IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1764

MICHAEL WARD,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

As originally enacted, the Jimmy Ryce Act[1] applied to persons then in custody and to Apersons convicted of a sexually violent offense in the future.@ Less than six months after the Act had become effective, the legislature added an additional requirement, making the Act applicable to Apersons convicted of a sexually violent offense **and sentenced to total confinement** in the future@ (emphasis added).

The District Court held in this case that the addition of the words Aand sentenced to total confinement@ reversed the meaning of the original provision, and made the Act now applicable to persons convicted of a sexually violent offense **in the past**, even if they did not commit a new sexually violent offense, if they were subsequently sentenced to total confinement for any offense.

Petitioner was not in custody on January 1, 1999 and was not thereafter convicted or any sexually violent offense. Yet the Third District held that the pending proceedings to commit him under the Act were proper because he was sentenced to total confinement for a non-sexual offense after January 1, 1999, and had previously been convicted of a sexually violent offense.

This cause is before the Court on petition for discretionary review. The parties will be referred to as they stood in the District Court. For purposes of this brief, references to AA@ refer to the Appendices submitted with this brief.

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[1] The Act was originally adopted as the AJimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators= Treatment and Care Act@ (*see* Chapter 98-64, Laws of 1998), and will be referred to herein as the Ryce Act, the Act or the statute.

STATEMENT OF THE CASE AND FACTS

Petitioner Michael Ward sought a writ of prohibition in the Third District Court of Appeal, barring the continued prosecution of a civil commitment proceeding brought and pending against him in the Circuit Court, Eleventh Judicial Circuit (Case No. 05-1287CA32, Hon. Peter Adrien), seeking his involuntary commitment as a sexually violent predator under Sections 394.910-930, Florida Statutes (the Ryce Act), on the ground that the Act does not authorize the proceeding because Mr. Ward was not in custody on January 1, 1999, the effective date of the Ryce Act, and has not been convicted of a sexually violent offense since the effective date of the Ryce Act. *See* A1; *see also* A2, A3.

The State Attorney for the Eleventh Judicial District had filed a petition in the Circuit Court on January 19, 2005, seeking to declare Michael Ward a sexually violent predator and to commit him to the Department of Children and Family Services for Acare, control and treatment@ (A4).

The petition did not allege that Ward had been in State custody or any custody on January 1, 1999, the effective date of the Ryce Act; instead, it merely alleged that Ward was Apresently@ in the custody of the State Department of

Corrections (A4 at **&** 3). The State subsequently agreed that Ward had not been in custody on January 1, 1999 (A8 at 1-2).

The petition did not allege that Ward had been convicted of a sexually violent offense subsequent to January 1, 1999, the effective date of the Ryce Act; instead it alleged that Ward had been convicted of a series of sexually violent offenses in 1976, more than 22 years prior to the effective date of the Ryce Act, when he was 24 years old (A4 at **&&** 6,8, and 10). The petition did not set forth the date when Ward, now 52 years old, was released from prison on these charges, nor did it set forth any subsequent convictions for sexually violent offenses, or for other offenses not defined as sexually violent offenses under the statute; *see* Section 394.912(9), defining the term Asexually violent offense.@ The State subsequently acknowledged that Ward was released from his sentences for the 1976 offenses (which were sexually violent offenses) prior to January 1, 1999, and was not in State custody on any charge on January 1, 1999 (A8 at 1-3). The State also acknowledged that Ward had not subsequently been convicted of a sexually violent offense, though he had been convicted of offenses that were not defined as sexually violent offenses, and was serving a State Prison sentence for

such an offense when the State=s petition was filed (A8 at 1-2, 3).[2]

Ward moved to dismiss the petition, on the ground that the statute did not authorize either the institution of the commitment proceeding or the commitment sought where Ward had not been in custody on January 1, 1999, and had not been convicted of any sexually violent offense since the effective date of the Act (A5).

The petition did not allege that Ward met either of these applicable criteria, and Ward affirmatively alleged that he was not in custody on January 1, 1999 (A5 at &3), and had not been convicted of a sexually violent offense subsequent to that date, on which the Ryce Act became effective (A5 at &9).

As noted, the State conceded these factual claims, but asserted that Ward was presently in State custody by reason of a conviction for an offense that is not defined as a sexually violent offense under the Act, and had previously been

[2] Upon the filing of the State=s petition, the trial court found probable cause warranting Mr. Ward=s detention by the Department of Children and Family Services pending the determination of the commitment proceedings, and Mr. Ward has been so detained since.

convicted of a sexually violent offense, and that this was sufficient under the Act.

The State had previously made a similar claim against Mr. Ward. The August 6, 2001 judgment in the prior case (Case No. 01-14851 CA 21) had established that the State could not have Michael Ward committed under the Ryce Act because Ward had not been in State custody on January 1, 1999, and had not been convicted of a sexually violent offense since the effective date of the Ryce Act. *See* A5, A6 and A7. Nothing had changed.

The trial court heard the motion on March 2, 2005 and March 16, 2005 (A10 and A11), and issued a written ruling (A9). The trial court ruled that a person incarcerated after the effective date of the Act for an offense not defined as a sexually violent offense, but who had previously been convicted of a sexually violent offense and been released at the end of his sentence prior to January 1, 1999, is subject to involuntary commitment under the Ryce Act (A12 at 4). The trial court held that the Act applies Ato people who are currently incarcerated even for a non-sexual offense and who have been previously convicted for a sexually violent offense@ (A12 at 4). And the court asserted that the Ryce Act applied to any person who ever been convicted of a sexually violent

crime, and who was thereafter incarcerated for any crime not defined as a sexually violent offense if he was Acurrently incarcerated **when the petition for civil commitment is filed**@ (A12 at 4, emphasis added).

The trial court indicated that this interpretation of the statute was derived from *Hale v. State*, 891 So. 2d 517, 521 (Fla. 2004) (defendant in custody on January 1, 1999 for offense not defined as a sexually violent offense). The trial court did not explain the basis for its conclusion that the rule in *Hale* also applied to a defendant such as Ward, released from incarceration for a sexually violent offense prior to January 1, 1999, not in custody on January 1, 1999, and not convicted of a sexually violent offense subsequent to January 1, 1999, but who been convicted of another offense and was in custody for that offense in January 2005.

The Third District denied the petition for a writ of prohibition, in an opinion by Judge Shepard, in which Judge Rothenberg joined; Chief Judge Cope dissented. *Ward v. State*, 936 So. 2d 1143 (Fla. 2006); *see* A17.

The Third District ruled that, Aunder the better reading and interpretation of this section,@ though Ward had not been in custody on January 1, 1999, and though he had not subsequently been convicted of a sexually violent offense, he

could be committed if, subsequent to January 1, 1999, he was sentenced to total confinement for a non-sexual offense, because he had been convicted of a sexually violent offense prior to January 1, 1999. *Ward*, 936 So. 2d at 1145.

The court considered Athe legislature=s placement of the amending language between the substantive phrase >sexually violent offense= and the prepositional phrase >in the future,= evidence that the legislature@ intended an expansion rather than a contraction of the Act=s scope. *Ward*, 936 So. 2d at 1146.

The Third District relied upon the grammatical doctrine of the last antecedent to find the meaning of the statute. ABecause the legislature elected to insert the amending language into the statute as it did, immediately prior to the qualifying prepositional phrase >in the future,= this canon impels us to conclude that the legislature intended the prepositional phrase >in the future= to modify the added language >and sentenced to total confinement= **but not** the remote phrase >sexually violent offense.= Our belief that the 1999 amendment was intended to **expand** and harmonize the second clause with the first rather than reduce its reach is fortified by this analysis.@ *Ward*, 936 So. 2d at 1147 (emphasis added).

The Third District purported to embrace the holding of *State v. Atkinson*, 831 So. 2d 172, 173-74 (Fla. 2002), saying Ait is now settled law that the purpose of the first clause is to address sexual predators who were in custody on the Ryce Act=s effective date, January 1, 1999, *see State v. Atkinson*, 831 So.2d 172, 173-74 (Fla. 2002) (confirming that the phrase >currently in custody= in the first clause means in custody as defined by the Act on January 1, 1999) . . . .@ *Ward,* 936 So. 2d at 1143.

However, the Third District also stated:

> A[W]e find the notion argued by the petitioner in support of relief here that the legislature necessarily intended a single-day prism for purposes of gathering all past offenders to be rationally farfetched. Cf. *Gordon*, 839 So. 2d at 716 n. 1 (stating that while the petitioner could not be committed under the Afirst clause@ of section 394.925 because he was not in custody at the time the proceeding was commenced, A[t]he [Ryce] Act **could** be applicable to [him] in the future should he ever be sentenced to total confinement@); *Tabor v. State*, 864 So.2d 1171, 1174 (Fla. 4th DCA 2004)(stating in a Aclause one@ case that AAppellant=s argument that his current incarceration must be as a result of a sexually violent offense is refuted by . . . other provisions of the Ryce Act. . . .@).

Ward, 936 So. 2d at 1147-48.[3] The Third District thus apparently rejected the rulings in *Atkinson* and *Hale* that custody status on January 1, 1999 is controlling as to the applicability of the statute, and construed statements that the issue was open as indicating that it had been decided where it had not been presented.[4]

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[3] Mr. Tabor had been in custody on January 1, 1999, and was thus subject the rule in *Hale v. State*, while Mr. Ward was **not** in custody at all on January 1, 1999.

[4] Indeed, the statement quoted from *Tabor* is wholly out of context, since Mr. Tabor was in custody on January 1, 1999; the statement in *Gordon* is the baldest dictum.

The District Court also claimed that Athe interaction of the [applicability provision] with other sections of the Ryce Act compels the conclusion we draw.@ *Ward*, 936 So. 2d at 1147. The District Court reviewed several provisions that it suggested were meaningless if they did not apply to persons not in custody on January 1, 1999, or that could meaningfully be applied to persons not in custody on January 1, 1999. All of these provisions were directly applicable to persons who **were** in custody on January 1, 1999 for non-sexual offenses, but who had previously been convicted of a sexually violent offense, either in Florida or elsewhere, and thus were eligible for commitment under *Hale v. State*, 891 So. 2d 517 (Fla. 2004).[5] The District Court did not explain why these provisions were meaningless or how they indicated intent to apply the Act to persons not in custody on January 1, 1999 who were not subsequently convicted of a sexually violent offense.

Judge Rothenberg Acompletely@ concurred with Judge Shepard=s analysis and conclusion, and wrote separately to assert that a statute that turned upon whether a person was or was not in custody on January 1, 1999 would violate the Equal

[5] These provisions pertain to notice and the furnishing of medical records, to persons in custody who were convicted of a sexually violent offense in another jurisdiction, and to the gathering of statistical information as to prior offenses. All applied to persons in custody on January 1, 1999.

Protection Clause of the United States and Florida Constitutions because

Ait would provide for the disparate treatment of individuals who had the ill-fortune of being incarcerated (for any offense) at the time the amended Act was passed, versus those who were not confined when the amended Act became effective, but who were later convicted and confined.@ *Ward*, 936 So. 2d at 1151-52.

Judge Rothenberg also indicated that such an interpretation Amakes no sense whatsoever.@ *Id*.

Chief Judge Cope dissented. He noted that Mr. Ward had not been in custody on January 1, 1999, and that he had not there-after been convicted of a sexually violent offense, and that he therefore could not be committed under the original version of the Ryce Act. *Ward*, 936 So. 2d at 1153. The Chief Judge noted that the original applicability provision applied to persons in custody and Aall persons convicted of a sexually violent offense in the future.@ ' 916.45, Florida Statutes (Supp. 1998). Judge Cope explained:

> Under this language, an offender qualified if he was convicted of a sexually violent offense Ain the future.@ The effective date of the Act was January 1, 1999, so Ain the future@ meant after January 1, 1999. Therefore an offender qualified for civil commitment if he was convicted of a sexually violent offense after January 1, 1999. The majority opinion and this opinion are unanimous on that point.

Ward, 936 So. 2d at 1153.

Judge Cope explained the effect of the May 1999 amendment:

AThe 1999 amendment added -- using the word Aand@ -- a second requirement for an offender to qualify for civil commitment: the defendant had to be sentenced to total confinement. . . . [The amended language now applied to] ›**all persons convicted of a sexually violent offense and sentenced to total confinement in the future.**= ' 394.25, Fla. Stat. The Act already required that an offender had to be convicted of a qualifying offense after January 1, 1999. The Legislature simply added a second requirement: the defendant had to be sentenced to total confinement.@ *Ward*, 936 So. 2d at 1154 (emphasis in original).

Chief Judge Cope addressed the claim that adding new language had changed the meaning of the original language:

> The majority opinion says that by adding new language to the statute, the Legislature changed the meaning of the already existing language. That is not correct.
>
> The majority acknowledges that the eligible group was originally Aall persons convicted of a sexually violent offense in the future,@ i.e., after January 1, 1999. The majority says that because the Legislature inserted new language before Ain the future,@ it follows that the Legislature intended Ain the future@ to apply only to the new phrase, not the old phrase.
>
> Respectfully, this is contrary to common understanding. The Jimmy Ryce Act already had an accepted meaning: that it applied to persons convicted of a qualifying offense after January 1, 1999. Under ordinary drafting practices, if the Legislature had wanted to change that part of the statute, it would have done so expressly and not by mere implication.

> Provisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law.@ 1A Norman J. Singer, *Statutes and Statutory Construction* ' 22:33, at 392 (2002).

Ward, 936 So. 2d at 1154.

Chief Judge Cope disagreed with the Court=s reliance upon the doctrine of the last antecedent. He pointed out that the rule applies only where no contrary intent appears, and does not serve to override the intent of the draftsman. He concluded:

AIn this case the most relevant pronouncement is one by Justice Brandeis on behalf of the Supreme Court many years ago. >When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.= *Porto Rico Ry. v. Mor,* 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920). The rule of the last antecedent has no application here.@ *Ward*, 936 So. 2d at 1156.

Chief Judge Cope rejected the claim that an amendment to Rule 3.172 (*see In Re: Amendments to Florida Rule of Criminal Procedure 3.172*, 911 So. 2d 763, 765 (Fla. 2005)), providing for warnings of possible Ryce Act commitments in connection with guilty pleas, was a construction of the applicability provision of the Ryce Act.[6] AThe law is well

[6] This claim is somewhat startling. The State here contends that a person previously convicted of a sexually violent offense may be committed if thereafter sentenced to total confinement for a non-sexual offense. Surely this warrants a warning to someone contemplating a guilty plea. The claim here is that, because the warning is authorized, the statutory construction urged by the State is correct. The claim would make the warning a self-fulfilling prophesy.

established that in adopting procedural rules, the court does not adjudicate substantive rights. *See Ramos v. State*, 505 So.2d 418, 421 (Fla.1987).@ *Ward*, 936 So. 2d at 1156.

Finally, Chief Judge Cope addressed the equal protection claim. AThe parties have made no such argument in this case. The State has defended the trial court=s ruling on the basis of grammatical rules, not constitutional rules. If the constitutional issue were properly before us (which it is not), the Legislature is allowed to, and has a rational basis for, narrowing the group eligible for civil commitment if it wishes to do so.@ *Ward*, 936 So. 2d at 1156.

This Court granted discretionary review.

SUMMARY OF ARGUMENT

As originally enacted, the Ryce Act applied to past offenders in custody and to persons Aconvicted of a sexually violent offense in the future.@ Less than six months after it became effective, the applicability provision of the statute was amended, by inserting the words Aand sentenced to total confinement,@ so that it applied to persons Aconvicted of a sexually violent offense and sentenced to total confinement in the future.@

Notwithstanding the amendment, the words Ain the future@ continued to modify Aconvicted of a sexually violent offense@ in the amended statute as in the original. Nothing indicates a legislative intent to reverse the meaning of the original statutory language and now have the statute apply to all persons convicted of a sexually violent offense in the past, regardless of whether or not they were in custody with the meaning of the original scope provision. The intent was to contract the statute by adding an additional requirement, not to expand it, as is apparent from the lack of inquiry as to the cost of the supposed expansion.

ARGUMENT

I

THE ACT APPLIES ONLY TO THOSE WHO COMMIT A SEXUALLY VIOLENT OFFENSE AFTER JANUARY 1, 1999, OR WHO WERE IN CUSTODY ON JANUARY 1, 1999

As originally enacted, the Ryce Act applied to past offenders in custody and to persons Aconvicted of a sexually violent offense in the future.@ Less than six months after it became effective, the applicability provision of the statute was amended, by inserting the words Aand sentenced to total confinement,@ so that it applied to persons Aconvicted of a sexually violent offense and sentenced to total confinement in the future.@

Notwithstanding the amendment, the words Ain the future@ continued to modify Aconvicted of a sexually violent offense@ in the amended statute as in the original. Nothing indicates a legislative intent to reverse the meaning of the original statutory language and now have the statute apply to all persons convicted of a sexually violent offense in the past, regardless of whether or not they were in custody with the meaning of the original scope provision.

The Act applies to persons convicted of a sexually violent offense in the past only if they were in custody when

the Act was adopted or if they are convicted of a sexually violent offense in the future. The legislature limited the scope of the Act in this fashion for economic reasons, not for reasons of logic or policy.

A.

The Original Applicability Provision of the Ryce Act, 916.45, Florida Statutes (1998 Supp.), Made the Act Applicable Only to Persons Who Were Convicted of a Sexually Violent Offense in the Past and in Custody on January 1, 1999, and to Persons Convicted of a Sexually Violent Offense in the Future

Section 394.925, Florida Statutes (2000) was originally enacted, effective January 1, 1999, as Section 916.45, Florida Statutes (1998 Supp.). *See* Chapter 98-64, Section 17, 1998 Laws of Florida, effective January 1, 1999.[7] As originally enacted, it 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.

[7] *See* Section 394.925, Florida Statutes (2000); *see also* Chapter 99-222, Section 20, 1999 Laws of Florida, effective May 26, 1999.

The statute thus covered two groups of people. It covered people who were convicted of sexually violent offenses in the future, and it covered people who had been convicted of sexually violent offenses in the past, and who were in custody on January 1, 1999, when the statute became effective. People who had been convicted of sexual offenses in the past but who were not in custody were plainly not covered.

The purposes of the statute would be served by applying it, as the Baker Act is applied, to all those who are dangerous, regardless of whether they have been convicted of an offense; instead the Act applies only to those who have been convicted of a sexually violent offense. Similarly, the statute=s purposes would be served by applying it to anyone who ever been convicted of a sexually violent offense; instead, the applicability of the Act is limited to those in custody, and those who commit new offenses in the future. One who has been convicted of a sexually violent offense, has served his sentence and has been released, may have been deterred, cured or rehabilitated. If he was not in custody on January 1, 1999, the statute does not reach him unless he commits Aa sexually violent offense . . . in the future.@

It is apparent that the statutory language in the last clause of Section 916.45, Aas well as to all persons convicted

of a sexually violent offense in the future,@ was meaningless and surplusage unless the language Acurrently in custody who have been convicted of a sexually violent offense@ means Ain custody as of January 1, 1999.@ If, as the State has contended, and as the trial court suggested, Acurrently in custody@ means in custody when a proceeding for involuntary commitment is commenced,@ anyone convicted of an offense that is not a sexually violent offense after the effective date of the statute would be Acurrently in custody@ at the end of their sentence, when the statute contemplates that a civil commitment proceeding may be instituted. Under that reading of Acurrently in custody,@ there would be no need to add Aas well as to all persons convicted of a sexually violent offense in the future,@ because those people would be Acurrently in custody@ when the commitment proceedings were commenced.

This was not what the legislature understood. It understood, considering the budgetary and related considerations referred to below, that the persons Acurrently in custody@ were those in custody on January 1, 1999, when the Act took effect. The number of such persons determined how many commitment proceedings might initially be instituted, what costs would be incurred to prosecute them, and how many people might initially be committed to facilities not yet in existence or

funded. With that understanding, and because of it, it was necessary to add Aas well as to all persons convicted of a sexually violent offense in the future,@ so that future offenders not in custody on January 1, 1999 would be included. The legislature could easily have provided that the statute applied to Aevery person now or hereafter in State custody who ever been convicted of a sexually violent offense.@ It did not do so.

The correctness of this interpretation is confirmed by analysis of the Atotal confinement@ language. The original statute, Section 916.32(10), Florida Statutes (1998 Supp.), set forth a definition of total confinement. Though it was less expansive that the definition subsequently incorporated in Section 394.912(11), Florida Statutes (2000), both definitions made plain that one was not in Atotal confinement@ unless one was in State custody. Both Section 916.45 and Section 394.925, in initially defining the scope of the statute=s application, referred initially to persons Acurrently in **custody**,@ (emphasis added), **not** to persons currently in Atotal confinement.@ Plainly the initial intent was to make the statute potentially applicable to those in county jail

when the statute took effect.[8] As is more fully set forth below, the original statute covered anyone convicted in the future, and the revised statute excluded those convicted in the future but not sentenced to total **confinement**. But it is plain that the legislature indicated no intent to have the involuntary commitment program cover persons not in any custody or confinement at all on January 1, 1999, unless they committed a sexually violent offense in the future.

In *Atkinson v. State*, 791 So. 2d 537 (Fla. 2d DCA 2001), *approved*, 831 So. 2d 172 (Fla. 2002), Atkinson=s criminal sentence had been corrected so that he was not lawfully in

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[8] Accordingly, the cases suggesting that there is no difference between Ain custody@ and Asentenced to total confinement@ are mistaken to the extent that defendants in county jail on January 1, 1999 may be committed. In *Gordon v. Regier*, 839 So. 2d 715 (Fla. 2d DCA 2002), defendant was on conditional release, not in custody, and Awas taken into custody pursuant to DCF=s warrant.@ *Gordon*, 839 So. 2d at 719. The Second District indicated that the legislature used two terms, custody and Atotal confinement,@ to mean the same thing, when Gordon was plainly not in either in custody or Atotal confinement.@ *Gordon* did not address whether Mr. Gordon could have been committed if he had been in county jail, rather than on conditional release. Indeed, the *Gordon* opinion is opaque as to whether Mr. Gordon had been in custody or on conditional release on January 1, 1999. A person in the county jail is in custody (and if in custody on January 1, 1999, may be committed if he was previously convicted of a sexually violent offense); a person convicted of a sexually violent offense in the future may not be committed unless he is also sentenced to total confinement. Since Atotal confinement@ requires state custody, it is easy and economical for the state to locate and evaluate the persons already under its control.

custody on January 1, 1999 when the Ryce Act took effect. The Second District held that Ainsofar as the Act applies to >all persons currently in custody,: **it is limited to persons who were in lawful custody on its effective date**.@ *Atkinson*, 791 So. 2d at 539. The Second District certified the following question as one of great public importance: ADoes the Jimmy Ryce Act apply to persons convicted of sexually violent offenses before the effective date of the act who were not in lawful custody on the effective date of the act?@ *Atkinson*, 791 So. 2d at 539.

This Court answered the certified question in the negative and approved the Second District decision, adding A**we hold that the Ryce Act is limited to persons who were in lawful custody on its effective date**.@ *Atkinson*, 831 So. 2d at 174.

Atkinson is entirely in accord with *State v. Siddal*, 772 So. 2d 555 (Fla. 3d Cir. 2000). Siddal was not in custody on January 1, 1999; he was on probation. The Court ruled that a defendant on probation was not in custody on the effective date of the Act, and therefore could not be involuntarily committed. The thrust of *Atkinson* and *Siddal* is that if those respondents had not been illegally held or on probation, they would have been at liberty, not in custody, on the effective

date of the Act and therefore not subject to involuntary commitment. It is not insignificant that the legislature has not subsequently revised the statute. There may be many reasons for legislative inaction, but it is nonetheless significant that since *Atkinson* the legislature has not taken action to change the interpretation that Athe Ryce Act is limited to persons who were in lawful custody on its effective date.@ The implication that *Atkinson* correctly read what the legislature wrote is compelling.

Subsequently, in *Hale v. State*, 891 So. 2d 517, 521 (Fla. 2004), this Court held that people who had been convicted of sexually violent offenses in the past and who were in custody on January 1, 1999, when the Act took effect, by reason of sentences for other offenses, were covered by the Act even though on January 1, 1999 they were not in custody by reason of convictions for their sexually violent offenses. *See also Tabor v. State*, 864 So. 2d 1171 (Fla. 4th DCA 2004). These cases do not reach the situation here, because Mr. Ward was not in custody on January 1, 1999, and has not been convicted of any sexually violent offense since that date. Neither do these cases impact upon the established holding that the Ryce Act applies only to persons who were in custody on January 1, 1999, the effective date of the Act, and persons who commit

sexually violent offenses subsequent to the effective date of the Act.

Nothing in *Hale v. State*, 891 So. 2d 517, 520-22 (Fla. 2004), remotely indicates that the *Hale* Court intended to recede from *Atkinson* or authorize commitment proceedings against persons who were not in custody on January 1, 1999, though *Atkinson* said the Act did not permit them. Mr. Hale was in custody on January 1, 1999, for an offense that was not a sexually violent offense under the Act; he had previously been convicted of, served his sentence for and been released from his sentence for a sexually violent offense. In accordance with the Act, *Hale* held he could be civilly committed, as a person who had previously been convicted of a sexually violent offense and who was in custody on January 1, 1999 for an offense that was not a sexually violent offense. Nothing indicated that Mr. Hale could have been committed if he had not been in custody on January 1, 1999 and did not commit a sexually violent offense after the effective date of the Act.[9]

[9] The civil commitment proceeding in *Hale* was commenced on April 26, 1999, and the court held that the original version of the Act, rather than the amended version that took effect on May 26, 1999, applied. Nothing suggested that custody when the proceeding was commenced, rather than custody on January 1, 1999, was relevant to the applicability of the

Act. The *Hale* opinion also stated (*Hale*, 891 So. 2d at 522) that Athe Act applies to all persons currently incarcerated.@ This language paraphrases the statutory language and the language of *Atkinson*, and nothing suggests that it was intended to apply to circumstances not before the *Hale* Court, involving a respondent such as Ward who was not in custody on January 1, 1999. *Gordon v. State*, 839 So. 2d 715 (Fla. 2d DCA 2003), *review denied*, 890 So. 2d 1115 (Fla. 2004), subsequently held that the present statute requires that respondent be in total confinement when the civil commitment proceeding is commenced. Nothing in *Gordon* remotely suggests that a showing that respondent is in total confinement obviates the need to show either that he was in custody on January 1, 1999 or that he thereafter committed a sexually violent offense.

Tabor is to the same effect, as the Court noted in *Hale*. Tabor was in custody on January 1, 1999 for an offense that was not a sexually violent offense under the Act; he had previously been convicted of a sexually violent offense, and been released from the sentence imposed for that offense. The *Tabor* court reasoned that the provisions for civil commitment of persons in Florida custody on January 1, 1999 who had previously been convicted of sexual violent offenses elsewhere demonstrated that it was not necessary that a person in custody on January 1, 1999 be in custody for a sexually violent offense. Nothing in *Tabor* indicates that a person who previously been convicted of a sexually violent offense but who was **not** in custody on January 1, 1999 can be civilly committed if, after the effective date of the Act, he commits an offense which is **not** a sexually violent offense under the Act.

B.

The Original Applicability Provision of the Jimmy Ryce Act, Section 916.45, Florida Statutes (1998 Supp.), Was Added to the Proposal Set Forth in the Original Bill Providing for the Civil Commitment of Sexually Violent Predators to Reduce the Scope and Cost of the Original Proposal

House Bill 3327 (1998) (*see* A13), which ultimately became the Ryce Act, originally contained a provision, in Section 5, that authorized involuntary commitments not only of Aa person presently confined@ but also of Aa person who is not presently confined but who has previously been convicted or a sexually violent offense@ and who Ahas committed a recent overt act;@ Section 3 of the bill defined an overt act as Aany act that either causes harm of a sexually violent nature or that creates a reasonable apprehension of such harm.@ *See* A13 at 6. When the bill was in this form, it contained no applicability provision such as the one here in question, and such as was subsequently enacted as Section 916.45, Florida States (1998 Supp.), now Section 394.925. This bill plainly called for the commitment of persons who were not in custody and without any subsequent conviction.

The Staff Research and Economic Impact Statement with respect to this bill indicated that broadening the scope of the Kansas statute (on which the bill was modeled) to include persons not in custody who committed overt acts would add at least 4300 people who might be committed who were then under Community Supervision (A14 at 8).

The Economic Impact Statement went on to indicate that there were 6,040 persons in Florida potentially eligible for

sexual predator commitment under the bill, estimated that 25% of these would actually be committed, that the cost for each person committed would be $100,000 per year or more, and that the total cost for the first year of the program would be **$151 million** or more, and would Agrow incrementally.@ *See* A14 at 20.

Thereafter, and prior to final passage, the bill was revised. Section 5 was rewritten and the provisions for the commitment of persons who were not in custody, on the basis of Aovert acts@ and without any subsequent conviction, were dropped. Instead, the applicability provision subsequently enacted as Section 916.45, Florida States (1998 Supp.), now Section 394.925, was added by a new Section 17 of the bill, providing the Act would apply Ato all persons currently in custody who have been convicted of a sexually violent offense . . . as well as to all persons convicted of a sexually violent offense in the future.@ *See* A15.

The Revised and Final Staff Research and Economic Impact Statement now indicated that the total number of persons who might qualify for commitment was approximately 1,413, and that Ait is estimated that approximately 60 will be committed to the program during the next fiscal year.@ A16 at 9. The legislature funded the program with appropriations totaling

6.4 million, slightly over $100,000 for each of the 60 persons expected to committed under the reduced scope and applicability of the Act. *See* A15 at 11.

It is thus apparent that the applicability of the bill and the scope of the program was specifically limited because of budgetary concerns. The view that limiting the Act to persons in custody on January 1, 1999 and persons who commit an new sexually violent offense Awould lead to an absurd result@ (A. 12 at 4) or Amakes no sense@ is blind to the budgetary realities that dictated limitations on the scope of the program. The legislative intent to limit the Ryce Act to persons in custody when the Act became effective and persons who were convicted of a sexually violent offense after its effective date could not be any more clearly indicated than where the original bill would have applied the Ryce Act to persons who had not committed a new sexually violent act and those provisions were deleted to reduce the cost of the program.

C.

The Scope Provision Was Amended in 1999 to Further Reduce the Scope of the Civil Commitment Program, by Excluding Persons Convicted of a Sexually Violent Offense in the Future If They Were Not Sentenced to ATotal Confinement@ as Defined in the Act

Less than five months after it took effect, Section 916.45, Florida Statutes (Supp. 1998) was re-enacted as Section 394.925 and amended, effective May 26, 1999. The amended statute, with added emphasis on the new language, read as follows:

> 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.

See Chapter 99-222, Section 20, 1999 Laws of Florida, effective May 26, 1999 (emphasis added); this is the current statute.

The Third District=s ruling, that a respondent can be committed if he is sentenced to total confinement after January 1, 1999, the effective date of the Act, and was previously convicted of a sexually violent offense, is flatly contrary to the statutory language. As amended by Chapter 99-222, Section 20, 1999 Laws of Florida, effective May 26, 1999,

the present statute, Section 394.925, Florida Statutes, applies to Aall persons convicted of a sexually violent offense **and** sentenced to total confinement in the future@ (emphasis added). The word Aand@ unambiguously indicates an additional requirement, not a alternative to a new conviction. The statute previously referred to Aall persons convicted of a sexually violent offense in the future.@ There is no basis at all for the suggestion that, in attempting to limit the Ryce Act to persons sentenced to total confinement, the legislature expanded it because the phase Ain the future@ no longer modifies Aconvicted@ and now modifies only Asentenced to total confinement.@ This is bad grammar, worse statutory interpretation and wholly inappropriate perversion of the plain legislative intent.

Plainly the legislature intended to continue the meaning of the prior statute, under which a conviction for a sexually violent offense Ain the future@ was required, and add the addition requirement that a person convicted in the future also be sentenced to total confinement. AProvisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law.@ 1A Norman J. Singer, *Statutes and Statutory Construction* ' 22:33 (Cum. Supp. 2002). *Accord, Burdick v. State*, 594 So. 2d 267, 271 (Fla. 1992) (when a statute is amended and

reenacted, A[i]t is a well-established rule of statutory construction that . . . the judicial construction previously placed on the statute is presumed to have been adopted in the reenactment@); *Deltona Corp. v. Kipnis*, 194 So.2d 295, 297 (Fla. 1st DCA 1966).

The District Court suggested that an interpretation requiring a new conviction for a sexually violent offense would render meaningless the provisions in Section 394.913 applicable where the defendant has been convicted a sexually violent offense in another state. Nothing in Section 394.913 remotely indicates that, as the District Court assumed, a defendant who was not in custody on January 1, 1999 can be committed if he is convicted of a sexually violent offense in another state, and then is sentenced to total confinement in Florida for a non-sexual offense. Section 394.913 was intended to cover persons who were in custody in Florida on January 1, 1999 and who had previously been convicted of a sexually violent offense in another state. Nothing in that provision would be rendered meaningless by a holding that, aside from persons who were in custody on January 1, 1999, only persons convicted of a sexually violent offense in the future (and sentenced to total confinement) may be committed. Likewise the notice and medical records provisions of the

Act, and the provisions requiring the gathering of statistical information, apply to persons who were in custody on January 1, 1999, and do not indicate any intent to cover persons who were not in custody on January 1, 1999 and who were not thereafter convicted of a sexually violent offense.

The State contends, and the trial court held, that Mr. Ward is subject to the Act because, on **January 19, 2005**, when the petition for his involuntary commitment was filed, he was in State custody for other offenses that are admittedly not sexually violent offenses under the Act. This contention is rested in part upon the language added to the statute in 1999, Aas well as to all persons convicted of a sexually violent offense **and sentenced to total confinement** in the future.@

It is plain beyond question that the purpose of the new language, and the intent of the legislature in adding it, was to exclude from the operation of the involuntary civil commitment program under the Ryce Act persons who been convicted of new sexual offenses for which they received non-state prison sentences, *i.e.*, sentences of 364 days in jail or less, requiring confinement in the county jail. Thus, the Act defines Atotal confinement@ as

> ATotal confinement@ means that the person is currently being held in any physically secure facility being operated

> or contractually operated for the Department of Corrections, the Department of Juvenile Justice, or the Department of Children and Family Services. A person shall also be deemed to be in total confinement for applicability of provisions under this part if the person is serving an incarcerative sentence under the custody of the Department of Corrections or the Department of Juvenile Justice and is being held in any other secure facility for any reason.

Section 394.912(11), Florida Statutes (2000).[10]

Under the amended statute, persons whose new offenses result in the imposition of sanctions less than total confinement are not subject to the involuntary commitment provisions of the Ryce Act. The language added by the legislature effective May 26, 1999 will not bear the meaning that the State would attribute to it, that a new conviction for sexually violent offense is no longer required, whether the language is considered on its face or in the context of the prior statute which was amended.

Finally, it is the State=s contention that the statute applies to anyone in State custody for any reason who was ever

[10] This definition was adopted by Chapter 99-222, Section 5 Laws of 1999, effective May 26, 1999, and is thus contemporaneous with Section 394.925; the provisions were adopted together.

convicted of a sexually violent offense. Section 394.912(10) (formerly Section 916.32(9)) defines a sexual predator in part as a person who has Abeen convicted of a sexually violent offense.@ Accordingly, if the State=s contention were correct, the legislature needed only to have said the statute applies to Aall persons in custody.@ It did not. The Constitution prescribes the manner in which the legislature is to legislate. *See Heggs v. State*, 759 So. 2d 620 (Fla. 2000). The legislative process is not properly implemented by having the executive or the courts come along after the fact and say Athat=s what they really meant.@ Still less is that appropriate where the words of the statute will not even bear the meaning sought to be ascribed, and it is necessary to disregard legislative language to arrive at the statute the courts think the legislature should have adopted.

D.

The Words Ain the future@ Originally Modified Aconvicted of a sexually violent offense@ and Required a conviction for a Sexually Violent Offense in the Future; inserting Aand sentenced to total confinement@ Did Not **Reverse** the Original Meaning and Make the Act Now Apply to Persons Convicted of a Sexually Violent Offense **In the Past** If Such persons were later Sentenced to Total Confinement for a Non-sexual Offense in the Future

This is not a case where it is claimed that modifying language added to a statute by amendment modified the original statutory language. Rather, the claim here is that the added language (Aand sentenced to total confinement@) so displaced the original modifier (Ain the future@) from the language originally modified (Aconvicted of a sexually violent offense@), that the original modifier (Ain the future@) no longer modifies the language originally modified (Aconvicted of a sexually violent offense@), and the originally modified language now means the **opposite** of what it meant before, (convicted of a sexually violent offense in the past).

There is no indication at all that the legislature intended that. If that had been intended, the legislature could easily have said so. And there is strong evidence that the legislature did not intend that, and thought it was making a slight contraction in the scope of the statute, not an enormous and costly expansion. Given the history of the statute, and the contraction of the original proposal, estimated to cost $151 million, so that the cost would be reduced to $6.4 million, the fact that no Economic Impact Statement was requested or prepared when the statute was amended is proof positive that the legislature did not intend a significant expansion in the scope of the statute; surely if

an expansion of this statute had been intended, the legislature would have wanted to know how much it would cost.

ALegislative intent is the polestar that guides . . . statutory construction analysis,@ and so-called grammatical rules should not be applied so as thwart the intent of the legislature. *Montgomery v. State*, 897 So. 2d 1282, 1285-86 (Fla. 2005); *Deason v. Florida Department of Corrections*, 705 So. 2d 1374, 1375 (Fla. 1998) (Athe primary and overriding consideration in statutory interpretation is that a statute should be construed and applied so as to give effect to the evident intent of the legislature regardless of whether such construction varies from the statute=s literal meaning=@) (quoting *State v. Nunez*, 368 So. 2d 422, 423 (Fla. 3d DCA 1979); *Royal World Metropolitan v. City of Miami Beach*, 863 So. 2d 320, 321 (Fla. 3d DCA 2003), *rev. den.*, 895 So. 2d 404 (Fla. 2005). Notwithstanding the State=s misplaced reliance upon a supposed canon of construction or grammarian=s rule, the meaning of the statute and the legislative intent are plain.

The statute originally provided:

> Sections 916.31-916.49 apply to all persons currently in custody who have been convicted of a sexually violent offense . . . as well as to all persons convicted of a sexually violent offense in the future.

Section 916.45, Florida Statutes (1998 Supp.) (emphasis added). In the original statute Aconvicted of a sexually violent offense@ was the only antecedent of Ain the future@ and was undoubtedly modified by that phrase.

The legislature thereafter inserted the words Aand sentenced to total confinement.@ Nothing remotely indicates that the legislature intended to change the meaning of the phrase in the original statute Aconvicted of a sexually violent offense in the future.@ Nothing indicates the legislature intended the meaning the State would now attribute to this language, turning the statute on its head: the State claims the statute is now applicable to all persons **convicted of a sexually violent offense in the PAST**!

The legislature did not intend to reverse the meaning of the statute. Plainly the legislature meant Aconvicted of a sexually violent offense in the future@ and Asentenced to total confinement in the future.@ To avoid repetition, the draftsman inserted the Atotal confinement@ language before the phrase Ain the future.@ As amended, the statute referred to Aall persons convicted of a sexually violent offense and sentenced to total confinement in the future.@ The claim that Ain the future@ now modifies only Asentenced to total confinement@ and no longer modifies Aconvicted of a sexually

violent offense,@ because the Atotal confinement@ language has been squeezed into the original phrase (Aconvicted of a sexually violent offense in the future@) would make a supposed grammatical rule trump the intent of the legislature and the constitutional provisions as to how new laws are enacted. A statute is not to be graded like an English paper or interpreted in the manner of a child who thinks chocolate milk comes from brown cows.

The proper interpretation of the statute is even more clear in view of the fact that House Bill 3327 (1998) (*see* A10), which ultimately became the Ryce Act, originally contained a provision for the commitment of Aa person who is not presently confined but who has previously been convicted of a sexually violent offense@ and who Ahas committed a recent overt act.@ *See* A13 at 6. The Staff Research and Economic Impact Statement indicated that the total cost for the first year of the program would be **$151 million** or more, and would Agrow incrementally.@ *See* A14 at 20. Prior to final passage, the bill was rewritten and the provisions for the commitment of persons who were not in custody, without any subsequent conviction, were dropped. Instead, the applicability provision subsequently enacted as Section 916.45, Florida Statutes (1998 Supp.), now Section 394.925, was added by a new

Section 17 of the bill, providing the Act would apply Ato all persons currently in custody who have been convicted of a sexually violent offense . . . as well as to all persons convicted of a sexually violent offense in the future.@ *See* A15. The Revised and Final Staff Research and Economic Impact Statement now indicated a very reduced applicability of the bill, and the legislature funded the program with appropriations totaling **6.4 million**. *See* A15. at 11.

Nothing remotely suggests that, less than six months after the statute became effective, the legislature decided to vastly increase the scope of the recently approved program, by including those who had just been just excluded for budgetary reasons, those who had committed a sexually violent offense in the past but who were not in custody, and without appropriating any additional funds. Only the clearest indiction of legislative intent would suffice to support the conclusion that the legislature narrowed a very broad and costly bill to manageable scope and then, less than six months later, while carrying forward the original language, broadened it again by changing the meaning of the original language, but without appropriating any additional funds or even assessing the increased cost. The legislature may have power to act in such an irrational fashion, but the legislature must manifest

its intent to do so. In view of the Economic Impact Statements prepared for the original proposal and for the bill adopted, it is impossible to believe that the legislature intended to broaden the scope of the statute but did not order or obtain a new Economic Impact Statement.

It is plain beyond question that the purpose of the new language, and the intent of the legislature in adding it, was to exclude from the operation of the involuntary civil commitment program under the Ryce Act persons who been convicted of new sexual offenses for which they received non-state prison sentences, *i.e.*, sentences of 364 days in jail or less, requiring confinement in the county jail. The Atotal confinement@ language was intended to contract the commitment program, not to expand it. The statute applies only to those who were in custody on January 1, 1999, and to those who commit new sexually violent offenses. Mr. Ward is not among them.

E.

The Doctrine of the Last Clear Antecedent Does Not Make the Act Applicable to Persons Convicted of a Sexually Violent Offense in the Past and Sentenced to Total Confinement for a Non-sexual Offense in the Future

The District Court claimed that its construction of the statute was supported by the doctrine of the last antecedent.[11]

AReferential and qualifying 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**.: . . . **The rule is another aid to discovery of intent or meaning and is not inflexible and uniformly binding. Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding**

[11] The District Court, without citation of authority, referred to the doctrine as Aa recognized canon of grammatical statutory construction@ (*Ward*, 936 So. 2d at 1147), though it has been recognized in some cases, and rejected in others. The State had not mentioned the doctrine of the last antecedent in the trial court, and the trial court had not relied upon it.

sections, the word or phrase will not be restricted to its immediate antecedent.

AEvidence 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.@ 2A Norman J. Singer, *Statutes and Statutory Construction* ' 47:33 (6th Ed. 2000) (footnotes omitted, emphasis added).

The doctrine of the last antecedent was Ainvented@ in the late 1880s, by Jabez Sutherland, author of *Sutherland on Statutory Construction*; it was intended as an interpretive aid, but has sometimes been employed as if it were a strict rule of grammar, without regard for its express limitations and qualifications. *See* Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers,* 2 Legal Writing 81, 89 (1996)(hereinafter ALECLERCQ@).

Professor LeClercq notes that the doctrine of the last antecedent is merely a linguistic principle, not a grammatical or legal rule, that it is inherently flawed, and that it contradicts other linguistic principles and principles of interpretation. LECLERCQ, 2 Legal Writing at 83,90.

Of particular interest is the portion of the doctrine that states that a comma is evidence that a qualifying phrase

is intended to apply to all prior antecedents instead of only to the immediately preceding one. This portion of the doctrine thus suggests that, if the legislature intended to follow it and apply the Act to all persons subsequently convicted of a sexually violent offense and also sentenced to total confinement in the future,@ it needed to say Aall persons convicted of a sexually violent offense, and sentenced to total confinement, in the future.@ Accordingly, the astounding claim here is that the omitted commas **reverse** the meaning of the language. As Professor LeClercq notes, the portion of the rule relating to the use of a comma to separate the qualifier from the antecedents is Aa punctuation rule that contradicts both common sense and the traditional role of the comma.@ LECLERCQ, 2 Legal Writing at 90-91.

As indicated, the doctrine of the last antecedent is confusing and contradictory, almost inviting judges to Atake whatever they need from the rule and ignore the rest.@ LECLERCQ, 2 Legal Writing at 93. It is therefore not surprising that the doctrine of the last antecedent is relied on by the courts when it supports the interpretation that seems most reasonably in accord with the legislative intent; it is disregarded when it would lead to a result not reasonably in accord with legislative intent. *See Barnhart v.*

Thomas, 540 U.S. 20, 26 (2003) (applying doctrine of the last antecedent); *Nobelman v. American Savings Bank*, 508 U.S. 324, 330 (1993) (declining to apply doctrine of last antecedent); *Miller v. Kase*, 789 So.2d 1095, 1098-99 (Fla. 4th DCA 2001) (declining to apply doctrine of last antecedent); *Mallard v. Tele-Trip Co.*, 398 So.2d 969, 972 (Fla. 1st DCA 1981) (applying doctrine of last antecedent). This selective use of the doctrine is entirely consonant with the principle that the doctrine of the last antecedent is applicable only where no contrary intention appears.

Professor LeClercq suggests two possible solutions to the problem of the unclear modifier when it is intended that the qualifying phrase will modify all the antecedents: repeat the modifier or put it first. LECLERCQ, 2 Legal Writing at 98-99. Thus, according to Professor LeClercq, the statute here in question should have referred to:

> all persons convicted of a sexually violent offense in the future and sentenced to total confinement in the future
>
> or
>
> all persons in the future convicted of a sexually violent offense and sentenced to total confinement.

It is readily apparent that the repeated modifier in the first example seems inane, and that the second example is not any clearer. The modifier followed the antecedent in the original statute, when there was only one antecedent, and the legislature simply inserted a second antecedent, thinking there could be no question that it was adding an additional requirement, not changing the original requirement.

Professor LeClercq ultimately suggests that statute interpreters should allow intent to prevail over punctuation and grammar, and should look to legislative history where intent is not clear from the language alone. LECLERCQ, 2 Legal Writing at 100-101. Judges perform a disservice when they put on Athick grammarian=s spectacles@ and ignore legislative intent and purpose, requiring further legislative action to make perfectly clear what was already clear enough. *West Virginia University Hospitals, Inc v. Casey*, 499 U.S. 83, 113-15 (1991) (Stevens, J. dissenting).[12]

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[12] Justice Stevens (*Id.*, 499 U.S. at 115) quoted Learned Hand: Ait is not enough for the judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would contradict or leave unfulfilled its plain purpose.@ L. Hand, How Far Is a Judge Free in Rendering a Decision?, in *The Spirit of Liberty* 103, 106 (I. Dilliard ed. 1952). Justice Stevens added (*Id.*, 499 U.S. at 116) Justice Cardozo=s comment: Ano judge of a high court, worthy of his office, views the

function of his place so narrowly. . . . It is when . . . there is no decisive precedent, that the serious business of the judge begins.@ Benjamin Cardozo, *The Nature of the Judicial Process*, at 20-21.

The District Court here applied the doctrine of the last antecedent here as if the words of the present statute had been written on a clean slate, at the same time. It is readily apparent that the clause Ain the future@ is as applicable to Aconvicted of a sexually violent offense@ as it is to Asentenced to total confinement.@ The current language was not written on a clean slate, it was grafted to the original language. The prior statute applied to those Aconvicted of a sexually violent offense in the future.@ Nothing indicates an intent to change that -**B** indeed, to reverse that -- in course of adding to the statute.

The First District=s decision in *Mallard* refers to Aa review of the grammar. . . used by the legislature.@ Here it is not necessary to see what grammar books the legislature had to ascertain what the legislature meant -**B** the prior statute makes that entirely clear. The legislature added an additional requirement. This did not indicate an intention, and the legislature did not intend, to completely reverse the meaning of the prior statute. Where the amended statute carries forward language from the prior version that had an established meaning, the prior meaning continues, absent a clear intention to change it. No such intention is indicated here. Here the application of the doctrine of the last

antecedent would distort, pervert and reverse the original meaning where nothing suggests that was intended.

As Chief Judge Cope=s opinion indicates, the doctrine of the last antecedent is inapplicable here. In *Porto Rico Ry. v. Mor,* 253 U.S. 345 (1920), Justice Brandies said that A[W]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.@ *Id*., 253 U.S. at 348. That is the controlling rule.

None of the District Court judges here mentioned the Economic Impact Statements obtained by the legislature prior to the enactment of the original statute or the failure to obtain any such statements when the statute was amended. Apparently the Third District majority considered the statute unambiguous, while Chief Judge Cope apparently saw no ambiguity when the present statute was compared to the original. Appellant contends that any ambiguity in the present statute is eliminated by comparing the present statute with the original; however, appellant would nonetheless want to know if the legislature had appropriated additional funds when it amended the statute, to cover any expansion in the scope of the statute. The legislature=s failure to do so to do

so confirms that, as the statutory language indicates, an additional requirement, not an expansion of the scope of the statute, was intended.

Regardless of ambiguity, materials such as Economic Impact Statements, appropriations, and the absence of concern that a costly program was being expanded without any funding are part of the Ahistorical context@ that must be considered in addressing legislative purpose and intent. *West Virginia University Hospitals, Inc v. Casey*, 499 U.S. 83, 112-15 (1991) (Stevens, J. dissenting); *see also Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (all public materials should be consulted in an effort to ascertain whether the legislature intended a meaning that would produce an Aunthinkable@ result); *American Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 368-69, 372-73, 375-76 (Fla. 2005); *Rollins v. Pizzarelli*, 761 So. 2d 294, 299 (Fla. 2000); *State v. Lockheed Martin Corp.*, 905 So. 2d 1017, 1020 (Fla. 1st DCA 2005).

In *Barnhart v. Thomas*, Justice Scalia applied the doctrine of the last antecedent, but acknowledged that it Ais not an absolute and can assuredly be overcome by other indicia of meaning.@ *Barnhart*, 540 U.S. at 26. Here the other indicia of meaning plainly indicate that the intent was to

apply the Act only to persons in custody on January 1, 1999 and persons who were convicted of a new sexually violent offense and who were also sentenced to total confinement in the future. To ignore that, as the District Court majority did, is to elevate the doctrine of the last antecedent to the status of an Eleventh Commandment.

F.

The Legislature Originally Indicated its Intent Not to Apply the Act to Persons Convicted of Sexually Violent Offenses in the past Unless They Were Also in Custody on January 1, 1999, and Nothing Indicates That the Legislature Changed Its Mind

The legislature originally indicated its intent not to apply the Ryce Act to persons convicted of sexually violent offenses in the past unless they were also in custody on January 1, 1999.

If the legislature had changed its mind, it could easily have indicated that it had decided to apply the Act to persons who had been convicted of sexually violent offenses in the past who were not in custody on January 1, 1999.

For example, the legislature could have provided that the Act would apply to Aall persons who have been convicted of a sexually violent offense and who have thereafter been sentenced to total confinement for any offense.@

It seems clear, however, that the legislature would not have done this without ordering an Economic Impact Statement from its staff. It had been estimated that the original Ryce Act proposal would have a cost of $151 million. The statute adopted in 1998, effective January 1, 1999, had a price tag of 6.4 million dollars. If the legislature had thought, in May, 1999, less than six months after the effective date of the

original statute, that it was significantly expanding the scope of the Act, it would have wanted to know how much more it was going to cost.

This is not to say that the legislature can not act without an Economic Impact Statement. However, as Chief Judge Cope noted, the effect of the 1999 amendment to the applicability provision was to add a second requirement, to eliminate the applications that did not met both the old and the new requirements, and to narrow the applicability of the statute. This contraction did not require a new Economic Impact Statement and none was requested or prepared.

Where the language of the 1999 amendment to the applicability provision does not indicate an intent to expand the Ryce Act to cover persons who were not in custody on January 1, 1999 and who were not thereafter convicted of a sexually violent offense, the Court should not conclude that was the intent where the legislature neither indicated it nor requested the Economic Impact Statement which would surely have been requested if the legislature intended a significant expansion of the Act, and the expenditure of significant additional sums.

CONCLUSION

The Court should quash the District Court=s ruling and grant the writ of prohibition.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was delivered by hand to Thomas C. Mielke, Assistant Attorney General, Office of the Attorney General, Appellate Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131 on November 29, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the type font in this brief is Courier New 12 point, except that the headings are set in Times New Roman 14 point.

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