation. The court left intact its holding in *Creighton* that the state's right to appeal depends on the existence of a statute.

Consequently, the state’s right to appeal the order in this case turns on the meaning of the

statute purporting to authorize the appeal.") (emphasis supplied).

3. Denson v. State, 711 So.2d 1225, 1228 (Fla. 2d DCA 1998)("The supreme court addressed this limitation on our jurisdiction in *In re Amendments to the Florida Rules of Appellate Procedure*, 685 So.2d 773 (Fla. 1996), and held that the courts will abide by reasonable legislative restrictions on a defendant's constitutional right of appeal.") (emphasis supplied).

4. Thompson v. State, 708 So.2d 289, 292 (Fla. 4th DCA 1998)("Lastly, we express some discomfort with the argument advanced in *Stone* that a legislative limitation on appellate jurisdiction would 'interfere with what the supreme court has concluded is a defendant's constitutional right to appeal.' 688 So.2d at 1008. It is true that the supreme court has recently determined that criminal defendants have a state constitutional right to appeal. *See Amendments to the Florida Rules of Appellate Procedure*, 685 So.2d 773, 774 (Fla. 1996).") (emphasis supplied)

5. Stone v. State, 688 So.2d 1006, 1008 (Fla. 1st DCA 1997)("To accept the state's to the contrary would result in the conclusion that the recent amendments to chapter 924 were intended to interfere with what the supreme court has concluded is a defendant's constitutional right to appeal.").

The decisions of the Supreme Court and the district courts of appeal above all conclude that in Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996), the Supreme Court receded from its decision in State v. Creighton, 469 So.2d 735 (Fla. 1985) only to the extent that the Court was now making it very clear that the

Florida Constitution does provide a guarantee of the right to appeal to a defendant in a criminal case. The Court left intact the rule stated in Creighton that the right of litigants to appeal in non-criminal cases is governed by statute. Creighton at 739-740. In the instant case, the Fifth District Court of Appeal has incorrectly interpreted the Amendments opinion and has incorrectly held that the Florida Constitution confers the right to appeal on the state in Ryce Act cases.

B. Chapter 59 of the Florida Statutes Should Only Confer the Right to Appeal in Those Actions that Existed at Common Law, And In Statutorily-Created Causes of Action Where the Legislature Specifically Authorizes A Right to Appeal.

"Appellate review of any order or judgement entered by a trial court is not a right derived from the common law, it is derived from the sovereign." State v. Brown, 330 So.2d 535 (Fla. 1976). Section 59.06 was enacted in 1853 when Florida was at its infancy as a state. The law was passed at the sixth session of the General Assembly of the State of Florida. This 1853 enactment strongly suggests that the law was passed to confer upon litigants the right to appeal in those actions that existed at common law. Thus, § 59.06 would confer upon the state the right to appeal in common-law actions such as tort actions. Section 59.06 would authorize, by way of example, the state's appeal in the

following common-law actions: State Dept. H.R.S. v. Arnold, 670 So.2d 96 (Fla. 1st DCA 1996)(in tort action against state, the state appealed from trial court's order granting a new trial); Florida Dept. of Corrections v. Parker, 553 So.2d 289(Fla. 4th DCA 1989)(state appealed final judgement for damages in tort action).

The legislature has created many causes of action that did not exist at common law and has specifically authorized the right to appeal in many of these statutorily-created actions. Section 59.06 can operate to control the extent to which a party may appeal in these statutorily-created actions that explicitly authorize the right to appeal. For example, arbitration actions can be appealed, ". . . in the manner and to the same extent as from orders or judgements in a civil action." See § 682.20 Fla. Stat. Thus, § 59.06 would be applicable to this type of action. Appeals in eminent domain actions would also be governed by § 59.06: "Appeals in eminent domain actions shall be taken in the manner prescribed by law and in accordance with the appellate rules. . ." See § 73.131 Fla. Stat. Section 59.06 would allow the Florida Department of Environmental Protection to appeal final judgements in civil actions. Section 403.121 authorizes the department to institute civil actions and § 403.121(2)(d) states, "Nothing herein shall be

construed as preventing any other legal or administrative action in accordance with law." An appeal of a final judgement in accordance with § 59.06 would therefore be allowed by statute.

In other statutorily-created actions that did not exist at common law, the legislature has specifically authorized a right to appeal that is greater in scope than the scope of the appeal prescribed in § 59.06. For example, § 984.24 confers the right to appeal upon the state, any child, or the family, guardian ad litem, or legal custodian of any child who is affected by an order of the court issued pursuant to Chapter 984 regarding children in families in need of service. The property appraiser is conferred with the right to appeal, to the circuit court, decisions of the value adjustment board and the circuit court conducts a *de novo* review. See § 194.036 Fla. Stat. An "aggrieved party" may appeal a final administrative order of a county or municipal code enforcement board to the circuit court. See § 162.11 Fla. Stat. A party who is adversely affected by final administrative agency action is authorized by the Administrative Procedure Act to seek review in the district court of appeal. *See* § 120.68 Fla. Stat. The right of the state and a child to appeal in juvenile delinquency cases is conferred by § 985.234. The legislature has even conferred

the right to appeal a “dangerous dog classification.” See § 767.12(1)(d).

The caselaw and statutes above make it clear that the state has the right to appeal in common law actions pursuant to § 59.06. Section 59.06 also confers the right to appeal upon the state and other parties in statutorily-created actions that explicitly authorize an appeal that is authorized by law (e.g., § 73.131 Fla. Stat.) and in actions where the legislature has authorized the state to pursue any legal action in accordance with the law (e.g., § 403.121(2)(d)). However, § 59.06 does not confer the right to appeal in statutorily-created causes of action, like the Jimmy Ryce Act, where the statute is silent as to the right to appeal. Appellee has not located any caselaw that holds – or even implies for that matter – that § 59.06 can confer the right to appeal when the legislature has been completely silent on the issue. Such an argument by the state that § 59.06 confers a “by-default” right to appeal should be rejected. This argument should be rejected in light of the above examples where the legislature has conferred the right to appeal in numerous actions involving a wide range of issues. It is illogical to suggest that the legislature ever intended § 59.06 to confer, “by default”, the right to appeal when one considers the painstaking efforts the

legislature has made in explicitly conferring appeal rights throughout the Florida Statutes in statutorily-created causes of action.

C. Chapter 59 of the Florida Statutes Does Not Confer the Right to Appeal Upon the State Because Jimmy Ryce cases are Not General Civil Cases.

If the state were to argue that § 59.06 confers the right to appeal on the state, this argument would presumably be premised on the grounds that chapter 59, Florida Statutes governs appeal rights in general civil cases and the legislature has labeled the act "a civil commitment procedure." See § 394.910 Fla. Stat. (1999). This argument fails because, despite the legislature's "civil" label, an involuntary commitment under the act is not a general civil case – rather, it is a "civil–criminal hybrid" proceeding.[4]

The Fourth District Court of Appeal has already made the considered observation that proceedings under the Ryce Act are not general civil cases. In Meadows v. Krischer, 763 So.2d 1087 (Fla. 4th DCA), the court concluded that, "Where service of the petition and the warrant finding

[4] Susan Klein, *Redrawing the Criminal-Civil Boundary*, 2 Buffalo Criminal Law Review 679 (1999). In this article, argues against the simplistic "criminal" or "civil" labeling of these laws. The author argues that the courts should begin to generate "middleground jurisdprudence" in response to these new laws.

probable cause is made, a standard civil summons would be unnecessary, especially since this is not a standard civil case." Because of the inability of the Florida Rules of Civil Procedure to provide adequate application to Jimmy Ryce proceedings, the court stated that there is a ". . . need for the Florida Supreme Court to appoint an appropriate committee to fashion comprehensive procedural rules for the implementation of substantive requirements for the Ryce Act for those situations where the application of the Rules of Civil Procedure would be impracticable and where the statute is silent as to procedure." Meadows at n. 4.

Even though Fla. R. Civ. P. 1.010 states that, "These rules apply to all actions of a civil nature. . .", the Florida Rules of Civil Procedure repeatedly are inapplicable to the Ryce Act and trial courts have to decide their applicability on an issue-by-issue basis. It is illogical to suggest that the Jimmy Ryce Act is a general civil case when the Florida Rules of Civil Procedure are inapplicable in many instances. For example, Fla. R. Civ. P. 1.440,

[5] Appellant does not agree that the Supreme Court should fashion procedural rules for those situations where the rules of civil procedure are impractical. The Supreme Court should not adopt rules that make the Ryce Act more "workable." If the legislature made a procedural mess in the Ryce Act, then the legislature, not the Court, should fix it.

which governs setting action for trial, cannot be reconciled with § 394.916(1) which requires a trial within thirty days of a probable cause determination unless the trial is continued for good cause. The entire Florida Rules of Civil Procedure, including its discovery provisions, cannot apply to a case that must be tried within thirty days of its inception.

The Florida Supreme Court has recognized that certain types of actions and proceedings cannot accurately be categorized as either "criminal" or "civil." In State ex ref. Butterworth v. Kenny, 714 So.2d 404, 409-410 (Fla. 1998), the Court concluded that, "Consequently, post-conviction proceedings, while technically classified as civil actions, are actually quasi-criminal in nature because they are heard and disposed of by courts with criminal jurisdiction." Similarly, the Court reached the conclusion that habeas corpus, is "quasi-criminal" even though it too is technically classified as a civil proceeding. See Allen v. Butterworth, 756 So.2d 52,62 (Fla. 2000). In State v. Boatman, 329 So.2d 309, 312-313 (Fla. 1976), the Court refused to simplistically categorize juvenile delinquency proceedings as either criminal or civil. The Court found that, "Juvenile delinquency proceedings are neither wholly criminal nor civil in nature." In In the Interest of

C.J.W., 377 So.2d 22, 24 (Fla. 1979), the Court concluded that, because the aim of juvenile delinquency system is treatment and rehabilitation, a child does not enjoy the full panoply of procedural rights to which one accused of a crime is entitled, but the juvenile must receive a certain level of due process because the state is also seeking to restrain the juvenile's liberty.

The conclusion in Boatman that juvenile proceedings are neither wholly criminal nor wholly civil in nature is particularly relevant to the issue of whether or not § 59.06 confers the right to appeal upon the state. In State v. C.C., 476 So.2d 144 (Fla. 1985), the Court held that chapter 39, governing juvenile delinquency matters, did not confer the right to appeal on the state. It is significant that the Court did not look to § 59.06 to confer an appellate right on the state even though juvenile delinquency proceedings are both civil and criminal in nature. In C.C., the Court emphasized that chapter 39 conferred the right to appeal upon the child and a child's parent or legal custodian, but did not confer an appellate right upon the state. The state, in C.C., argued that the state could appeal pursuant to chapter 924 which provides for the state's appellate review in criminal cases. The Court rejected this argument: "Because chapter 924 gives a

defendant a right of appeal, section 39.14 would not be necessary to give a juvenile defendant a right of appeal if chapter 924 applied to juvenile proceedings. The legislature has exhibited no intent to have chapter 924 apply to juvenile proceedings." C.C. at 146. This analysis is directly applicable to the issue of whether § 59.06 confers appellate rights upon the state in Jimmy Ryce cases. To paraphrase the C.C. decision, because chapter 59 gives a party in a general civil case a right of appeal, section 394.917 would not be necessary to give a respondent determined to be a sexually violent predator a right of appeal if chapter 59 applied to Jimmy Ryce cases. The legislature has exhibited no intent to have chapter 59 apply to the Jimmy Ryce Act.

The court should also consider the ramifications that would result from a decision that chapter 59 confers the right to appeal on the state in the instant case. Such a decision would inevitably be relied on by the state to argue that chapter 59, and in particular § 59.041, authorizes the state in Ryce cases to appeal both non-jury and jury trials where the respondent was determined to not be a sexually violent predator and was therefore released from his civil incarceration. There is nothing in the Jimmy Ryce Act to even hint that the legislature intended that the state have

the ability to appeal trial verdicts. Of course this issue also raises numerous constitution questions. Appellee submits that this possible consequence militates against the argument that chapter 59 confers appellate rights upon the state in Ryce Act cases.

D. The Legislature's Amendments to the Jimmy Ryce Act Demonstrate the Legislature's Intent That Only the Other Statutes Specifically Enumerated by the Legislature Apply to the Act - and Then Only to the Extent Prescribed.

The original version of the Ryce Act and its amendment the following year in 1999 demonstrate that the legislature meant for the act to "stand on its own" without reference to any other statutes for its interpretation and operation except in those situations where the legislature has specifically prescribed which other statutes are applicable. Both the original version of the act and the 1999 amendment confer the right to appeal only upon a respondent who has been determined to be a sexually violent predator. § 916.37(1) Fla. Stat. (Supp. 1998); § 394.917(1) Fla. Stat. (1999). In 1999, the legislature made several amendments to the act which demonstrate the legislature's intent to clearly dictate what other Florida Statutes would and would not apply to the act. The legislature amended the legislative intent section of the

act to specifically provide that the procedures in part I of Chapter 394 – the Baker Act – shall not apply to commitment procedures under the Jimmy Ryce Act:

> 394.911 Legislative intent – The Legislature intends that persons who are subject to the civil commitment procedure for sexually violent predators under this part be subject to the procedures established in this part and not to the provisions of part I of this chapter. Less restrictive alternatives are not applicable to cases initiated under this part.

The legislature made other amendments in 1999 which indicate that other statutes apply only to the extent authorized by the legislature. The Florida Rules of Evidence (§ 90 Florida Statutes) were to apply "unless otherwise specified in this part." § 394.9155(2) Fla. Stat. (1999); Ch. 99-222, §. 10, Laws of Fla. These amendments by the legislature evince the legislature's intent that other statutes are not to be applicable to the Ryce Act unless the legislature specifically made them applicable.

In McKnight v. State, 727 So.2d 314, 316 (Fla. 3d DCA 1999), the court's analysis of legislative intent relied on legislative committees' staff analysis reports and economic impact reports. The Senate Staff Analysis and Economic Impact Statement pertaining to the 1999 amendments to the Ryce Act does not contain any indication that the legislature ever intended to confer the right to appeal on the state. (This economic impact statement is included in

the appellant's appendix to the initial brief). Likewise, the 1998 House Committee on Family Law and Children Final Bill Research Economic Impact Statement concerning the original enactment of the Ryce Act in 1998 does not contain any indication that the legislature ever intended to confer a right to appeal on the state. (This economic impact statement is also included in appellant's appendix to initial brief).

E. Rules of Statutory Construction Militate in Support of Appellee's Position that § 59.06 Does Not Confer the Right to Appeal on the State.

The Ryce Act does not contain any provision that confers the right to appeal on the state. It is a recognized rule of statutory construction that courts cannot amend or complete acts of the legislature by supplying relief in instances where the legislature has not provided such relief. See Dade County v. National Bulk Carriers, 450 So.2d 213, 216 (Fla. 1984). It is not the function of the judicial branch to supply omissions of the legislature. See Brooks v. Anastasia Mosquito Control District, 148 So.2d 64 (Fla. 1st DCA 1963); Devin v. City of Hollywood, 351 So.2d 1022, 1023 (Fla. 4th DCA 1976). Ordinarily, the judiciary will not take the liberty of even adding a single word to a statute. See Atlantic Coast Line Railroad Company v. Boyd,

102 So.2d 709, 712 (Fla. 1958). The omission of a provision in a statute establishes a presumption that the legislature did not intend to include the provision in the statute. See Peterman v. Floriland Farms, Inc., 131 So.2d 479 (Fla. 1961); Gay v. Singletary, 700 So.2d 1220, 1221 (Fla. 1997)("If the legislature had intended that this important decision be determined by *another* agency, such as the Department of Corrections, the legislature surely would have made that intent clear."). These rules of statutory construction parallel the separation of powers constitutional principle that courts are law-interpreting and not lawmaking bodies, and thus they have no power to make the law. State v. Barquet, 262 So.2d 431, 433 (Fla. 1972)("Governmental powers are divided into the executive, legislative, and judicial branches. The lawmaking function is the chief legislative power. This function involves the exercise of discretion as to the contents of a statute, its policy or what it shall be. See 4 F.L.P., Constitutional Law, § 33. The judicial branch is constitutionally forbidden from exercising any powers appertaining to the legislative branch (Fla. Const., art. II, § 3), and will not suggest a solution to this sensitive problem.")

The rule of statutory construction *inclusio unius est exclusio alterius* supports appellees position that § 59.06

does not confer a right to appeal upon the state. Under this rule of statutory construction, the mention of one thing implies the exclusion of another. In other words, when a law expressly describes a particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded. See Industrial Fire & Casualty Insurance Co., v. Kwechin, 447 So.2d 1337, 1339 (Fla. 1983)("The express authorization of deductibles in the enumerated situations implies the prohibition against them in all other situations according to the rule of statutory construction inclusion unius est exclusio alterius.") Applying this principle to the Ryce Act, the express authorization of the right to appeal in the act under the circumstance prescribed implies the prohibition against the right to appeal in all other circumstances. In other words, because the legislature expressly provided that only the respondent can appeal in Ryce Act cases (§ 394.917), the inference should be drawn that the legislature intended that the state not have the ability to appeal. Likewise, because the Ryce Act specifically describes which other Florida statutes apply and do not apply to the act (i.e. § 394.9155, § 394.911), an inference must be drawn that other statutes (i.e. § 59.06) not included in the act by specific reference

were intended to be excluded from any application to the act.

F. The Time Periods Established in the Ryce Act Suggest that the Legislature Intentionally Did Not Confer Any Ability to Appeal upon the State Because the State Would Have Multiple Opportunities to Initiate and Pursue Commitments If the State Followed the Time Periods In the Act.

The legislature intended that the sexually violent predator trial pursuant to the Ryce Act should take place well in advance of the respondent's date of release from prison. State v. Goode, 830 So.2d 817,826 (Fla. 2002). In the routine case where the potential Ryce Act respondent is serving a prison sentence, the state attorney will receive the recommendation from the Department of Children and Families to file a petition for commitment at least one year before the prisoner's release. *See* § 394.913(1)(a) and (3)(e) Fla. Stat. (2002). The Court in the Goode case recognized that the time periods in the Ryce Act, if followed by the state, would allow more than enough time for multiple attempts at prosecuting a respondent's commitment: "Presumably, if the State followed the time periods in the Ryce Act, the commitment trial would take place will in advance of the respondent's date of release from prison and the due process concerns of commitment beyond imprisonment

would be substantially alleviated. Under this scheme, the State would have multiple opportunities to initiate and pursue these commitments before the respondent's criminal sentence expires.[8]" Goode, 830 So.2d 826 (footnote omitted). In Goode, the Court explained that in cases where the trial did not take place within 30 days of the filing of the state's petition, as provided in § 394.916(1), but the respondent's prison sentence had not expired, the trial court would retain jurisdiction even though the mandated time period for trial had expired. Goode, 830 So.2d 829.

Appellant submits that the legislature intentionally did not confer any appeal rights upon the state in the Ryce Act because of the fact that the state would have multiple

opportunities to initiate and pursue the commitment. It is logical to believe that the legislature concluded that there was no need to confer the right to appeal on the state in the Ryce Act because of the multiple opportunities that were available to the state to pursue the commitment as long as the time periods in the Ryce Act were followed. The legislature, in drafting the Ryce Act, must have believed that the state would actually follow the time periods established in the Ryce Act. The state's multiple opportunities to initiate and pursue commitments, as contemplated by the time periods in the Ryce Act, would make the state's ability to appeal unnecessary. Thus, appellant submits that the legislature intentionally did not confer the right to appeal upon the state in the Ryce Act.

II.

IF THE COURT DECIDES THAT THE STATE DOES HAVE THE ABILITY TO APPEAL THE DISMISSAL OF THE STATE'S PETITION, THEN THE DISTRICT COURT OF APPEAL'S OPINION SHOULD BE REVERSED UNDER THE AUTHORITY OF THIS COURT'S DECISION IN STATE V. GOODE, WHICH HAD THE SAME FACTS AS THE INSTANT CASE

In State v. Goode, 830 So.2d 817 (Fla. 2003), the Court affirmed the trial court's dismissal of the state's petition for commitment in a case that had the same facts as those in the instant case. Therefore, under the authority of the Goode decision, the Fifth District Court of Appeal's opinion in the instant case should be reversed.

In State v. Goode, *supra*, the state filed its petition for commitment as a sexually violent predator on the very day that Goode finished his prison sentence. Goode at 819. On that same day, the circuit court made an ex parte finding that probable cause existed to believe that Goode was a sexually violent predator as that term is defined by statute and ordered Goode incarcerated indefinitely despite the expiration of his prison sentence. Goode at 819. No adversarial probable cause hearing pursuant to § 394.915(2) was held in Goode's case. Goode at 820. The thirty day trial period in § 394.916(1) Fla. Stat. (1999) was not requested to be continued for good cause by either the state or Goode or by the court on its own motion. Goode at 819. More than two months after the state filed its petition,

Goode filed a motion to dismiss the state's petition for the state's failure to bring the case to trial within 30 days of the ex parte finding that Goode was a sexually violent predator. The trial court granted the motion to dismiss and the state appealed the dismissal. The district court of appeal certified that the trial court's order required immediate resolution by the Florida Supreme Court as an issue of great public importance and has a great effect on the proper administration of justice throughout the state. State v. Goode, 779 So.2d 544 (Fla. 2d DCA 2001). The Supreme Court held that the 30-day trial period in § 394.916(1) is mandatory and affirmed the trial court's order dismissing the state's petition. Goode at 818.

The facts in the instant case are the same as the facts in Goode; therefore, the Fifth District Court of Appeal's decision in the instant case should be reversed. In the instant case, the state filed its petition for commitment as a sexually violent predator on the very day that appellant finished serving his prison sentence. (R 55,61,124,16-17). On the same day that the state's petition was filed and appellant finished his prison sentence, September 16, 1999, the trial court entered an ex parte order finding that probable cause existed to believe that appellant was a sexually violent predator. The order further directed that

appellant be detained for further proceedings under the Jimmy Ryce Act. (R.104). There was no adversarial probable cause hearing held in the instant case. The 30 day trial period in § 394.916(1) Fla. Stat. (1999) was not requested to be continued for good cause by either the state or the appellant or by the court on its own motion. Three months after the trial court's ex parte probable cause finding, the appellant filed his motion to dismiss for the state's failure to hold a trial within 30 days. (R.123). Thus, the facts of the instant case are the same as the facts in the Goode case.

In the Goode case, the Court held that the 30 day trial period in § 394.916(1) is mandatory but not necessarily jurisdictional: "Similarly, we conclude here that although the language requiring the trial to be held within thirty days is mandatory, the language is not necessarily jurisdictional because there are limited instances where the court would retain jurisdiction beyond the thirty-day time period, most notably where a continuance for good cause or in the interest of justice has been granted under section 394.916(2)." Goode at 828. However, the other limited instances where the trial court would retain jurisdiction that the Court was referring to in Goode were not the facts of the Goode case. In Goode, the Court affirmed the trial

court's dismissal of the petition. Appellant submits that the dismissal, under the facts of the Goode case, ended the jurisdiction of the trial court.

In Goode the Court explained that if the state followed the time periods in the Ryce Act, the commitment trial would take place well in advance of the respondent's release from prison and that, "Under this scheme, the State would have multiple opportunities to initiate and pursue these commitments before the respondent's criminal sentence expires.[8]" Goode at 826 (footnote omitted). The Court explained that under these circumstances where the respondent's prison sentence had not expired, the trial court would retain jurisdiction even though the mandated time period for trial had expired. Goode at 828,829. Appellant emphasizes again that this is not what happened in the Goode case. In the Goode case, as in the instant case, respondent finished his prison sentence the same day that the state filed its Ryce Act petition and Goode's incarceration, like appellant's civil incarceration, was solely for the state's civil commitment prosecution. Although the Goode decision does not explicitly state that the dismissal under the facts of the case ended the trial court's jurisdiction in the case, appellant submits that that is in fact what must be the

result because any subsequent petition for commitment would necessarily have to be filed when the respondent is no longer in custody. However, the Ryce Act allows the state's petition for commitment to be filed only when the respondent is in the custody of the department of corrections or serving an incarcerative sentence as a juvenile in a facility operated by the Department of Juvenile Justice of Department of Children and Families. *See* § 394.925 and §394.912(11) Fla. Stat. (1999).

In State v. Siddall, 772 So.2d 555 (Fla. 3d DCA 2000), the court affirmed the dismissal of the state's petition for commitment because the respondent was on probation and not in prison when the state filed its petition. The court held that probation was not "custody" for the purposes of the Ryce Act. The Siddall decision was interpreting the first version of the Ryce Act passed in 1998. The Ryce Act was amended effective May 26, 1999 and this second version of the Ryce Act applies to the instant case. *See* Ch.99-222, Laws of Fla. The 1999 amendments to the Ryce Act, in particular, § 394.925 and § 394.912(11) Fla. Stat. (1999), make it even more clear that the state's petition must be filed while the respondent is incarcerated.

The legislature's mandate that Ryce Act respondents cannot be released prior to trial or during the trial

militates in favor of the argument that dismissal in the Goode case ended the trial court's jurisdiction. *See* § 394.915(5) Fla. Stat. (1999). In Department of Children and Families v. Mitchell, 844 So.2d 694 (Fla. 5th DCA 2003), the state convinced the court that this "no pretrial release" statute prevented even a brief release from the respondent's civil incarceration to attend the funeral of a family member. Presumably the legislature decided against any pretrial release in Ryce Act cases because the legislature has made the finding that sexually violent predators are extremely dangerous who are like to engage in sexually violent behavior.[6] *See* § 394.910 Fla. Stat. (1999).

The trials in Ryce Act cases have typically been held two or three years after the state files its petition for commitment. This is a long time for an alleged sexually violent predator to be released prior to trial and this too militates in support of appellant's argument that the dismissal in Goode ended the trial court's jurisdiction.

[6] Appellant would be remiss if he did not point-out that appellant's freedom for almost four years without the commission of a sex crime along with the many other released respondents across the state who have not committed sex crimes casts serious doubts on the state's ability to predict who constitutes this small group of dangerous prisoners.

Practical reasons support appellant's position that the dismissal in Goode was with prejudice and ended the trial court's jurisdiction. If the state were allowed to initiate another petition against Goode after his release from his civil incarceration pursuant to State v. Kinder 830 So.2d 832 (Fla. 2002), which has the same facts as, for example, Goode, then nothing would prevent Goode from moving to the State of California during his pretrial release. The State of Florida would have no way to force Goode to return to Florida for his civil commitment trial because the rules of civil procedure do not require any party to attend their trial and the uniform extradition statute only applies to persons charged with crimes. *See* § 941.05 Fla. Stat. (2002).

CONCLUSION

The Court should reverse the holding in State v. Osborne, 781 So.2d 1137 (Fla. 5th DCA 2001), that the Florida Constitution confers the right to appeal upon the State of Florida in this civil case. In reversing the district court opinion, the Court should order the state's appeal dismissed in the instant case. If the Court decides that the state does have the right to appeal in the instant case, then the Court should reverse the district court of appeal's decision under the authority of State v. Goode, 830 So.2d 817 (Fla. 2002).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing amended initial brief was mailed this ____ day of November 2003 to Richard Polin, Assistant Attorney General, 444 Brickell Ave., Suite 950, Miami, Florida 33131.

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FONT COMPLIANCE CERTIFICATE

Pursuant to Fla. R. App. P. 9.210(a)(2), undersigned counsel certifies that this amended initial brief was submitted in Courier New 12-point font.

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