IN THE SUPREME COURT OF FLORIDA

IN RE COMMITMENT OF:

STATE OF FLORIDA,

Petitioner,

v.

LARRY PHILLIPS,

Respondent.

Case No. SC11-411

ON DISCRETIONARY (QUESTION OF GREAT PUBLIC IMPORTANCE) REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

Cases

Statutes

Other Authority

Rules

STATEMENT OF THE CASE AND FACTS

Case: On December 6, 2005, Phillips was released from the Florida Department of Corrections ("DOC"), and was transferred to the Florida Civil Commitment Center, for consideration by the Multi-Disciplinary Team as to whether Phillips should be civilly committed pursuant to Section 394.910-.931, Fla.Stat., commonly known as the Jimmy Ryce Act ("Act"). Pursuant to the recommendation of the Multi-Disciplinary Team, the State commenced civil commitment proceedings under the Act on December 12, 2005.

On June 11, 2009, Phillips filed Respondent's Motion to Dismiss, responded to by the State on July 9, 2009, and denied by the trial court on November 16, 2009. Phillips filed a Petition for a Writ of Prohibition with the Second District Court of Appeal, responded to by the State. In the majority decision under review, In Re Commitment of Phillips v. State, 35 Fla. L. Week. D2614 (Fla. 2d DCA Dec. 1, 2010), the court granted the writ and certified a question of great public importance. The State submitted a Motion for Rehearing or Rehearing En Banc, which was denied February 9, 2011, as amended February 16, 2011. The State filed its Notice to Invoke Discretionary Jurisdiction on February 24, 2011.

Facts: The relevant facts are presented in the majority opinion and quoted below:

> In February 1990 Phillips was arrested on a fugitive warrant in Georgia and extradited to Collier County where he was charged with three counts of committing a lewd and lascivious assault. After posting bond in Florida,

Phillips was returned to Georgia for prosecution of a separate offense. In July 1990 a Georgia court sentenced Phillips to three years in prison followed by seventeen years of probation for that offense. Phillips was paroled in March 1992 and returned to Florida to resolve the Collier County case.

In April 1992 the Collier County circuit court sentenced Phillips to two years in prison followed by ten years of probation. The court awarded Phillips two years of credit for the time he had served in Georgia prior to his return to Florida. This effectively erased the two-year prison sentence, and Phillips was processed in and out of the Florida Department of Corrections (DOC) on the same day that he was sentenced. Phillips thereafter returned to Georgia to serve both his Georgia and Florida probationary terms.

Less than two years later, Phillips violated both his Georgia probation and his Florida probation by committing a new law offense in Georgia. A Georgia court revoked his probation and sentenced him to prison. In January 2004 Phillips was paroled from prison in Georgia and extradited to Florida to face the violation of probation charge in Collier County. Phillips admitted to violating his Florida probation, and the court sentenced him to 5.5 years in prison with 177 days of jail credit. Less than a year later, Phillips filed a motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). Phillips requested that a Florida postconviction court award him credit against his prison sentence for the two years of credit for time served in Georgia that the Florida court had awarded in 1992. In September 2005 the postconviction court granted the motion and ordered the DOC to award Phillips the original jail and prison credit in addition to the credit for the 177 days he spent in custody prior to the revocation of his probation.[1]

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1 On October 21, 2005, Phillips filed a Motion to Clarify Order, arguing that the Court's first order "fails to inform the DOC of his Georgia incarcerations." On November 8, 2005, the Court issued an Order Denying Defendant's Motion To Clarify. In its order, the Court noted that contrary to Phillips'

On December 6, 2005, Phillips was released from the DOC and was transferred to the Florida Civil Commitment Center pursuant to section 394.9135(1), Florida Statutes (2005) [footnote omitted]. The Department of Children and Family Services placed a seventy-two hour hold on Phillips and began its evaluation to determine whether he met the criteria for commitment as a sexually violent predator under the Act [footnote omitted]. The multidisciplinary team timely recommended civil commitment to the state attorney, who filed a commitment petition.

[* * *] In June 2009 Phillips, who was still in custody but had not been to trial, filed a motion to dismiss the commitment petition in the circuit court. Phillips argued that he was not in lawful custody at the time commitment proceedings were initiated on December 6, 2005, because his sentence had expired on August 31, 2005, based on the postconviction court's determination of entitlement to two years of prison credit against Phillips' sentence of 5.5 years. The DOC included the award of 420 days of basic gain time and 234 days of incentive gain time in making this calculation [footnote omitted].

The circuit court denied the motion to dismiss based on its determination that Phillips was in lawful custody when commitment proceedings were initiated because "[t]he time period from August 31, 2005 to December 6, 2005 was well within the legal term of [Phillips'] sentence of 5 1/2 years." Phillips then filed this petition for writ of

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assertions, his "April 12, 1992, written judgment and sentence clearly contemplates jail credit for time Defendant was imprisoned in Georgia." The Court also advised Phillips that the DOC was responsible for keeping records of his sentencing documents and any claims that DOC was failing to properly apply credit for time served must be addressed to DOC through administrative channels. See Phillips' Appendix to Petition, Exhibit C, p.1-2; Exhibit Z, p.3.

> prohibition contending that because his sentence legally expired on August 31, 2005, he was not in lawful custody when commitment proceedings were initiated in December 2005.

35 Fla. L. Week. D2614, 2010 WL 4861458 *1 - *2.

In summary, then, Phillips was in DOC's custody up to and through December 6, 2005/when he was referred for possible commitment proceedings under the Act, on a facially valid sentence for a violation of probation, though a corrected calculation of gain time and credit for time served would have entitled Phillips to release on August 31, 2005.

The majority and dissent below certified the following question as one of great public importance:

> DOES THE STATE HAVE JURISDICTION TO INITIATE CIVIL COMMITMENT PROCEEDINGS UNDER THE 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?

SUMMARY OF THE ARGUMENT

Contrary to the majority's decision below, Larimore v. State, 2 So. 3d 101 (Fla. 2008), did not necessitate the issuance of the writ of prohibition. Without such a constraint, the majority's opinion is erroneous as a matter of law, in light of Section 394.9135, Fla. Stat. Policy considerations further buttress the State's position herein. In this regard, the State should not be faulted for the sentencing court's error, made over a year prior, especially since the State cannot act until the recommendation of the Multi-Disciplinary Committee, which in turn, cannot act until notification of pending immediate release by the Department of Corrections, which in turn, cannot act until it received and processed the corrected sentence.

ARGUMENT

THE CORRECTION OF GAIN TIME OR CREDIT FOR TIME SERVED DOES NOT RENDER AN INCARCERATIVE SENTENCE UNLAWFUL FOR PURPOSES OF THE ACT, WHERE THE ENTIRE SENTENCE WAS NOT UNLAWFUL.

A. Standard of review.

In that the certified question presents an issue of law based upon undisputed facts, the standard of review 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 majority opinion misreads Larimore v. State.

The decision below rests on the majority's view that Larimore v. State, 2 So. 3d 101 (Fla. 2008), was binding authority. In finding as such, and in rejecting the State's arguments that Larimore was distinguishable/did not apply, the majority opinion, in attempting to align the subject cause with Larimore, noted that "the petitioner in Larimore was entitled to immediate release due to a misapplication of gain time. See also Madison v. State, 27 So. 3d 61, 63 (Fla. 1st DCA 2009) [, review denied, 24 So. 3d 559 (Fla. 2009)]." See 35 Fla. L. Week. D2614, 2010 WL 4861458 *4.

In Larimore, the court held that an individual must be in lawful custody when the State takes steps to initiate commitment proceedings pursuant to the Act in order for the circuit court to have jurisdiction to adjudicate the commitment petition. However,

the court noted that Larimore's entire resentencing had been unlawful; and, therefore, its ruling did "not reach the question of whether section 394.9135, Florida Statutes, 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." Id. at 117 n.8 (emphasis in original).

Sub judice, the Florida violation of probation proceeding and the sentence were legal except that the time-served-credit, and, therefore, the related gain time, were incorrect. As such, and since Petitioner's entire sentence was not unlawful, the analysis looks to Section 394.9135, Fla.Stat./jurisdiction vis-à-vis imminent release proceedings, see below, whereas in Larimore, the analysis rested on Section 394.913(1), Fla.Stat./jurisdiction vis-a-vis referral for evaluation of whether the inmate meets the definition of a sexually violent predator, before the term of incarceration has ended and before the inmate's release becomes imminent. Larimore, then, is distinguishable.

Moreover, and contrary to the majority's suggestion that the corrected gain time is what rendered Larimore subject to immediate release, Larimore's entire incarcerative sentence was unlawful at its inception, pursuant to Tripp v. State, 622 So. 2d 941 (Fla. 1993). Indeed, the court in Larimore, expressly limits its holding to cases where the entire sentence was unlawful. See Larimore, 2 So. 3d at 117 n.8.

Similarly, the majority opinion's reliance of Madison is

misplaced, for a variety of reasons. First, the context of Madison establishes, implicitly but clearly, that the case did not involve Section 394.9135/jurisdiction vis-à-vis imminent release proceedings, as in the case at hand; but, instead, and as in Larimore, with Section 394.913(1), Fla.Stat./jurisdiction vis-a-vis referral for evaluation of whether the inmate meets the definition of a sexually violent predator, before the term of incarceration has ended and before the inmate's release becomes imminent. Second, Madison, as dicta, reversed and remanded the case for the trial court to determine if factors existed which could affect the length of sentence, such as gain time or other credits, which could bear on "lawful custody;" Madison did not hold as a matter of law that gaintime or other credits could render an initially lawful custody unlawful nunc pro tunc. Madison simply held that the appellate court had insufficient information to determine "lawful custody."

As such, and contrary to the majority's reasoning below, Larimore did not serve as binding authority mandating the conclusion reached by the majority.

2. Larimore suggests that Phillips was in lawful custody.

The Larimore opinion is one that addresses solely an issue of statutory construction; it came to its conclusions solely on the basis of the interpretation of relevant statutory provisions, to wit, Section 394.913, Fla.Stat. There is nothing in Larimore that holds, as a matter of constitutional law, that the State would in

any way be barred from enacting a statute and applying a statute, herein, Section 394.9135, Fla.Stat., which attempts to protect the State's legitimate interests in protecting the public from individuals who are dangerous, as a result of their mental conditions, see Westerheide v. State, 831 So. 2d 93 (Fla. 2002), where such is the only manner in which the State is able to do so.

Indeed, Larimore, if anything, strongly suggests that Section 394.9135(4), Fla.Stat., allows for the commencement of civil commitment proceedings under the Act against Phillips and those similarly situated. While generally discussing Section 394.9135, Fla.Stat. (2005), this Court noted the intent of Section 394.9135:

> This interpretation is confirmed by Senate staff analyses on chapter 99-222, Laws of Florida, which added section 394.9135. The Florida Senate Committee on Children and Families' staff analysis stated that the section addresses situations where, "because of unforeseen circumstances, it is anticipated that a person's release from total confinement will become immediate. This section ... would assist in dealing with cases such as when inmates successfully challenge gain-time and early release statutes and win early judicially mandated release from prison." Fla. S. Comm. on Child. & Fams., CS for SB 2192 (1999) Staff Analysis 25 (Mar. 30, 1999) [hereinafter Child. & Fams. Comm. SB 2192 Analysis]; *see also* Fla. S. Comm. on Judiciary, CS for SB 2192 (1999) Staff Analysis 12 (Apr. 8, 1999) (stating that section 394.9135 "provide [s] an expedited involuntary civil commitment process for a person whose release becomes imminent due to factors such as successful gain-time challenges and early release statutes") [hereinafter Judiciary Comm. SB 2192 Analysis]. The section is intended to assist the Department of Children and Families and state attorneys with expediting cases in such circumstances. Child. & Fams. Comm. SB 2192 Analysis at 25; Judiciary Comm. SB 2192 Analysis at 12.

2 So. 3d at 109 n.4 (emphasis added).

In examining Larimore, then, and especially notes 4 and 8 in conjunction, Larimore, impliedly but contextually clearly, reasoned that an incarcerative sentence subject to immediate termination due to a proper award of gain time or credit for time served is "lawful custody" for purposes of Section 394.9135, Fla.Stat. (2005). This conclusion is buttressed by looking to the critical words in note 8 of Larimore: "who *while in lawful custody* obtains an order for immediate release for any reason" (italics in original; underlined emphasis added). The "who" refers to a prisoner who is in lawful custody, notwithstanding that the incarcerative sentence is subject to termination due to matters such as gain time or credit for time served. Thus, the custody is (still) lawful when the prisoner obtains an order for immediate release, through the execution thereof.

In a similar vein, immediate release for "any" reason would include the situation at hand, and, indeed, the current scenario was contemplated in the creation of Section 394.9135, Fla.Stat. (2005). See Larimore, 2 So. 3d at 109 n.4. See also Washington v. State, 866 So.2d 725, 727 (Fla. 3d DCA 2004) (Cope, J., concurring) ("[s]ection 394.9135 establishes the procedure where the anticipated release of an inmate becomes immediate for any reason. […] § 394.9135(1). The classic example of such a release would be in a situation in which the defendant has been resentenced to a shorter sentence, or has been granted additional credit for time served."), review denied, 895 So. 2d 1068 (Fla. 2005).

3. Section 394.9135(4), Fla.Stat., applies herein.

Without Larimore mandating the decision below, and, indeed, strongly suggesting that the decision below was erroneous, Section 394.9135(4), Fla.Stat., establishes as a matter of law that the civil commitment proceedings pursuant to the Act against Phillips were proper. In this regard, the majority's opinion stated,

> [Section 394.9135(4), Fla.Stat.] does not apply because lawful custody is required before the State may initiate commitment proceedings. [Citations omitted]. Thus, even though Phillips' release became immediate upon his resentencing by the postconviction court, section 394.9135 was inapplicable.

See 35 Fla. L. Week. D2614, 2010 WL 4861458 *4

The majority holds, then, that an incarcerative sentence must be proper at its inception, even under/notwithstanding Section 394.9135(4), Fla.Stat., even where the entire sentence is not unlawful. Such a position is unsustainable.

Section 394.9135(1), Fla.Stat. (2005), states that:

> If the anticipated release from total confinement of a person who has been convicted of a sexually violent offense becomes immediate for any reason, the agency with jurisdiction shall upon immediate release from total confinement transfer that person to the custody of the Department of Children and Family Services to be held in an appropriate secure facility.

In enacting Section 394.9135, Fla.Stat., into law, in 1999, the Senate noted the following, manifesting no less than three times the intent of Section 394.9135, Fla.Stat.:

> A new statutory section relating to immediate releases from total confinement would be created. This section would help the DCFS and the state attorneys to expedite cases where, because of unforeseen circumstances, it is anticipated that a person's release from total confinement will become immediate. This section, s. 394.9135, F.S., would assist in dealing with cases such as when inmates successfully challenge gain-time and early release statutes and win early judicially mandated release from prison.
>
> If such a scenario arises, CS/SB 2192 would provide authority for the agency releasing the qualifying person to instead immediately transfer that person to the custody of the DCFS to be held in an appropriate secure facility.

See Fla. S. Comm., CS for SB 2192 (1999) Staff Analysis 25 (Mar. 30, 1999) (emphasis added).

> Section 7 creates s. 394.9135, F.S., to provide an expedited involuntary civil commitment process for a person whose release becomes imminent due to factors such as successful gain-time challenges and early release statutes. In such cases, the agency releasing the qualifying person from total confinement in a secure facility operated by the Department of Corrections, the Department of Juvenile Justice, and the Department of Children and Family Services is authorized to immediately transfer that person to the custody of the DCFS in an appropriate secure facility.

See Fla. S. Comm., CS/CS for SB 2192 (1999) Staff Analysis 25 (April 8, 1999) (emphasis added).

> A new statutory section relating to immediate releases from total confinement would be created. This section would help the DCFS and the state attorneys to expedite cases where, because of unforeseen circumstances, it is anticipated that a person's release from total confinement will become immediate. This section, s. 394.9135, F.S., would assist in dealing with cases such as when inmates successfully challenge gain-time and early release statutes and win early judicially mandated release from prison.

> If such a scenario arises, CS/CS/CS/SB 2192 would provide authority for the agency releasing the qualifying person to instead immediately transfer that person to the custody of the DCFS to be held in an appropriate secure facility.

See Fla. S. Comm., CS/CS/CS for SB 2192 (1999) Staff Analysis 25 (Apr. 15, 1999) (emphasis added).

Although no case has squarely addressed the scope of Section 394.9135, Fla.Stat., the caselaw has nonetheless been uniform in its dicta that Section 394.9135, Fla.Stat., addresses scenarios involving early release based upon factors such as successful challenges against gain time, based in large part on the Staff Analysis quoted above. See Larimore, 2 So. 3d at 109 and 109 n.4. See also Washington, 866 So.2d at 727 (Cope, J., concurring).

No question exists as a matter of law that Section 315.9135, Fla.Stat., applies herein. Indeed, the reference to "early" release in the Staff Analyses, manifests that a sentence which was facially proper at its inception but subsequently corrected, thereby entitling the detainee to immediate release, was lawful for purposes of the Act.

Such a conclusion is buttressed by the maxims of law that the courts must endeavor to construe statutes to effectuate the intent of the Legislature, and to avoid interpretations of law which would render a statute meaningless. Larimore, 2 So. 3d at 111, 114. With regard to the former, the statute specifically states that it applies to anyone subject to the Act, but against whom the civil

commitment proceedings have not yet commenced, whose release "becomes immediate for any reason." Moreover, the Staff Analyses, and the related caselaw, as noted and quoted above, all recognize that the statute applies herein.

With regard to the latter, the majority opinion below renders Section 394.9135, Fla.Stat., all but meaningless. In this regard, the majority opinion effectively precludes the Act from applying to (nearly) every scenario contemplated by Section 394.9135, Fla.Stat. (2005), since matters such as corrected gain time, early release, or credit for time served, are rarely, if ever, evident on the face of the sentence. Under the majority opinion, however, and the requirement therein that the sentence must be properly calculated at its inception, subsequent corrective matters contemplated by the statute, such as gain time, early release, or credit for time served, become irrelevant, and effectively forecloses the statute from ever being utilized. Indeed, the only scenario in which Section 394.9135, Fla.Stat., could ever apply would be those involving executive clemency or other similar and narrow scenarios. Such is an improper reading of the statute. Cf. Crutcher v. School Bd. of Broward County, 834 So. 2d 228, 232 (Fla. 1st DCA 2002) ("[t]his Court must interpret statutes by the well-established norms of statutory construction which require rendering the statutory provisions meaningful.").

4. Policy considerations support the State's position.

Policy considerations heavily weigh against the majority

opinion. As pointed out by Judge Altenbernd in his dissent, notwithstanding a "facially legal sentence," "a defendant's attorney is well advised to assure there is an unpreserved error in jail or prison credit when a client may be subject to civil detention. Once the error is rendered in the sentence, the defendant need only wait until the final portion of his sentence to file a motion under rule 3.800(a) to guarantee that the error will be corrected at a point that will divest the Department of Children and Family Services from jurisdiction." Such "may have a perverse effect on sentencing in cases where a Jimmy Ryce proceeding is a possibility." 35 Fla. L. Week. D2614, 2010 WL 4861458 *7 (Altenbernd, J., dissenting as to the opinion but concurring as to the certified question).

The majority addresses such a concern by concluding that there was no indication of such an intent in this case. 35 Fla. L. Week. D2614, 2010 WL 4861458 *5. Notwithstanding the absence of any such indication herein, the majority's opinion allows for future intentional and abusive avoidance of civil commitment proceedings, especially since the majority opinion is based on an issue of law. Regardless of intent, however, the majority opinion divests the Department of Children and Family Services and the State from initiating Act proceedings in the face of a good faith reliance on facially proper sentences.

Similarly, and as suggested by Judge Alternbernd in his dissent, the State should not be penalized for judicial error,

committed by the sentencing trial court on June 10, 2004, in failing to award the proper credit for time served. In this regard, had the sentencing court originally awarded the 2 years credit for time served, the State could have initiated civil commencement proceedings at least 545 days prior to Phillips' release from DOC, pursuant to Section 394.913, Fla.Stat., the preferred means of commencing civil commitment proceedings under the Act, cf. Larimore v. State, 917 So. 2d 354, 357 (Fla. 1st DCA 2005), quashed on other grounds, 2 So. 3d 101 (Fla. 2008). Such would be the case, since the State would have had notice of the proper release date prior to the actual release itself. Instead, and due to the sentencing court's error, the State could not commence the civil commitment proceedings under the Act, until the Multi-Disciplinary Team of the Florida Department of Children and Families recommended as such, see Harden v. State, 932 So. 2d 1152 (Fla. 3d DCA 2006), 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.

Such is especially true since Phillips himself, on or about October 21, 2005 (e.g., in the interim between the September 15, 2005, Order Granting Defendant's Motion to Correct Sentence to Reflect Prison Time Credit, and Directing the Clerk to Serve a Certified Copy of the Order to the DOC, and Phillips' December 6,

2005, release from DOC), filed his pro se Motion to Clarify Order, regarded as a motion for rehearing, thus delaying the effectiveness of the September 15, 2005, order, until it became final on or about November 8, 2005 with the Order Denying Defendant's Motion for to Clarify. See Phillips' Appendix to Petition, Exhibit C, p.1-2; Exhibit Z, p.3. The September 15, 2005, order would only have become operative when the order was final and then transmitted to DOC, which, in the subject cause, did not occur until after November 8, 2005. At such a juncture, DOC, the Multi-Disciplinary Team, and the State all responded in good faith and expeditiously. The State's reliance was proper.

CONCLUSION

For the reasons discussed above, Petitioner, the State of Florida, respectfully requests that this Honorable Court disapprove the majority decision below, and answer the certified question in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard R. Donnelly, Assistant Public Defender, Public Defender's Office, PO Box 151327, Cape Coral, Florida 33915-1327, this ____ day of April, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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