IN THE SUPREME COURT OF FLORIDA

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

AN APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF APPELLANT

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I.

THE STATE DOES NOT HAVE ABILITY TO APPEAL THE DISMISSAL OF THE STATE'S PETITION FOR CIVIL COMMITMENT FILED PURSUANT TO THE RYCE ACT

In its answer brief, the state argues that the district courts of appeal have decided Ryce Act cases where the state was the appellant and that this demonstrates that the courts recognize that the state has the right to direct appeal in Ryce Act cases. The state concedes, however, that the Fifth District Court of Appeal in the instant case is the only court which has addressed the question of whether or not the state has the ability to appeal or not. Appellant Osborne submits the instant case is the only case where this issue has been raised and the instant case presents the issue as one of first impression in Florida. The fact that appellate courts have entertained state appeals in Ryce Act cases does not support the state's argument because the state's ability to appeal was not challenged in those cases. The appellate decisions that the state cites are silent on the issue and appellant therefore submits that they do not offer any support for the state's position that the state has the right to appeal in Ryce Act cases that is guaranteed by the Florida Constitution.

In its answer brief, the state asserts that, "Neither Creighton nor any other case ever held that the state's right to appeal civil final judgements, under the current Constitution, was in any way dependant upon statutory authorization." (answer brief at 12). Appellant submits that the state refuses to acknowledge that the Court in Creighton did in fact reach this very conclusion that a litigant's ability to appeal final judgements in civil cases is dependent upon statutory authorization. The pertinent part of State v. Creighton, 469 So.2d 735, 741 (Fla. 1985) reads:

> Cases decided after the 1972 revision of article V still recognize the right to appeal as a matter of substantive law controllable by statute not only in criminal cases but in civil cases as well. *See, e.g., State ex rel. Sebers v. McNulty*, 326 So.2d 17 (Fla.1975); *Clement v. Aztec Sales, Inc.,* 297 So.2d 1 (Fla.1974); *State v. Matera*, 378 So.2d 1283 (Fla. 3d DCA 1979); *State v. I.B.*, 366 So.2d 186 (Fla. 1st DCA 1979); *State v. Brown*, 330 So.2d 535 (Fla. 1st DCA 1976); *see generally* Fla.R.App.P. 93140, Committee Note. (emphasis supplied).
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> . . . . . .
>
> In view of the above considerations – the fact that *Crownover* interpreted constitutional language that has been changed, that court decisions decided after the constitutional change make clear that appeals by the state are

> governed by statute, that *Crownover* itself was an aberration in interpretation of the pre-1973 language, that the present constitutional language merely allocates jurisdiction rather than conferring appeal rights, and that the common-law rule provides insight into the meaning and purpose of the criminal appeal statutes – we reaffirm the principle that the state's right of appeal in criminal cases depends on statutory authorization and is governed strictly by statute.
>
> 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. *See* chapter 59, Florida Statutes (1983) (appeal rights in general civil cases); § 120.68, Fla.Stat. (1983) (judicial review of administrative agency action). The rights to appeal various specific statutes. *See, e.g.,* § 75.08, Fla. Stat. (1983) (bond validations); § 382.45, Fla.Stat. (1983) (appeals of judicial action on petition for certification of birth facts). (emphasis supplied).

The state argues in its answer brief that the Court wholly receded from the Creighton decision in Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla. 1996). The state is incorrect. The Florida Supreme Court and the district courts of appeal have uniformly concluded that the Court in the Amendments case receded from the Creighton opinion only to the limited extent to make it clear that the Constitution would provide protection of the right to appeal if the legislature were ever to thwart a

criminal defendant's right to appeal. *See* State v. Jefferson, 758 So.2d 661,664 (Fla.2000); Hall v. State, 775 So.2d 376,378 (Fla. 4th DCA 2000); State v. Allen, 743 So.2d 532,533-534 (Fla. 1st DCA 1998); Denson v. State, 711 So.2d 1225,1228 (Fla. 2d DCA 1998); Thompson v. State, 708 So.2d 289,292 (Fla. 4th DCA 1998); Stone v. State, 688 So.2d 1006,1008 (Fla. 1st DCA 1997). In the Amendments case, the Florida 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.

The state in its answer brief argues that section 59.06(1) Fla. Stat. confers on the state the right to appeal final judgements in Ryce act cases and further argues that the appellant has not cited any caselaw which holds that section 59.06 authorizes appeals only in common law actions as was argued by appellant in the initial brief. What is equally true is that the state was not able, in support of the state's argument, to cite a single case which holds that section 59.061(1) confers the right to appeal "by default" when a statutorily-created cause of action does not confer on litigants the right to appeal. The state makes this "right to appeal by default" argument without any supporting caselaw. The state has not responded to the appellant's

warning that a decision which holds that chapter 59 authorizes the state's appeal in the instant case would be used by the state in the future to argue that section 59.041 authorizes the state to appeal cases where respondents have been released from civil incarceration because a jury or judge has rendered a trial verdict that the respondent is not a sexually violent predator. This point is extremely important in deciding whether or not chapter 59 authorizes the state to appeal final orders in Ryce Act cases.

The state asserts that it is absurd for the appellant to argue that the state does not have the ability to appeal in the instant Ryce Act case because the district court of appeals have entertained hundreds or thousands of appeals taken by the state in civil cases and the state cites a few examples. However, what the state failed to recognize is that the courts entertained these appeals in instances where the case was either a common law action or where there was independent, statutory authorization for the appeal. The fact that the courts have entertained hundreds or thousands of state appeals in civil cases offers no support to the state's position when considering that the appeal of these cases was authorized in statutes such as the Administrative Procedure Act and a multitude of other statutes.

The state argues that the appellate courts' entertainment of appeals in civil contempt cases supports the state's position that the state has the right to appeal in Ryce Act cases. The state is incorrect because, as noted by the state, the courts have entertained civil contempt appeals as either appeals of non-final orders authorized by the rules of appellate procedure or as non-final orders reviewable by certiorari. *See* Department of Health and Rehabilitative Services v. Beckwith, 624 So.2d 395,397 (Fla. 5th DCA 1993); Stewart v. Muggoline, 487 So.2d 96 (Fla.3d DCA 1986). These cases are not relevant, even by analogy, to the instant case because in the instant case there was a final order of dismissal with prejudice. Pursuant to Article V, section 4(b)(1) of the Florida Constitution[1], the Court can adopt rules which would allow the state to appeal interlocutory orders in Ryce Act cases, and other interlocutory orders would be reviewable by certiorari in the district court of appeals pursuant to Fla. R. App. P. 9.030(b)(1)(B). *Cf.* Weir v. State, 591 So.2d 593,594 (Fla.

[1] Article V, section 4(b)(1) reads: District courts of appeal shall have jurisdiction to hear appeals, that maybe taken as a matter of right, fom final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. *They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.* (emphasis supplied).

1991); State v. Pettis, 520 So.2d 250,254 (Fla.1988). Neither certiorari review nor the Florida Rules of Appellate Procedure can confer the right to appeal a final order in a Ryce Act case because the right to appeal final orders can only be conferred by statute. State v. Creighton, *supra.*

II.

UNDER THE FACTS OF THE INSTANT CASE, THE REMEMDY FOR VIOLATING THE 30-DAY TRIAL PROVISION OF THE RYCE ACT SHOULD BE DISMISSAL WITH PREJUDICE OF THE STATE'S PETITION FOR CIVIL COMMITMENT

The trial court in the instant case dismissed with prejudice the state's petition for civil commitment. (S.R. 1-2). The state argues that in State v. Kinder, 830 So.2d 832 (Fla. 2002), the Supreme Court approved of the continued prosecution of the state's petition for civil commitment after a respondent has been released from his civil incarceration as a remedy for the state's failure to try the respondent within 30-days of the filing of the state's petition. (answer brief at 26, 27). The state has incorrectly interpreted the scope of the Court's opinion in Kinder. In both the district court of appeal and in the Supreme Court, the ability or inability of the state to continue its Ryce Act prosecution after respondent was

released was intentionally not part of the Kinder opinions. As was noted by the district court of appeal in Kinder, the issue of whether the Ryce Act permits the state to continue the commitment proceeding after release was not before the court so the court declined to address the issue. Kinder v. State, 779 So.2d 512,515 (Fla. 2d DCA 2000). Since the issue was not properly before the district court of appeal, it was of course not before the Florida Supreme Court and the Supreme Court therefore did not address the issue. In intentionally not addressing this issue, the district court of appeal and the Florida Supreme Court correctly followed the maxim of judicial review enunciated by Justice Terrell in State v. DuBose, 99 Fla. 812, 128 So. 4, 6 (Fla. 1930), that courts "consistently decline to settle questions beyond the necessities of the immediate case. This court [Florida Supreme Court] is committed to the 'method of a gradual approach to the general, by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted.'" *See* State Commission on Ethics v. Sullivan, 430 So.2d 92, 942 (Fla. 1st DCA 1983)(Shaw specially concurring). Appellant submits that the only rule that can be taken from the Supreme Court's opinion in Kinder

is that, under the particular facts of the Kinder case, immediate release from civil incarceration is a proper remedy for the state's failure to comply with the 30-day trial provision of the Ryce Act. The district court of appeal and the Supreme Court correctly left for another day in another case the question of whether or not dismissal with prejudice of the state's petition for commitment as a sexually violent predator is, under certain facts, a correct remedy for the state's failure to comply with the 30-day trial provision of the Ryce Act. Appellant submits that the instant case is the case where this issue is properly before the Court because the dismissal of the state's petition in the instant case was with prejudice and the respondent, like in State v. Goode[2], had completed his prison term and was incarcerated only on the state's Ryce Act petition.

The state's reliance on Johnson v. Department of Children and Family Services, 747 So.2d 402 (Fla. 4th DCA 1999), is equally misplaced because in Johnson the court only ruled that the respondent would have to be released within 72 hours pursuant to the writ of habeas corpus if all

[2] In State v. Goode, 830 So.2d 817, 819 (Fla.2002), the Court approved of the dismissal of the state's petition for civil commitment as a proper remedy for the failure of the state to comply with the 30-day trial provision of the Ryce Act, but the order of dismissal in Goode was not with prejudice.

of the members of the DCF multidisciplinary team did not sign the recommendation for commitment. The Johnson case cannot correctly be extended to support the state's position that the state can continue with its Ryce Act civil commitment prosecution after a respondent has been released from civil incarceration for the state's failure to comply with the 30-day trial provision of the Ryce Act. However, the state's reliance on Tanguay v. State, 782 So.2d 419 (Fla. 2d DCA 2001) is not misplaced. In Tanguay v. State, review pending SC01-613, the court held that where the state wrongfully detained Tanguay beyond the expiration of his prior incarcerative sentence, the remedy in the subsequent civil commitment proceeding was release pending the commitment trial. In Tanguay, the court certified this question to the Supreme Court 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?" For the reasons argued by the appellant in his initial brief, appellant submits that the Florida Supreme Court should answer the certified question affirmatively.

The state's reliance on In the Matter of the Civil Commitment of E.D., 803 A.2d 166 (N.J. App. 2003) is

misplaced because E.D. dealt with the conditional release of a person already committed as a sexually violent predator who was treated for 14 months and later, at an annual review hearing, was found to no longer qualify as a sexually violent predator. The E.D. case has no bearing on the instant case due to the fact that it concerned post-commitment release conditions.

The state cites a number of ordinary civil cases that hold dismissal without prejudice is the proper sanction for misconduct or malpractice in civil cases. These ordinary civil cases are inapplicable to Ryce Act cases because they do not pertain to a legislative act like the Ryce Act which mandates mandatory incarceration with no possibility of release with possible life-time incarceration resulting from the case. *Cf.* State v. Goode, 830 So.2d 817, 824 (Fla. 2002) (Court found that the Fifth District Court of Appeal incorrectly relied on civil cases in defining the word "shall" in the instant case. The court noted that, "Importantly, neither of these cases involved the significant deprivation of an individual's liberty rights.").

As hard as it is to believe, the state argues that nothing in the Ryce Act would require that the state file its petition for commitment prior to the expiration of a

respondent's prison sentence. Appellant submits that the Ryce Act, when read in its entirety, leaves no doubt that the state must file its petition prior to the expiration of a respondent's prison sentence. Legislative amendments that have been made to the Ryce Act make this perfectly clear. In 1999, the legislature amended the Act to provide that, after the state files it petition for commitment and the trial court finds probable cause, the respondent shall "remain in custody and be immediately transferred to an appropriate secure facility if the persons' incarcerative sentence expires." *See* § 394.915 Fla. Stat.(1999); Ch. 99-222 at 1380, Laws of Fla.[3] *See also* State v. Goode, 830 So.2d 817, 825 (Fla. 2002)("Furthermore, as noted above, it

[3] The Senate Staff Analysis and Economic Impact Statement, Committee on Children and Families, CS/SB 2192 (March 20, 1999)(see page 23 of appendix to appellant's initial brief) explains the intent of the changes to the Ryce Act: "The practical effect of extending the time frame in which notice must be given is that the process must begin earlier. The most positive effect this would have to the state is that it would greatly diminish the need to place a person who would otherwise be released from criminal incarceration in an 'appropriate secure facility' that is operated by DCFS pending civil commitment. If there is not enough time to obtain a judicial determination for civil commitment prior to expiration of an incarcerative criminal sentence, the state must continue to hold such persons if a judge has determined that probable cause exists to believe he or she is a sexually violent predator. The need to detain persons in an appropriate secure facility is alleviated if there is still time remaining on a criminal sentence to be served subsequent to a final determination to civilly commit a sexually violent predator."

appears that the legislature intended that the State would initiate commitment proceedings while the inmate is still incarcerated. *See* § 394.915(1), Fla. Stat. (1999).”). Contrary to the argument by the state, the “immediate release” provision of the Ryce Act, § 394.9135 Fla. Stat., does not have any applicability to the instant case because in the instant case there was not an immediate release caused by extraordinary circumstances to which the immediate release provision of the Ryce Act would apply.

It is noteworthy that the state has not offered an explanation of how the state would be able to compel the trial attendance of a released respondent who moves out of state. This is no small point. As appellant argued previously, Chapter 941 of the Florida Statutes only applies to the interstate extradition of persons charged with crimes and nothing in the Florida Rules of Civil Procedure requires a party to attend a civil trial.

Finally, appellant would argue that the entire legislative intent in the Ryce Act that Ryce Act trials take place before the completion of the respondent’s prison sentence would be rendered meaningless if the Court were to accept the state’s argument that the state should be allowed to continue its civil commitment prosecution even when the sate files its petition for commitment on the very day that

a person completes their prison term and even though the state then fails to comply with the 30-day trial provision of the Ryce Act. The Ryce Act, in its current form, contemplates that the state will file its petition for commitment approximately one year before a prisoner finishes their prison term. After about the first year of the Ryce Act's operation in 1999, the Department of Children and Families began to actually comply with the time periods in the Ryce Act and the state since then has been typically filing its petition for commitment more than six months prior to the completion of the respondent's prison sentence. The instant case, the Goode case, *supra*, and the Kinder case, *supra*, where the state filed its petitions for commitment on the last day of the respondents' prison terms, are now anomalies. The Court should not accept the state's argument in the instant case and thereby render meaningless the legislature's intent in the Ryce Act, especially when the instant case represent an historic anomaly.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing reply brief was mailed this ___ day of December 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. 9210(a)(2), undersigned counsel certifies that this reply brief was submitted in Courier New 12-point font.

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