IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1996

DAVID EVERETTE,

Petitioner,

-vs-

THE STATE OF FLORIDA,
DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1963

JOHN EDDY MORRISON
Assistant Public Defender
Florida Bar No. 072222

Counsel for Mr. Everette, Petitioner

TABLE OF CONTENTS

PAGE(s)

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

FLORIDA STATUTES

LAWS OF FLORIDA

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1996

DAVID EVERETTE,

Petitioner,

-vs-

THE STATE OF FLORIDA,
DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON MERITS

INTRODUCTORY NOTE

All emphasis in quotations is supplied unless otherwise noted.

SUMMARY OF ARGUMENT

The recent amendments to Chapter 916, while not altering the purpose of the law, show the error in the decision below. Specifically, the amendments now define Aforensic client@ by reference to specific sections under which criminal defendants can be committed under Chapter 916, but does not include placements in secured facilities under section 916.303. This Court should consider these subsequent amendments to the statute in its interpretation, especially because DCFS concedes that the amendments were not an attempt to substantively change the statute.

DCFS=s attempt to categorize everyone in a secured facility as a forensic client (and, conversely, everyone in a non-secured facility as civilly committed) ignores the statutory scheme. The statute differentiates between persons with criminal charges and those with no such charges. DCFS=s argument that Mr. Everette=s status as a forensic client, which ended a decade ago, extends forward in perpetuity despite the subsequent dismissal of all criminal charges shows the paucity of its position.

The sheriff would transport a forensic client to a jail facility, not a mental health facility. Persons such as Mr. Everette tend to decompensate in penal environments. The trial court, and apparently the legislature, understand this dynamic. The legislature did not include persons without criminal charges placed in secured facilities within the definition of Aforensic client.@ This Court should not do so by judicial fiat. DCFS does not contest that the sheriff was a necessary and indispensable party.

While Mr. Everette could have reiterated Judge Ramirez=s argument or quoted it at length, such recitation is unnecessary and would serve only to lengthen pleadings. Adopting the arguments in Judge Ramirez=s opinion (and attaching it to the motion for rehearing in the unlikely event that his colleagues had not read it) Afairly apprised@ the lower court of the issue. Doing anything more would not have changed the outcome below.

ARGUMENT

I.
MR. EVERETTE IS NOT A AFORENSIC CLIENT@ BECAUSE HE IS COMMITTED UNDER A CIVIL MENTAL HEALTH STATUTE. THE DISTRICT COURT OF APPEAL=S DECISION PLACES MR. EVERETTE IN A SECOND-CLASS STATUS YEARS AFTER ALL CRIMINAL CHARGES WERE DISMISSED.

A few days before undersigned counsel finished work on the initial brief, the legislature amended some of the relevant statutes in Chapter 2006-195, Laws of Florida. The governor signed the bill about a month later. In a pair of footnotes to its brief, DCFS suggests that the amendments did not substantively change the statutes involved in this case (Respondent=s brief, pp. 2 & 8). Mr. Everette agrees with that characterization, but notes that the amendments make DCFS=s position and the decision below even more untenable.

As DCFS notes in a footnote, the key definition of Aforensic client@ at issue in this case has been amended to Amean[] any defendant who has committed to the department or agency pursuant to s. 916.13, s.916.15, or s.916.302.@ Ch. 2006-195, ' 2 (to be codified as ' 916.106(9), Fla. Stat. (2006)). The legislature could have copied that list from page 10 of Mr. Everette=s initial brief, listing the types of commitments available in chapter 916, as opposed to placements. DCFS has to concede that Mr. Everette=s placement is pursuant to section 916.303, a section conspicuously absent from that list in the amended statute. This amendment emphasizes the legislature=s distinction between commitments

and placements. Only those committed under chapter 916 are Aforensic clients@ subject to diminished rights.

This Court may consider these subsequent amendments in interpreting the previous version of the statute: AThe court has the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation.@ *Ivey v. Chicago Ins. Co.*, 410 So. 2d 494, 497 (Fla. 1982) (quoting other cases); *see also Lowrey v. Parole and Probation Comm.*, 473 So. 2d 1248, 1250 (Fla. 1985). Such consideration is appropriate here because DCFS concedes that the amendments were an attempt to clarify, not change, the previous statute.

These amendments belie DCFS=s assertion that the legislature drew a line between dangerous/non-dangerous persons committed, resulting in diminished rights (and transportation by the sheriff) for those deemed Adangerous.@ Instead, the legislature drew a line between those with criminal charges and those without such charges. The sections listed in the definition of Aforensic clients@ all involve persons committed to the department who are defendants in pending criminal prosecutions or whose criminal case resulted in a verdict of not guilty by reason of insanity. *See* Ch. 2006-195, ' 12 (to be codified as 916.13(1), Fla. Stat. (2006) (applies to A[e]very defendant who is charged with a felony and who is adjudicated incompetent to proceed.@)); Ch. 2006-195, ' 19 (to be codified as ' 916.302(1), Fla. Stat. (2006) (applied to A[e]very defendant who is charged with a felony and who is adjudicated incompetent to proceed.@)) Ch. 2006-195, '

14 (language unchanged from ' 916.15, Fla Stat. (2005)); Mr. Everette and others placed in a secured facility pursuant section 916.303 have had all their criminal charges dismissed and were never brought to trial. *See* 916.303(1), Fla. Stat. (2006).

This statutory reality leaves DCFS arguing that Mr. Everette, although now committed under 393.11, was Aearlier in the process, committed to a secure setting for competency training pursuant to ' 916.302.@ (Respondent=s brief at 8 n.4). Therefore, according to DCFS, the A916.303(2)(b) commitment is essentially a recommitment,@ presumably under some provision of chapter 916 that would fall within the list of Aforensic clients.@ *Id.*[1] The paucity of this argument is revealing. The theory is that because someone once was a forensic client, that classification remains indelible regardless of subsequent changes in his legal status. Implicit in this argument, however, is an admission that Mr. Everette is not currently committed pursuant to any statute that would qualify him as a Aforensic client.@ Section 916.303(2)(a) specifies that the procedure is to Ainvoluntary admit the defendant to residential services pursuant to s. 393.11,@ and not pursuant to any section of chapter 916. Ch. 2006-195, ' 21 (language unchanged from ' 916.303(2)(a), Fla. Stat. (2005)). Just because Mr. Everette was a forensic client committed pursuant to chapter 916 prior to December 1996, when all charges were dismissed, does not mean

[1] Note that DCFS refers to Aplacements@ under section 916.303 as Acommitments,@ despite the legislature=s very careful use of language to the contrary.

that Mr. Everette has remained a forensic client for the last decade and will remain so potentially for the rest of his life.

For administrative convenience, DCFS would like to treat everyone in a secured facility as a forensic client and everyone in a non-secure facility as a non-forensic client. DCFS would also then be able to move people to facilities anywhere around the state and force the sheriffs to pay for their transportation. The legislature, however, has placed the welfare and liberty interest of its citizens above DCFS=s administrative convenience or budgetary interests. Forensic clients committed under chapter 916 can be placed in civil mental health facilities with judicial approval. *See* Ch. 2006-195, ' 19 (unchanged in substance from ' 916.302(2)(d), Fla. Stat. (2005)). Such a person would still be a forensic client within the definition of section 916.106 and subject to diminished liberty interests because of the pending criminal charges. Conversely, a person such as Mr. Everette civilly committed under chapter 393 can be placed in a secure facility and he does not convert to a forensic client.

Nor does acknowledging that persons committed under chapter 393 but placed in a secured facility under section 916.303 are not forensic clients render that section Ameaningless@and Afunctionally no different than a civil commitment.@ (Respondent=s brief at 9). Beyond these broad assertions, DCFS does not articulate how the greater protections of a civilly committed person=s would impede the proper functioning of a

secured facility. For instance, DCFS does not explain how greater protection of patients= medical records would be detrimental to security. *Compare* '' 393.13(4)(j) & 394.4615(10), Fla. Stat. (2005) *with* ' 916.107(8), Fla. Stat. (2005). Civilly committed persons also have greater protections of their personal property, but those protections consist of greater accountability and care by the department. '' 393.13(4)(b) & 394.459(6), Fla. Stat. (2005). Civilly committed persons can still have their property removed for Amedical or safety reasons.@ ' 393.13(4)(b), Fla. Stat. (2005); *see also* ' 394.459(6), Fla. Stat. (2005). The greater rights to visitation and telephonic communication likewise would not impede security because they are subject to either Areasonable rules of the facility@ or curtailment if Athere is reason to believe@ that it Amay be harmful to the client or others.@ *See* ' 393.13(4)(a)1-3, Fla. Stat. (2005). Finally, the legislature has now declared its purpose Ato minimize and achieve an ongoing reduction in the use of restraint and seclusion on persons who are committed to a civil or forensic facility under@ chapter 916 and has passed legislation requiring development of administrative rules to that end. Ch. 2006-195, '' 1 & 8 (to be codified as '' 916.105(4) & 916.1093(2), Fla. Stat.). The legislature does not perceive any inconsistency between limitations on seclusion and restraint and the proper running of a forensic facility. In sum, DCFS makes broad, alarmist suggestions about detriments to security at secured facilities without any detailed analysis of the statutory rights involved.

The legislature had good reason to draw the line between persons with pending criminal

charges and those without criminal charges. The legislature knew that sheriffs house people in jails, not mental health facilities. Even if the sheriff has designated some portion of the jail as a mental health wing or floor, those facilities are primarily jails. If the sheriff transports persons such as Mr. Everette, the sheriff places them back in jail. This placement violates the prohibition on holding mental health clients in jails fifteen days after a judge enters a commitment order. *See* Ch. 2006-195, ' 3 (to be codified ' 916.107(1)(a), Fla. Stat. (2005)). Experience has also shown that mentally ill or mentally retarded persons returned to jail from mental health facilities often decompensate. The trial court and apparently the legislature were aware of this dynamic. The legislature did not include a secured placement under section 916.303 in the definition of Aforensic client.@ This Court should not do so by judicial fiat.

II.

BECAUSE THE SHERIFF WAS DIRECTLY AFFECTED, THE SHERIFF WAS A NECESSARY AND INDISPENSIBLE PARTY. CASE LAW REQUIRES THAT SUCH PARTIES RECEIVE NOTICE AND AN OPPORTUNITY TO BE HEARD.

The respondents do not address the merits of this issue. Instead, DCFS relies solely on a claim of lack of preservation. Essentially, DCFS=s claim is that adopting by reference Judge Ramirez=s arguments from his dissenting opinion is insufficient to preserve this issue.

After reading Judge Ramirez=s dissenting opinion pointing out the lack of notice to a necessary and indispensable party, Mr. Everette had three options: First, he could have quoted the dissenting opinion verbatim in the motion for rehearing. As the other judges on the Third District Court of Appeal surely read their colleague=s opinion, this option was unnecessary and would lead only to a much lengthier motion for rehearing. Second, Mr. Everette could have attempted to rewrite Judge Ramirez=s argument. As Judge Ramirez=s argument was cogent and well articulated, this option was also unnecessary and would result only in a longer motion for rehearing. The third option, which Mr. Everette chose, was to adopt the arguments in Judge Ramirez=s opinion by reference, attaching a copy of the opinion to the motion for rehearing in the unlikely event another judge had not read Judge Ramirez=s opinion. The motion for rehearing stated: AJudge Ramirez=s dissenting opinion also sets forth in detail other problems with the majority opinion. As that opinion

speaks for itself, those arguments will not be repeated here (a copy of the Court=s opinion is attached). That opinion demonstrates the need for this Court to reconsider the majority=s opinion *en banc*.@ (Motion for Rehearing, pages 4-5).

Ironically, the State of Florida has done the same thing before this Court by adopting DCFS=s brief rather than reiterating the same points in a brief of its own. As the State of Florida=s example shows, adopting the arguments of other is good, efficient legal practice. Florida does not require magic words or long reiterations to preserve an issue.[2] The standard is that the objection Afairly apprised@ the lower court of the error. *See, e.g.*, '924.051(1)(b), Fla. Stat. (2005). Judge Ramirez=s dissent pointed out the lack of a necessary and indispensable partyCthe sheriffCand Mr. Everette adopted that opinion in the motion for rehearing. Nothing more was required to fairly apprise the lower court of this issue. Unnecessary reiterations or verbatim quotations of Judge Ramirez=s argument would not have assisted the lower in reaching the correct ruling.

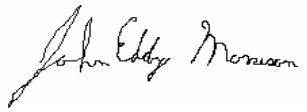
By its silence, DCFS tacitly agrees to the merits of this argument.

CONCLUSION

[2] Page eleven of DCFS=s brief quotes a passage that purports to be from Florida Rule of Civil Procedure 1.140, but is instead from the case cited therein with a Asee also@ signal. Neither of the cases cited deal with an original proceeding in the appeallate court, such as this case. The Florida Rules of Civil Procedure apply only Ain the circuit and county courts.@ Fla. R. Civ. P. 1.010. The rules of appellate procedure govern this original proceeding. *See* Fla. R. App. P. 9.010. Those rules contain no rule parallel to Rule 1.140. DCFS concedes that raising this issue on a motion for

Nothing in the Respondent=s brief gives this Court any reason why it should not reverse the decision of the Third District Court of Appeal. DCFS=s brief did not even attempt to argue that the sheriff was not a necessary and indispensable party, and the new amendments to chapter 916 clarify that the Third DCA=s decision, and DCFS=s arguments before this Court, are contrary to the plain language of the statute and legislative intent.

Respectfully submitted,
BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1963



BY:_____
JOHN EDDY MORRISON
Assistant Public Defender
Florida Bar No. 072222

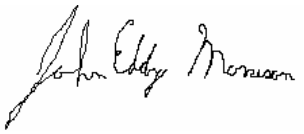
---

rehearing was timely (Respondent=s brief at 11).

CERTIFICATES

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to counsel for the Agency for Persons with Disabilities (successor to the Department of Children and Family Services), Amy McKeever Toman, Senior Attorney, Sunland Center, 4030 Esplanade Way, Suite 380, Marianna, Florida 32446, and by courier to counsel for the State of Florida, Richard L. Polin, Assistant Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida 33131 this eighth day of August 2006.

I HEREBY CERTIFY that this brief is printed in 14 point Times New Roman.



BY:_____
JOHN EDDY MORRISON