IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1764

MICHAEL WARD,
Appellant,

- versus -

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

APPELLEE'S CORRECTED ANSWER BRIEF ON THE MERITS

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Table Of Contents

Page:

Table Of Contents i

Table Of Authorities ii

Preliminary Statement vi

Statement of the Case and Facts 1

Summary of the Argument 3

Argument:

Whether a person who was not in custody on January 1, 1999, is eligible for civil commitment under the Jimmy Ryce Act if that person was sentenced to total confinement after January 1, 1999, but the qualifying conviction occurred before January 1, 1999 4

Conclusion 19

Certificate Of Service 20

Certificate of Font Compliance 20

TABLE OF AUTHORITIES

FEDERAL CASES

62 Cases More or Less, Each Containing Six Jars of Jam v. U.S.,
340 U.S. 593, 71 S. Ct. 515, 95 L. Ed. 566 (1951)……5

STATE CASES

A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 137 So. 157 (1931)……..16

Amendments To Florida Rule of Criminal Procedure 3.172,
911 So. 2d 763 (Fla. 2005)……...18

Campus Crusade for Christ v. Unemployment Appeals Com'n,
702 So. 2d 572 (Fla. 5th DCA 1997)……...14

City of St. Petersburg v. Nasworthy,
751 So. 2d 772 (Fla. 1st DCA 2000)……12, 13, 14

Department of Environmental Reg. v. Goldring, 477 So. 2d 532 (Fla. 1985)……16

Donato v. American Telegraph & Telegraph Co.,
767 So. 2d 1146 (Fla. 2000)……...5

Florida Department of Revenue v. New Sea Escape Cruises, Ltd.,
894 So. 2d 954 (Fla. 2005)…….4

Florida State Racing Commission v. Bourquardez, 42 So. 2d 87 (Fla. 1949)……14

Forsythe v. Longboat Key Beach Erosion Control District,
604 So. 2d 452 (Fla. 1992)…….9

Gordon v. Regier, 839 So. 2d 715 (Fla. 2d DCA 2003)…….……10

Hale v. State, 891 So. 2d 517 (Fla. 2004)……...8, 9, 10, 16, 17

Heggs v. State, 759 So. 2d 620 (Fla. 2000)……11

Holly v. Auld, 450 So. 2d 217 (Fla. 1984)……..16

Hott Interiors, Inc. v. Fostock, 721 So. 2d 1236 (Fla. 4th DCA 1998)……..15

Kirksey v. State, 433 So. 2d 1236 (Fla. 1st DCA 1983)……...13, 14

M.W. v. Davis, 756 So. 2d 90 (Fla. 2000)……8

Moore v. State, 909 So. 2d 500 (Fla. 5th DCA 2005)……..7

Operation Rescue v. Women's Health Center, Inc.,
626 So. 2d 664 (Fla. 1993)……4

Palm Beach Cty. Canvassing Board v. Harris, 772 So. 2d 1273 (Fla.2000)……8

Racetrac Petroleum, Inc. v. Delco Oil, Inc.,
721 So. 2d 376 (Fla. 5th DCA 1998)……4

State v. Atkinson, 831 So. 2d 172 (Fla. 2002)……11

State v. Brigham, 694 So. 2d 793 (Fla. 2nd DCA 1997)……..…6

State v. Byars, 804 So. 2d 336 (Fla. 4th DCA 2001)……5

State v. Mitchell, 866 So. 2d 776 (Fla. 1st DCA 2004)……8

State v. Rife, 789 So. 2d 288 (Fla. 2001)……..6

Tabor v. State, 864 So. 2d 1171 (Fla. 4th DCA 2004)……..……8, 9

Vreuls v. Progressive Emplr. Services,
881 So. 2d 688 (Fla. 1st DCA 2004)……14

Ward v. State, 936 So. 2d 1143 (Fla. 3rd DCA 2006)……..18, 19

Westerheide v. State, 831 So. 2d 93 (Fla. 2002)……...…16, 17

Young v. Progressive Southeastern Insurance Co., 753 So. 2d 80 (Fla.2000)……....8

STATE STATUTES

Fla. Stat. § 394.912(2)……...…6

Fla. Stat. § 394.912(9)……...6

Fla. Stat. § 394.912(10)…….6

Fla. Stat. § 394.912(11)…….6

Fla. Stat. § 394.913(1)……...6, 7

Fla. Stat. § 394.913(2)……...7

Fla. Stat. § 394.913(2)(e)……..6

Fla. Stat. §394.9135……10

Fla. Stat. § 394.9135(1)…….7

Fla. Stat. § 394.925……4, 10

Fla. Stat. § 901.17……...13

Fla. Stat. § 916.32(8)…….9

CHAPTER LAWS

Chapter 99-222……..5

FLORIDA RULES OF CRIMINAL PROCEDURE

Fla. R. Crim. P. 3.172……..18

MISCELLANEOUS

Black's Law Dictionary 794 (5th ed. 1979)……14

Norman J. Singer, Statutes and Statutory Construction, Vol. 2A, at 369-72……..15

Preliminary Statement

Petitioner was the Jimmy Ryce respondent in the trial court and the Petitioner in the Third District Court of Appeal, and will be referred to herein as "Petitioner" and "Ward." Respondent, the State of Florida, initiated the Jimmy Ryce proceeding below and was the Respondent in the Third District Court of Appeal and will be referred to herein as "Respondent" or "the State."

Reference to the record on appeal in Case No. 3D05-1277, will be by the symbol "R;"

Reference to Petitioner's brief will be by the symbol "IB;"

Reference to the Appendix accompanying Petitioner's Initial Brief will be by the symbol "App;" all followed by the appropriate volume and page numbers. For example page one of volume two of the supplemental record would appear as (SR 2 at 1).

Statement Of The Case and Facts

Respondent accepts the statement of the case and facts contained in Petitioner's Initial Brief subject to any additions, corrections, and/or clarifications contained herein and developed throughout the argument.

On January 19, 2005, the State filed its "Petition to Declare Respondent a Sexually Violent Predator and an Ex Parte Petition to Determine Probable Cause," against Ward. (App. 4). This Petition was filed pursuant to Fla. Stat. §§ 394.910-394.930, hereinafter referred to as the Jimmy Ryce Act. The State alleged that Ward was currently in the custody of the Department of Corrections residing at Everglades Correctional Institution. Further the State alleged that Ward had previously been convicted of sexually violent offenses in Miami-Dade County, Florida. On March 1, 2005, Ward filed his motion to dismiss the Petition. (App. 5). On March 16, 2005, the trial court denied Ward's motion to dismiss. (App. 12). The trial court concluded that the Act applied to

> persons who were convicted prior to 1999 for a sexually violent act and who are currently incarcerated for any crime, if said persons are determined to be a danger to the community. This is the only way to ensure the "compelling state interest" of protecting the citizens of the State of Florida from sexually violent predators and providing treatment for the dangerous mentally ill.

(App. 12, pp 4-5).

On May 31, 2005, Ward served his Petition for a Writ of Prohibition in the Third District Court of Appeal. (App. 1). On July 28, 2005 the State served its Response. (App. 2). On August 3, 2005 Ward served his Reply. (App. 3). On August 16, 2006, the Third District Court of Appeal rendered its opinion finding the Jimmy Ryce Act applicable to Ward. (App. 17). The district court then certified the following question as one of great public importance to this Court:

> Whether a person who was not in custody on January 1, 1999, is eligible for civil commitment under the Jimmy Ryce Act if that person was sentenced to total confinement after January 1, 1999, but the qualifying conviction occurred before January 1, 1999.

(App. 17, p. 7).

Summary of the Argument

An affirmative answer to the certified question is mandated by the plain language of the statute. Additionally application of the principles of statutory construction of the language at issue require an affirmative answer. Further, examination of the language at issue in the context of the entire Act reveal Petitioner's interpretation would render meaningless other sections of the Act. The purpose of the Jimmy Ryce Act to protect the public and provide treatment to mentally ill offenders is better accomplished by the State's position.

Argument

WHETHER A PERSON WHO WAS NOT IN CUSTODY ON JANUARY 1, 1999, IS ELIGIBLE FOR CIVIL COMMITMENT UNDER THE JIMMY RYCE ACT IF THAT PERSON WAS SENTENCED TO TOTAL CONFINEMENT AFTER JANUARY 1, 1999, BUT THE QUALIFYING CONVICTION OCCURRED BEFORE JANUARY 1, 1999?

Standard of Review:

The issue of statutory construction is purely legal, thus Judicial interpretation of Florida statutes is therefore subject to de novo review. Florida Dept. of Revenue v. New Sea Escape Cruises, Ltd. 894 So.2d 954, 957 (Fla. 2005), citing Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376, 377 (Fla. 5th DCA 1998), citing Operation Rescue v. Women's Health Center, Inc., 626 So. 2d 664, 670 (Fla. 1993).

Merits:

Petitioner argues that the sexually violent predators civil commitment act (SVPA) does not apply to him because he does not fall within the scope of § 394.925, Florida Statutes, which 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**.[1]

(e.s.). The plain language of the statue demonstrates the Act is applicable to Petitioner. As to the first requirement, Ward does not dispute his qualifying offenses as outlined in the Petition. (App. 4, ¶¶ 6-13). The second requirement is clearly met by Ward's burglary sentence of total confinement on June 6, 2002.

A fundamental tenet of statutory construction mandates that "courts must follow what the legislature has written and neither add, subtract, nor distort the words written." State v. Byars, 804 So. 2d 336 (Fla. 4th DCA 2001). Citing, 62 Cases More or Less, Each Containing Six Jars of Jam v. U.S., 340 U.S. 593, 596, 71 S.Ct. 515, 95 L.Ed. 566 (1951); Donato v. American Tel. & Tel. Co., 767 So. 2d 1146, 1150-1151 (Fla. 2000) (a court abrogates legislative power when it construes an "unambiguous statute in a way which would extend, modify, or limit

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[1] As originally promulgated, the predecessor version of s. 394.925, as set forth in s. 916.45, Florida Statutes (Supp. 1998), provided:

> Sections 916.31 – 916.49 apply to all persons currently in custody who have been convicted of a sexually violent offense, as that term is defined in s. 916.32(8), as well as to all persons convicted of a sexually violent offense in the future.

its express terms or its reasonable and obvious implications."). Further, the Florida Supreme Court has held that this "principle is 'not a rule of grammar; it reflects the constitutional obligation of the judiciary to respect the separate powers of the legislature.'" State v. Rife, 789 So. 2d 288 (Fla. 2001), citing State v. Brigham, 694 So. 2d 793, 797 (Fla. 2nd DCA 1997). Appellant invites this Court to add the requirement that his confinement must be pursuant to a sexual crime. This flies in the face of both the tenets of statutory construction and the plain language of the statute.

An examination of Fla. §§ 394.912(2), (9), (10) and (11) 394.913(1), (2)(e) reveals that a person subject to Ryce commitment must be confined as defined in Fla. § 394.912(11) and must at some point have been convicted of a sexually violent offense. Fla. §§ 394.912(2) and (9). There is absolutely no statutory requirement that the "total confinement" must be resultant from a sexually violent offense. Fla. § 394.912(11). In fact, the statute specifically cites that the person is being securely held, **"for any reason."** Fla. § 394.912(11). (e.s). Additionally, any other reading of this clear language would render the provisions of Fla. § 394.913(1) and (2)(e) meaningless.

The statutory scheme enacted by the legislature specifically provides for

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This section was amended in May, 1999, and now reads as set forth in the text

those Florida prisoners who have never been convicted of a sexually violent offense in Florida but are serving a Florida sentence who have also been previously convicted for a sexually violent act in either another state or federal court. Fla. § 394.913(1). According to Petitioner, Ryce proceedings could never be initiated against this class of prisoner, however, the statute mandates otherwise.

Further, Fla. § 394.913(2)(e) specifically provides that if a respondent has been returned to total confinement from a period of supervision (ie. probation or community control) the multidisciplinary team must be provided documentation regarding this supervision. According to Petitioner, Ryce proceedings could never be initiated against those in total confinement as a result of violation of probation, community control or other supervision. The statute specifically contemplates and provides for Ryce proceedings against this class of prisoner. Thus, Petitioner's interpretation of the statute renders Fla. § 394.913(2)(e) meaningless. Also illustrative is Fla. Stat. § 394.9135(1) which commands the immediate transfer to the Department, "[I]f the anticipated release from total confinement of a person who has been convicted of a sexually violent offense becomes immediate for any reason." The legislature did not limit this requirement to "total confinement for a sexually violent offense," further refuting Appellant's argument. "[T]he Jimmy

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above. Chapter 99-222, Laws of Florida.

Ryce Act applies to all persons who are currently incarcerated and who at some point in the past have been convicted of committing a sexually violent offense." Moore v. State, 909 So.2d 500, 504 (Fla. 5th DCA 2005).

Petitioner's, "argument is refuted by sections 394.913(1), 394.912(9)(g), and 394.912(11), Florida Statutes." State v. Mitchell, 866 So. 2d 776, 777 (Fla. 1st DCA 2004). Furthermore,

> Even if we did agree that this provision, standing alone, was ambiguous, we would be bound to give effect to all provisions of the Ryce Act and construe related provisions in harmony with one another. Young v. Progressive Southeastern Ins. Co., 753 So.2d 80 (Fla.2000); Palm Beach Cty. Canvassing Bd. v. Harris, 772 So.2d 1273 (Fla.2000) (all parts of a statute should be read together in order to achieve a consistent whole); M.W. v. Davis, 756 So.2d 90 (Fla.2000).

Tabor, at 1174. Petitioner's version of the Ryce Act requires the judiciary to determine the legislature did not mean what was clearly written. Further, Petitioner's version requires the judiciary to determine the legislature drafted statutory provisions which were intended to have no meaning.

In Hale v. State, 891 So. 2d 517, 518 (Fla. 2004), this Court addressed the issue of whether the Act requires that the person to be committed be currently incarcerated for a sexually violent offense. In answering the question in the negative, this Court elaborated,

The statute does not state that it applies to all persons currently in custody for a sexually violent offense and it does not otherwise link the current incarceration to the sexually violent offense.

Other sections of the Act, when read together with section 916.45, lead to the conclusion that the legislature did not intend that the Act apply only to persons currently incarcerated for sexually violent offenses. A "sexually violent offense" is defined to include a federal conviction or a conviction from another state. See § 916.32(8)(g), Fla. Stat. (Supp. 1998). As the Fourth District Court of Appeal recently 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.

Tabor v. State, 864 So. 2d 1171, 1174 (Fla. 4th DCA 2004).

Therefore, reading sections 916.45 and 916.32(8)(g) together, we conclude that the Act applies to all persons who are currently incarcerated and who at some point in the past have been convicted of a sexually violent offense. Such a reading of the Act "gives effect to all statutory provisions and construes related statutory provisions in harmony with one another." See Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992). We find that the Ryce Act does not require

> that the respondent's current incarceration be for a sexually violent offense.

Hale v. State, 891 So. 2d 517, 521-522 (Fla. 2004).

The State acknowledges that Hale dealt with the pre-1999 version of the SVPA (this case is controlled by the original version of the Act contained in sections 916.31 -.49, Florida Statutes (Supp. 1998), not the 1999 version). Hale, at 520. However, the rationale is similar to the present situation, as noted by the trial court in its order. The Hale decision made clear that total confinement, as used in the Act, need not be for a sexually violent offense. The Act applies to all persons convicted of a qualifying sexually violent offense and who are then subsequently convicted of a crime and sentenced to total confinement. This is apparently the construction that is given by the Second District Court of Appeal. In Gordon v. Regier, 839 So. 2d 715, 716 (Fla. 2d DCA 2003), the State petitioned for involuntary civil commitment of Gordon as a sexually violent predator. However, Gordon was released from DOC custody on April 6, 2000. He was arrested two days later on a warrant issued pursuant to a letter under §394.9135, Fla.Stat. (2000). The Second District found that the person must be in custody or in "total confinement" for the Act to apply and that Gordon was not in custody when the petition was filed and, therefore, the Act was not applicable to him. The court

continued by noting, "[T]he Act could be applicable to Mr. Gordon in the future should he ever be sentenced to total confinement. See § 394.925." Gordon, at 716 fn 1. The Second District has implicitly held that, under the second section of § 394.925, the SVPA is applicable to those convicted of a sexually violent crime in the past and subsequently sentenced to total confinement.

As the State noted below, State v. Atkinson, 831 So. 2d 172, 173 (Fla. 2002) is not dispositive in this case. The Supreme Court was asked to resolve whether the custody requirement should be read to include "lawful custody." Atkinson was in custody when the petition was filed but it was subsequently determined that the custody was not lawful because he was resentenced pursuant to Heggs v. State, 759 So. 2d 620 (Fla. 2000). Although in custody, his sentence should have expired at the time the petition was filed.

This Court stated, "Section 394.925, Florida Statutes (2001), provides **in pertinent part** that the Ryce Act 'applies to all persons currently in custody who have been convicted of a sexually violent offense.'" Atkinson at 173. (e.s.). Thus, the current issue regarding the language, "as well as to all persons convicted of a sexually violent offense and sentenced to total confinement in the future" was not addressed. In fact, this Court specifically declined to address the issue now being raised. "The section further provides that the Act applies to 'all persons convicted

of a sexually violent offense and sentenced to total confinement in the future.' **We do not address this language**, as it clearly does not apply to Atkinson." Atkinson, at 174, fn 3(e.s.). The State submits that Atkinson is of no consequence to the present issue.

The issue before this Court is whether the phrase "in the future" applies only to the "sentenced to total confinement," or to both the "sentenced to total confinement" and the "convicted of a sexually violent offense." The State contends that "in the future" refers only to the sentence of "total confinement." A traditional rule of statutory construction known as the doctrine of the last antecedent "provides that relative and qualifying 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). Applying that principle, the qualifying phrase "in the future" applies to the immediately preceding phrase, "sentenced to total confinement," and not to the more remote phrase, "convicted of a sexually violent offense."

Nasworthy provides an example of the application of this principle. The relevant provision of the workers' compensation act stated:

> . . . . Impairment income benefits are paid weekly at the rate of 50 percent of the employee's average weekly

> temporary total disability benefit not to exceed the maximum weekly benefit under s. 440.12.

Id., at 774. In construing this provision, the court had two alternatives. The qualifying phrase "not to exceed . . .," could apply to either the immediately preceding language, i.e., "the employee's average weekly temporary total disability benefit," or to the more remote phrase, "impairment income benefits." Id. While the trial court had applied the qualifying language to the initial phrase, "impairment income benefits," the appellate court held that was erroneous, as the qualifying phrase applied only to the immediately preceding phrase, "the employee's average weekly temporary total disability benefit." Id. The same principle would apply to limit the phrase "in the future" to the immediately preceding phrase, "sentenced to total confinement."

Another example supports the same conclusion. In Kirksey v. State, 433 So. 2d 1236, 1239-41 (Fla. 1st DCA 1983), the court was interpreting § 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."

Kirksey, 433 So. 2d at 1239. The court was required to determine 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, the court concluded that 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.

It has long been the law that "[t]he legislature is presumed to know the meaning of words and the rules of grammar . . .." Florida State Racing Comm'n v. Bourquardez, 42 So. 2d 87, 88 (Fla. 1949). See Campus Crusade for Christ v. Unemployment Appeals Com'n, 702 So. 2d 572, 576 (Fla. 5th DCA 1997). Clearly, the doctrine of the last antecedent is a well-recognized rule of grammar, regularly used in resolving issues involving statutory construction. See Vreuls v. Progressive Emplr. Servs., 881 So. 2d 688, 691 (Fla. 1st DCA 2004); Nasworthy; Kirksey. Black's Law Dictionary defines the rule of last antecedent 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, 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.

Black's Law Dictionary 794 (5th ed. 1979). Clearly, then, the doctrine is important

in deciding issues such as that in the instant case.

The doctrine is explained in a published work authored by a law professor at the University of Alabama. He writes:

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.' Thus a proviso usually is construed to apply to the provision or clause immediately preceding it. . . . Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.

Norman J. Singer, Statutes and Statutory Construction, Vol. 2A, at 369-72 (6th ed., 2000 Revision, West Group).

At bar, the qualifying phrase "in the future" is not separated from the antecedents by a comma. Thus, there is no evidence that it is supposed to apply to all antecedents. As a result, the correct application of the qualifying phrase "in the future" is to the last antecedent only, "sentenced to total confinement." See Id.

Therefore, should this Court find that the statutory terms are ambiguous, then ordinary and common statutory construction and interpretation leads to the conclusion advocated by the State. "[W]hile extrinsic aids and rules of statutory construction and interpretation are available to courts where statutes are

ambiguously worded, 'when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'" Hott Interiors, Inc. v. Fostock, 721 So. 2d 1236, 1238 (Fla. 4th DCA 1998); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)(quoting A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So. 157 (1931)).

Statutory rules of construction indicate that the interpretation of the provision advocated by Respondent herein should prevail. "The Ryce Act serves the dual state interests of providing mental health treatment to sexually violent predators and protecting the public from these individuals." Westerheide v. State, 831 So. 2d 93, 112 (Fla. 2002). "The provisions of statutes enacted in the public interest should be given a liberal construction in favor of the public." Dep't of Envtl. Reg. v. Goldring, 477 So. 2d 532, 534 (Fla. 1985). Thus, the statutory provision at issue should be liberally construed to authorize commitment proceedings where the individual has any conviction for a sexually violent offense and the sentence of total confinement occurs in the future, i.e., after January 1, 1999.

This reading of the statute fully comports with the rationale employed by this Court in Hale (the Act applies to all persons who are currently incarcerated and who at some point in the past have been convicted of a sexually violent offense. Such a

reading of the Act "gives effect to all statutory provisions and construes related statutory provisions in harmony with one another."). The State's proposed interpretation of the present second proviso, that "in the future" applies to "sentenced to total confinement", does the same and yields the same result as Hale. A person need not be sentenced to total confinement for a sexually violent offense for the Act to apply. It is sufficient that a person have committed a sexually violent offense at some point and that he subsequently is incarcerated in total confinement.

As the State pointed out below, a person with prior convictions for sexually violent crimes and in need of treatment may be arrested and prosecuted for a non-sexually violent crime. Both the trial court and district court of appeal correctly concluded that the statute was intended to deal with those sexually violent predators that are determined to have an ongoing mental illness and this reading of the Act's applicability ensures the dual interests of the State in protecting its citizens and providing treatment for dangerously mentally ill persons. Westerheide.

Additional support for the State's position is this Court's recent rule-making regarding the Jimmy Ryce Act. The admonishments to a defendant entering a plea must now include,

> (9) that if the defendant pleads guilty or nolo contendere, and the offense to which the defendant is pleading is a sexually violent offense or a sexually motivated offense, **or if the defendant has been previously convicted of**

> **such an offense**, the plea may subject the defendant to involuntary civil commitment as a sexually violent predator upon completion of his or her sentence. It shall not be necessary for the trial judge to determine whether the present **or prior offenses** were sexually motivated in this respect, as this admonition shall be given to all defendants in all cases.

In Re Amendments To Florida Rule of Criminal Procedure 3.172, 911 So.2d 763, 765 (Fla. 2005). (e.s.). As explained by the district court,

> This advice would amount to an incorrect statement of law and have no effect other than engendering unnecessary dread in defendants considering or making pleas if prior convictions for sexually violent offenses could not later be used as a basis for a Ryce Act action. Amended Rule 3.172 is consistent with our reading of the Ryce Act.

Ward, at 1149-1150.

The district court's opinion comports with the tenets of statutory construction. The plain language of the statue mandates an affirmative answer. Likewise, analysis pursuant to the principals of statutory construction requires and affirmative answer.

Conclusion

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court answer the certified question in the affirmative and affirm the ruling of the Third District Court of Appeal in Ward v. State, 936 So. 2d 1143 (Fla. 3rd DCA 2006), holding that the Jimmy Ryce Act is applicable to Ward and those similarly situated.

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Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to ROY A. HEIMLICH, ESQUIRE, at 1320 N.W. 14th Street, Miami, Florida 33125, and electronically transmitted to royheimlich@msn.com [2] on, this ____ day of January, 2007.

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