IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

VS. CASE NO.: SC11-411

LARRY PHILLIPS

Respondent.

_____/

On Discretionary Review (Certified Question)
From the District Court of Appeal Second District
Of Florida

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Case - The Petitioner, State of Florida, seeks discretionary review from the grant of a writ of prohibition, an order dismissing the "Jimmy Ryce" petition with prejudice and an order releasing the Respondent, Larry Phillips, from custody of the Florida Department of Children Families (DCF).

On December 12, 2005, the State petitioned to commit Respondent Larry Phillips under the "Jimmy Ryce Act" sections 394.910- 394.932, Florida Statutes.[1] Phillips criminal sentence ended over 3-months earlier, on August 31, 2005. He remained in the custody of the Florida Department of Corrections (DOC) until December 6, 2005, at which time the State initiated the "Ryce" proceedings and he was transferred to the custody of the DCF at the Florida Civil Commitment Center (FCCC) in Arcadia, Florida. Phillips filed a motion to dismiss for of lack of jurisdiction to prosecute the civil commitment petition in the Collier County circuit court which was subsequently denied. Phillips sought a writ of prohibition in the Second District Court of Appeal. The decision of that court, Phillips v. State, ---

[1] The reference to the term"Jimmy Ryce Act" relates back to the original statute that became effective on 1-1-1999 and originally codified at sections 916.31-916.49, Florida Statutes (Supp. 1998), and has commonly been used in the legal literature to refer to the amended and renumbered statute under F. S. §§ 394.910-394.932; although it is technically no longer titled the "Jimmy Ryce Act". Reference in this Answer Brief to "Ryce" refers exclusively to F. S. §§ 394.910-394.932, which is the current renumbered and amended statute titled "Involuntary Civil Commitment of Sexually Violent Predators Act".

So.3d ---, 35 Fla. L. Weekly D2614 (Fla. 2d DCA, December 1, 2010), is now under review. The 2d DCA granted the petition for the writ. The court also dismissed the "Ryce" petition with prejudice and ordered Phillips' release from the DCF's custody. Additionally, the 2d DCA certified the stated question *infra*., as one of great public importance.

Facts - The facts are not in dispute. Mr. Phillips was originally sentenced in the Collier County, Florida, circuit court on April 13, 1992, to two years prison time followed by ten years probation. He was given two years jail credit for time served in the State of Georgia between his arrest in 1990 on the Collier County charge and his sentencing on that charge in 1992. He had therefore completed the incarceration portion of the Collier County sentence and he immediately returned to Georgia where he resided to serve out his ten-year term of probation. He violated his Florida probation due to an offense in Georgia after his return in 1992 and was sentenced to prison for the Georgia offense that violated his Florida probation. Upon release from the Georgia DOC in January 2004, he was returned to Florida and formally arrested on the violation of probation (VOP) warrant. He remained in custody in the Collier County Jail for 177 days until he entered a plea to the VOP on June 10, 2004, and was sentenced on that date to 5.5 years in the Florida prison system. He was given 177 days presentence jail credit toward the VOP 5.5 year sentence. On April 6, 2005, Mr. Phillips filed a *pro se* motion to

correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800 (a), requesting the award of the two-years jail credit the Collier Circuit Court originally ordered at the time of his 1992 sentencing on the original offense in addition to the 177 days jail credit he had been awarded in his VOP sentencing. The post-conviction court granted his 3.800 motion to correct an illegal sentence on September 30, 2005. The order was served directly on the DOC in Tallahassee. Appendix B. He remained in the custody of the Florida DOC after the post-conviction court's order of September 30, 2005 until December 5, 2005, when the Florida DOC finally recalculated his VOP sentence. In the 2-month plus period between the post-conviction court's order correcting the sentence and directive to the DOC to recalculate the sentence, Mr. Phillips filed three *pro se* grievances with the DOC, each with an attached copy of that court order and a demand the DOC carry out the court's September 30, 2005 order. Appendices R, S and T.[2] Finally, on December 5, 2005, the DOC completed the recalculation of his sentence to include, along with other credits, the 2-years credit ordered by both the original sentencing court in 1992 and the post-conviction court on September 30, 2005,

[2] Mr. Phillips also filed a *pro se* motion to clarify the September 30, 2005 order of the post-conviction court (Appendix B) but did not serve the DOC in Tallahassee. The State argues this extended the date when the September 30, 2005 order became final and justifies the State's failure to act on Mr. Phillips unlawful custody status until December 5, 2005. Such an argument ignores the dictates of Larimore and cannot legally restore jurisdiction to proceed with the adjudication of a "Ryce" petition subsequently filed without having initiated Mr. Phillips referral while he was in lawful custody.

correcting the June 10, 2004 VOP sentence. The recalculation produced an end of sentence (EOS) date of August 31, 2005. Appendix E. The parties have stipulated this date is correct. Appendix O; Appendix W, p.2, L.12-15. On the next day, December 6, 2005, the DOC took the first step to initiate the "Ryce" proceeding against him by referring his case on that date to the DCF's Multidisciplinary Team (MDT) in Tallahassee. Appendix F. This is also stipulated. Appendix Z, p.4; and Appendix W, p.20, L.3-9.

He was physically transferred on the same date from the DOC's Hendry C.I. prison facility to the DCF's FCCC facility in Arcadia, Florida. Appendix F. This transfer was purportedly pursuant to the authority of section 394.9135(1) Florida Statutes 2005, which authorizes a 72-hour hold while the DCF's MDT and the Collier County state attorney determined whether or not to file a "Ryce" petition. Appendix F. The "Ryce" petition was filed in the Collier circuit court on December 12, 2005. Appendix Y. The Collier circuit court then made an *ex parte* determination that there was probable cause that he met the criteria for involuntary civil commitment under the "Ryce Act" and he was ordered to remain in the custody of the DCF at the FCCC to await trial. Phillips filed a motion to dismiss on jurisdictional grounds on June 11, 2009. Appendix V. The motion was denied by the Collier circuit court. Appendix D. Phillips then filed a timely petition for writ

of prohibition and that decision granting the writ is this discretionary appeal (certified question) now before the court . Exhibit 1 of the Appendices.

SUMMARY OF ARGUMENT

The decision below, Phillips v. State, --- So.3d---, 35 Fla. L. Weekly D2614, (Fla. 2d DCA, December 1, 2010) correctly applied the holdings in State v. Atkinson, 831 So. 2d 172 (Fla. 2002) and Larimore v. State, 2 So.3d 101 (Fla. 2009). The Phillips majority correctly answered the question raised by Phillips in his petition for writ of prohibition argument by holding that in order to have jurisdiction to adjudicate a commitment petition against Mr. Phillips, it must be established that he was in *lawful* custody at the time the State initiated the commitment procedure under the "Ryce Act". Furthermore, the majority correctly concluded that in recalculating his 1994 VOP sentence, consistent with the post-conviction court's order, Mr. Phillips was entitled to the DOC's award of both basic and incentive gain time in the recalculation and determination of his revised EOS. The majority likewise correctly concluded that the State's argument that section 934.9135 of the Act provided the State with jurisdiction to initiate "Ryce" proceedings against Mr. Phillips on December 6, 2005 was indeed, erroneous. The majority properly determined there was a lack of the prerequisite *lawful* custody on that date and that section 394.9135 Florida Statutes (2005) was therefore inapplicable to Mr. Phillips.

The majority and dissent in the decision below certified the following question to this court:

> DOES THE STATE HAVE JURISDICTION TO INITIATE CIVIL COMMITMENT PROCEEDINGS UNDER INVOLUNTARY CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS ACT AGAINST AN INMATE WHO IS ENTITLED TO IMMEDIATE RELEASE BASED ON A CORRECTED AWARD OF GAIN TIME?[3]

Phillips argues that the decision below, granting the writ of prohibition and dismissing the case with prejudice and ordering Mr. Phillips' immediate release from custody, should be affirmed by this court and the certified question presented to this court should be answered in the negative. The key to the correct answer to the certified question is whether or not the inmate was in *lawful* custody at the time the civil commitment proceeding was *initiated* and whether the commitment process was initiated before the inmate's corrected EOS date. The initiation of civil commitment proceedings has been held to be the time the DOC takes the first step in referring the inmate's case to the DCF for evaluation. *See* Bishop v. Sheldon, --- So. 3d --- (35 Fla. L.Weekly D2617) *See also* Madison v. State, 27 So. 3d 61 (Fla.

[3] Respondent respectfully submits that the phrase "gain time" used in the Phillips court's certified question may more appropriately have been "credits against prison sentence". It was the 2-year presentence jail time that was awarded by the sentencing judge in the original sentence of 1992 and reordered by the post-conviction order correcting the VOP sentence of 2004, combined with his then existing earned and credited "gain time" (basic and incentive) awarded by DOC while in prison that accelerated Phillips' EOS to December 6, 2005, and not solely the award of gain time that caused his release to become immediate on September 30, 2005.

1st DCA 2005), *review denied*, 24 So.3d 559 (Fla. 2009). The decision below correctly concluded that Mr. Phillips was not in *lawful* custody on December 6, 2005.

ARGUMENT

IF A CIVIL COMMITMENT PROCEEDING IS INITIATED UNDER EITHER § 394.913 FLA. STAT. OR § 394.9135 FLA. STAT. BUT IS NOT INITIATED WHILE A PERSON IS IN LAWFUL CUSTODY OF THE STATE THEN THE CIRCUIT COURT DOES NOT HAVE JURISDICTION TO ADJUDICATE THE INVOLUNTARY CIVIL COMMITMENT PETITION. (restated)

A. Standard of Review

Florida State Constitution, Article 5, section 3 (b) (4): The Supreme Court: may review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance. The standard of review for a certified question from a court of appeal that arises from undisputed facts that poses a legal question of statutory construction is *de novo*. *See* Florida Parole Comm'n v. Spaziano, 48 So. 3d 714 (Fla. 2010), *review denied*, 2011 WL 101685 (Fla. Jan. 11, 2011).

B. Merits

1. The Decision below correctly rests on this Court's Precedent that Jurisdiction Requires Lawful Custody under the Act.

Phillips' argument, both in the 2d DCA and in this answer brief, rests on the correctness of this court's analysis and holdings on this issue of jurisdiction

articulated in Atkinson and Larimore**.** These decisions held that a person must be in *lawful* custody when commitment proceedings are initiated for the circuit court to have jurisdiction to adjudicate a petition under the Act. Larimore noted that this court had previously construed the term "custody" to mean "lawful custody". In Atkinson, this court held that the "Ryce Act" was not applicable to individuals who were not in *lawful* custody on its effective date.

The Larimore court explained that:

> interpreting the Jimmy Ryce Act as not requiring *lawful* custody for individuals who had been incarcerated at some point after the effective date of the Act but are not in *lawful* custody when commitment proceedings are *initiated* would be contrary not only to the overall intent of the Act but "would be contrary to the basic tenets of fairness and due process. Larimore *Id.* 2 So.3d 101,115 (Fla. 2009) [e.s.]

Id. (quoting Atkinson, *Id*. at 174). Therefore, Phillips was correct when it concluded "…Under Larimore, Phillips cannot be committed pursuant to the Act if he was not in *lawful* custody when the State initiated commitment proceedings". Phillips *Id.* 35 Fla. L. Weekly D2614, * 5.

It is stipulated that Mr. Phillips' EOS occurred on August 31, 2005. It is also stipulated that the State initiated the "Ryce" proceedings against him on December 6, 2005. The majority in Phillips correctly concluded:

> After the post-conviction court determined that the prior prison and jail credits should be applied to correct the illegal sentence, the DOC recalculated Phillips' sentence and found that it had

> expired as of August 31, 2005.Thus, Phillips was not in lawful custody when the State initiated commitment proceedings in December 2005. *Cf.* Atkinson, 831 So. 2d at 174 (holding that *defendant who was resentenced because his prior sentence had been imposed pursuant to unconstitutional sentencing guidelines was not in lawful custody when his sentence expired*).
> Phillips *Id.*35 Fla. L. Weekly D2614, * 4. [e.s.]

2. Section 394.9135 Florida Statutes (2005) Does Not Constitute an Exception to the *Lawful* Custody Requirement as a Prerequisite to filing a "Ryce" Petition .

Likewise the Phillips majority correctly reasoned that:

> … section 394.9135 provides a procedure for the DOC to initiate commitment proceedings under the Act when the release of an inmate convicted of a qualifying offense "becomes immediate for any reason." However, this " 'safety valve' " does not apply because *lawful* custody is required before the State may initiate commitment proceedings. Larimore, 2 So. 3d at 105,117 (quoting Gordon v. Regier, 839 So. 2d 715, 719 (Fla. 2d DCA 2003)). Thus, even though Phillips' release became immediate upon his resentencing by the post conviction court, section 394.9135 was inapplicable. *Id*. 35 Fla. L. Weekly D2614, * 4. [e.s.]

The State argues that section 394.9135 Florida Statutes (2005) provides a procedure for the DOC to initiate commitment proceedings under the Act when the release of an inmate convicted of a qualifying offense "becomes immediate for any reason." However, the State has not been able to present a persuasive argument that contradicts the holdings in both Atkinson and Larimore that *lawful* custody is a prerequisite to initiating the proceedings under section 394.9135 Florida Statues (2005). Indeed the State has conceded that the custody must be lawful at the time a

"Ryce' petition is filed. *See response brief of State*, p. 7 in 35 Fla. L. Weekly D2614; *See also, initial brief of State in the instant appeal*, p. 6. What is not conceded is that Mr. Phillips' custody was *not* lawful on December 6, 2005, the date the State initiated the "Ryce" procedure.

Phillips argues his lawful custody ended on August 31, 2005. He was held in *physical* custody for over 3 months before the State attempted to initiate the commitment proceedings authorized by section 394.9135 Florida Statutes (2005). The provisions of section 394.9135 Florida Statutes (2005) do not turn physical custody into lawful custody. Mr. Phillips' release became immediate on September 30, 2005 (the date of the post-conviction court's order awarding additional prison time credit) however, (1) he was not in lawful custody on December 6, 2005 and (2) the State negligently held him in physical custody for over 3 months beyond his EOS without taking any steps to initiate the "Ryce" proceedings, thereby allowing his custody status to remain *unlawful, physical* custody.

Mr. Phillips was unlawfully incarcerated in a Florida state penitentiary for at least 97 days beyond his EOS. When his custodians at the DOC finally acted, they did so pursuant to section 394.9135 Florida Statutes (2005) and chose to continue his unlawful detention. Under such circumstances, that was a misuse of the emergency release provision of section 394.9135 Florida Statutes (2005). Thus Mr. Phillips, like Mr. Larimore, is today entitled to immediate release from

custody. The emergency release provisions of section 394.9135 Florida Statutes (2005) were meant to apply to situations where an inmate, who at that time was in lawful custody, and whose EOS date changes, leaving the State unable to meet the burden of the mandatory time requirements of the Act. However, the Act nonetheless requires that involuntary civil commitment proceedings be initiated while the individual is still in lawful custody in the DOC, even if his referral is initiated by section 394.9135 Florida Statutes (2005). Section 394.9135 Florida Statutes (2005) was intended as a method of extending the custody of an individual currently in *lawful* confinement and not as a mechanism of extending an unlawful confinement or converting unlawful custody into lawful custody.

The State erroneously argues in its initial brief that the Phillips majority's reliance on Madison v. State, 27 So.3d 61(Fla. 2d DCA 2010) is misplaced. Mr. Madison was referred pursuant to F.S. § 394.913 (1) by the DOC to the DCF for a "Ryce" evaluation in September 2004, while he was serving his prison sentence and he was subsequently committed. He appealed; arguing that he was not in lawful custody at the time the State filed the "Ryce" petition. He claims his lawful custody ended no later than April 14, 2005, prior to the filing of the petition in September 2005. The 2d DCA remanded the case to the trial court for an evidentiary hearing to determine whether Mr. Madison was in lawful custody when the DOC referred him to the DOC for a "Ryce" evaluation in September 2004.

> "...However, because there may be factors outside the record affecting the length of Appellant's sentence, such as gain-time or other credits, this court cannot make a factual determination of Appellant's custodial status in September 2004. Madison, *Id.* at 63.

The Madison court said that if it is determined that Mr. Madison was in lawful custody at the time the DOC referred him for the "Ryce" evaluation in September of 2004, then the trial court previously had jurisdiction to adjudicate the commitment petition. The converse would also have been true. The State argues in its initial brief that Madison simply stands for the proposition that the court had insufficient information to determine whether Mr. Madison was in lawful custody at the time of his "Ryce" referral. Phillips argues it is significant the State didn't argue that the Madison court was in error in its conclusion that that the determination of whether there was subject matter jurisdiction would turn on whether Mr. Madison was in "lawful custody" at the time of the "Ryce" referral in September 2004. The State attempts to distinguish the Madison case from Phillips because in Madison there was no issue of early release or initiation of the referral pursuant to section 394.9135 Florida Statutes (2005). Phillips argues the State misunderstands the significance of Madison. Madison represents another instance of the application of the Larimore "lawful custody" prerequisite rule consistent with how the 2d DCA applied it in the Phillips case. If both Mr. Madison's and Mr. Phillips' EOS dates occurred prior to the DOC initiation of their referrals for a

"Ryce" evaluation, then under Larimore, in neither case would subject matter jurisdiction exist to allow the circuit court to adjudicate the "Ryce" petitions. Phillips argues that if the State's reasoning is accepted, then Mr. Madison has the benefit of the prerequisite requirement of "lawful custody" because his referral was pursuant to section 394.913 Florida Statutes (2005) whereas Mr. Phillips' referral was a transfer to DCF pursuant to section 394.9135 Florida Statutes (2005). Apparently, this latter provision of the statute, according to the State's reasoning, does not have the prerequisite requirement of "lawful custody". Such a result would not only be inconsistent with Larimore, but would raise serious due process and equal protection issues. Additionally, Phillips argues Madison also reinforces the propriety of the Second DCA's rejection of the State's assertion discussed in Phillips that gain time should not be considered when courts are determining the inmate's custody status at the time of the referral.

Phillips points out that the State discusses Madison in their initial brief but fails to mention Bishop v. Sheldon, ---So. 3d --- 2010 WL 4861512 (2 DCA Dec. 1, 2010), another decision of the 2d DCA, revised and released on the same day as the release of the Phillips decision. This is noteworthy because Bishop was a situation very similar to Mr. Phillips' case. Mr. Bishop was serving his prison sentence for a VOP and, before any attempt to refer him to the MDT for a "Ryce" evaluation, he obtained an order of immediate release due to a Heggs v.

State,759 So.2d 620 (Fla. 2000) resentencing. The DOC, as in Mr. Phillips' situation, on the same day as his recalculated sentence, referred Mr. Bishop to the MDT under section 394.9135 Florida Statutes (2005) for evaluation. He was subsequently petitioned, tried and committed. He appealed and similar to Madison, the 2d DCA remanded the case to the circuit court for an evidentiary hearing to determine the status of Mr. Bishop's custody at the time he was initially referred to the MDT under section 394.9135 Florida Statutes. The Bishop court stated:

> On the merits, we conclude that Bishop may be entitled to relief under Larimore if his sentence had indeed expired before the State initiated commitment proceedings under the Act. Bishop *Id.* *2.

In Bishop, the "Ryce" referral from the DOC to the MDT was initiated pursuant to section 394.9135 Florida Statutes (2005) and, like Madison, the Bishop court properly applied Larimore to determine whether Mr. Bishop was in lawful custody at the time the "Ryce" referral to the MDT was initiated. Clearly there is no separate standard applied to determine if there is jurisdiction to proceed with the adjudication of an involuntary civil commitment petition whether initiated by section 394.913 or section 394.9135 Florida Statutes (2005). In either situation, lawful custody is required at the time the "Ryce" referral is initiated. As in the discussion of Madison, Phillips argues Bishop supports the 2d DCA's rejection of the State's assertion that gain time should not be considered when courts are determining the inmate's custody status at the time of the referral.

No legal mechanism exists that would allow a person in unlawful confinement to be transferred from one department of the state to a second department and thereby convert the person's status to that of lawful custody. That is precisely what the state attorney asked the Collier circuit court to permit by filing a civil commitment petition against Larry Phillips on December 12, 2005, more than three months beyond his EOS. It was also the argument made by the State in Phillips and currently being presented by the State in this appeal of that decision. If this court were to approve the State's attempt to expand interpretation and extend the reach of section 394.9135 Florida Statutes (2005) to establish jurisdiction in the case under review, it would run counter to well established principles of due process of law as clearly set out in Larimore and Atkinson. Such a ruling would also relieve the State of its obligation to comply with the other mandatory, procedural safeguards of the Act. *Cf.* State v. Goode, 830 So. 2d 817 (Fla. 2002).

Mr. Phillips' legal sentence expired no later than August 31, 2005. While it may be true that the State could have lawfully preceded against him under section 394.913 Florida Statutes (2005) at any time up until that date, it is stipulated in this case that the State took no steps to initiate the civil commitment proceedings until December 6, 2005, over 3-months later. Appendix Z, page 4 and Appendix W, page 20, lines 3-9.

3. Legally Awarded Gain Time must be credited when calculating the EOS Release Date from the Custody of the Florida Department of Corrections.

The State's contention that incentive gain time should not be considered in determining whether Mr. Phillips was in lawful custody at the time commitment proceedings were initiated is without merit or legal support. Of note, both the Collier circuit court in its order denying Phillips' motion to dismiss and the State in its response brief to Phillips' petition for writ of prohibition incorrectly referred to "discretionary" gain time rather than "incentive" gain time. Reading "discretionary" in lieu of "incentive" gives the false inference that the inmate has no right to claim this type of gain time but, as was correctly pointed out by the majority in the Phillips decision:

> Under section 944.275(4) (b), Florida Statutes (1989), incentive gain time "shall be credited and applied monthly." In September 2005, when the postconviction court ordered that Phillips receive credit against the sentence imposed upon revocation of probation for the time previously served in prison, he had already been awarded incentive gain time. Both basic and incentive gain time become vested rights once awarded, subject to all other applicable statutory conditions. Waldrup v. Dugger, 562 So. 2d 687, 694 (Fla. 1990); Davis v. Singletary, 659 So. 2d 1126, 1127 n.3 (Fla. 2d DCA 1995). Id. 35 Fla. L. Weekly D2614, * 4.

The Phillips majority correctly rejected the State's contention that if only basic gain time had been awarded, then Phillips would have been in lawful custody when commitment proceedings were commenced. *Id.* 35 Fla. L. Weekly D2614,

*4. That decision's majority was correct in concluding the State has pointed to no authority to support its contention that basic and incentive gain time should be treated differently. *Id*.*4. Additionally, the majority in Phillips correctly concluded that incentive gain time should, according to Florida law, be credited and awarded monthly and when the post-conviction court in September of 2005 ordered that Mr. Phillips should be awarded credit for the time previously served in prison, he had already been awarded incentive and basic gain time as of that date. Appendix X. Thus, the incentive gain time already earned and calculated was properly included in determining whether Mr. Phillips was in lawful custody at the time the commitment proceedings were initiated on December 6, 2005. *Id.**4.

The recalculation of Mr. Phillips' sentence, utilizing both incentive and basic gain time awarded as of the date of recalculation, resulted in the stipulated EOS date of August 31, 2005. Any custody after this date was *physical* custody and was not *lawful* custody. Any custody of Mr. Phillips after August 31, 2005 must be considered unlawful custody or, at minimum, it became unlawful custody after the post-conviction court's order of September 30, 2005.

The State's argument is that Mr. Phillips' custody was lawful on December 6, 2005. The State argued if one were to ignore the application of all other sentencing credit, such as gain time, in calculating Mr. Phillips' EOS, it would have kept him in custody until a date after December 6, 2005, when the "Ryce"

procedure was initiated. However, as of the date of the DOC's recalculation on December 5, 2005, Mr. Phillips had already been awarded gain time and was entitled to immediate release as a result of the effect of the post-commitment court's order of September 30, 2005, and the inclusion of the existing gain time credit in the calculation of his EOS. *Cf.* Appendix X. To sustain the State's argument requires that all of Phillips' post sentence jail and prison credit awards such as basic and incentive gain time would not be calculated.

The majority in Phillips correctly rejected this argument by pointing out that, under Florida law, incentive gain time is calculated and awarded to the inmate on a monthly basis. *See* Appendix X. Furthermore, the DOC awards each inmate the basic gain time (a percentage of the total sentence) upon the inmate's arrival at the DOC after sentencing. *Id.* 35 Fla. L. Weekly D2614,*4. There is no legal authority to treat these two types of gain time differently or to arbitrarily ignore the award of gain time in determining the inmate's EOS. *Id.* *4 To accept the State's argument in this regard would allow the DOC to arbitrarily and unilaterally keep all inmates in custody until the time has expired for the punishment for the particular class of felony for which he was sentenced. If that were the case, what would be the relevance of the existence or calculation of any gain time? Such an argument is not only contrary to Florida statutes but, we respectively assert, is also illogical.

The State argues that Mr. Phillips' custody on December 6, 2005 was lawful because his original VOP sentence of June 10, 2004 was legal except that the gain time award was "incorrect". However, the Phillips majority specifically found that "…Phillips' prison sentence of 5.5 years for the violation of his probation was *illegal* because the court failed to award prior jail and prison credit." *Id*.*4. [e.s.]. Is the State arguing that a portion of the 5.5 year VOP sentence should be considered legal? If so, what portion and when did the lawful portion end and the unlawful begin? If Mr. Phillips' custody did not become unlawful when it ended on August 31, 2005, then what was his custody status as of September 1, 2005? Is the State arguing that section 394.9135 would have allowed the DOC to detain Mr. Phillips in prison until that state agency unilaterally decided to initiate his referral to the DCF for a "Ryce" evaluation and that the resulting custody would have been lawful so long as it was initiated prior to the end date of his original 5.5 year prison sentence? Such a result would allow the DOC to unilaterally determine when to end an inmate's custody without regard to its lawfulness. The holdings in Larimore, Atkinson and due process considerations are clear bars to such an interpretation.

The State argued that the DOC has sole authority to "regulate" gain time. They argued below that without the award of gain time Mr. Phillips would not have had a release date until 1 and ½ years after the August 31, 2005 recalculated

EOS. The State argues that he would not have been eligible for release on August 31, 2005, had he not been awarded gain time. Phillips replies that the DOC recalculation of his sentence was done in accordance with the law as well as administrative rules. Florida statutes provide for "incentive" gain time but there is no category of gain time entitled "discretionary" as cited repeatedly in the State's pleadings in this case. It is inferred that by "regulating" the DOC can arbitrarily deny gain time i.e., the DOC has complete, unfettered discretion. That view of the DOC's authority in administering gain time is contrary to the law. *See* Pettway v Wainwright, 450 So.2d 1279, 1280 (Fla. 1st DCA 1984); Baranko v. Wainwright, 448 So. 2d 1067, 1069 (Fla. 1st DCA 1984). There is statutorily awarded gain time that is earned and credited to the inmate monthly called "incentive" gain time of up to 20 days per month (*See* §944.275(4)(a)(b)Florida Statutes (2004); Fla. Admin. Code Ann. R. 33-603.401(2)). *See also* Appendices X and E. There is "basic" gain time; a percent of the entire sentence that is awarded "up front" upon an individual's arrival at the DOC *See* § 944.275 (4)(b)(1) and Fla. Admin. Code Ann. R. 33-603.401(2) and *See also* Appendix E.

Despite the State's attempt to arbitrarily remove the application of gain time from the calculation of Mr. Phillips' release date, the fact remains that he was entitled to the "basic" and "incentive" gain time that he had previously been awarded by the DOC in its calculation of his release date. *See* Appendix X and E.

Furthermore, the parties stipulated to the accuracy of the DOC's calculated release date of August 31, 2005. *See* Appendix O. The State's speculation as to what his release date may have been if various gain time had not been credited to him by the DOC is inconsistent with the gain time statutes, irrelevant to the issues raised in the petition for writ of prohibition and not probative of anything at issue before this court.

4. Mr. Phillips Not in Lawful Custody when "Ryce" Procedure Initiated and Implementing the Provisions of F.S. §394.9135 Did Not Turn Physical Custody into Lawful Custody. The Certified Question Must be Answered in the Negative

The State claims Mr. Phillips was in lawful custody when the State initiated its involuntary civil commitment petition against him on December 6, 2005. Therefore, the State argues that section 394.9135, Florida Statutes (2005), allows the State to proceed with initiating the civil commitment procedure over 3-months after the date his lawful sentence ended. They maintain that this is lawful because his original and subsequently modified sentence fell within the legally permissible sentencing range for a second degree felony. Phillips argues that this reasoning is flawed. First, the State erroneously argues "lawful sentencing" legitimizes holding a person in custody for any period of time after the person's end of sentence date so long as it does not extend beyond the permissible sentencing range for the particular class of crime. Second, the State erroneously reasons that holding a person, contrary to a court order requiring his release, does not result in "unlawful

custody" and third, the State incorrectly concludes that section 394.9135 Florida Statutes (2005), converts Mr. Phillips' physical custody to lawful custody. Is the State arguing here that since a second degree felony has a possible maximum sentence of 15 years, and therefore the DOC would have up to 15 years to hold a person in custody and file a "Ryce" petition anytime in that time frame even though the person's EOS occurred after only 3 years?

Phillips argues that the State misreads section 394.9135 Florida Statutes (2005) and Larimore. The State argues that reliance on Larimore is incorrect because the opinion stated in f.n.8 that Larimore's entire resentencing was unlawful and therefore the court did not reach the question of whether section 394.9135, Florida Statutes (2005), would allow the State to take steps to initiate a commitment proceeding against a person, who while in lawful custody, obtains an order for immediate release for any reason. However, it is clear from reading the language of f.n.8 that the court, by the use in this footnote of the italicized words, "*while in lawful custody*," was emphasizing exactly what is required to establish jurisdiction in order to proceed with an involuntary civil commitment proceeding. *See* Larimore, f.n.8.

Phillips argues that the insertion of f.n.8 in Larimore should not be interpreted to mean the decision failed to address the question of whether the State should be able to exercise jurisdiction by its reliance on section 394.9135 Florida

Statutes (2005), even though Mr. Phillips' end of sentence date had passed over three months prior to the State's initiation of the "Ryce" petition. Phillips argues f.n.8 merely represents the proposition that in Mr. Larimore's case the court did not have to decide the case by interpreting the effect of section 394.9135 Florida Statutes (2005). Furthermore, f.n.8 should not be interpreted to mean that the Larimore decision did not identify what is required to meet the threshold for jurisdiction under the entire "Ryce Act", including section 394.9135 Florida Statutes (2005). The language of f.n.8 and of the opinion identifies the threshold for jurisdiction. That threshold, set out in Larimore, is whether the *custody* is lawful on the day the "Ryce" evaluation process is initiated and not whether the particular sentence was lawful. Any confinement can turn from "lawful custody" to "unlawful custody" especially if the person is negligently or intentionally confined contrary to a court order effectuating his release. *See discussion infra.* In Larimore this court concluded:

> Based on the foregoing analysis conducted in accord with our longstanding principles of statutory construction, we hold that an individual must be in *lawful* custody when the State takes steps to initiate commitment proceedings pursuant to the Jimmy Ryce Act in order for the circuit court to have jurisdiction to adjudicate the commitment petition. When effect is given to all the provisions of sections 394.913 and ***394.9135***, we conclude that the Legislature clearly intends that the individual be in *lawful* custody when steps are taken to initiate civil commitment proceedings under the Act. [e.s.], *Id.* at 117.

The State cites the Staff Analysis of Fla. S. Comm. on Child. and Fams., CS for SB 2192 (1999) wherein the Staff stated:

> …section 394.9135 provide[s] an expedited involuntary civil process for a person whose release becomes *imminent* due to factors such as successful gain-time challenges and early release statutes…[t]he section is intended to assist the Department of Children and families and state attorneys with expediting cases in such circumstances. Child. and Fams. Comm. SB 2192 Analysis at 25; Judiciary Comm. SB 2192 Analysis at 12. [e.s.]

Phillips submits that in accordance with accepted principles of statutory construction, significance and effect must be given to every word, phrase, sentence and part of the statute if possible, and words in the statute should not be construed as mere surplusage. *See* Gulfstream Park Racing Assn. v. Tampa Bay Downs, Inc., 948 So.2d 599,606 ((Fla. 2006) (quoting Hechtman v. Nations Title Ins. Of N.Y., 840 So.2d 993,996 (Fla. 2003). This same principle is applicable to the process of determining legislative intent in a review of the analysis of section 394.9135 Florida Statutes (2005) by the Child. and Fams. Comm. SB 2192. The State contends that to interpret section 394.9135 Florida Statutes (2005) to allow a judicially mandated resentencing to render the custody of an individual unlawful would make this provision of the Act "meaningless". Phillips disagrees and cites the forgoing principle of statutory construction and directs the court to the universally accepted definition of the word *imminent* as that word references the

individual's release. The word *imminent*, as used by the Child. and Fams. Comm. SB 2192, is helpful in discerning legislative intent. Without exception, the dictionary definition of the word *imminent* describes an event that has not yet occurred.[4] If this universally accepted meaning is given to *imminent* in the context of the Staff Analysis, then the intent of the legislature appears clear. If the inmate's early release date has not yet occurred, then section 394.9135 Florida Statutes (2005) would allow the State to initiate the referral of an inmate to the MDT and transfer him to a DCF facility for a 72-hour evaluation for a sexually violent predator (SVP) evaluation. As stipulated by the parties, the release date for Mr. Phillips was announced by the Collier circuit court on September 30, 2005, and made retroactive to August 31, 2005, as a result of the DOC's eventual recalculation of his sentence on December 5, 2005 *See* Appendix E.

Phillips would caution this court from putting disproportionate weight on the Staff Analysis of Fla. S. Comm. On Child. And Fams., CS for SB 2192 (1999) without considering its context *i.e.*, considering when these staff comments were written (1999) and also looking at the apparent reasons why section 394.9135 Florida Statutes was passed as an amendment to the original "Jimmy Ryce Act". The original Act did not have an expedited release provision. Finally, consideration

[4] "about to happen" "liable to happen soon" Oxford Dictionary of the English Language – Oxford. com; "impending" "about to occur" American Heritage Dictionary of the English Language (4th ed. 2009).

must be given to the evolution of the body of law surrounding the issue of jurisdiction in involuntary civil commitment cases that has evolved since 1999.

As to the reasons for the proposed § 394.9135 amendment, the Staff Analysis stated:

> Section 6 includes provisions whereby an immediate release of a possible sexually violent predator from the Department of Corrections may be detained for 72 hours while an appropriate evaluation is conducted. If the 72 hours ends on a weekend, this could be extended until the next workday. *This is important to the new bill, as the emergency releases have resulted in logistical nightmares where well considered evaluations were difficult to achieve.*
> *See* Fla. S. Comm. on Com., CS for SB 2192 (March 18, 1999) (available at Fla. Dep't. of State, Fla. State Archives, Tallahassee, Fla.) [e.s.].

Phillips' first observation as to this Staff Analysis is that this amendment appears to address the problem of too many "soon to be released" inmates and not enough time or personnel to process them. The purpose being articulated now is purportedly to assist in meeting the time deadlines for inmates who earn early release. Phillips argues neither reason justifies allowing § 394.9135 to be a vehicle to violate a person's liberty and due process rights.

A later comment on this amendment by the Staff stated:

> III. Effect of Proposed Changes
> . . .This bill would clarify that a judge is to order that a person remain in custody and be immediately transferred to an appropriate secure facility if the person's incarcerative sentence expires; *otherwise the person is to remain in incarceration on his or her criminal sentence*. . . *See* Fla. S. Comm. on Com., CS for SB 2192 (March 30, 1999)

> (available at Fla. Dep't. of State, Fla. State Archives, Tallahassee, Fla.) [e.s.].

Phillips' second observation is that this Staff Analysis comment rebuts the argument put for by the State in their initial brief that to require the Larimore lawful custody prerequisite, when implementing the provisions of § 394.9135, would make this provision meaningless. It is obvious that the language of the above comment contemplates the inmate would be evaluated before his EOS since "*. . . otherwise the person is to remain in incarceration on his or her criminal sentence. . .* " clearly infers that the person being evaluated under § 394.9135 and who presumably had obtained an early release, would still be in lawful custody at the time of the evaluation since it is contemplated he would remain in the DOC until he completes his sentence. It is also consistent with the accepted definition of *imminent* referring to the inmate's release as something that has not yet occurred. These Staff comments support Phillips' argument that by requiring *lawful custody* as a prerequisite to section 394.9135 does not render this section of the Act meaningless.

Another Staff Analysis comment on this amendment by the Staff states:

> Although a similar law in Kansas was upheld by the U.S. Supreme Court in 1997, this Act may still face some Constitutional challenges on issues such as *due process*, . . . exemplified by the following:
>
> *The expedited civil commitment process of persons who*

> *are to be immediately released lack certain procedural safeguards* such as notice of examination, *transfer and confinement*, and . . .. *See* Fla. S.Comm. on Com., CS for SB 2192 (April 5, 1999) (available at Fla. Dep't. of State, Fla. State Archives, Tallahassee, Fla.) [e.s.].

This comment seems somewhat prescient. The Staff had due process concerns with the proposed amendment §394.9135 many years prior to the numerous cases that have subsequently confirmed their concerns. Phillips argues the State's attempts to apply the provision to his situation likewise confirms the Staff's concerns reflected in this comment.

Phillips' fourth and final point is that this amendment to the Act was considered and passed into law by the legislature prior to the numerous court decisions that have evolved on the issue of jurisdiction in this new field of law since 1999. Cases such as Atkinson, Kephart, Goode, Gordon, and Larimore, to mention a few, have all been decided since this amendment to the Act became effective in mid-1999. These cases have all contributed to this evolving body of law that although clothed in civil garb, because of a person's liberty interests being at stake, must include the application of accepted constitutional principles of due process.

Phillips anticipates that the State will argue that because he had literally not been released as of December 6, 2005, section 394.9135 Florida Statutes (2005) allows the State to lawfully initiate the referral and transfer his custody from the

DOC to the DCF. This is because the States' interpretation is that section 394.9135 Florida Statutes (2005), preserves jurisdiction and thereafter allows the circuit court to proceed with the adjudication of the involuntary civil commitment case. However, this court in Larimore rejected this interpretation of section 394.9135 Florida Statutes (2005) by requiring the State to exercise the provisions of this section against the person *while* (the person is) *in lawful custody*. Larimore 2 So. 3d 101, 117.

Phillips submits that to require *lawful* custody as a prerequisite to the exercise of section 394.9135 Florida Statutes (2005) does not render that section of the Act "meaningless" as contended by the State. If a person obtains a modification of his sentence for any reason and his modified EOS date, as calculated after the sentence modification is "imminent' but has not yet actually occurred, then at that point, the State has the right to implement the provisions of section 394.9135 Florida Statutes (2005) and transfer the person's custody to the DCF for a period of 72-hours in order for the MDT to do its evaluation and make its written recommendation. Giving this interpretation to section 394.9135 Florida Statutes (2005) provides meaning to this provision that is consistent with basic principles of statutory construction and with this court's interpretation in Larimore as well as with the basic tenets of fairness and due process. The meaning to be given to this provision must be construed in light of the entire "Ryce" Act and that

is exactly what this court and the majority in Phillips did. See Larimore, at 117. *See also* Phillips *Id.* * 4.

Obviously the corrected sentence produced an earlier release date in Mr. Phillips' case that was retrospective in its effective date but it could just as well have been prospective had the post-conviction court ruled earlier or other circumstances produced a release date that would have occurred after the issuance of the September 30, 2005 order. If the latter situation would have resulted from the recalculation of Mr. Phillips' sentence and release date, the effect of section 394.9135 Florida Statutes (2005) does not seem meaningless. In that situation, the State could have implemented the provisions of this section of the Act by initiating a referral to the MDT before the recalculated early release date and thereby have given meaning to the language of the statute and initiated the referral to the MDT at a time Mr. Phillips would arguably have been in lawful custody.

In its interpretation of the Child. and Fams. Comm. SB 2192 analysis, the State, appears to be arguing that legislative intent overrides the constitutional right of due process afforded all citizens. However, Larimore held that "…because the Act can impose…a substantial deprivation of liberty-one that is of indeterminate duration-our construction of the Act must be conducted with due regard to the basic tenants of fairness and due process…" *See* Larimore, at 107 citing Atkinson. The Larimore court held that requiring the individual to be in *lawful* custody when

commitment proceedings are initiated was consistent with due process considerations and a sex offender is entitled to immediate release from custody or commitment imposed as a result of civil commitment proceedings initiated against him at a time when he was not in lawful custody. *See* Larimore at 116-117.

5. The State Failed to Comply with the 72-Hour Mandatory Time Provisions of the Involuntary Civil Commitment Statute

The "Ryce Act" provides a 72-hour extension period to the DCF, beyond the person's EOS, to hold a detainee whose release has become immediate for any reason. *See* section 394.9135 (2) Florida Statutes (2005). This provision requires the DCF's MDT to make a written recommendation of the person's status as a SVP and whether or not to file a civil commitment petition within the 72-hour period following the person's transfer from the custody of the DOC to the DCF.[5]

In Mr. Phillips' case the 72-hour period commenced on Tuesday, December 6, 2005, at 9:09 P.M. He was released from DOC's Hendry C.I. and transported to FCCC, where he arrived on December 6, 2005 at 9:09 P.M. Appendix P and Appendix Q. Section 394.9135(2) Florida Statutes (2005) requires written recommendation to be submitted to the state attorney within 72-hours of his transfer, at the latest. However the MDT's letter recommending filing was not

[5] Section 394.9135 (2) states:"…the team (MDT) shall provide the state attorney, …with its written assessment and recommendation within the 72-hour period or, if the 72-hour period ends on a weekend or holiday, within the next working day thereafter".

dated until Monday, December 12, 2005, some 130 hours after his transfer from the DOC to the custody of the DCF at the FCCC and more than two days after the initial 72-hour period had run on Friday, December 9, 2005 at 9:09 P.M.

The State argued in Phillips that the 72-hour provision of section 394.9135(2) Florida Statutes (2005) does not contain any language mandating the detainee's release for violation of its time limitations similar to the language in section 394.9135(4) Florida Statutes. However, the absence of such language does not preclude the loss of jurisdiction if the State does not comply with the 72-hour time limit in section 394.9135 (2) Florida Statutes (2005).

This argument, as to the 72-hour extension, although standing on its own merit as fully supportive of Phillips' argument there was a lack of jurisdiction to adjudicate the "Ryce" petition, is nonetheless not determinative in any case. This is because Mr. Phillips was not in lawful custody when he was transferred to DCF on December 6, 2005, as required by the rule in Larimore. In other words, as explained by the court in Larimore, section 394.9135 Florida Statutes (2005) does not transform the status of unlawful custody into lawful custody. Therefore, if Mr. Phillips was not in lawful custody at the time of his transfer on December 6, 2005, the 72-hour statutory violation becomes cumulative but because of *scrupulous compliance* and corresponding due process considerations discussed *infra*., it nonetheless remains at issue. Furthermore, the petition may be filed only if the

MDT is able to provide its written recommendation to do so to the state attorney within 72 hours of the physical transfer of the detainee to the DCF, and then, only if the person was in lawful custody when he was initially transferred to the DCF's facility.

This analysis § 394.9135, in determining whether Phillips was in lawful custody when any portions of the commitment proceedings were initiated, requires *scrupulous compliance* with the Act's requirements. See Larimore at 116-117; see also Kephart v. Hadi, 932 So. 2d 1086, 1092 (Fla. 2006) ("As enacted, the Act provides numerous safeguards to ensure that a prisoner's due process rights are protected"). The Kephart court held that the "confinement of an individual past the expiration of his or her incarcerative sentence requires '*scrupulous compliance*' with the Act's requirements." Id. at 1093, quoting State v. Goode, 830 So. 2d 817, 826 (Fla. 2002) [e.s.]. Thus, in giving scrupulous compliance to the provisions of § 394.9135(2), this court must strictly and narrowly apply the wording of the statute to the facts of the instant case.

Here, the result of such an analysis of the facts and application of statute compels the conclusion that the State failed to comply with the provisions of the 72-hour hold requirements of § 394.9135(2). *Scrupulous compliance* in reality nullifies the State's argument that the statutory language of § 394.9135(2) requires an interpretation of the definition of "weekend," since that approach goes well

beyond the strict meaning of the 72-hour requirement. Furthermore, Petitioner submitted exhibits and arguments at the October 12, 2009 hearing that *weekend* should be defined as Saturday and Sunday and should not include some vague time portion of a Friday.[6] Appendix W, page 38, lines 24-25 and page 39, lines 1-25 and page 40, lines 1- 18 . If a word is not defined by statute, the plain and ordinary meaning can be ascertained by reference to a dictionary. See: Seagrave v. State, 802 So. 2d 281,286 (Fla. 2009) and Valdes v. State, 3 So. 2d 1067, 1076 (Fla. 2009). If the legislature intended to limit the close of the specified period of 72-hours to five o'clock P.M. on a Friday, they could have added that language but did not.

6. The DOC Knew or Should Have Known that Mr. Phillips was Subject to Undergo a Civil Commitment Evaluation by the DCF and the Failure to Initiate the Referral as required by Section 394.913(1)(a) Florida Statutes (2005) was Solely the Result of the State's own Omission and Failure to Act.

The dissenting opinion in Phillips suggests that Mr. Phillips and/or his former counsel intentionally attempted to deprive the DCF of jurisdiction by

[6] See: Florida Board of Bar Examiners Re Amendments to Rules of the Supreme Court Relating to Admissions to the Bar, 967 So. 2d 877, 908, (Fla. 2007) the court defined "weekend" as: "Filing Deadline on Weekend or Holiday. If the examination filing deadline falls on a Saturday, Sunday or Holiday, then the deadline will be extended until the end of the next business day…" See also: Compact Edition of the Oxford Dictionary of the English Language (Compact Disc Ed.), Oxford University Press, Twenty-Sixth Publication, 1987, where *weekend* is defined as: "Saturday and Sunday."

foregoing an appeal and delaying the filing of his motion to correct sentence, thereby allowing his sentence to expire before the unpreserved error was corrected. In essence, the dissent suggests that if a timely appeal had been taken or had Mr. Phillips been more diligent in filing his *pro se* April 6, 2005 motion to correct illegal sentence, the State would likely have had notice and been aware that his EOS would have been accelerated to an earlier date than anticipated. The majority in Phillips specifically stated its disagreement with the dissent's speculative reasoning. The majority pointed out there was nothing in the record to suggest any attempt by Mr. Phillips to delay or otherwise deprive the DCF of jurisdiction. Additionally, the majority wrote that Phillips' *pro se* motion to correct the illegal sentence was filed months before his lawful sentence expired on August 31, 2005.

Phillips argues that the state agencies responsible to carry out the provisions of sections 394.910-394.932 Florida Statutes (2005) were negligent in failing to comply with the statutory provisions of section 394.913 (1) (a) Florida Statutes (2005). This section requires that the DOC give notice to the DCF within 545 days of an inmate's anticipated release or if less than 545 days then as "as soon as practicable" of that inmate's eligibility for referral to the DCF for possible "Ryce" commitment. The State, in its initial brief, argues if the judge of the June 10, 2004 VOP sentencing court had correctly sentenced Mr. Phillips then the DOC could have initiated civil commitment at least 545 days prior to Mr. Phillips' release.

This statement reveals the weakness of the State's argument that they had insufficient notice or procedurally could not timely act to initiate Mr. Phillips' "Ryce" referral under section 394.913 Florida Statutes (2005). Given the plethora of notice to the State discussed *infra.*in this answer brief, Phillips argues there is no practical difference between the original VOP sentence being two years shorter in length as a result of a sentence correction and the amount and variety of notice the State had of Phillips' eligibility for a "Ryce" referral as an incentive for the State to act and initiate the referral earlier. In Mr. Phillips' case, had the DOC timely complied with this mandatory, statutory directive, there would have been more than a year before his corrected EOS date occurred during which time the DCF could have initiated the "Ryce" procedure and maintained jurisdiction to adjudicate the petition.

All that is required to retain jurisdiction to proceed under the Act is for the DOC to *initiate* the referral to the DCF at a time the inmate is in *lawful* custody. The DOC should have fulfilled its statutory duty by following the guidelines of § 394.913 (1) (a) Florida Statutes (2005) and given notice to the DCF "as soon as practicable" after the Mr. Phillips arrived at the DOC in mid-summer of 2004. During this time frame when he was arguably in lawful custody, the DOC knew or should have known that inmate Larry Phillips was a "Ryce" candidate and that his release date might occur in less than 545 days. Consequently, the DOC had a legal

duty, pursuant to this statute and under the case law, to notify the DCF "as soon as practicable" after his arrival at prison.[7] *See* section 394.913(1) (a) Florida Statutes (2005). Phillips strongly disagrees with the State's contention in their initial brief that his case relates only to the provisions of section 394.9135 Florida Statutes (2005) and not section 394.913 (1) (a) Florida Statutes (2005). Phillips submits it involves the State's noncompliance with both sections of the statute along with a general failure to act.

Mr. Phillips filed his *pro se* motion to correct errors of his illegal VOP sentence on April 6, 2005, almost 5 months prior to the occurrence of his recalculated EOS date. The State was put on notice by the motion to correct the illegal sentence on April 6, 2005 The motion stated specifically that he was seeking to shorten his sentence and accelerate his EOS date by at least two years. Appendix A. Additionally, the DOC was fully aware that he would be entitled to both basic and incentive gain time from the initiation of his DOC prison term upon his arrival at the DOC facility shortly after the June 10, 2004, VOP sentencing. Had the steps mandated section 394.913 Florida Statutes been taken by the DOC

[7] Section 394.913 (2) (a) through (d) Florida Statues (2005) describes the content of the notice the DOC is required to provide the MDT, *viz.*, inmates name, identifying characteristics, offense history (including any documentation), type of supervision, if any, mental health records, documents showing institutional adjustment and if he had received any treatment. All of this data is readily available at the inmates' custodial institution in the DOC, DCF or Dept. Juv. Just. (DJJ).

between his initial arrival at the DOC in mid-summer of 2004, and before August 31, 2005, the State could have initiated the simple referral process. This would have notified the DCF of Mr. Phillips' potential civil commitment eligibility and thereby preserved jurisdiction to do so at a later date-even after August 31, 2005. However the State did nothing and did not act until over 3 months after his August 31, 2005 EOS.

The State knew of and acknowledged the likelihood that Mr. Phillips would be subject to a "Ryce Act" commitment review as early as the date of his VOP sentencing hearing on June 10, 2004. The state attorney mentioned that possibility to the sentencing judge at that hearing, 14 months prior to Mr. Phillips' EOS of August 31, 2005. Appendix U, page 27. Additional notice was the fact that the VOP sentencing judge, pursuant to the request of the state attorney, designated Mr. Phillips as a "sexual predator" at that same hearing in June 2004. Appendix U, page 25, line 23 – 25 and page 26, line 1. Further notice was due to the fact that the state attorney asked the VOP sentencing judge to order that Mr. Phillips be placed into some sex offender treatment while in the Department of Corrections. Appendix U, page 25, lines 14 – 22. In response, the judge stated on the record that he was ordering that Mr. Phillips be placed into counseling "as a sexual predator or sexual offender". Appendix U, page 26, lines 1-20. Additionally, Mr. Phillips' prison documentation, evident to the DOC upon his arrival at the DOC reception

center in mid-summer 2004, reflected he had a conviction for a "Ryce Act" qualifying sexual offense under F. S. § 394.912 (9) (b) (2) and therefore was subject to a "Ryce" evaluation.

Taken altogether, the foregoing facts gave substantial notice to the State that a "Ryce" referral of Larry Phillips should have been made to the DCF long before it was finally initiated on December 6, 2005. Furthermore this factual history rebuts the State's contention in its initial brief that it had insufficient notice to act to initiate the "Ryce" proceeding against Mr. Phillips before August 31, 2005, while he was arguably in lawful custody. The Supreme Court opinions in Atkinson and Larimore clarified the prerequisite of the lawful custody requirement at the time any step is taken to initiate a civil commitment proceeding. Larimore held that this prerequisite applies to both sections 394.913 and § 394.9135 Florida Statutes. Larimore at 117. The Court in both opinions held that requiring only *actual* custody, regardless of its *lawfulness*, would produce an unreasonable, harsh or absurd consequence and thus, would be contrary to public policy. Atkinson at 174; Larimore at 115 [e.s.]. The Atkinson Court held that it would be contrary to the basic tenets of fairness and due process if the court were to interpret § 394.925 (Applicability of act) as requiring only *actual* custody. Atkinson at 174.

The comment in the trial court's conclusion in the November 16, 2009 order denying Phillips' motion to dismiss, as to why Mr. Phillips' custody on December

6, 2005 was lawful, is precisely the argument rejected by the Supreme Court in Atkinson and Larimore. *Cf.* Appendix D. Those opinions held that *actual* custody, regardless of its lawfulness, was not the equivalent of *lawful* custody, which is a prerequisite necessary to establish jurisdiction for the filing of an involuntary civil commitment petition.

Even Justice Harding, who disagreed with the Atkinson majority's interpretation of the "in custody" requirement, stated in his dissent in that case that even though he believed that the process of law resulting in Atkinson's sentencing and incarceration constituted lawful custody, if there was a subsequent judicial or administrative finding that custody should have terminated on an earlier date, it would nonetheless not disturb an inmate's good faith custodial status as lawful at the time the "Ryce" petition was filed, *provided the inmate's custody beyond his legal EOS date was not the result of negligent* or intentional wrongdoing by the State. *See* Atkinson at 177 (Harding, J. dissenting). [e.s.]

That portion of Justice Harding's dissent directly refutes the State's argument that Mr. Phillips' custody was lawful on December 6, 2005, over 3 months after his August 31, 2005, EOS. The State contends, and the trial court erroneously concluded, that Mr. Phillips was in lawful custody on December 6, 2005. Appendix Z and Appendix D.

Justice Harding's definition of lawful custody includes custody that results after a date an inmate should have been released; however he maintains it is lawful only if the state was *not negligent* in causing the delay of the inmate's release from custody. Phillips does not cite Justice Harding's dissent as an endorsement of his view that in such a situation the inmate's custody is, if not negligently delayed, nonetheless lawful; but rather, to underscore the fact that, even under Justice Harding's definition of the prerequisite custody requirement, custody would be insufficient to establish jurisdiction for the adjudication of the civil commitment petition if the inmate's release from custody is delayed beyond his EOS as a result of the State's own negligence.

Phillips submits that in his situation, the State knew of his exposure to the application of the Act from even before the start of the incarceration portion of his VOP sentence; well over a year prior to his end of his legal sentence on August 31, 2005. See Appendix U, page 27, lines 1-6. On April 6, 2005, additional notice was given to the State that he was seeking to reduce the length of his sentence by at least two years. Appendix A. Consequently, the State knew that Mr. Phillips, was a convicted sex offender; that he was a designated sexual predator; that he had been ordered into treatment as a sexual predator or sexual offender by the VOP sentencing judge; that he was a person with a "Ryce" qualifying sexual offense and eligible for an evaluation for involuntary civil commitment and finally; they knew

at least 5 to 6 months prior to his recalculated sentence, that he was attempting to substantially accelerate his EOS date. All this notice to the State occurred at a time when Mr. Phillips was arguably in lawful custody. The State should have then timely initiated the involuntary civil commitment proceedings by referring him to the DCF for an evaluation. That could and should have been done at anytime between the date of his arrival at the DOC shortly after his sentencing on June 10, 2004 and the end of his lawful sentence on August 31, 2005. Instead, the State did nothing for seventeen months and over 3 months after his August 31, 2005 EOS.

Phillips argues that in addition to the statutory non-compliance as a bar to jurisdiction to proceed in the "Ryce" case, there are due process considerations that should also raise a bar to jurisdiction and to a further restraint of his liberty. In this regard Phillips would partially agree with the sentiment of the dissent in this case under review as to the constitutionality of holding a person in custody. In his dissent, Judge Altenbernd wrote:

> Although I do not agree that that prohibition should be granted *on the ground alleged*, it is noteworthy that Mr. Phillips has a pending civil commitment proceeding five years after he was released from prison. I must question the constitutionality of a procedure that holds a person in civil detention without a final determination for years when the statutes contemplate a trial within thirty days. Phillips, *Id*. f.n.7 *8. [e.s.].

The State, in their initial brief asserts that:

> "… had the sentencing court originally awarded the 2 years credit

> for time served, the State could have initiated civil commitment proceedings at least 545 days prior to Phillips' release from DOC…since the State would have had notice of the proper release date prior to the actual release itself. Instead, due to the sentencing court's error, the State could not commence the civil commitment proceedings…until the [MDT]…recommended as such…and such a recommendation was not possible until notification from DOC, which in turn was not possible until the trial court awarded the proper credit for time served and gain time. The State should not be penalized for its reliance on a facially proper sentence…."
> *See* State's initial brief, p.16.

Phillips points out, as the majority correctly stated in the case under review, that "ultimately…it is the responsibility of judges and prosecutors to ensure that legal sentences are imposed and that errors are timely corrected…" Phillips*5. Likewise, Mr. Phillips is a lay person and unlike the government with its vast resources and highly trained attorneys, had neither the training nor knowledge to advise the circuit court of its errors in his sentencing. Ultimately however Mr. Phillips on his own initiative did get the sentencing error corrected and, although his timing did not suite the State or the dissent, certainly Mr. Phillips should not be penalized. It is the DOC's responsibility under the Act to see that referrals to the DCF of potential "Ryce" detainees are timely initiated. The provisions of section 394.913 Florida Statutes (2005), that mandates DOC notice to the DCF, establishes the minimal time frame for this notice to be given, but the requirement to initiate the "Ryce" proceeding review while the inmate is in lawful custody should compel the DOC to act as suggested by this section of the Act - "as soon as practicable"

after the inmates' "Ryce" eligibility becomes apparent. *Cf.* F.S. § 394.913, *See also,* State v. Goode, 830 So. 2d 817, 826 (Fla. 2002). Larimore set out the *lawful* custody prerequisite for initiating "Ryce" referrals and the DOC has the burden to establish procedures to timely comply with this requirement.

This court has consistently emphasized the need for the State to file the "Ryce" referrals as early as reasonably possible in order to avoid due process violations. *See* Larimore 116-117 quoting Mitchell v. State, 911 So. 2d 1211(Fla. 2005) where this court wrote:

> We further "emphasize[d] that the State should make every effort to initiate the commitment trial 'well in advance of the [detainee's] date of release from prison [, so that] the due process concerns of commitment beyond imprisonment would be substantially alleviated." Mitchell, *Id*. at 1219 (quoting State v.Goode,*Id.* at 826).

As a matter of public policy, it is indefensible under the tenets of fairness and due process for the State to take the position that the DOC and the DCF in this case could not have acted to review Phillips' status as a potential "Ryce" detainee until after a post-conviction judge issued an opinion in Phillips' *pro se* motion to correct illegal sentence. This argument, set out in the State's brief, creates the image of a daisy-chain of finger pointers; each saying it is the responsibility of the other agency to act to initiate Mr. Phillips' "Ryce" proceedings. Mr. Phillips, without the assistance of counsel, researched, created and filed his motion to correct his illegal sentence. He did so months before the court ruled on his motion

and months before the date of his August 31, 2005 EOS. He did so without the benefit or expectation of the Larimore holding since it was not to be decided for another 5 years. His due process rights have been violated and he has lost his liberty for the past six years, after he had already paid the price for his criminal violations. Nevertheless, the State, and even the dissent in the case under review, unjustifiably points the finger of blame toward him in this appeal.

While public sentiment in our society toward convicted sex offenders, who have completed their criminal penalties, reflects an almost universal intolerance, as citizens, they nonetheless deserve to receive from our courts the same constitutional protections afforded anyone else in society.

CONCLUSION

For all the reasons set out in this brief, this court should affirm the issuance of the writ of prohibition by the 2d DCA, affirm the dismissal of the involuntary civil commitment petition with prejudice and affirm the order of Larry Phillips' release from the custody of the DCF and, should answer the certified question in the negative given the stipulated facts of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief of Respondent, Larry Phillips, was sent to Joseph H. Lee, Assistant Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607-7013 postage pre-paid, this ___day of April, 2011.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210 (a) (2).

Respectfully Submitted,

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