IN THE SUPREME COURT OF FLORIDA

WILLIAM TODD LARIMORE,

Petitioner,

v. **CASE NO. SC06-139**

STATE OF FLORIDA,

Respondent.
_____/

On Discretionary (Certified Conflict)
Review from the District Court of Appeal
First District of Florida

ANSWER BRIEF OF RESPONDENT

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT R. WHEELER
Assistant Attorney General
Bureau Chief, Criminal Appeals
Florida Bar No. 796409

CHARLIE MCCOY
Senior Assistant Attorney General
Florida Bar No. 333646

Office of the Attorney General
The Capitol, Suite PL-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 922-6674 (fax)

Counsel for Respondent

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page**

Other Authority

STATEMENT OF THE CASE AND FACTS

Case--Larimore seeks discretionary review from denial of writ of prohibition. In November 2004, the State petitioned to commit him under the Jimmy Ryce Act, §§394.910-.931, Florida Statutes. He sought prohibition in the First District Court of Appeal. In the decision under review--Larimore v. State, 917 So.2d 354 (Fla. 1st DCA 2005)--the court denied the writ and certified conflict with Gordon v. Reiger, 839 So.2d 715 (Fla. 2d DCA 2003), *rev. den.*, 890 So.2d 1115 (Fla. 2004). The decision BELOW was rendered December 29, 2005. Larimore filed notice to invoke this court's discretionary jurisdiction January 26, 2006.

Facts--The pertinent facts appear in the decision below, but are more useful presented in a timeline:

Date	*Event*
08/29/1991	Larimore pleads to two lewd & lascivious acts: the first (case no. 91-8223), committed in 1987; the second (case no. 90-11642), in June/July 1990. Sentenced to 15 years for first; 5 years probation for second. (Pet.App.II, p.1-2).[1]
10/10/1998	Larimore released on probation.
01/01/1999	Effective date of Ryce Act.
05/26/1999	Effective date of amendments to Act. (ch.99-222, Laws of Fla.)
12/1999 to 02/2000	Larimore detained in county jail for 82 days.

[1]Appendices to Larimore's petition for writ of prohibition below are cited (Pet.App.[Roman numeral], p.__). For Pet.App.II, the page numbers cited are those at the top center.

02/29/2000	Larimore's probation revoked. Sentenced to 5 years.
03/12/2002	First DCA holds Larimore entitled to 15 years credit, thus finishing his sentence for the first offense as of 10/10/98; "erasing" incarceration for violating probation; & entitling him to "immediate release." Larimore v. State, 2002 Fla. App. LEXIS 2948 (Fla. 1st DCA Mar. 12, 2002).
05/04/2002	First commitment petition filed. (Pet.App.II, p.2 & Pet.App.V, p.3).
	Larimore released from DOC custody & into DCF custody pending commitment under the Ryce Act. (Pet.App.II, p.2).
08/12/2002	On rehearing, the court deleted the "immediate release" language from the original opinion. Larimore v. State, 823 So.2d 287 (Fla. 1st DCA 2002).
10/22/2002	DOC revokes gaintime as to 1990 offense; Larimore returned to DOC custody; tentative release date set for 10/09/2006. (Pet.App.II, p.2-3).
03/25/2003	1st petition dism. w/o prejudice. (Pet.App.VI).
11/23/2004	Second commitment petition filed. (Pet.App.VII at p.4).
11/24/2004	Larimore released from DOC custody & into DCF custody. (*See* DOC website).
12/10/2004	First DCA holds Larimore entitled to immediate release as gaintime was improperly revoked. Larimore v. Fla. DOC, 910 So.2d 847 (Fla. 1st DCA 2004), *rev. den.*, 905 So.2d 125 (Fla. 2005).
01/25/2005	Larimore moves to dismiss commitment petition.
12/29/2005	Decision under review denies writ of prohibition.

SUMMARY OF ARGUMENT

The decision below and Gordon reached different results on materially different facts. There is no conflict. This appeal should be dismissed.

The decision below reached the right result for two reasons: First, Larimore was on probation when the Act took effect. For such persons, §394.925, Florida Statutes, requires mere "custody," not "total confinement." To the extent they hold probation cannot rise to custody, the decision below and Gordon are both wrong and must be disapproved.

Second, and alternatively, Larimore was adjudicated for violating probation and sentenced to prison after the Act took effect. Thus, he was "sentenced to total confinement in the future" for purposes of §394.925, despite the fact his original plea was obtained before the Act took effect. Under either alternative, the Act was properly applied to him.

The plain language of §394.913(4) and §394.9135(4) makes the timeframe for commitment proceedings non-jurisdictional. The decision below correctly concluded as much. Gordon wrongly concluded failure to file the commitment petition before the defendant's release from total confinement is jurisdictional. On this point, the decision below must be approved, and Gordon disapproved.

ARGUMENT

ISSUE

DID THE TRIAL COURT HAVE SUBJECT MATTER JURISDICTION OVER A RYCE ACT PROCEEDING TO COMMIT APPELLANT AS A SEXUALLY VIOLENT PREDATOR? (Restated).

A. Standard of Review

Resolving conflict between court decisions presents a question of law reviewed *de novo*. *See* Nelson v. State, 875 So. 2d 579, 581 (Fla. 2004) (describing the "point of conflict" and noting review of "this question of law is de novo").

B. Merits

1. No Conflict

This court's order of February 2, 2006 postponed a decision on jurisdiction. The State suggests there is no conflict between the decision below and Gordon, because the decisions reached different results on materially different facts.

Gordon was conditionally released in 1998. Some time later, release was revoked and returned to DOC custody. In April 2000, conditional release was reinstated and he left prison. Over a few days, the State determined he could be subject to the Ryce Act, had him arrested, and petitioned for commitment. Gordon, 839 So.2d at 717. Relying on State v. Siddal, 772 So.2d 555 (Fla. 3d DCA 2000), Gordon held conditional release was not "custody:"

> Accordingly, in regard to the Act, we determine that the word "custody" is synonymous with "total confinement" and means that the person in question is being held at a secure facility.
>
> * * *
>
> Thus, Mr. Gordon may have been under the supervision of the DOC, but he was not being held in total confinement by the DOC at the time he was taken into custody pursuant to the DCF's warrant.

Id. at 718-19.

Having concluded anything less than "total confinement" was not "custody" under §394.925, Florida Statutes, the court had no need to decide whether a commitment petition could be filed after "total confinement" ended. It needed only to conclude Gordon, on conditional release when the Ryce Act took effect, was not in custody. Its pronouncements about a jurisdictional bar to post-custody filing of the commitment petition were dicta. "Dicta conflict" does not establish subject matter jurisdiction in this court. *See* Padovano, 2 Florida Appellate Practice (2005 ed.) §3.10 ("[A]rticle V, section 3(b)(3) establishes jurisdiction on the basis of conflicting decisions. Thus, in a literal sense dicta conflict cannot exist." [e.s.; footnote omitted]).

The decision below concluded Larimore had been in lawful custody after the Jimmy Ryce Act was amended in 1999, by virtue of his 82-day stay in county jail, in late 1999. *See* 917 So.2d at 356. It then became necessary to address whether release

from such custody before the commitment petition was filed defeated subject matter jurisdiction.

Consequently, the two decisions turn on materially different facts. Their differing results do not create conflict.

2. Post-Act Detention in County Jail until VOP Hearing is Not "Custody" under §394.925, Florida Statutes[2]

The decision below upheld application of the Ryce Act to Larimore, the correct result. The State, however, respectfully disavows the court's reliance on Larimore's 82-day detention in county jail as subjecting him to the Act.

"Custody," in whatever form which satisfies the Act, must be "lawful." *Cf.* State v. Atkinson, 831 So.2d 172, 174 (Fla. 2002) (holding the 1998 Act was "limited to persons who were in lawful custody on its effective date"). Here, Larimore was detained for 82 days in county jail, in late 1999 to early 2000, awaiting the hearing to revoke probation. Such detention was "lawful" under §948.06(1), Florida Statutes (1999) (providing for arrest of probation violators), and Fla.R.Crim.P. 3.790(b) (authorizing detention or bail for violators). *See* 917 So.2d at 356, *citing* State v. Ducharme, 892 So. 2d 1133, 1135 (Fla. 5th

[2]The State does not concede all detention in county jail falls outside "custody" under §394.925. For example, someone serving a year in county jail as a condition of probation, on the effective date of the Act, would be "currently in custody." Also, such detention can meet the definition of "total confinement" in §394.912(11).

DCA 2004) (holding Ducharme in lawful custody when he was returned to Florida for VOP charges), *rev. den.*, 908 So. 2d 1057 (Fla 2005).

However, the lawfulness of such detention is not at issue. The dispositive question is whether lawful, post-Act detention in county jail, pending a hearing to revoke probation on pre-Act sex offenses, satisfies §394.925, Florida Statutes.

Section 394.925 provides:

> 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.

On its face, the statute creates two classes of Ryce Act defendants: (1) those "currently in custody;" and (2) those "sentenced to total confinement in the future."

Larimore's detention in county jail awaiting the VOP hearing did not start until December 1999. It could not be "custody" on the effective date of the Ryce Act. Also, it was not a "sentence," but a credit toward any incarcerative sentence imposed upon revocation of probation. Such detention cannot be a "sentence[] to total confinement in the future."

3. <u>The Decision Below Reached the Right Result</u>

Regardless of its rationale, the decision below reached the right result for two reasons. First, Larimore was on probation

when the Act took effect, and therefore "currently in custody." Second, and alternatively, he was adjudicated for violating probation and sentenced to imprisonment after the Act took effect. He was thereby "sentenced to total confinement in the future," despite the fact his original pleas were obtained before the Act took effect.

The State acknowledges that neither of these reasons was raised or decided below; however, either would sustain the result. The State will address each one separately.

Probation Satisfies the "Custody" Requirement of §394.925

Gordon concluded conditional release was not "custody." It relied on cases involving statutory interpretation, and cited Siddal for the point that probation is not custody under the Act. 839 So.2d at 718. It then went astray:

> There is no provision in the Act for commencing proceedings against a person under the Act where he or she is not in custody and is, in fact, living in society.

Id. at 719. Unnecessary to the decision, this conclusion precludes treating any type of non-prison sanction (e.g., community control, or probation with special conditions) as "custody" for purposes of the Act; and gives sexual predators the benefit of mistaken release. *Cf*. Moore v. State, 909 So. 2d

500, 502 (Fla. 5th DCA 2005)[3] (noting the defendant in Gordon was released through an apparent "bureaucratic snafu" and observing: "To date, no other appellate court has interpreted section 394.9135(4) in the same way as Gordon.").

The decision below also cited Siddal, but with no analysis, to observe that probation was not "custody." 917 So.2d at 355. In Siddal, the Third DCA reasoned:

> We conclude that, especially considering the serious consequences of the statutory section at issue, the liberal reading of the term advocated by the state is not supported by the terminology employed or the section's legislative history. Also, we find unpersuasive the state's reliance on State v. Bolyea, 520 So. 2d 562, 563 (Fla. 1988). While it is true that in Bolyea the Supreme Court concluded the term "custody under sentence" included court ordered probation, this conclusion was clearly for the limited purpose of permitting probationers to seek post conviction relief, a very different issue than the question before us. [e.s.].

Id., 772 So. 2d at 556.

The first quoted sentence shows the primary force behind Siddal's conclusion was the "serious consequences of the statutory section at issue." However, similar reasoning has already been rejected in the context of the Ryce Act. In State v. Mitchell, 848 So. 2d 1209 (Fla. 1st DCA 2003), the majority concluded the automatic stay in rule 9.310(b)(2) applied to Ryce Act proceedings. The dissent reasoned that the deprivation of

[3]Moore (case no.SC05-1779) is stayed pending this case.

liberty worked by the Act raised a serious due process concern for the automatic stay, and observed that "rule 9.310(b)(2) was never meant for a situation like this." *Id*. at 1213.

On review, this court held the stay was available. Mitchell v. State, 911 So. 2d 1211, 1212 (Fla. 2005). It then agreed with the dissent's concerns, and said: "[W]hen applying the automatic stay provisions to the Jimmy Ryce Act, courts must remain mindful of the due process concerns when a liberty interest is involved." *Id.*, 911 So.2d at 1216.

Still, the serious consequences for a Ryce Act defendant's liberty alone do not determine how the Act is interpreted, just as such consequences did not alone determine how a court rule was interpreted in Mitchell. *Cf.* 911 So.2d at 1214 ("The same principles of construction apply to court rules as apply to statutes." [quote & cite omitted]). Therefore, Siddal's concern for the "serious consequences" of Ryce Act commitment do not alone require the narrow reading of "custody" adopted by Gordon.

The Siddal court also rejected the State's reliance on Bolyea, where this court held "probation in and of itself constitutes 'custody under sentence' for purposes of Rule 3.850." 520 So.2d at 562. It did so by characterizing that decision as addressing a "very different issue."

Bolyea determined whether postconviction relief would be available to someone not incarcerated, but still on probation. Here, interpretation of "custody" will determine whether a Ryce Act applies to persons not physically confined when the Act took effect. The analogy is apt. Bolyea should be extended to hold "custody" under §394.925 is satisfied by probation.

Mitchell provides further ground to disapprove Gordon. Analyzing a rule, this court began:

> If the language of a statute or rule is plain and unambiguous, it must be enforced according to its plain meaning. Legislative history is not needed to determine intent when the language is clear. [e.s.].

911 So.2d at 1214. Gordon expressly relied on legislative history, without indicating what parts of that history were persuasive. *See id.*, 839 So.2d at 718 (mentioning "available evidence of legislative intent" without more). Thereby, Gordon ignored or improperly diminished the plain language of §394.925.

Section 394.925 is but one sentence. Within that sentence, the 1999 legislature deliberately employed quite different terminology: "custody" for defendants convicted before the Act took effect, and "total confinement" for defendants sentenced in the future. *See* §20, ch.99-222, Laws of Florida. The facially-plain result is that the legislature intended two different things. *See* Maddox v. State, 2006 Fla. LEXIS 6 *11 (Fla. 2006) ("[T]he legislative use of different terms in different portions

of the same statute is strong evidence that different meanings were intended." [e.s.; cites omitted]).

Had the legislature intended to require previously convicted Ryce Act defendants to be in "total confinement," it readily could have said: "currently in total confinement." That it did not do so undermines Gordon's conclusion.

Requiring less than "total confinement" to establish "custody" comports with one purpose of the Act; that is, to protect the public from sexual predators who were released into society (on parole or probation) before January 1, 1999. *Cf*. Westerheide v. State, 831 So. 2d 93, 104 (Fla. 2002) ("The state's purposes for the Ryce Act--long-term mental health treatment for sexual predators and protection of the public from them--are both compelling and proper.").

When the legislature amended the Act in 1999, it simultaneously changed now-§394.925 to its current version, and changed the definition of "total confinement." *See* §5, ch.99-222 (amending "total confinement") *and* §20 (amending §394.925). It is unreasonable to assume the legislature was oblivious to the use of "custody" versus "total confinement" in §394.925. It is also unreasonable to conclude the legislature, deliberately placing "total confinement" in §394.925 for the first time, intended "custody" to mean the same thing.

The 1999 legislature determined persons sentenced in the future, but not to "total confinement," should be excluded from the Act. However, requiring "total confinement" for persons sentenced before the Act took effect creates a large loophole, whenever such persons were no longer incarcerated when the Act took effect. The better reading of the statute is that probation is "custody" for purposes of §394.925.

Larimore's probationary sentence was lawful on January 1, 1999. He was re-sentenced, in 2000, to 5 years imprisonment for violating probation. Reviewing the sentence, the First DCA said:

> Although crediting the appellant with time served may have the effect of erasing the subsequent sentence for the probation violation because the subsequent sentence is less than the original incarcerative period, this result is mandated by Tripp [v. State, 622 So. 2d 941 (Fla. 1993)].
>
> Since the appellant received a split sentence for two cases which were scored on a single scoresheet, he should have received credit for time served after resentencing for his violation of probation.

823 So.2d at 288.

The court did not hold the original probationary sentence was invalid. Instead, it held only that imposition of 15 years imprisonment precluded re-sentencing to incarceration under Tripp. Further re-sentencing was directed. Thus, Larimore was lawfully on probation, and in "custody," when the Act took effect. If this court were to assume the original probationary

sentence was "unlawful," the trial court still had subject matter jurisdiction. *See* Tanguay v. State, 880 So.2d 533, 537 (Fla. 2004) (concluding, under the 1998 version of Ryce Act: "[T]he fact that the petitioner was not in lawful custody when the commitment petition was filed does not divest the circuit court of jurisdiction to adjudicate the petition.").[4]

Because Larimore was in lawful custody on January 1, 1999; the Act was properly applied to him. The decision below reached the right result based on facts of record, and must be affirmed. *See* Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002) ("The longstanding principle of appellate law, sometimes referred to as the 'tipsy coachman' doctrine, allows an appellate court to affirm a trial court that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.'"), *quoting* Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644-5 (Fla. 1999).

Violation of Probation and Re-Imprisonment after Act is a "Sentence[] to Total Confinement in the Future"

Larimore was placed on probation as part of his original, pre-Act sentence. He was re-sentenced, in 2000, to 5 years

[4]The State respectfully suggests that Gordon's difficulty may stem from Tanguay's treatment of "custody" as a jurisdictional matter. As the State will argue, the better approach is to read §394.925 as declaring alternative prima facie elements ("custody" or "total confinement") of the State's cause of action.

imprisonment for violating probation. Reviewing this sentence, the First DCA said:

> Although crediting the appellant with time served may have the effect of erasing the subsequent sentence for the probation violation because the subsequent sentence is less than the original incarcerative period, this result is mandated by Tripp.
>
> Since the appellant received a split sentence for two cases which were scored on a single scoresheet, he should have received credit for time served after resentencing for his violation of probation.
>
> Reversed and Remanded for resentencing.

823 So.2d at 288.

The court did not hold any sentence for violating probation was unlawful. Instead, it held only that the original imposition of 15 years imprisonment precluded incarceration for violating probation. Re-sentencing was directed. Therefore, Larimore was "sentenced ... in the future" for purposes of §394.925.

The next question is whether Larimore was sentenced to "total confinement." The facts show there was a legitimate dispute in how to apply the gaintime forfeiture statute to him. Because the second offense to which he pled (case no. 90-11642) was committed after October 1, 1989; DOC applied §944.28(1), Florida Statutes (1989) to forfeit gaintime as to that offense. When Larimore's sentence was re-calculated, his tentative release date became October 9, 2006. Thus, the effect of re-sentencing for violation of probation still resulted in "total

confinement." (Pet.App.II, p.3-4). At the least, Larimore was totally confined for the time it took DOC to determine whether prior credits entitled him to immediate release.

DOC's application of §944.28(1) was not invalidated by the First DCA until its December 2004 opinion. Until November 2004, when the second commitment petition was filed, Larimore was totally confined by DOC. At that time, he was placed in custody of the Department of Children and Families Services (DCF), still totally confined. The Ryce Act was properly applied to him.

Larimore pled, in 1991, to two crimes. Unavoidably, his "conviction" occurred well before the Ryce Act took effect. Section 394.925, however, does not require conviction for a sexually violent offense be "in the future," only that sentencing to total confinement occur then.

Again, §394.925 provides:

> This part applies to ... persons convicted of a sexually violent offense and sentenced to total confinement in the future. [e.s.].

The phrase "in the future" applies only to sentences of total confinement, not to conviction, under the rule of the "last antecedent.[5]" That rule "provides that relative and qualifying

[5]Black's Law Dictionary defines the rule as:

> A canon of statutory construction that relative or qualifying words or phrases are to be applied to the words or phrases immediately preceding, and as not extending to or including other

words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to, or including, others more remote." City of St. Petersburg v. Nasworthy, 751 So.2d 772, 774 (Fla. 1st DCA 2000) (interpreting §440.15, Fla. Stat.).

In Kirksey v. State, 433 So.2d 1236, 1239-41 (Fla. 1st DCA 1983), the court interpreted §901.17, Florida Statutes (1979), which provided that an officer making a warrantless arrest:

> Shall inform the person to be arrested of his authority and the cause of arrest except when the person flees or forcibly resists before the officer has an opportunity to inform him or when giving the information will imperil the arrest.

433 So. 2d at 1239. The court had to decide whether the phrase "before the officer has an opportunity to inform him" applied to both "flees" and "forcibly resists." *Id*. at 1239-40. Applying the rule of the last antecedent, it concluded the qualifying phrase "before the officer has an opportunity to inform him" applied only to the situation in which one forcibly resists, not to the situation in which one flees. *Id*. at 1240.

Section 394.925 and the larger Act do not clearly require a construction favorable to Larimore, as the State's construction

---

> words, phrases, or clauses more remote, unless such extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by an examination of the entire act.

Id. at 794 (5th ed. 1979).

makes sense in light of the Act's purpose. If probation alone does not amount to "custody," then a pre-Act probationer who never commits a new offense is not subject to the Act.

However, a pre-Act probationer who does violate probation should not be treated the same, given the Act's purpose of providing mental health treatment and protecting society from sexually violent predators. *See* Dep't of Envtl. Reg. v.Goldring, 477 So. 2d 532, 534 (Fla. 1985) ("The provisions of statutes enacted in the public interest should be given a liberal construction in favor of the public."). Therefore, §394.925 should be construed to include an individual convicted for a sexually violent offense before the Act took effect, but sentenced to total confinement after January 1, 1999. Larimore cannot get the benefit of intervening probation yet be insulated from the Act upon violating probation.

4. The Deadlines in the Ryce Act are not Jurisdictional

The State has argued Larimore was in "currently in custody" when the Ryce Act took effect, or was sentenced to "total confinement in the future." He was still in prison under a presumptively-lawful sentence when the second petition was filed. It is not necessary to reach the issue of whether the Act's contemplation of pre-release filing is jurisdictional. Should this court disagree, the State addresses the point.

The Ryce Act does not require, as a jurisdictional matter, that a commitment petition be filed while the defendant is still in total confinement. Absent prejudice, the State can file a commitment petition at any reasonable time thereafter.[6]

The decision below parsed the Act, as amended by ch. 99-222, Laws of Florida. 917 So.2d at 356-7. The court concluded:

> While the Act as amended clearly contemplates that a commitment petition *should* be filed before a person is released from total confinement, there is nothing in the Act that provides that the petition *must* be filed before the person's release. [italics original].

Id. at 357. The State agrees, and suggests the Act's preference for pre-release filing will become the norm.

Had the legislature wanted pre-release filing to be jurisdictional, it would have said so. Instead, it declared:

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

§394.913(4), Florida Statutes. This language, particularly the "in no way" phrase, refutes Larimore's claim that pre-release filing is a jurisdictional requirement.

However, the legislature did more. It also declared:

> The provisions of this section are not jurisdictional, and failure to comply with the time limitations, which results in the release of a person who has been convicted of a sexually violent offense, is not

[6]The Act does not specify a limitation period. The general civil limitation period is 4 years. *See* §95.11(3)(p), Fla. Stat.

> dispositive of the case and does not prevent the state attorney from proceeding against a person otherwise subject to the provisions of this part. [e.s.].

§394.9135(4), Florida Statutes. Nothing in §394.925 mentions jurisdiction. Release from custody or total confinement does not defeat the State Attorney's authority to file a petition.

Against this, Gordon relied on the underlined language in §394.915:

> (1) ... If the judge determines that there is probable cause to believe that the person is a sexually violent predator, the judge shall order that the person remain in custody and be immediately transferred to an appropriate secure facility if the person's incarcerative sentence expires. [e.s.].
>
> (2) Upon the expiration of the incarcerative sentence and before the release from custody . . . .

839 So.2d at 719. Given the express language in §394.913(4) and §394.9135(4), and the absence of jurisdictional language in §394.925; the phrase "remain in custody" and the modest inference drawn by Gordon are but delicate support for a jurisdictional bar. Also, "remain in custody" is necessary to explain what will happen to a Ryce Act defendant whose sentence expires before a commitment hearing can be held. It does not operate when the incarcerative sentence expires before a commitment petition is filed.

The crux of Gordon are these pronouncements:

> There is no provision in the Act for commencing proceedings against a person under the Act where he or

> she is not in custody and is, in fact, living in society.
>
> * * *
>
> [N]either the state attorney nor the DCF had jurisdiction to proceed against him because the Act is not applicable to a person who has been released into society but thereafter has been recaptured.

Id. at 719 & 720. Taken as correct for the sake of argument, these observations go not to the trial court's subject matter jurisdiction, but whether a cause of action could be alleged against Gordon under the Ryce Act; and whether the prosecutor would have authority to bring such action under the facts. Neither issue is subject to writ of prohibition.

This case presents an issue of statutory interpretation about what amounts to "custody" under §394.925. If the trial court erred by denying dismissal, such error should not have been cognizable in prohibition. *See* Mandico v. Taos Constr., 605 So.2d 850, 854 (Fla. 1992) ("Prohibition lies to prevent an inferior tribunal from acting in excess of jurisdiction but not to prevent an erroneous exercise of jurisdiction."). While the difference between "excess of" jurisdiction and "erroneous" jurisdiction is subtle, it illustrates Gordon's frailty as persuasive authority.

The decision below also was conceptually flawed by resolving the issue as one of jurisdiction, while reaching the correct result. Circuit courts have broad jurisdiction. *See*

Mandico, 605 So.2d at 854 ("In this state, circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which clearly and specially appears so to be.").

Section 394.914 provides the "state attorney may file a petition with the circuit court." It confers jurisdiction on circuit courts without requiring a commitment petition to be filed at any particular time. All procedural matters before the petition is filed--which would include any mandatory deadline to file the petition before release from DOC custody or total confinement--are expressly declared not jurisdictional by §§394.913(4) and .9135(4).

The decision below relied on the plain meaning of those provisions to determine legislative intent. Such intent is the polestar of statutory interpretation. *See* State v. Rife, 789 So. 2d 288, 292 (Fla. 2001) ("When construing a statutory provision, legislative intent is the polestar that guides the Court's inquiry." [internal quote & cite omitted]); State v. J.M., 824 So. 2d 105, 110 (Fla. 2002) ("[W]when the Court construes a statute, we look first at the statute's plain meaning." [internal quote omitted]). It concluded the plain meaning rendered the deadlines in the Act non-jurisdictional.

In Tanguay, this court construed the 1998 version of the Ryce Act. It said:

> Second, the State argues that because section 916.34, Florida Statutes, does not expressly provide a time limit within which the State must file the commitment petition, the State is only required to file the petition upon receipt of the multidisciplinary team's assessment whether that be before or after the expiration of the person's sentence.
>
> We agree. There was no "in custody" requirement in the statute conferring jurisdiction in the circuit court which conditioned jurisdiction on the petitioner being "in custody" on the date the petition was filed.

880 So.2d at 537 [footnote omitted].

The current version of §916.34 (codified as §394.914) has not changed materially since Tanguay. The only difference is that §394.914 has a new last sentence, which declares there is no filing fee. If §916.34 (in 1998) had no "in custody" requirement for purposes of jurisdiction, then current §394.914 still does not.

Facially, §394.925 does not purport to be jurisdictional. It does not address the circuit court's authority to entertain a commitment petition. Instead, it declares to which persons the Act applies, a matter far more akin to prima facie elements than to circuit court jurisdiction. Tanguay's rationale applies here, to conclude the filing a commitment petition after a Ryce Act defendant's release from custody is not jurisdictional.

It would be an unreasonable interpretation of the Act to conclude pre-release filing is required under the facts of this case. Larimore was imprisoned, lawfully at the time, but retroactively relieved of incarceration for violating probation. Still later, the First DCA reversed forfeiture of gaintime. No other legal consequences of his original sentence were lifted. The State had no reason to seek his commitment years before his actual release became imminent. Interpreting §394.925 to find a jurisdictional bar under these facts is unreasonable. Statutes are not to be interpreted unreasonably. *See* Maddox, 2006 Fla. LEXIS 6 *14 (rejecting the district court's interpretation of §316.066(4), Fla. Stat., as acceptance would be "sanctioning a construction of this statutory provision that would lead to unreasonable or ridiculous results").

If §394.925 is interpreted as the court did in Gordon, then §394.913(4) and §394.9135(4), Florida Statutes, are negated. However, courts are to give meaning to all statutory language. *See* American Home Assur. Co. v. Plaza Materials Corp., 908 So. 2d 360, 366 (Fla. 2005) ("[I]t is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage."); State v. Goode, 830 So. 2d 817, 824 (Fla.

2002) (rejecting the Fifth DC'S interpretation of §394.916(1) and concluding: "If the thirty-day time period in section 394.916(1) were held to be merely directory ..., the limitations on continuances listed in section 394.916(2) would essentially be rendered meaningless.").

In Goode, the court concluded:

> [A]lthough the language [in §394.916(1)[7]] 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).

830 So. 2d at 828. As was Goode, this case is a good example of an instance in which the Ryce Act's preference for pre-release filing of a petition, if mandatory, is not jurisdictional.

In State v. Ducharme, 892 So.2d 1133 (Fla. 5th DCA 2004), *rev. dism.* 895 So.2d 405/*rev. den.* 908 So.2d 1057 (Fla. 2005), *overruled in part on other grounds*, 911 So.2d 1211; Ducharme was on probation in Florida when he relocated to Michigan and committed new crimes. There, he pled guilty to sexual assault and burglary, and was released from prison in 2000. He was returned to Florida for violating probation and sentenced to time served. 892 So.2d at 1134.

[7]§394.916(1) provides: "Within 30 days after the determination of probable cause, the court shall conduct a trial to determine whether the person is a sexually violent predator."

The sheriff took him into custody until DOC could determine exactly when his sentence ended. DOC determined the sentence ended the day it was pronounced. Ducharme was then transferred to custody of the Department of Children and Families (DCF) for evaluation as a sexually violent predator. An expedited evaluation recommended the state attorney file a civil commitment petition; one was filed. *Id*.

Ducharme eventually moved to dismiss the petition on the ground his prison sentence had expired, so he was not in "custody" for purposes of the Ryce Act. The trial court granted the motion, but the Fifth DCA reversed. *Id*.

The Fifth DCA implicitly concluded Ducharme was lawfully held by DOC while his prison term was being calculated, until he was transferred (3 days later) to DCF's custody; and lawfully thereafter while DCF complied with the statutory procedure for commitment. *Id*. It concluded:

> While Ducharme may have been entitled to a writ of habeas corpus after being sentenced to time served as he was arguably not legally detained from June 13 to June 16, that does not divest the circuit court of jurisdiction to adjudicate the commitment petition.

Id. at 1135.

Here, Larimore may have been entitled to habeas corpus anytime after the First DCA held his gaintime was improperly forfeited. That circumstance did not divest the circuit court of

jurisdiction over the proceeding to commit him under the Ryce Act. *See* Moore, 909 So.2d at 504 ("Ducharme II held that the timeline for filing a petition for civil commitment under the Jimmy Ryce Act does not begin to run until the date DOC transfers the defendant to the custody of DCF, and that an improper detention is of no consequence for purposes of jurisdiction to proceed under the Jimmy Ryce Act").

Larimore was returned to prison; his probation was revoked in 2000. The First DCA's March 2002 decision retroactively eliminated incarceration as a sanction. When the first commitment petition was filed in May 2002, he was released from DOC (not DCF) custody.[8] In October 2002, DOC forfeited his gaintime. Larimore was returned to prison and DOC custody. He was still there when the second commitment petition was filed in November 2004. The next month, the First DCA held he was entitled to immediate release.

To contend he was not lawfully confined, Larimore relies heavily on Atkinson. However, Atkinson stands for one narrow point: When someone should have been released from prison before the Ryce Act took effect, but was not because the improper guidelines were used; the State may not seek to commit that person as a sexually violent predator.

[8]DOC's website shows Larimore was released from custody on May 4, 2002; and returned to DOC custody October 22, 2002.

Atkinson should have been sentenced to 21 months in 1996; instead, he received 5 years. He could not lawfully have been in prison on that charge when the Act took effect. In contrast, Larimore was lawfully on probation when the Act took effect. When probation was revoked in 2000, he was lawfully re-sentenced to 5 years in prison, until the First DCA determined an incarcerative sanction was not available. However, Larimore was not entitled to immediate release.[9]

After DOC forfeited his gaintime in October 2002, Larimore remained in prison until the second commitment petition was filed. Only later was his gaintime found improperly forfeited and immediate release ordered. Until then, he was lawfully in prison. It was not the sentence that was unlawful, only DOC's mistaken forfeiture of Larimore's gaintime.

In Washington v. State, 866 So. 2d 725 (Fla. 3d DCA 2004), *rev. den.,* 895 So. 2d 1068 (Fla. 2005), the Third DCA affirmed denial of Washington's motion to dismiss the petition to commit him under the Ryce Act. Washington urged he should have received 19 more days gaintime; and, if so, would not have been confined on the date the petition was filed. *Id*. at 725. The court,

[9]In its original opinion, the First DCA concluded Larimore was entitled to "immediate release." 2002 Fla.App. LEXIS 2948 *2. On rehearing, the court deleted such language, holding Larimore "should have received credit for time served," and remanding for resentencing. 823 So. 2d at 288.

noting the sentence could not be attacked in the civil commitment action, concluded:

> More importantly, the respondent has failed to show that his detention prejudiced his ability to defend against the commitment. Tanguay v. State, 782 So. 2d 419, 421 (Fla. 2d DCA 2001), [*approved & cert. question answered*, 880 So. 2d 533 (Fla. 2004)].

Id.

Larimore was not held by DOC after immediate release was ordered in December 2004, as he had been transferred to DCF custody pursuant to §394.9135(1), Florida Statutes, the prior month.[10] He has not alleged prejudice to his ability to defend. He, like Washington, is claiming he should have already been released, therefore not subject to commitment proceedings. Like Washington, he is wrong.

Larimore suggests §§394.913 and .9135 are jurisdictional when custody is not lawful, but not jurisdictional otherwise. (IB, p.17). He confuses subject matter jurisdiction with cause of action. The statutes are jurisdictional or they are not. By suggesting their nature depends on whether custody is lawful, he implicitly concedes the lawfulness of custody goes to the State's ability to allege a cause of action; not to the trial court's subject matter jurisdiction.

[10]The second commitment petition was filed Nov. 23, 2004. (Pet.App.VII at p.4). DOC's website (visited 04/19/2006) shows Larimore released from DOC custody on Nov. 24.

CONCLUSION

This appeal should be dismissed. If not, the court should uphold the result below. It should disapprove the decision below, Gordon, and Siddal to the extent they hold probation is not "custody" under §394.925; and declare someone on probation as of January 1, 1999 is subject to the Ryce Act. Alternatively, it should declare the Act applies to someone who violates probation after the Act took effect and is then incarcerated.

The court should conclude deadlines for commitment proceedings under the Act are not jurisdictional. It should approve the decision below and Moore, while disapproving Gordon, on this point; and declare the State's filing of a petition after a defendant is released from custody or total confinement does not defeat the trial court's subject matter jurisdiction.

CERTIFICATES OF SERVICE AND COMPLIANCE WITH RULE 9.210

I certify a copy of this ANSWER BRIEF has been sent by U.S. mail to Larimore's attorney: **WARD L. METZGER**, Assistant Public Defender, Office of the Public Defender, 25 North market Street, Suite 200, Jacksonville, Florida 32202; on May ___, 2006. I certify this brief complies with Fla.R.App.P. 9.210.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

RICHARD L. POLIN
Assistant Attorney General
Florida Bar No. 0230987
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441

_____
CHARLIE MCCOY
Senior Assistant Attorney General
Florida Bar No. 333646
Office of the Attorney General
The Capitol, Suite Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3300