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 REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner, the State of Florida, will rely on the statement of the case and facts as presented in Petitioner's Initial Brief on the merits.

SUMMARY OF THE ARGUMENT

The Legislative intent manifests that custody is lawful under Section 394.9135, Fla.Stat., as against Respondent, vis-à-vis that lawfulness is not defined in terms of the end of sentence, but, instead, in terms of the issuance of an administrative or judicial order correcting gain time or credit for time served, thereby modifying the end of sentence, and the processing thereof. Moreover, to construe Section 394.9135, Fla.Stat., in the manner proposed by Respondent, and adopted by the majority opinion below, renders the statute redundant with Section 394.913, Fla.Stat., and effectively meaningless.

Section 394.9135, Fla.Stat., was enacted by the Legislature based on the recognition that errors can and will occur in the criminal justice system with respect to the lengths of sentences, and that notwithstanding such errors, the conditions and dangerousness of sexually violent predators warranted a procedure whereby such individuals would still be subject to involuntary civil commitment under the Act.

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.

Respondent Phillips, in his Answer Brief, responds to the arguments presented in the Initial Brief on the merits, in 6 parts. For clarity of the pleadings, Respondent will note each part, and reply thereto or advise this Honorable Court that the State will rely on its initial arguments.

1. The Decision below correctly rests on this Court's precedent that Jurisdiction Requires Lawful Custody under the Act [as stated by Respondent].

Respondent herein makes a general argument that the majority's decision under review properly rests on the general requirement of lawful custody at the time of the commencement of the involuntary civil commitment proceedings, pursuant to Section 394.910-.931, Fla.Stat., commonly known as the Jimmy Ryce Act ("Act"), as espoused in State v. Atkinson, 831 So. 2d 172 (Fla. 2002), and Larimore v. State, 2 So. 2d 101 (Fla. 2008).

In Atkinson, this Honorable Court held that a person must be in lawful custody on the effective date of the Act, pursuant to Section 394.925, Fla.Stat., to establish proper jurisdiction. The State does not dispute Respondent's reading of the case, as a general proposition of law. However, Respondent's application of Atkinson to the case sub judice is misplaced. In this regard, Atkinson dealt with Section 394.925, Fla.Stat., in the context of

the effective date of the Act; Atkinson did not deal with Section 394.9135(1), Fla.Stat., which is pivotal herein, and the issue as to whether custody is lawful under the Act, for a sentence which is not unlawful in its entirety and which is facially valid, but against which the inmate is entitled to immediate release based on a corrected award of gain time (and where the correction is made after the end of sentence). Atkinson's general holding, then, does not address the situation now under review. Indeed, the State does not dispute that the custody must be lawful herein, but maintains that the custody was lawful pursuant to Section 394.9135(1), Fla.Stat.

As to Respondent's suggestion that Larimore required the majority's opinion below, the State will rely on its Initial Brief on the merits, contending that the majority has misread Larimore as necessitating the issuance of the writ of prohibition, and that a proper reading of Larimore actually supports the State's position, especially in the context of Section 394.9135(1), Fla.Stat.

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 [as stated by Respondent].

Respondent argues herein that (even) under Section 394.9135(1), Fla.Stat., the custody, in order to be lawful, must be prior to expiration of the sentence. The State will rely on its Initial Brief on the merits, maintaining that under Section 394.9135(1), Fla.Stat., the custody was lawful as against Respondent, and that such lawfulness is defined not in terms of

whether the Act proceedings are initiated prior to the actual expiration of the sentence, but, instead, in terms of the trial court's order correcting the expiration of a facially valid sentence and the processing thereof. As such, the State clarifies that it is not arguing that Section 394.9135(1), Fla.Stat., creates an exception to lawful custody; instead, the State is contending that as a matter of law, that under Section 394.9135(1), Fla.Stat., lawful custody includes the scenario where an inmate is entitled to immediate release due to the correction of gain time or credit for time served, where the correction is made after the expiration of the sentence. Or, stated otherwise, that notwithstanding the corrected end of sentence, that a detainee's custody is lawful pursuant to Section 394.9135(1), Fla.Stat., pending the trial court's order of correction of gain time or credit for time served, and the processing thereof.1

> 3. Legally Awarded Gain Time must be credited when calculating the EOS Release Date from the Custody of the Florida Department of Corrections [as stated by Respondent].

Respondent argues that "[t]he State's contention that incentive gain time should not be considered in determining whether

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1 Respondent seems to think it of import that the State did not discuss Bishop v. Sheldon, 35 Fla.L.Week D2617 (Fla. 2d DCA Dec. 1, 2010), in its Initial Brief on the Merits. See Respondent's Answer Brief at p.13. Bishop, however, is, at most, redundant with the majority's opinion under review, with regard to the lower court's reading of Section 394.9135(1), Fla.Stat., in the context of Larimore, and was issued the same day as the opinion under review, by the same District Court of Appeal and with Judge Altenbernd dissenting, as he did herein.

Mr. Phillips was in lawful custody at the time commitment proceedings were initiated is without merit or legal support." See Respondent's Answer Brief at p.16. Respondent has misconstrued the State's reference to gain time in the lower proceedings. By virtue of the stipulation that Respondent's end of sentence was August 31, 2005, the State's references to gain time were not for the purpose of contending that it extended the end of sentence date. Instead, and as gain time is regulated solely by the Florida Department of Corrections, see Moore v. Pearson, 789 So. 2d 316 (Fla. 2001), the references to gain time served to support the facial validity of Respondent's sentence, and that said sentence on its face extended beyond December 6, 2005, notwithstanding the eventual correction of the sentence to expire on August 31, 2005.

> 4. Mr. Phillips Not in Lawful Custody when "Ryce" Procedure Initiated and Implementing the Provisions of F.S. [Section] 394.9135 Did Not Turn Physical Custody into Lawful Custody. The Certified Question Must be Answered in the Negative [as stated by Respondent].

Respondent argues herein that the State has misconstrued Larimore (that Larimore did not dictate the issuance of the writ of prohibition by the Second District Court of Appeal) and Section 394.9135(1), Fla.Stat. The subject argument seems to be the heart of Respondent's Answer Brief. In most respects, the State will rely on its Initial Brief on the merits. However, some of the claims advanced by Respondent herein warrant discussion.

First, Respondent has construed at least part of the State's argument to maintain that Respondent's sentence was lawful, because

it was within the permissible range for a second degree felony. See Respondent's Answer Brief at p.21. This reading is flawed. The State is not arguing that the sentence falling within the guidelines establishes the sentence's lawfulness, except to the extent that the sentence was facially valid, notwithstanding the eventual correction of the end of sentence. Instead, the State is arguing that pursuant to Section 394.9135(1), Fla.Stat., that the custody is lawful, notwithstanding the corrected end of sentence nunc pro tunc to a prior date, pending the trial court's order of correction of gain time or credit for time served, and the processing thereof, especially when all relevant agencies acted reasonably and properly, and without negligence or undue delay.

Second, Respondent contends that the use of "imminent" in one of the Staff Analysis for the bill which eventually became Section 394.9135, Fla.Stat., supports the view that Section 394.9135, Fla.Stat., requires that proceedings under the Act commence prior to the actual end of sentence. The relied upon analysis is as follows:

> 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). Respondent argues that because "imminent" refers to something which has not yet occurred, that lawful custody requires that Act proceedings commence prior to the end of sentence. See Respondent's Answer Brief at p.24-25. Such an argument, however, is unpersuasive.

An inmate whose release is "imminent" in the context of corrected gain time or credit for time served rests on the issuance of an administrative or judicial order correcting the gain time or credit for time served, and the processing thereof; "imminent" in such a context does not mean that the sentence has not expired, since the correction of gain time or credit for time served is not self-executing. Indeed, the other Staff Analyses relevant to Section 394.9135, Fla.Stat., to wit, Fla. S. Comm., CS for SB 2192 (1999) Staff Analysis 25 (Mar. 30, 1999), and Fla. S. Comm., CS/CS/CS for SB 2192 (1999) Staff Analysis 25 (Apr. 15, 1999), as quoted in the State's Initial Brief on the merits, clearly establish the Legislative concern of potential sexually violent predators whose release from total confinement becomes "immediate" in "cases such as when inmates successfully challenge gain-time and early release statutes and win early judicially mandated release from prison" (emphasis added).

Third, and in implied recognition that the Legislative intent herein, as espoused in the Staff Analyses as a whole, supports the State's position, Respondent subtly urges this Honorable Court to minimize its consideration of the Staff Analyses and Legislative

intent, in favor of his views of fairness and due process. See Respondent's Answer Brief at p.25, 30. Legislative intent, however, is the polestar that guides a court's statutory construction analysis, and the courts, if at all possible, must sustain the propriety of the statute as intended, see State v. J.M., 824 So. 2d 105, 109-10 (Fla. 2002); cf. State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997). See also Larimore, 2 So. 3d at 111, 114.

Fourth, Respondent notes that cases defining jurisdiction in Act proceedings, such as Atkinson, Kephardt v. Hadi, 932 So. 2d 1086 (Fla. 2006), cert. denied sub nom Toward v. Florida, 549 U.S. 1216 (2007), State v. Goode, 830 So. 2d 817 (Fla. 2002), Gordon v. Reiger, 839 So. 2d 715 (Fla. 2d DCA 2003), review denied, 890 So. 2d 1115 (Fla. 2004), and Larimore, have been decided since the effective date of Section 394.9135, Fla.Stat. None of these cases, however, have dealt with the issue now before this Honorable Court, as to the parameters of lawful custody under said statute.

Finally, and in response to the State's argument in its Initial Brief on the merits that the majority opinion below has rendered Section 394.9135, Fla.Stat., all but meaningless, Respondent posits that "meaning" is found in Section 394.9135, Fla.Stat., vis-à-vis that Section 394.9135, Fla.Stat., should apply only to situations where the "a person obtains a modification of his sentence for any reason and his modified EOS date […] is imminent but has not yet actually occurred." See Respondent's

Answer Brief at p.29. Respondent's posited reading of the statute, however, actually supports the State's argument herein. If Section 394.9135(1), Fla.Stat., is limited only to those persons whose end of sentence has not expired, then there is no need for Section 394.9135, Fla.Stat., since the State could proceed under Section 394.913(1)(a), Fla.Stat., for which a preference exists to provide notice at least 545 days prior to the anticipated release, but for which the notice may be provided at any time up and until the time of release. See Section 394.913(4), Fla.Stat. See also Kephardt, 932 So. 2d at 1093 n.7; 1095 n.9 (Cantero, J., concurring); Goode, 830 So. 2d at 826. Respondent's proposed reading of the statute, then, renders Section 394.9135, Fla.Stat., at most unnecessary and redundant, or, more likely, meaningless. In either scenario, Respondent's interpretation is unsustainable. Larimore, 2 So. 3d at 111, 114.

In conclusion, Respondent's interpretation of Section 394.9135, Fla.Stat., is not only unsustainable as a matter of law, but ignores the purpose of said statute. In this regard, the Legislature enacted Section 394.9135, Fla.Stat., based on the recognition that errors could and would occur in the criminal justice system, with regard to sentences where the errors were not evident at its inception. In enacting the statute, the Legislature determined that notwithstanding such errors, the dangerousness of sexually violent predators and the need to protect the public from such individuals, see Westerheide v. State, 831 So. 2d 93 (Fla.

2002), warranted a procedure so as to enable the State to commence proceedings under the Act against such persons.

> 5. The State Failed to Comply with the 72-Hour Mandatory Time Provisions of the Involuntary Civil Commitment Statute [as stated by Respondent].

Respondent argues, as an apparent alternative to the issue of whether he was in lawful custody, pursuant to Section 394.9135(1), Fla.Stat., that the Act proceedings should still be dismissed because the Multi-Disciplinary Committee failed to give its written recommendation to initiate Act proceedings, within 72 hours of the transfer of the detainee's custody from the Department of Corrections to the Department of Children and Families, pursuant to Section 394.9135(2), Fla.Stat.

Although this argument seems to be outside the scope of the certified question, the State would respond by referencing and incorporating by reference the arguments presented before the Second District Court of Appeal, in the Response to Petition for Writ of Prohibition, to wit,

> Petitioner contends that the Multi-Disciplinary Team failed to make its recommendation for commitment within 72 hours, as required by Section 394.9135(2), Fla.Stat. In all respects, Respondent hereby references and incorporates by reference the response advanced below, to wit,
>
> > [T]he Respondent submits that the State Attorney lacked jurisdiction to file the petition for involuntary civil commitment because the Department of Children and Families failed to make its recommendation to the State within the 72-hour period specifically provided for by the Act. His claim is based on the fact that he was cleared for release from the DOC on Tuesday, December

6, 2005, and was transferred to the Florida Civil Commitment Center at 9:09 p.m. on that date, but the DCF did not make its recommendation to the State until Monday, December 12, 2005. He contends that the DCF only had until 9:09 p.m. on Friday, December 9, 2005, to make its final recommendation.

It is true that Fla. Stat. § 394.0135 provides for a 72-hour period in which the multidisciplinary team must assess whether the person meets the definition of a sexually violent predator and provide the state attorney with a written assessment and recommendation. However, the statute is very clear that "if the 72-hour work period ends on a weekend or holiday," the assessment and recommendation shall be provided "within the next working day thereafter." Fla. Stat. § *394.9135(2).* Because the 72-hour work period ended on a Friday evening at 9:09 in this case, the Department of Children and Families was correct in providing its written assessment and recommendation to the State within the next working day thereafter, which was Monday, December 12, 2005.

The term "weekend" found in § 394.9 135(2) is not defined within the Act. However, it is well-settled that where the legislature has not defined the words used in a statute, the language should be given its plain and ordinary meaning. *See Green v. State,* 604 So.2d 471, 473 (Fla. 1992). In the absence of a definition, the Court should look to the plain meaning, whether expressed in a dictionary or similar statute. *See Grohs v. State,* 944 So.2d 450 (Fla. 4th DCA 2006); *L.B. v. State,* 700 So.2d 370 (Fla. 1997) ("A court may refer to a dictionary to ascertain the plain and ordinary meaning which the legislature intended to ascribe to the term.").

The term "weekend," is defined by Merriam Webster's Collegiate Dictionary, Tenth Edition (1993) as "the end of the week: the period between the close of one working or business or school week and the beginning of the next."

> The term is defined by the American Heritage Dictionary as "The end of the week, especially the period from Friday evening through Sunday evening." This same definition of "weekend" was adopted in an Ohio Court of Appeals opinion in *State v. Cartier,* 1986 WL 2489, No.85AP-909, Unreported (Ohio App. February 19, 1986), where the Ohio sentencing statutes failed to define the term.
>
> Given the lack of a definition of "weekend" in the Jimmy Ryce Act, the plain and ordinary meaning of the term must be employed. By the plain and ordinary meaning, the "weekend" began at the close of business on Friday, December 9, 2005. Therefore, the 72-hour work period, which concluded at 9:09 p.m., ended on a "weekend," and the DCF was authorized by statute to provide its recommendation to the State on Monday, December 12th. Because the DCF acted pursuant to statute in providing its recommendation to the State on December 12, 2005, the State possessed jurisdiction to file its petition *for* involuntary civil commitment on that same date.

See Petitioner's Exhibit Z, p.9-10. Relief is not proper.

See Response to Petition for Writ of Prohibition at p.17-19.

Moreover, the State would note and emphasize that even if the 72 hour hours were miscalculated, the State would not be barred from commencing proceedings under the Act, pursuant to Section 394.9135(4), Fla.Stat., which provides that

> [t]he provisions of this section are not jurisdictional, and failure to comply with the time limitations, which results in the release of a person who has been convicted of a sexually violent offense, is not dispositive of the case and does not prevent the state attorney from proceeding against a person otherwise subject to the provisions of this part.

Respondent's argument, then, is unpersuasive.

> 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 [as stated by Respondent].

As another apparent alternative basis, and although seemingly outside the scope of the certified question, Respondent contends that the Florida Department of Corrections had notice of possible civil commitment proceedings against him under the Act, and should have referred him for such consideration prior to August 31, 2005/the corrected end of sentence, pursuant to Section 394.913, Fla.Stat. For self evident reasons, the subject argument is immaterial: the issue is not whether the Florida Department of Corrections should have considered Respondent for possible civil commitment under the Act, prior to August 31, 2005, pursuant to Section 394.915, Fla.Stat., but, instead, whether Respondent's custody was lawful under Section 394.9135(1), Fla.Stat.

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 _____, 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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