IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-139

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

WILLIAM TODD LARIMORE,

PETITIONER

vs.

STATE OF FLORIDA,

RESPONDENT.

INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This proceeding arises from the denial by the First District Court Of Appeal of Petitioner's Emergency Petition For A Writ Of Prohibition filed in that court.

The record, in relevant part, consists of the emergency petition with attached appendices, a response filed by the State, Petitioner's reply to the response and Petitioner's supplement to the petition. Petitioner will designate any references to those pleadings, respectively as, Petition, Response, Reply and Supplement followed by correct page number(s).

Petitioner will be referred to as Larimore or Petitioner and Respondent as the State or Respondent.

STATEMENT OF THE CASE

On July 25, 2005, Petitioner filed his Emergency Petition For A Writ Of Prohibition in the First District Court of Appeal. The petition was denied and the court issued an opinion on December 29, 2005. Larimore v. State, 917 So.2d 354 (Fla. 1st DCA 2005). In its opinion, the First District, Id. at 357, certified conflict with Gordon v. Regier, 839 So.2d 715 (Fla. 2d DCA 2003).

On January 26, 2006, Petitioner timely filed his Notice To Invoke Discretionary Jurisdiction. This Court entered its order establishing a briefing schedule on February 2, 2006 and granted Petitioner's motion for extension of time on March 2, 2006 extending the service date for the initial brief until March 28, 2006.

STATEMENT OF THE FACTS

In Larimore v. State, 917 So.2d 354, 355 (Fla. 1st DCA 2005) (Larimore III), the court summarized the relevant facts as follows:

> On August 29, 1991, after pleading guilty to lewd and lascivious acts on a child under 16 years of age in two separate cases, Larimore was sentenced pursuant to the guidelines to 15 years in prison in one case followed by five years of probation in the second case. On October 10, 1998, Larimore was released from prison due to the award of gaintime, and began serving probation. On February 29,2000, Larimore's probation was revoked, and he was sentenced to five years in prison. On August 12, 2002, this court held that Larimore was entitled to credit pursuant to *Tripp v. State*, 622 So.2d 941 (Fla. 1993), for the 15 years served on his prison sentence (which included both actual prison time served and gaintime) which had the effect of erasing his five-year sentence for violating probation. *Larimore v. State*, 823 So.2d 287 (Fla. 1st DCA 2002). Shortly thereafter, based on the revocation of probation, the Department of Corrections forfeited the gaintime (2,830 days) earned on Larimore's 15-year prison sentence, relying on section 944.28(1), Florida Statutes.
>
> On November 23, 2004, the state filed a petition to have Larimore declared a sexually violent predator and involuntarily committed pursuant to the Jimmy Ryce Act. However, on December 10, 2004, this court held that Larimore was entitled to immediate release from custody because forfeiture of Larimore's gaintime was not authorized pursuant to section 944.28(1) where Larimore's offense occurred before the effective date of the amendment to section 944.28 authorizing the forfeiture of gaintime upon revocation of probation. *Larimore v. Fla. Dep't of Corr.*, 910 So.2d 847 (Fla. 1st DCA 2004), *review denied*, 905 So.2d 125 (Fla. 2005). Larimore then filed a motion to dismiss the state's

> commitment petition under the Jimmy Ryce Act, arguing that he was not in lawful custody on the effective date of the Act. After the trial court denied the motion to dismiss, this petition for writ of prohibition followed.

In addition to the facts set forth by the First District, it is important to note that while Petitioner was serving the sentence imposed without being given Tripp credit, on May 2, 2002 the state filed a petition seeking to have him declared a sexually violent predator. (Petition, Appendix V) On March 25, 2003, that petition was dismissed (Petition, Appendix VI) while he was incarcerated pursuant to the Department of Corrections' unlawful forfeiture of gaintime.

SUMMARY OF ARGUMENT

This case involves the resolution of a conflict between the opinion in Gordon v. Regier, 839 So.2d 715 (Fla. 2d DCA 2003); rev. den., 890 So.2d 1115 (Fla. 2004) and the decisions in Moore v. State, 909 So.2d 500 (Fla. 5th DCA 2005) (currently pending in this Court) and the First District's opinion in this case. The ultimate issue to be decided is whether a Ryce Act petition can be filed against Petitioner. He was unlawfully incarcerated in prison for over two years after the expiration of his sentence. The first petition was filed some twenty-six months into the unlawful incarceration. The second petition was filed well over a year into a second unlawful period of incarceration.

Petitioner argues that Gordon was properly decided. The current version of the statute requires a person to be in actual custody when a petition is filed. Further, this Court's decision in State v. Atkinson, 831 So.2d 172 (Fla. 2002), that defined custody as being lawful custody, is equally applicable to the current version of the statute as it was to its predecessor. It is necessary to define custody as lawful custody in order to avoid unduly harsh or absurd results and to comport with due process as required by Atkinson.

Moore and this case were not properly decided by the lower tribunals. Those courts overlooked specific legislative intent that made the Act applicable to those in custody and this Court's requirement that custody be lawful.

ARGUMENT

ISSUE SEXUALLY VIOLENT PREDATOR PROCEEDINGS CANNOT BE BROUGHT AGAINST PETITIONER BECAUSE HE WAS NOT IN LAWFUL CUSTODY ON THE DATE THE STATE FILED THE PETITION AND THE RYCE ACT DOES NOT APPLY TO PETITIONER.

A. STANDARD OF REVIEW

This case requires the Court to review lower tribunals' conflicting interpretations of portions of Chapter 394, Florida Statutes. The standard of appellate review regarding the interpretation of statutes is *de novo*. B. Y. v. Department of Children and Families, 887 So.2d 1253, 1255 (Fla. 2004).

B. GORDON V. REGIER

Gordon v. Regier, 839 So.2d 715 (Fla. 2d DCA 2003), rev. den., 890 So.2d 1115 (Fla. 2004) is the first of three recent cases, arising under the current version of the statute, that determine the ability of the state to initiate sexually violent predator (SVP) proceedings regarding individuals either not in custody or not in lawful custody of the Department of Corrections (DOC) at the time of initiation. Gordon is the case with which the First District certified conflict.

Gordon was sentenced to fifteen years in prison in 1992. In 1998 he was released on conditional release, but he violated his supervision and was returned to custody of DOC. On April 6, 2000, the conditional release was reinstated and

Gordon was released from custody. The next day a DOC administrator reviewed Gordon's file and determined that he might be subject to the Ryce Act (Act). A warrant issued and Gordon was picked up on April 8, 2000, two days after his release from custody. Proceedings pursuant to the Act were then initiated. Gordon, 839 So.2d at 716-717.

The Second District found that pursuant to section 394.925, Florida Statutes, in order for the Act to apply the person must be in custody or in total confinement. Id. at 717. The Court pointed out that section 394.925 specifically requires total confinement and custody. Id. In the Second District's interpretation of this statute, DOC is to provide notice of the future release to the state attorney and the multidisciplinary team. Then the Department of Children and Families (DCF) provides the state attorney with a written recommendation on whether the person meets commitment criteria. At that point a petition may be filed. Id. at 718-719. The court specifically pointed out the Act's safety valve for situations where an anticipated release becomes immediate. In that situation the person is to be transferred to DCF for the proceedings to commence. Id. at 719.

At the conclusion of Gordon's DOC custody, he was not transferred to DCF, he was released. He was not in total confinement. The court found that there were no provisions in the Act for commencing proceedings against a person who is not in custody. Id. The court concluded that there was no jurisdiction to proceed

against Gordon and specifically found that section 394.9135(4) did not provide authority to start proceedings against a person not in custody. Id. at 720. Section 394.9135(4) provides:

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

The Second District concluded that subsection 4 could not be applied to a person who was not in custody because such a person could not be subject to the Act. Gordon, 839 So.2d at 720. The court also recognized that the custody requirement of the statute had to be read to require lawful custody pursuant to this Court's opinion in State v. Atkinson, 831 So.2d 172 (Fla. 2002). Gordon, 839 So.2d at 718, fn 4.

C. MOORE V. STATE

The next case to involve application of the Act to a person who had been released was Moore v. State, 909 So.2d 500 (Fla. 5th DCA 2005)[1] Moore was sentenced to five years imprisonment. However, he moved to withdraw his plea two years later and the motion was granted. Shortly thereafter, DOC informed DCF that Moore appeared eligible for SVP proceedings. However, on that same

[1] Moore is pending in this Court, Case No. SC05-1779.

day, DCF informed DOC that Moore was not eligible because his conviction had been vacated. Id. at 501. A month later, Moore entered a plea to the charge and received a time-served sentence. The jail sent information to DOC regarding the new sentence. Two days later the jail requested Moore's release paperwork from a separate unit of DOC. Moore was mistakenly released from the jail based on the initial release paperwork indicating DOC had no interest in him at the time the original conviction was vacated. Id. The day after Moore was released, DOC notified DCF that he appeared to qualify as a SVP. A week later he was taken into custody and Ryce Act proceedings were begun. Id. at 502.

The Fifth District was presented with the argument that Gordon prevented application of the Act to Moore. The Fifth District chose not to follow Gordon. Id. In part, relying on precedent from an earlier opinion, the court found that the provisions of section 394.9135 are not jurisdictional and the release of an individual from custody does not prevent the state from instituting SVP proceedings. Id. at 503. The court relied on its decision in State v. Ducharme, 881 So.2d 70 (Fla. 5th DCA 2001); rev. dism., 895 So.2d 405 (Fla. 2005) (Ducharme I) and Judge Cope's concurring opinion in Washington v. State, 866 So.2d 725 (Fla. 3d DCA 2004); rev. den., 895 So.2d 1068 (Fla. 2005). The Fifth District also found that Moore was also not entitled to relief based on the decisions in State v. Ducharme, 892 So.2d 1133 (Fla. 5th DCA 2004); rev. dism., 895 So.2d 405 (Fla.

2005) (Ducharme II) and this Court's opinion in Tanguay v. State, 880 So.2d 533 (Fla. 2004). Moore, 909 So.2d at 504. In Ducharme II the defendant had been arguably detained unlawfully for three days and Tanguay was unlawfully detained for sixteen days beyond the expiration of his sentence. Id. Based on those decisions the court found that there was no difference between being improperly detained after the expiration of the sentence and a release followed by a subsequent detention. Accordingly, there was no problem with the detention of Moore who had been erroneously released. Id.

D. LARIMORE V. STATE (LARIMORE III)

The third case in the series of cases involving application of the current version of the Act to a person in unlawful custody is the instant case, Larimore III. The First District found that Larimore was not in lawful custody when the state filed its Ryce Act petition. Larimore, 917 So.2d at 356. However, the court found that the provisions of section 394.913 were not jurisdictional. Id. at 356-357. That section, as summarized by the First District:

> …provides that the agency with jurisdiction over a person convicted of a sexually violent offense shall give written notice to the multidisciplinary team and state attorney at least 365 days or, in the case of an adjudicated committed delinquent, at least 90 days before the person's anticipated release from total confinement. Ch. 99-222, §6 at 1377, Laws of Fla. In the case of a person who has been returned to total confinement for no more than 90 days, written notice must be given as soon as practicable following the person's return to confinement.

> §394.913(1)(b), Fla. Stat. (1999). Within 45 days after receiving the notice, the multidisciplinary team must make a written assessment and recommendation regarding whether the person meets the definition of a sexually violent predator and should be committed under the Act, which shall be provided to the state attorney by the Department of Children and Family Services. §394.913(3)(3). Fla. Stat. (1999).

Larimore, 917 So.2d at 356. The court also reviewed section 394.9135, the safety-valve statute as did the Moore and Gordon courts. The Larimore III court found that while the Act contemplated that a petition should be filed before a person was released, there was no requirement that a petition be filed prior to release. There was no jurisdictional requirement of the person being in custody. The court relied on Moore, Ducharme and Washington to reach that conclusion. Larimore, 917 So.2d at 357. Moreover, the First District declined to follow Gordon on the basis of 1) it failed to follow the plain statutory language to the effect that section 394.9135 is not jurisdictional and 2) Gordon could not be reconciled with this Court's decision in Tanguay. Larimore, 917 So.2d at 358.

E. JURISDICTIONAL REQUIREMENT OF LAWFUL CUSTODY AS A PREDICATE FOR FILING A SVP PETITION

In State v. Atkinson, 831 So.2d 172 (Fla. 2002) this Court held that, "…the Ryce Act is limited to persons who were in lawful custody on its effective date." Id. at 174. (emphasis added) The Atkinson decision construed the retroactivity of the Act. Tanguay, 880 So.2d at 537.

Section 394.925, Florida Statutes, specifically provides that the Act, "…applies to all persons currently in custody…and sentenced to total confinement…" The original Act had no in custody requirement for the filing of a petition. Tanguay, 880 So.2d at 537 ("There was no 'in custody' requirement in the statute conferring jurisdiction in the circuit court…"). However, the Act was substantially revised in Chapter 99-222, Laws of Florida, that took effect on May 26, 1999. As of that date, a petition could only be filed against a person who was in custody. As previously noted, Section 394.925 specifically provides that the Act applies to persons presently in custody or sentenced in the future to total confinement. Tanguay's determination that there was no in custody requirement in the original act was based on the language of section 916.35(1) that stated "If the judge determines that there is probable cause… the judge shall direct that the person be taken into custody." Tanguay, 880 So.2d at 537. However, section 9, Chapter 99-222, Laws of Florida renumbered that statute as section 394.915 and amended it to read, "If the judge determines that there is probable cause…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." (emphasis added) The requirements that person be in custody and to continue to be held in custody remain in the statute and have not been modified since the date they took effect on May 26, 1999.

In examining these provisions of the Act, several rules of statutory construction are important. It is well recognized that statutes that relate to a closely related subject are regarded as *in pari materia* and construed together and compared with each other. Ferguson v. State, 377 So.2d 709, 710 (Fla. 1979). Courts view the entire statutory scheme to determine legislative intent and statutes relating to the same subject matter should be construed to give effect to all the provisions if it can be done by any fair and reasonable construction. Id. at 710-711. Most importantly, unambiguous statutory language, i.e. plain language, is not subject to judicial construction. State v. Jett, 626 So.2d 691, 693 (Fla. 1993).

Section 394.925, Florida Statutes, makes the Act applicable to persons in custody or sentenced in the future to total confinement. Section 394.915 requires a judge determining probable cause to continue a person's confinement and to transfer the person to a secure facility if the sentence expires. Reading those sections together and according them their plain meaning leads to the obvious and inescapable conclusion that the legislature intended the Act to apply to persons in custody. Custody means total confinement and that the person is being held at a secure facility. Gordon, 839 So.2d at 718.

Although the Act makes no reference to lawful custody, this Court resolved that question in Atkinson. In that case an SVP petition was filed while Atkinson was being held in prison on a sentence where resentencing was required pursuant

to Heggs v. State, 759 So.2d 620 (Fla. 2000). Atkinson, 831 So.2d at 173. When he was resentenced Atkinson was entitled to immediate release because the lawful sentence had expired almost two years prior to the date of resentencing. Id. The June 25, 1998 sentence expiration date meant that although Atkinson was in physical custody when the SVP petition was filed in 2000, he was not in lawful custody. Id. at 173-174.

Atkinson resolved the issue of the Act's retroactivity and interpreted the requirement of custody being that of lawful custody. That interpretation is equally compelling under the current version of the statute that is applicable herein. As this Court noted:

> A basic tenet of statutory construction compels a court to interpret a statute so as to avoid a construction that would result in unreasonable, harsh, or absurd consequences…It would be contrary to the basic tenets of fairness and due process if we were to interpret section 394.925 as requiring only actual custody.

Id. at 174.

In this case, Petitioner was entitled to release immediately upon his sentencing for the VOP. He remained in physical custody only because the trial court failed to credit him with the time served to which Petitioner was entitled. While he was still in physical custody, over two years after he was entitled to release, the initial SVP petition was filed. Any interpretation of chapter 394 that would permit the state to proceed against Petitioner simply because he was in

actual custody as opposed to lawful custody, would produce the unreasonable, harsh, absurd and unfair result condemned by Atkinson. The circumstances of this case and those of Atkinson are not meaningfully distinguishable. Both Petitioner and Atkinson had petitions filed while they were in physical custody some two years after they were entitled to release.

F. THE PETITION MUST BE DISMISSED BECAUSE PETITIONER WAS NOT IN LAWFUL CUSTODY WHEN THE PENDING SVP PETITION WAS FILED

In Larimore I the First District determined that Petitioner was entitled to Tripp credit. Subsequent to that decision, the credit was applied to the sentence. The Department of Corrections then forfeited all of the gaintime earned by the Petitioner while serving the initial prison sentence. Larimore II, 910 So.2d at 848. On December 10, 2004, the district court held the gaintime forfeiture to be improper, once again recognizing that the trial court was effectively precluded from imposing any sanction for the violation of probation. Id. Petitioner was ordered to be immediately released from custody. Id.

On November 23, 2004, the state filed a second SVP petition. (Petition, Appendix VIII) That petition was filed while Petitioner was being unlawfully held in custody due to the improper forfeiture of accumulated gain time. Accordingly, Petitioner was not in lawful custody at the point in time when the SVP petition was filed. The same legal principles apply to the second petition as well as the first petition because of Petitioner's status of being in unlawful custody.

As discussed in section E, *supra*, Atkinson, should limit the application of the current Act to persons in lawful custody. Because Petitioner was not in lawful custody at the time the petition was filed, the state cannot proceed against him.

G. GORDON V. REGIER WAS THE CORRECT DETERMINATION OF LEGISLATIVE INTENT AND STATUTORY APPLICABILITY AND MOORE V. STATE AND LARIMORE III WERE WRONGLY DECIDED

Gordon recognized that the Act applied to persons in total confinement or custody based on the specific terms of section 394.925 that set forth the terms "custody" and "total confinement." Gordon, 839 So.2d at 717. Neither Moore, 909 So.2d 500 nor Larimore III, 917 So.2d 354 discussed the expression of legislative intent in section 394.925. Legislative intent is crystal clear:

> 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.

Section 394.925, Florida Statutes. In order for any person to be subject to the Act, the person must either be convicted of a sexually violent offense and be currently in custody as of the effective date of the statute, or be convicted of a sexually violent offense and be sentenced to total confinement some time in the future. Although the prior version of the Act had no in custody requirement, Tanguay, 880 So.2d at 537, there is no question that there is now a custody requirement because of the specific provisions of section 394.925. However, both Moore and Larimore

III overlook the provisions of section 394.925. Those are crucial omissions that result in the analyses of those courts being incomplete. Once it is recognized that the statute requires custody, then this Court's decision in Atkinson, 831 So.2d at 173-174, should be applied because that case defines custody as lawful custody. Based on the rational definition of custody as lawful custody and the recognition that the Act only applies to those in custody, then Gordon and Atkinson read together stand for the proposition that the Act only applies to persons actually in lawful custody at the time the petition is filed.

The Moore and Larimore III decisions permit SVP petitions to be filed against anyone, not in custody, who had committed a qualifying offense. This outcome results from the failure to properly apply the in custody requirement of section 394.925. In doing so, the Moore and Larimore III courts have effectively rewritten the statute. The essence of those cases is their interpretation of sections 394.913 and 394.9135 that specifically say the provisions of those sections are not jurisdictional. Moore, 909 So.2d at 503-504, Larimore III, 917 So.2d at 356-357. However, those sections should be read in conjunction with the in custody requirement which leads to the conclusion that failing to follow the mandatory statutory procedures is not jurisdictional regarding a respondent who is in lawful custody at the time a petition is filed. Properly defining in custody in conformity with Atkinson's lawful custody requirement means that if a respondent is in lawful

custody and the statutory time periods or procedures are not followed, there is no jurisdictional impediment to proceeding with the prosecution. The Moore and Larimore III opinions are incomplete for failing to include the in custody requirement of section 394.925 and the lawful custody definition of Atkinson.

Moore also relies on an analysis that Gordon cannot be reconciled with Tanguay. Moore, 909 So.2d 504. Larimore III, 917 So.2d at 358, adopted that analysis. Both courts have overlooked the material distinction between the version of the statute at issue in Tanguay and the current version of the statute. The Tanguay statute was a prior version of the statute that did not have an in custody requirement. Tanguay, 880 So.2d at 537. Tanguay's decision, predicated on a statute that lacked an in-custody requirement, is inapplicable to Moore and Larimore III because of the current existence of a statutory in-custody requirement. Simply put, Gordon and Tanguay reach different results based on the existence of different statutes. The crux of the decision in Tanguay was:

> 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.

Tanguay, 880 So.2d at 537. Because the current version requires the respondent to be in custody and the statute at issue in Tanguay did not, the Moore and Larimore III courts erred in relying on Tanguay.

Gordon constituted the correct analysis of the operation of the Act as being inapplicable to persons who are not in lawful custody at the time an SVP petition is filed. Both Moore and Larimore III overlooked relevant portions of the current statute and those opinions contradict statutorily expressed legislative intent as to the applicability of the Act.

CONCLUSION

This Court should reverse the decision of the First District Court of Appeal and direct that the trial court dismiss the Ryce Act petition filed below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to the Office of the Attorney General, representing the State of Florida, and Mr. William Todd Larimore, SVP# 990547, Florida Civil Commitment Center, 13613 S.E. Highway 76, Arcadia, FL 34266 this 28th day of March, 2006.

CERTIFICATE OF TYPE-SIZE COMPLIANCE

I HEREBY CERTIFY that this brief is printed in 14 point Times New Roman font, which conforms to type-size and spacing requirements of the Florida Rules of Appellate Procedure.

WARD L. METZGER
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