IN THE SUPREME COURT OF FLORIDA

FRANK MITCHELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC03-1210

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellant in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Frank Mitchell, the Appellee in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State filed an amended civil complaint against Appellee, seeking to commit him to state custody as a sexually violent predator under Part V, Chapter 394, Florida Statutes (known as the Jimmy Ryce Act) on December 10, 2001. Reports of a multidisciplinary team that had evaluated Appellee were included as Attachment 2. Supp. 1. The Appellee, respondent below, filed an answer and affirmative defense on January 3, 2002. Supp. 12-14. The affirmative defense was that the Jimmy Ryce Act is unconstitutional under article I, sections 2, 9, 10 and 17 of the Florida Constitution and the fifth, eighth and

fourteenth amendments to the United States Constitution. Supp. 13.

On February 5, 2002, Appellee made a motion to vacate the order determining probable cause based on the decision in Kansas v. Crane, 537 U.S. 407 (2002). On August 9, 2002, Appellee moved to dismiss the petition on grounds that the Ryce Act violated substantive due process, did not have the proper standard of proof, was an *ex post facto* law and violated equal protection. Supp. 20.

On February 6, 2003, Appellee filed a motion to dismiss the petition and to strike the order of probable cause that had been found, arguing that he had not been incarcerated for a sexually violent offense at the time civil commitment proceedings had been undertaken. I, 1-5. The trial court therefore lacked subject matter jurisdiction. I, 3.

The State filed a response, arguing that sections 394.913, 394.914 and 394.925, Florida Statutes, when read *in pari materia*, evince a clear legislative intent to apply the Act to anyone in custody at the time of the date of the act who previously had been convicted of a sexually violent offense. I, 19-21.

After the hearing Circuit Judge Charles A. Francis issued an order granting the motion and dismissing the petition. I, 22-26. The order found that the Act did not permit the State to file a petition for civil commitment against anyone not incarcerated for a sexual offense. I, 23. The trial court phrased the issue:

> DOES PART V., CHAPTER 394, FLORIDA STATUTES (THE JIMMY RYCE ACT) APPLY TO PERSONS WHO HAVE PREVIOUSLY BEEN CONVICTED OF A SEXUAL OFFENSE, COMPLETED THEIR SENTENCE, AND SUBSEQUENTLY INCARCERATED FOR A NONSEXUAL OFFENSE?

I, 23. Judge Francis answered the question in the negative, ruling:

> The Respondent in this case completed his sentence for the 1983 sexual battery conviction and was released into society without supervision by the State. There is no record evidence to indicate that he received any mental health treatment, nor evidence he committed any new sexual offense during the lengthy period of time he was out. In fact his sentence had been served and completed long before the passage of the Jimmy Ryce Act. If this Court were to rule that the Jimmy Ryce Act applied to this Respondent, it would not be consistent with the intent of the Legislature that sexually violent predators receive treatment in a proper setting before being released from custody and turned loose upon the population of this State. This would be a particularly unreasonable or harsh construction of the legislative enactment, and such a result should be avoided by the Courts. *State v. Atkinson*, 831 So. 2d 172, 174 (Fla. 2002).

I, 24. Judge Francis' order continued:

> In light of the fact that the Motion to Dismiss in this case was not filed until long after a probable cause determination was made in this case, a warrant issued, and petition was filed and ready for trial, this Court stays the operation an effect of its Order for a period of 10 days to allow the State to take an appeal of this order.

I, 24.

The State appealed to the First District Court of Appeal and gave notice that it would rely on the automatic stay provision made available to the government in civil cases through Florida

Rule of Appellate Procedure 9.310(b)(2). State v. Mitchell, 848 So. 2d 1209 (Fla. 1st DCA 2003). Appellant moved to vacate the stay and Judge Francis denied the motion. Id. Appellant then moved the appellate court to dissolve the stay. The First District Court of Appeal affirmed the lower court's ruling in a decision rendered before the merits of the underlying appeal were reached. Id. The DCA concluded that because sexually violent predator proceedings are civil and because Rule 9.310(b)(2) applied in civil cases, the automatic stay provision was applicable. 848 So. 2d at 1210. The lower court also noted that once the trial court had found probable cause to believe that the SVP respondent (i.e., Petitioner here) met the criteria for civil commitment, it could not order his release. Id. at 1210-1211. The lower court certified the following question as being of great public importance.

> WHETHER THE STATE IS ENTITLED TO THE BENEFIT OF THE AUTOMATIC STAY PROVISION OF RULE 9.310(b)(2) ON APPEAL IN A CIVIL COMMITMENT PROCEEDING BROUGHT PURSUANT TO PART V OF CHAPTER 394, FLORIDA STATUTES, WHEN THE TRIAL COURT HAS DISMISSED THE PETITION SEEKING COMMITMENT.

848 So. 2d at 1211.

Later the First District Court of Appeal decided the merits of the appeal, finding that the Jimmy Ryce Act was not limited to persons who were serving prison terms for a sexually violent offense, but could be applied to those, like Appellant, had been convicted of a sexually violent offense in the past, but whose current prison sentence was for some other crime. State v.

Mitchell, 866 So. 2d 776 (Fla. 1st DCA 2004). That matter was appealed to this Court and assigned case number SC04-368.

On May 6, 2004, the Court issued an order in SC04-368 that states, in its entirety: "The proceedings in this Court in the above case are hereby stayed pending disposition of Hale v. State, Case No. SC03-166, which is now pending in this Court."

SUMMARY OF ARGUMENT

The State was entitled to the automatic stay provision of Florida Rule of Appellate Procedure 9.310(b)(2). The rule applies in all civil proceedings, including Jimmy Ryce Act cases, where the State is a litigant. The trial court did not err in declining to dissolve the stay because the State showed a strong likelihood of success on the merits – no Florida case has ever accepted the proposition that sexually violent predator commitment is limited to prisoners whose current sentence is for a sexually violent crime – and the State and its citizens could suffer irreparable harm if the person against whom sexually violent predator proceedings have been instituted is granted his freedom pending appeal.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY NOT ORDERING PETITIONER'S RELEASE AFTER DISMISSING THE SEXUALLY VIOLENT PREDATOR PETITION AGAINST HIM? (Restated)

A. JURISDICTION

This Court's jurisdiction is discretionary and is based on the lower court's decision to certify a question as being of great public importance. Art. V, §3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(v).

B. STANDARD OF REVIEW

A trial court's order granting a stay is reviewed for abuse of discretion. McQueen v. State, 531 So. 2d 1030, 1031 (Fla. 1st DCA 1988).

C. THE TRIAL COURT'S RULING

The Circuit Court of Leon County ruled that the State was entitled to rely upon the automatic stay provision of Florida Rule of Appellate Procedure 9.310(b)(2) when appealing the order that dismissed a sexually violent predator commitment petition on the ground that the respondent in that action had not been in prison for a sexually violent offense at the time the proceedings were commenced.

D. THE APPELLATE COURT'S OPINION

The First District Court of Appeal affirmed the lower court's ruling in a decision rendered before the merits of the

underlying appeal were reached. State v. Mitchell, 848 So. 2d 1209 (Fla. 1st DCA 2003). The DCA concluded that because sexually violent predator proceedings are civil and because Rule 9.310(b)(2) applied in civil cases, the automatic stay provision was applicable. 848 So. 2d at 1210. The lower court also noted that once the trial court had found probable cause to believe that the SVP respondent (i.e., Petitioner here) met the criteria for civil commitment, it could not order his release. Id. at 1210-1211. The lower court certified the following question as being of great public importance.

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848 So. 2d at 1211.

E. MERITS

Appellant argues that Florida Rule of Appellate Procedure 9.310(b)(2) should not apply in this instance because a liberty interest was at stake and the rule was meant to apply strictly to financial interests. Moreover, he asserts, the liberty interest outweighs any state interest at stake and the State is not likely to prevail on appeal. The State respectfully disagrees with all these contentions.

The rule is unambiguous and clearly applies to any civil case where the government is a litigant. Florida Rule of Appellate Procedure 9.310(b)(2) states:

> The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

It is settled law that, irrespective of the liberty interest at stake, Jimmy Ryce Act cases are civil. Kansas v. Hendricks, 521 U.S. 346, 365-366 (1997); Westerheide v. State, 831 So. 2d 93, 100-102 (Fla. 2002). Except to establish a separate time period for public records and public meetings cases, the rule makes no distinction as to the type of civil case, and does not expressly exempt Jimmy Ryce Act cases, Baker Act[1] cases or Marchman Act[2] cases, though a liberty interest is at stake in each proceeding.

As the majority opinion noted, even Judge Padovano, upon whose dissent Appellant relies, stated in his treatise that the rule does not distinguish between types of civil cases. Philip J. Padovano, *Florida Appellate Practice* §12.5 (2004 ed.). Inasmuch as the rule applies in all civil cases where the government is a litigant, it should apply irrespective of the interest at stake in the litigation.

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[1] Part I, Ch. 394, Fla. Stat.

[2] Ch. 397, Fla. Stat.

The recent decision in State v. Ducharme, 881 So. 2d 70 (Fla. 5th DCA 2004) also relied on Judge Padovano's dissent in Mitchell, finding that the State should have to justify a stay under Florida Rule of Appellate Procedure 9.310(a). Judge Padovano wrote:

> The original purpose of the rule was to enable the state to maintain the status quo while avoiding the unnecessary expense of providing a supersedeas bond. A litigant who obtains a money judgment against the state should have no fear that the judgment will be uncollectible if the state loses the appeal. The state will always be subject to the jurisdiction of the court and a bond is not required because the state is a solvent litigant. These considerations, which prompted the adoption of the automatic stay provision in rule 9.310(b)(2), are not even remotely applicable to an involuntary commitment proceeding.

864 So. 2d at 1213.

This analysis blatantly ignores a basic rule of statutory interpretation: "If the language of the statue is clear and unambiguous, a court must derive legislative intent from the words used without involving rules of construction or speculating as to what the legislature intended." State v. Dugan, 685 So. 2d 1210, 1212 (Fla. 1996). Extrinsic aids such as legislative history – the existence of which Judge Padovano merely alluded to without specific reference – must be avoided. Bryan v. State, 865 So. 2d 677, 679 (Fla. 4th DCA 2004).

Moreover, as noted by the Mitchell majority, Judge Padovano's own treatise noted that there is no express limit to the kinds of civil cases to which the rule applies. Judge Padovano's

treatise, moreover, did not treat the rule as being in any way ambiguous.

Neither the Ducharme opinion nor Judge Padovano's dissent below addressed the question of why the automatic stay in Rule 9.310(b)(2), and the procedural framework that has grown up around it, are unable to produce just results in every instance. While the rule is, in effect, automatic, a stay entered pursuant to the rule may be dissolved. There are two principal considerations that trial courts take into account when deciding whether to vacate a stay: the likelihood of success on the merits and the likelihood of irreparable harm should the stay be dissolved. Perez v. Perez, 769 So. 2d 389, 391 n. 4 (Fla. 3d DCA 1999).

Inasmuch as the position taken in the trial court has never been accepted in Florida, the State's likelihood of success on the merits is great. Certainly, the State has succeeded thus far. The lower court reversed the trial court's order dismissing the petition (866 So. 2d at 777) by relying on Tabor v. State, 864 So. 2d 1171, 1173-1174 (Fla. 4th DCA 2004), which held that the Jimmy Ryce Act could be applied to prisoners whose incarceration was not for a sexually violent offense. No case has disagreed with this proposition, and, as the Court has noted, the issue will be decided by Hale v. State.[3]

[3] The Second District Court of Appeal's opinion in Hale v. State, 834 So. 2d 254 (Fla. 2d DCA 2002) did not address this issue directly, finding only a jury instruction question worthy of discussion.

Tabor held that sections 394.912(9)(g), 394.913(1) and 394.925, Florida Statutes, conclusively demonstrate that the legislature did not intend the result championed by Mr. Tabor and by Petitioner and accepted by Judge Francis. First, the Tabor court held that section 394.925 is not ambiguous. That section reads:

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

The court went on to acknowledge that even if it were ambiguous, any construction given would have to construe it harmoniously with other sections, specifically sections 394.913(1) and 394.912(9)(g).

Section 394.913(1) provides:

> The agency with jurisdiction over a person who has been convicted of a sexually violent offense shall give written notice to the multidisciplinary team, and a copy to the state attorney of the circuit where that person was last convicted of a sexually violent offense. **If the person has never been convicted of a sexually violent offense in this state but has been convicted of a sexually violent offense in another state or in federal court,** the agency with jurisdiction shall give written notice to the multidisciplinary team and a copy to the state attorney of the circuit where the person was last convicted of any offense in this state.

(Emphasis provided). As the bold-faced passage demonstrates, the Legislature meant to apply the act to persons incarcerated in Florida whose qualifying crime – i.e., a sexually violent

offense – occurred in another jurisdiction. Under Judge Francis' ruling this section of the law is meaningless, since the State could not petition to commit anyone who is not currently imprisoned for committing a sexual offense.

Section 394.912(9)(g) defines "sexually violent offense" to include "any federal conviction or conviction in another state for a felony offense that in this state would be a sexually violent offense." Taken together, the Tabor court held those sections "refuted" the argument made here. The court reasoned:

> A person in custody in Florida, whose only conviction for a sexually violent offense is from another jurisdiction, would not be in custody for a sexually violent offense. The non-Florida sentence for the sexually violent offense could be running concurrently, could have been completed, or could be consecutive to the Florida sentence. Under none of those scenarios would the current incarceration be as a result of the sexually violent offense.

864 So. 2d at 1174.

The statute does not require that the person currently be in custody for a sexually violent offense. If that had been the legislative intent, it would have been a simple matter to state that the act applies to those who are "currently in custody for a conviction for a sexually violent offense." Rather, the act applies to those currently in custody and who had a sexually violent offense conviction, whether it be for the current sentence being served or for a past sentence. Thus, the act would apply to two classes of individuals: 1) all those who were in custody on January 1, 1999, for any current conviction, with

a sex offense conviction either being the current one or a past one; and 2) those who were not in custody on January 1, 1999, but who will be convicted of sexually violent offenses in the future. This dichotomy would enable the State to evaluate all prisoners, starting with January 1, 1999, as they were released, to determine whether there was anything in their backgrounds that would warrant commitment as sexually violent predators.

Despite the fact that no Florida court ever has agreed with him, Petitioner argues "there is no reason to believe that the state is likely to prevail on the merits." (IB at 8-9.) He explains this assertion by merging the second factor – likelihood of irreparable harm – into the first, and by arguing that his liberty interest is great whereas the State would not be deprived of jurisdiction to proceed against him if the State were to prevail. (IB at 9.) He then goes on to argue the merits, wherein he dismisses the opinion below and Tabor as establishing a rule of law that would violate substantive due process as applied to him. (IB at 16-19.) This argument is improper here, inasmuch as it was not raised below, as is necessary when challenging a statute's constitutionality as applied to a particular individual, and thus was not preserved. Westerheide, 831 So. at 105; Trushin v. State, 425 So. 2d 1126, 1129-1130 (Fla. 1982).

Petitioner also appears to attempt to make an equal protection argument in the guise of substantive due process, claiming that the act does not apply to individuals who have committed

sexually violent crimes in the past but who were not in prison at the time the Jimmy Ryce Act was passed and have not been incarcerated since then, i.e., an "under-inclusiveness" claim. (IB at 18-19). As this Court noted in Westerheide, however:

> [I]t is not a requirement of equal protection that every statutory classification be all-inclusive. Rather, the statute must merely apply equally to the members of the statutory class and bear a reasonable relation to some legitimate state interest.

In the Jimmy Ryce Act the legislature decided to limit the law's application to persons over whom personal jurisdiction could easily be achieved, state prisoners. Moreover, those persons who have been imprisoned after committing a separate sexually violent offense had demonstrated an inability to control their unlawful behavior, and part of the profile of a sexually violent predator is an inability to exercise such control. Westerheide, 831 So. 2d at 107. Thus, the distinction between those in prison with prior convictions for sexually violent crimes and those previously convicted but not within state custody is not unreasonable.

Petitioner's reliance on State v. Atkinson, 831 So. 2d 172 (Fla. 2002) is misplaced, as is his assertion that Atkinson involved subject matter jurisdiction. Atkinson, wherein this Court held that a person not lawfully in custody on the date the Jimmy Ryce Act took effect was not susceptible to civil commitment as a sexually violent predator, has no bearing on this case, where Petitioner was lawfully in custody after the

effective date of the act. Moreover, the jurisdiction that the State lacked in Atkinson was jurisdiction over the person, and not jurisdiction over the type of case that was filed.[4] Atkinson does not stand for any proposition at issue here.

Similarly, the out-of-state decisions that petitioner references are inapposite. As to Commonwealth v. McLeod, 771 N.E.2d 142 (Mass. 2002), Massachusetts law did not expressly apply to persons whose current incarceration was for a sexual offense. Florida has section 394.925, which does evince legislative intent. The Tabor court distinguished McLeod on the ground that "sexual offense was only defined as a Massachusetts conviction." 864 So. 2d at 1174. Tabor also distinguished State v. Gonzalez, 658 N.W.2d 102 (Iowa 2003).

> The Iowa statute applies to two classes of sexually violent offenders, those who are currently confined, and those who have been released but have committed a recent overt act. The Iowa Supreme Court concluded that requiring a recent overt act for one class, those who were not confined, but not requiring a recent overt act for those who are confined, "would raise serious [state and federal] constitutional issues." *Id.* at 105. The Iowa Supreme Court resolved this problem by finding the statute ambiguous and construing the statute to mean that the current confinement was for a sexually violent offense.

864 So. 2d at 1174.

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[4] In the lower court, the State argued that Petitioner had waived the argument that led to the trial court's decision to dismiss the petition. While the motion was premised on subject matter jurisdiction, in fact it appeared to be a defense of want of personal jurisdiction. Under Florida Rules of Civil Procedure 1.140(b), and 1.140(h), such defenses must be raised in the first responsive pleading, and had not been.

As to the likelihood of irreparable harm, the State's interest is far stronger. There has been an *ex parte* finding of probable cause that Respondent has a mental defect or personality disorder that, unless he is confined and treated, makes it likely that he will commit a further act of sexual violence.[5] Thus, the risk to the State's citizens is substantial if Petitioner is released for the pendency of an appellate proceeding that can take months. The public interest in safety and security and in determining whether Petitioner is, indeed, a sexually violent predator in this instance trumps his liberty interest.

The Ducharme court overlooked or ignored this balancing-of-interests approach when concluding that an "automatic" stay was unfairly utilized when a liberty, rather than property, interest was at stake. Petitioner here – and those like him – are not deprived of their liberty automatically. The State still must be able to persuade the judge of success on the merits and that the likelihood of harm to its citizens is substantial if a Jimmy Ryce Act respondent is released into the community.

Inasmuch as such individuals often are not on probation at the time, the State has no means of monitoring their whereabouts or even ensuring that they can be returned to custody in the event the State prevails on its appeal. The risk of harm to society is, therefore, great.

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[5] Such findings are required under section 394.915(1), Florida Statutes.

Finally, it should be noted that the party seeking to vacate the stay has the burden of establishing an evidentiary basis to show compelling circumstances to justify lifting the stay. See State, Dep't of Environmental Protection v. Pringle, 707 So. 2d 387, 390 (Fla. 1st DCA 1998) stay quashed without written opinion, 743 So. 2d 1189 (Fla. 1st DCA 1999). This should not be difficult to accomplish, but Petitioner here made no such showing, beyond arguing that he would not be at liberty while the case was appealed. It also has been held that when a planning-level decision is made (such as the discretionary act of bringing a petition for civil commitment as a sexually violent predator) the stay should be vacated only under the most compelling circumstances. St. Lucie County v. North Palm Devel. Corp., 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984). Petitioner made no showing that such circumstances existed here.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the affirmative, the decision of the District Court of Appeal reported at 848 So. 2d 1209 should be approved, and the order entered in the trial court should be reversed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Robert Friedman, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on November 15, 2004.

Respectfully submitted and served,

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[AGO# L03-1-20773]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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IN THE SUPREME COURT OF FLORIDA

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Appendix A