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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v. **CASE NO. SC14-1801**

VICTOR REED,
Respondent.
____________________/

On Discretionary Review from the First District Court of Appeal (Certified Question)

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Case--The State seeks discretionary review of the First DCA's decision, which certified this question of great public importance:

> Does a trial court have jurisdiction over a petition filed under the Jimmy Ryce Act against a person who obtains an order for immediate release while in lawful custody where the commitment process is initiated under section 394.9135, Florida Statutes, after the person's sentence expired but before he is actually released?

Reed v. State, 2014 WL 3865842,4 (Fla.1st DCA Aug.7, 2014). (App.A, p.10).[1] The decision below was prompted by Reed's petition for writ of habeas corpus, which the court treated as seeking prohibition. The State moved for rehearing August 11. On September 5, the court denied rehearing and directed the clerk to withhold the writ or mandate pending disposition of the State's petition for review. (App.B). The State filed notice to invoke September 12, 2014.

Facts--On March 9, 2012 Reed was charged in Duval County cases 2012-CF-975, 976, and 978 with six felonies: sexual battery (three counts), kidnapping (two counts), and false imprisonment. (State Ex.A).[2] On May 23, 2013 he pled guilty to the sexual battery charges. (StateEx.B). In accord with the plea bargain, he was sentenced to time served (481 days) followed by 5 years sex offender probation. He was expressly committed to custody of the Department of Corrections (DOC) in cases 2012-CF-975 and 978. (StateEx.C,p.4,16). The written pleas specifically acknowledged

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[1]Appendices A & B (attached) are cited (App.[A or B],p.__).

[2]The exhibits to the State's April 24 response in the First DCA are cited (StateEx.__,p.__). State's emphasis is noted [e.s.].

that Reed "may be subject to involuntary civil commitment as a sexually violent predator." (StateEx.B,p.4,8,12 at ¶F).

Reed was sentenced May 23, then returned to Duval County jail for processing out of DOC custody. These events followed:

Thursday 5/23/13

9:00 AM--Scheduled court hearing; guilty plea entered. [Reed sentenced to time served, etc.].

Friday 5/24/13

2:49 PM--DOC Immediate release notification sent to SAO and DCF. [StateEx.D,p.1].

4:33 PM--72 hour hold Notice by DCF emailed to DOC and SAO. [StateEx.D,p.8].

4:54 PM--DOC authorizes release on DOC sentence, puts DCF detainer on Reed.

Saturday, May 25, 2013

2:44 AM--Reed arrives Fla. Civil Commitment Center.

Tuesday, May 28, 2013

1:47 PM--MDT notifies State Attorney that Reed meets commitment criteria.

Thursday, May 30, 2013

10:15/11:30 AM--Petition for commitment filed [State Ex.E]; probable cause order [State Ex.F] issued.

(adapted from StateEx.D).

SUMMARY OF ARGUMENT

The process to commit Reed as a sexually violent predator (SVP) was initiated one day after his negotiated sentence of time served was imposed. Under these facts, custody was "lawful" when commitment was initiated. By reversing denial of dismissal, the decision below extended this court's decisions in Larimore and

Phillips[3] to their factual extreme, and reduced §394.9135, Fla.Stat., to surplus. The certified question should be answered "yes," with the admonition that Reed's custody was lawful when SVP commitment was initiated; and due process was not violated.

Reed's custody was lawful at least until his time-served sentence was pronounced. Unlike the individuals in Larimore and Phillips, he was not imprisoned well beyond the proper end of sentence. Instead, commitment was initiated the day after sentencing. The State filed the petition within the 5 working days thereafter, as required by §394.9135(2) and (3), Fla.Stat.

Under the decision below, the State cannot use the "fast track" procedure in §394.9135 when a time-served sentence expires just one day before commitment is initiated. The only scenario in which §394.9135 could be used is when a prisoner's release date is abruptly moved forward, but remains a short time in the future.

Such possibility is more illusory than real. In contrast to the "fast track" procedure in §394.9135, a "slow track" is prescribed by §394.913. Under §394.913(4) and Larimore, the deadlines in §394.913 are not jurisdictional. So long as the State initiates commitment no later than the day imprisonment ends, the State can rely just on the "slow track" procedure of §394.913. There would be no need to invoke §394.9135 and its expedited deadlines. The "fast track" procedure is reduced to surplus.

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[3] Larimore v. State, 2 So.3d 101 (Fla.2008); State v. Phillips, 119 So.3d 1233, 1242 (Fla.2013).

The First DCA's decision also addressed whether a person must be in "total confinement" to be subject to commitment. Nominally placed in DOC custody for time served, Reed was so confined. Alternatively, Larimore requires only "lawful custody," not total confinement. Reed's argument on this point was correctly rejected.

ARGUMENT

ISSUE

DID THE DECISION BELOW ERR BY REQUIRING DISMISSAL OF AN ACTION TO COMMIT REED AS A SEXUALLY VIOLENT PREDATOR, WHEN COMMITMENT WAS INITIATED ONE DAY AFTER HIS SENTENCE OF TIME SERVED WAS PRONOUNCED? (Restated from Certified Question).

A. Standard of Review

The issue, as certified and restated, raises a question of how to apply §394.9135, Fla.Stat., in light of Larimore and Philips. Such questions are reviewed de novo. *See* Arsali v. Chase Home Finance LLC, 121 So.3d 511, 514 (Fla.2013) ("Regarding a certified question of great public importance, this Court undertakes de novo review of questions that present a pure question of law."); Rochester v. State, 140 So.3d 973, 974 (Fla.2014) ("The certified conflict issue ... involves an issue of statutory interpretation and is subject to de novo review.").

B. Merits

Reed's Custody was Lawful When Commitment was Initiated

The process to commit Reed as a sexually violent predator

(SVP) was initiated one day after his negotiated[4] sentence of time served was pronounced. His evaluation and recommendation for commitment, the filing of a petition, and the finding of probable cause; all happened within 5 working days from sentencing, as required by §394.9135, Fla.Stat. Under these facts, custody was "lawful" when commitment was initiated. By reversing denial of dismissal, the decision below extended Larimore and Phillips to their factual extreme[5] and reduced §394.9135, Fla.Stat., to surplus. The certified question should be answered "yes," with the admonition that Reed's custody was lawful when SVP commitment was initiated; and due process was not violated.

Reed pled guilty to three sexual batteries. His written plea declared that he could "be subject to involuntary civil commitment as a sexually violent predator." (StateEx.B,p.4,8,12 at ¶F). He was sentenced to time served followed by 5 years sex offender probation (on May 23). Had SVP commitment not been initiated, his liberty still would have been significantly constrained.

Simultaneously committed to DOC custody and sentenced to time served, Reed had to be processed out of the state prison system. To that end, he was held in Duval County jail for convenience, and

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[4]Before the First DCA, the State did not distinguish between a defendant like Reed--who negotiated a sentence of time served--from a defendant whose non-negotiated sentence was time served.

[5]The decision below concluded: "However, because we recognize that this case presents a slightly different situation than Larimore and Phillips and extends those decisions to their logical--but potentially unintended extreme ...." (App.A,p.9-10).

processed out in just one day (Friday, May 24).

During this time, DOC recognized Reed was potentially subject to commitment as a sexually violent predator. It notified DCF (StateEx.D,p.1) as required by §394.9135(1), Fla.Stat. This notice "initiated" the commitment process. *See* Larimore v. State, 2 So.3d 101, 108 (Fla. 2008)(noting one way for commitment to be initiated is by transfer of custody of to DCF upon the person's "immediate release from total confinement" under §394.9135(1), Fla.Stat.). Reed was not detained well beyond the legal end of his sentence until commitment was initiated. *Cf.* Larimore, 2 So.3d at 104 (implying Larimore's sentence legally ended about 6 years before the commitment petition was filed); Phillips, 119 So.3d at 1235-6 (sentence expired about 3 months before commitment initiated due to failure to carry forward about 2 years credit).

Notification of DCF triggered the 72-hour "hold" under §394.9135(2), Fla.Stat., for the multidisciplinary team (MDT) to determine if Reed met the requisites for commitment. Because he was sentenced in the morning of May 23, the 72-hour period ended Sunday, May 26; carried through to Monday, May 27 (Memorial Day), and then to Tuesday, May 28, 2013 as the next "working day." §394.9135(1)-(2), Fla.Stat.

The MDT recommended commitment (StateEx.D,¶6-9), but could not have done so until Wednesday, May 29. (See StateEx.E at ¶8, noting Dr. Raymond provided reports dated May 27 and May 29.) May 29th was a day late. However, the State Attorney filed the petition

(StateEx.E) on May 30, in sufficient time for the trial court to issue a probable cause order the same day. (StateEx.F). Not only did the State Attorney file within 48 hours from receipt of the MDT recommendation as required by §394.9135(3), Fla.Stat.; but--by filing in one day--did so within 5 working days (72 + 48 hours) overall. The critical events took place within the expedited deadline of §394.9135.

This view comports with the text of §394.9135(2) and (3). Subsection (2) establishes a 72-hour interval in which to assess a person whose release has become "immediate for any reason." Subsection (3) provides another 48-hour interval for the State to petition for commitment. Together, the statutes provide that a person's immediate release can be delayed for 5 working days to effectuate commitment. Such result is consistent with public policy in §394.910[6] and comports and Larimore's concern for due process. *See id.*, 2 So.3d at 116-17 (concluding that interpreting the Ryce Act to require "lawful custody" when commitment is initiated, is "consistent with due process considerations").

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[6]§394.910 provides legislative findings, which include:

> The Legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different from the traditional treatment modalities for people appropriate for commitment under the Baker Act. It is therefore the intent of the Legislature to create a civil commitment procedure for the long-term care and treatment of sexually violent predators.

There are two processes for committing someone as a SVP. The first is the "slow track" method in §394.913. The second is the "fast track" method in §394.3195, invoked here. *See* Larimore, 2 So.3d at 108 (noting commitment "is done in one of two ways"). For either method, interim deadlines are not jurisdictional. *See id.* at 111 (parsing §394.913(4) & .9135(4)).

Although requiring commitment be initiated while custody is "lawful," Larimore confirmed the deadlines in the slow process (§394.913) are not jurisdictional. Therefore, so long as the State initiates commitment no later than the same day a defendant's lawful custody ends, the State can rely just on the "slow track" procedure of §394.913. There is no need to use §394.9135, with its expedited deadlines.

Section §394.9145 would be needed only when SVP commitment had to be initiated after a prison sentence ended. Here, the State did so. Nevertheless, the decision below found Reed's commitment was not timely initiated. By doing so, it deprived §394.9135 of a field of operation different from §394.913; that is, to authorize initiation of commitment within 5 working days after imprisonment ends. The "fast track" was reduced to surplus.

Statutes are not to be interpreted in a way to make them meaningless or surplus. *See* Raymond James Financial Services, Inc. v. Phillips, 126 So.3d 186, 191 (Fla.2013)("Another important tenet of statutory construction is that courts must give significance and effect ... to every word, phrase, sentence, and part of the statute

if possible, and words in a statute should not be construed as mere surplusage." [internal quote & cite omitted]); Larimore, 2 So.3d at 106 (same). However, as the decision below observed:

> We share Judge Lawson's views that the judicial gloss placed upon section 394.9135 by these decisions renders the statute largely meaningless, but we are nevertheless bound by these decisions. *See* Evans v. State, 125 So. 3d 799, 803-04 (Fla. 5th DCA 2013) (Lawson, J., concurring specially).

(App.A,p.6 at n.6) [e.s.].

If §394.9135 cannot be employed to commit someone under facts such as Reed's, it has become meaningless. While processing Reed out of the prison system, DOC recognized he was potentially subject to civil commitment as a sexually violent predator (SVP). It so notified DCF (StateEx.D,p.1), as required by §394.9135(1), Fla.Stat.; initiating commitment. A lawful, 72-hour "hold" arose under §394.9135(2), Fla.Stat.; during which Reed was lawfully in custody of DCF. *See* Larimore v. State, 2 So.3d 101, 108 (Fla. 2008) (noting that 394.9135(1) provides the commitment process can be initiated by transferring custody to DCF upon a person's "immediate release from total confinement").

Here, the commitment petition was filed and the probable cause order issued within 48 hours from when the 72-hour assessment interval ended--satisfying §394.9135(3), Fla.Stat. Reed was in lawful custody of DOC, then DCF, from when he was sentenced to when the probable cause order was issued. Neither Phillips nor Larimore preclude this result. *See* Phillips, 119 So.3d at 1243, n.11 ("As Phillips was not in lawful custody, the situation described in

footnote eight of Larimore is yet again not before us."); Larimore, 2 So.3d at 117 n.8 ("In this case Larimore's entire resentencing was unlawful. Thus, we do 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. That issue is not before us." [e.s.].).

Reed was not re-sentenced, but initially sentenced pursuant to a negotiated plea; to time served. That plea, he contends, required immediate release. However, the same sentence would not have required actual release had there been an outstanding detainer or warrant lodged against him.

DCF's 72-hour hold was treated as a detainer (StateEx.L), albeit lodged the day after Reed was sentenced. (StateEx.D, p.8). Neither Larimore nor Phillips exempts a defendant from civil commitment if lawful custody is extended beyond a specific sentence through a detainer. This case presents the "immediate" release issue not reached in Larimore or Phillips; therefore, neither compels relief here. *Cf.* Evans v. State, 125 So.3d 799, 804 (Fla. 5th DCA), *rev.dism.*, 118 So.3d 222 (Fla.2013)("Finally, the Larimore court was very careful to define unlawful custody narrowly, based upon the facts before it.")(Lawson,J., concurring).

In Evans, the opinion of the court followed Phillips to reverse denial of dismissal of a Ryce Act proceeding. It noted the facts were "analytically indistinguishable" from Phillips. The

concurrence noted Evans belatedly obtained additional credit for time served, retroactively causing his sentence to expire. Here, Reed was not legally entitled to release at least until his time-served sentence was pronounced. He was held for one day more until committed was initiated.

This circumstance significantly distinguishes Reed from the individuals in Larimore, Phillips and Evans. Reed obtained highly beneficial plea bargains which addressed the possibility of SVP commitment. (StateEx.B,p.4,8,12). He was in actual custody when commitment was begun, the day after sentencing. Nowhere does he contend he was denied procedural due process. As the concurrence in Evans aptly observed:

> Were I writing on a clean slate, my preference would be to interpret the statute in accordance with its plain language (for, it plainly does not require that an individual be in lawful custody as a precondition to the commencement of Ryce Act proceedings), and to address the due process concern by recognizing that anyone for whom application of the Act as it is written would violate due process could raise an as-applied constitutional challenge as a defense to application of the Act. *Cf.* People v. Wakefield, 81 Cal.App.4th 893, 97 Cal.Rptr.2d 221 (2000); People v. Hedge, 72 Cal.App.4th 1466, 86 Cal.Rptr.2d 52, 61 (1999) (holding that the "unambiguous language" of the Sexually Violent Predators Act "contains no requirement [that] a defendant's custody be 'lawful' at the time such petition is filed, only that the person alleged to be a [sexually violent predator] be in [actual] 'custody under the jurisdiction of the [DOC].' "). As it stands, though, we are bound by the holding in Larimore that the Act only allows the state to initiate a Ryce Act proceeding against an individual who is in "lawful custody" when the proceeding is started.

125 So.3d at 804.

Dismissal of the commitment action against Reed is contrary to

legislative intent, that presently-violent sexual predators be subject to long-term care and treatment. §394.910, Fla.Stat. *See* Anderson v. State, 93 So.3d 1201, 1210 (Fla.1st DCA 2012) ("The purpose of the Jimmy Ryce Act is to isolate and treat persons who are *presently* dangerous." [italics original]).

Reed's plea bargain called for five years of sex offender probation. Had he been released, he would have been subject to the constraints of such probation. Instead, he was kept in DOC custody for one day more, until the SVP commitment process was initiated and legal custody transferred to DCF. He was evaluated and recommended for commitment, and the petition was filed, within 5 working days from when he was sentenced. At most, he was entitled to "immediate" release--not "retroactive" release as were the individuals in Larimore and Phillips. Under these facts, his right to due process was not violated.

"Total Confinement" Not Required to Initiate Commitment

The other point addressed in the decision below was whether a person had to be in "total confinement"[7] to be subject to SVP

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[7]Effective July 1, 2014 the legislature amended the definition of "total confinement" to include persons situated similarly to the defendants in Larimore and Phillips. The legislature also made it clear that serving a sentence for a sexual offense, in jail, is "total confinement:"

> (11) "Total confinement" means .... A person shall also be deemed to be in total confinement for applicability of provisions under this part if:
>
> * * *
>
> (b) The person is serving a sentence in a county or municipal jail for a sexually violent offense as defined in paragraph (9)(i); or

commitment. As noted in the facts, Reed was nominally committed to DOC for time served, thus totally confined; although actually held in the Duval County jail for convenience.

Alternatively, in Larimore, this court concluded:

> Therefore, as to the question of custody, we conclude that it is clear from a reading of all of the related provisions that the legislative intent of the Jimmy Ryce Act is that the person is in lawful custody at the time any initial steps are taken in the commitment process under either section 394.913 or 394.9135.

Id. at 111 [e.s.]. The quoted language does not require a person to be in "total confinement," only in "lawful custody" when commitment is initiated. Nevertheless, in his motion to dismiss Reed argued he was not in "total confinement" when commitment was initiated. (StateEx.H,¶11). Such claim implies that because he was physically in the Duval County jail, he could not have been in DCF or DOC custody. As Respondent has already noted, Reed was committed to DOC for his time-served sentence. In effect, the time served in jail was converted to prison time, meeting the definition of total confinement in §394.912(11), Fla.Stat. (2012).

The State relies on the language quoted from Larimore. Should this court exercise its ancillary jurisdiction to reach Reed's lesser point, it should agree with the decision below. *Cf.* Durden

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> (c) A court or the agency with jurisdiction determines that the person who is being held should have been lawfully released at an earlier date and that the provisions of this part would have been applicable to the person on the date that he or she should have been lawfully released.

§1, ch.2014-2, Laws of Fla.[strike-through & underlining original].

v. State, 777 So.2d 416, 417 n.3 (Fla. 2001) (noting the ancillary issue and declining to disturb the district court's construction of the carjacking statute, as applied, to whether carjacking is done with a deadly weapon when the weapon is a common pocketknife).

CONCLUSION

The certified question should be answered affirmatively and the First DCA's decision reversed. This court should hold that initiating and petitioning for SVP commitment within 5 working days after release from imprisonment is lawful under §394.9135; and due process is not violated.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 9.210

I certify a copy of this INITIAL BRIEF has been sent by email to Reed's counsel, **CHARLES MICHAEL WILLIAMS**, at: seemichaelwilliams@gmail.com; on October 24, 2014. I also certify this brief complies with Fla.R.App.P. 9.210.

/s/ **CHARLES R. MCCOY**
Senior Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v. **CASE NO. SC14-1801**

VICTOR REED,
Respondent.
__________________/

TABLE OF APPENDICES

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A	Decision Below	08/07/2014
B	Order Denying Rehearing	09/05/2014

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D14-1147

VICTOR REED,
Petitioner,
v.

STATE OF FLORIDA,
Respondent.
_____________________________/

Opinion filed August 7, 2014.

Petition for Writ of Prohibition.

C. Michael Williams, Jacksonville, for Petitioner.

Pamela Jo Bondi, Attorney General, and Charles R. McCoy, Senior Assistant Attorney General, Tallahassee, for Respondent.

PER CURIAM.

Victor Reed petitions for a writ of prohibition to review the trial court's order denying his motion to dismiss the involuntary civil commitment petition filed against him under the Jimmy Ryce Act.[1] Reed contends that the trial court lacks jurisdiction over the petition because he was not in "lawful custody" when the commitment process was initiated. We agree. Accordingly, we grant the petition for writ of prohibition.

Factual and Procedural Background

On May 23, 2013, Reed pled guilty to multiple felonies, including three counts of sexual battery, and the trial court sentenced him to the custody of the Department of Corrections (DOC) for a negotiated term of 481 days, with credit for 481 days (i.e.,

[1] §§394.910-.932, Fla. Stat. (2012).

time served). After sentencing, Reed was returned to his pre-trial detention facility – the Duval County Jail – in order to be "processed out."

Reed was still in custody the following afternoon, May 24, 2013, when DOC notified the Department of Children and Families (DCF) that Reed was a potential Jimmy Ryce inmate and that he was scheduled to be released that day due to the end of his sentence. Several hours later, DCF responded with a "detainer" letter directing DOC to transport Reed to the Florida Civil Commitment Center (FCCC) "immediately upon his release from the Department of Corrections." That night, at approximately 8:00 p.m., Reed was "released" from the Duval County Jail and transported to the FCCC. Reed arrived at the FCCC at approximately 2:45 a.m. the following morning, May 25, 2013.

On May 29, 2013, the multidisciplinary team provided the state attorney a written report and recommendation based upon its clinical evaluation of Reed and its review of his records.[2] The report recommended that Reed met the statutory definition of a sexually violent predator.

The following day, May 30, 2013, the state attorney timely[3] filed a petition seeking to commit Reed to the custody of DCF under the Jimmy Ryce Act. The petition alleged that Reed has "a lengthy history of sexual battery and rape, spanning at least a decade or more" and that he "suffers from a mental abnormality and/or personality disorder that makes him likely to engage in acts of

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[2]The report was untimely because, as acknowledged by the State, the 72-hour period in section 394.9135(2) expired on May 28, 2013. This is not a jurisdictional defect, see §394.9135(4), Fla. Stat. (2012); Larimore v. State, 2 So. 3d 101, 112-13 (Fla 2008), and Reed does not argue that he was prejudiced by the tardy report.

[3]See §394.9135(3), Fla. Stat. (2012) (requiring the state attorney to file the commitment petition within 48 hours after receipt of the written report and recommendation from the multidisciplinary team).

sexual violence if not confined in a secure facility for long-term control, care and treatment." The same day, the trial court found probable cause to believe that Reed was a sexually violent predator and ordered that he be maintained in DCF custody at the FCCC pending further order.

On December 9, 2013, Reed filed a motion to dismiss the petition for lack of jurisdiction. The motion argued that (1) Reed was not in "total confinement"[4] when the State initiated the commitment process because, at the time of his convictions, he was in the Duval County Jail and he was not, and had not been, in the custody of DOC, the Department of Juvenile Justice, or DCF, and (2) Reed was not in "lawful custody" when the commitment process was initiated on May 24, 2013, because his time-served sentence had expired the previous day.

The trial court denied the motion to dismiss. The court determined that Reed was lawfully in State custody when the commitment process was initiated on May 24, 2013, because "the Duval County Jail lacked authority to release [Reed] until approved by the State Department of Corrections." Reed timely appealed the trial court's order, and he also sought review of the order by filing a petition for writ of prohibition. The appeal, Case No.

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[4]"Total confinement" is defined to mean that

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

§394.912(11)(a), Fla. Stat. (2012).

1D13-6196, was subsequently dismissed as "duplicative" of this case.

Reed raises the same two arguments in the petition for writ of prohibition that he raised in the motion to dismiss. In response, the State argues that (1)(a) the Jimmy Ryce Act only requires the respondent to be in "lawful custody" – and not "total confinement" – when the commitment process is initiated, and in any event, (b) Reed was in "total confinement" under the second sentence of the statutory definition because, upon sentencing, he was remanded to the custody of DOC for time served, whereupon his previously-served time in the Duval County Jail was effectively converted to prison time; and (2) Reed was in "lawful custody" at the time the commitment process was initiated because DOC was entitled to a reasonable period to "process out" Reed after the expiration of his sentence and the "detainer" letter lodged by DCF and Reed's transfer to the FCCC occurred during that period. We agree with the State on the first point without further comment, but we disagree with the State on the second point for the reasons that follow.

Analysis

In Larimore, the Florida Supreme Court explained that the commitment process under the Jimmy Ryce Act can be initiated against a person who has been convicted of a sexually violent offense in one of two ways: (1) under section 394.913, Florida Statutes, by giving notice to the multidisciplinary team and state attorney at least 545 days before the person's anticipated release from total confinement; or (2) under section 394.9135, Florida Statutes, by transferring the person to the custody of DCF upon immediate release from total confinement. See 2 So. 3d at 108. Here, the State initiated the commitment process under section 394.9135.

Section 394.9135(1) provides that when a person who has been convicted of a sexually violent offense is about to be released, "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." Although this statutory language plainly states that the transfer will occur upon – meaning, "immediately or very soon after" [5]5 – the person's release from total confinement, the Florida Supreme Court recently held that the transfer must occur prior to the expiration of the person's sentence:

> We hold that lawful custody under section 394.9135(1) requires the State to initiate commitment proceedings prior to the expiration of sentence date. When the anticipated release of a corrected sentence is imminent, the DOC may properly initiate the transfer of the individual to the custody of the DCF prior to the expiration of the individual's incarcerative sentence pursuant to section 394.9135(1). Conversely, if the State first initiates commitment proceedings under section 394.9135(1) after the actual expiration of sentence date—which was accelerated due to credit for time-served and/or an award of gain-time—the individual is not in lawful custody and the circuit court is without jurisdiction to adjudicate the commitment petition.

State v. Phillips, 119 So. 3d 1233, 1242 (Fla. 2013); see also Larimore, 2 So. 3d at 110-11 ("[T]he legislative intent of the Jimmy Ryce Act is that the person is in lawful custody at the time any initial steps are taken in the commitment process under either section 394.913 or 394.9135.") (emphasis added); State v. Atkinson, 831 So. 2d 172, 174 (Fla. 2002) (construing the Jimmy Ryce Act to require "lawful custody," rather than "actual custody").[6]

Here, Reed's transfer to the FCCC did not occur until the day after his sentence expired at which point he was no longer in

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[5]See, e.g., http://dictionary.reference.com/browse/upon?s=t

[6]We share Judge Lawson's views that the judicial gloss placed upon section 394.9135 by these decisions renders the statute largely meaningless, but we are nevertheless bound by these decisions. See Evans v. State, 125 So. 3d 799, 803-04 (Fla. 5th DCA 2013) (Lawson, J., concurring specially).

"lawful custody" for purposes of the Jimmy Ryce Act. Accordingly, the trial court was without jurisdiction to adjudicate the commitment petition. See Phillips, 119 So. 3d at 1234 ("[B]ecause Phillips' sentence had expired at the time the State initiated commitment proceedings under the Jimmy Ryce Act, Phillips was not in lawful custody, and consequently, the circuit court lacked jurisdiction over the commitment petition.").

We find additional support for this conclusion in Morel v. State, 2014 WL 1908830 (Fla. 4th DCA May 14, 2014). The defendant in that case, Morel, was the subject of a commitment proceeding initiated in 2002 that languished for more than a decade based upon Morel's "'tactical' decision to 'purposely delay his trial.'" Id at *1 (citing Morel v. Wilkins, 84 So. 3d 226, 247 (Fla. 2012)). In 2012, Morel filed a motion to dismiss the proceeding in which he argued that he was not in "lawful custody" on April 18, 2002, when the State initiated the proceeding by transferring him to FCCC because, on April 17, 2002, he was resentenced to a prison term which had already expired based upon gain time and credit for time served. Id. at *2. The trial court denied the motion and Morel thereafter consented to his commitment, subject to a reservation of his right to appeal the denial of his motion to dismiss. Id.

On appeal, the Fourth District held that the trial court erred in denying the motion to dismiss. The court explained that, based upon Larimore and Phillips, Morel "was not in lawful custody on April 18, 2002, when the civil commitment proceedings were initiated, because his sentence as recalculated had expired . . . []two and a half months prior[]." Id. at *3 (emphasis in original). The court further explained that:

> no court in Florida had jurisdiction to allow the State to initiate civil commitment proceedings against [Morel] on April 18 once the State entered into the agreement with [Morel] on April 17 . . . creating the situation where [Morel] was then continuing to serve time on an expired sentence, not a sentence to expire in the future. Pursuant to Phillips, the State cannot utilize the immediate release provision of the Jimmy Ryce Act on

> April 18, 2002, to cover its failure to fully think through the consequences of the agreement it entered into on April 17, 2002.

Id. (citations omitted and emphasis in original). The same is true here; the State cannot utilize section 394.9135(1) on May 24, 2013, to cover its failure to fully think through the consequences of the time-served plea agreement it entered into on May 23, 2013.

We have fully considered all of the State's arguments in support of the trial court's order, but find only one that merits discussion: that Larimore and Phillips are not controlling because, unlike the respondents in those cases, Reed obtained an order for immediate release while he was in lawful custody, not after his sentence had expired. We are not persuaded by this argument.

The State is correct that Larimore and Phillips did not address the question of whether section 394.9135 would allow the State to take steps to initiate a commitment proceeding against a person who, like Reed, obtains an order for immediate release while he was in lawful custody. See Larimore, 2 So. 3d at 117 n.8 ("[W]e do 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.") (emphasis in original); Phillips, 119 So. 3d at 1243 n.11 (noting that "the situation described in footnote eight of Larimore is yet again not before us"). However, as we read the broad language in Phillips, even if the person obtained an order for immediate release while in lawful custody, the State would still have to take steps to initiate the commitment process before the person's sentence expires. See 119 So.3d at 1242 ("We hold that lawful custody under section 394.9135(1) requires the State to initiate commitment proceedings prior to the expiration of sentence date."). That did not happen here; the State did not take any steps to initiate the commitment process until the day after Reed's sentence expired. Accordingly, notwithstanding the distinction noted by the State, we

find Larimore and Phillips controlling here.

Conclusion

In sum, for the reasons stated above, we grant the petition for writ of prohibition and direct the trial court to dismiss the commitment proceeding against Reed with prejudice [7] and to order his release from the FCCC. However, because we recognize that this case presents a slightly different situation than Larimore and Phillips and extends those decisions to their logical – but potentially unintended – extreme, we certify the following question of great public importance to the Florida Supreme Court:

> DOES A TRIAL COURT HAVE JURISDICTION OVER A PETITION FILED UNDER THE JIMMY RYCE ACT AGAINST A PERSON WHO OBTAINS AN ORDER FOR IMMEDIATE RELEASE WHILE IN LAWFUL CUSTODY WHERE THE COMMITMENT PROCESS IS INITIATED UNDER SECTION 394.9135, FLORIDA STATUTES, AFTER THE PERSON'S SENTENCE EXPIRED BUT BEFORE HE IS ACTUALLY RELEASED?

PETITION GRANTED; QUESTION CERTIFIED.

LEWIS, C.J., WOLF and WETHERELL, JJ., CONCUR.

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[7] Although dismissal "with prejudice" is mandated by Larimore (see 2 So. 3d at 117) and Phillips (see 119 So. 3d at 1236), that does not preclude the State from initiating a commitment proceeding against Reed in the future if he is incarcerated for another offense. See Ward v. State, 986 So. 2d 479, 481 (Fla. 2008); Taylor v. State, 65 So. 3d 531, 535 (Fla. 1st DCA 2011).

APPENDIX B

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

September 05, 2014

CASE NO.: 1D14-1147
L.T. No.: 2013-CA-5492

Victor Reed	v.	State of Florida
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Respondent's Motion to Rehear August 7 Opinion and Contingent Motion to Stay Writ/Mandate, filed August 11, 2014, is denied in part and granted in part. Rehearing is denied, but the clerk is directed to withhold issuance of the writ of prohibition and/or mandate in this case pending the Florida Supreme Court's disposition of any petition for review filed by Respondent.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Hon. Pamela Jo Bondi, A.G.
Charles R. McCoy, S. A. A. G.
Charles Michael Williams
Sierra Kombluth

jm

[clerk's signature & seal omitted]