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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the substance of the statement of the case and facts contained within the Brief of Petitioner on the Merits. However, one relevant date was omitted. With the addition of the following relevant date, respondent accepts petitioner's statement of the case and facts.

On May 25, 2000, the Circuit Court of Putnam County resentenced respondent to a total of twenty-one (21) months incarceration. Said sentence was ordered to be nunc pro tunc to September 25, 1996.

SUMMARY OF THE ARGUMENT

Two facts are dispositive of the issues presented in this case. Respondent was unlawfully in custody at the time Florida's Involuntary Civil Commitment of Sexually Violent Predators Act came into effect. This illegality was not determined until after the Act became effective. However, respondent was also being held in custody without any pretense of legal authority at the time the civil commitment petition was filed. Because of the concurrence of both these facts, the Second District Court of Appeal had to read that portion of section 394.925, Florida Statutes, which sets forth the applicability of the Act to persons in custody at the time the Act became effective, as applying only to those persons lawfully in custody. To do otherwise would not only have resulted in unreasonable, harsh or absurd results in Atkinson's case but also in other cases.

ARGUMENT

ISSUE

THE INVOLUNTARY CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS ACT DOES NOT APPLY TO RESPONDENT BECAUSE HE WAS NOT LAWFULLY IN CUSTODY ON THE EFFECTIVE DATE OF THE ACT.

Two primary facts exist in respondent's case which are critical to its resolution. Fact 1: Respondent was unlawfully in custody at the time Florida's Involuntary Civil Commitment of Sexually Violent Predators act became effective, albeit this fact was not determined until after the effective date of the Act. Fact 2: Respondent was in custody without any pretense of legal authority at the time the petition for involuntary civil commitment was filed in this case, and this fact was known at the time the commitment petition was filed. Keeping these two facts in mind, the provisions of Florida's Involuntary Civil Commitment of Sexually Violent Predators act must be examined to determine if the Act is applicable to respondent.

Part V of chapter 394, Florida Statutes, is the Involuntary Civil Commitment of Sexually Violent Predators Act (hereinafter referred to as the Act). When adopted, it was the stated intent of the legislature to "create a civil commitment procedure for the long-term care and treatment of sexually violent predators." However, the

legislature did not make the Act applicable to all sexually violent predators.

The Act defines a sexually violent predator as any person

who:

(a) Has been convicted of a sexually violent offense;

and

(b) Suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

Section 394.912(10), Florida Statutes (1999) (emphasis added).

Instead of making the Act applicable to all persons who meet this definition of sexually violent predators, section 394.925 limits the applicability of the Act to "all persons currently in custody who have been convicted of a sexually violent offense, . . . , as well as to all persons convicted of a sexually violent offense and sentenced to total confinement in the future." (emphasis added).

Therefore, instead of applying to all persons convicted of a sexually violent offense, the Act applies only to those persons who have been convicted of a sexually violent offense and who also were either in custody on the day the Act became effective or were subsequently in custody as the result of being sentenced to total confinement.

In this case, no one contends that respondent was convicted of a sexually violent offense and sentenced to total confinement subsequent to the effective date of the Act. Consequently, in deciding whether the Act is applicable to respondent, it must be determined if respondent was "currently in custody on the effective date of the Act."¹

There is no dispute that respondent was in actual custody on the effective date of the Act. As noted earlier, the respondent was in custody, albeit unlawful custody, on both January 1, 1999 and May 26, 1999. The illegality of this custody was determined by *Heggs v. State*, 759 So.2d 620 (Fla. 2000), after the effective date of the Act. The illegality should have been rectified and respondent's custody should have ended when respondent was resentenced to a term of twenty-one (21) months incarceration on May 25, 2000, *nunc pro tunc* to September 25, 1996. However, this did not occur.

It was against this factual backdrop that the Second District Court of Appeal considered respondent's petition for writ of prohibition. Atkinson argued that the Act was not applicable to him because he was not in lawful custody on the effective date of the Act. The State contended that the legality of respondent's custody was irrele-

¹Florida's Involuntary Civil Commitment of Sexually Violent Predators act was initially enacted as Sections 916.31 - 916.49, Florida Statutes (1998) and became effective on January 1, 1999. The act was amended and renumbered as sections 394.910 - 394.929, Florida Statutes (1999) with an effective date of May 26, 1999. The limitation of the applicability of the act to "all persons currently in custody" was not altered when the act was amended and renumbered. The statutory interpretation of the phrase "all persons currently in custody" is, therefore, not affected whether the effective date of the Act is January 1, 1999 or May 26, 1999.

vant and that the Act applied to him because he was in actual custody on the effective date of the Act. Simply stated, respondent argued that the custody requirement of section 394.925 be read to require "lawful" custody. The State argued that the plain language of the section did not require that the custody be lawful. The Second District correctly concluded that to read the Act without any regard to the lawfulness of custody would result in unreasonable, harsh, or absurd consequences. Instead, the Second District held, "that insofar as the Act applies to `all persons in custody,' it is limited to persons who were in lawful custody on its effective date." *Atkinson v. State*, 731 So.2d 537 (Fla. 2d DCA 2001).

The State contends that the California case of *Garcetti v. Superior Court*, 80 Cal. Rptr.2d 724 (Cal. App. 1998) supports its position. Quite to the contrary, under *Garcetti* the civil commitment petition filed against respondent would have had to be dismissed.

Garcetti does indeed stand for the proposition that, under California law, a civil commitment petition can be filed against a person who is in actual custody even if that custody is later determined to be unlawful. However, the state of California in *Garcetti* acknowledged that, "[o]f course, if the custody [were] a complete sham without any pretense of legal authority, the [Department of Corrections] would not have `jurisdiction' in any legal

sense. This case does not present such an extreme situation."
Supra. at 726.

Respondent's case does present just such an extreme situation. When respondent was resentenced on May 25, 2000, he was entitled to an award of credit for all time served since September 25, 1996. Since more than twenty-one (21) months elapsed between September 25, 1996 and May 25, 2000, respondent should have been immediately released. Instead, he continued to be held in the custody of the Department of Corrections until a petition for involuntary civil commitment was filed some 14 days later on June 8, 2000. This custodial detention from May 25, 2000 until June 8, 2000 was a complete sham without any pretense of legal authority.²

Applying the rule set forth in *Garcetti*, the civil commitment petition filed against respondent was properly dismissed.

The fact that respondent was in custody without any pretense of legal authority from May 25, 2000 until June 8, 2000, allowed the Second District to resolve the issues presented in respondent's case by interpreting only section 394.925, Florida Statutes (1999) and finding it to require that the custody requirement be read to mean lawful custody. However, if the respondent's custodial status had been different, if it had simply been unlawful but not without legal justification, and if, as suggested by the State, the legality of custody was irrelevant to the State's ability to commence involuntary commitment proceedings, then serious constitutional impairments to Florida's entire Act would have had to be addressed.

²The State contends that respondent's resentencing had the effect of placing him in the category of persons subject to immediate release and that his evaluation as well as the filing of the commitment petition were handled accordingly. Section 394.915, Florida Statutes (1999) does provide for continuing custodial detention of a person who has been convicted of a sexually violent offense if their release from total confinement becomes immediate for any reason. However, this section provides that the person be immediately transferred from the Department of Corrections to the Department of Children and Family Services (DCF). It further provides that an evaluation by the multidisciplinary team to determine if the person meets the definition of a sexually violent predator must be completed and a written report submitted within 72 hours of transfer to DCF. The commitment petition must then be filed within 48 hours after receipt of the written report. None of these provisions of section 394.915 were complied with in respondent's case.

The State seeks to have this Court review this case without considering all the relevant facts. The rephrased certified question suggested by the State ignores the fact that respondent was being held without any legal authority at the time the involuntary commitment proceedings were commenced. The State suggests that the certified question read:

DOES FLORIDA'S INVOLUNTARY CIVIL COMMITMENT OF
SEXUALLY VIOLENT PREDATORS ACT APPLY TO PERSONS
CONVICTED OF SEXUALLY VIOLENT OFFENSES BEFORE
THE EFFECTIVE DATE OF THE ACT WHOSE CUSTODY,
ALTHOUGH PRESUMPTIVELY CORRECT ON THE EFFECTIVE
DATE OF THE ACT IS LATER DETERMINED TO HAVE BEEN
ER? IMPROP-

According to the State's argument, this question should be answered in the affirmative. However, if the Act applies to a person in such a custodial situation, the entire Act must be examined to determine if it could be constitutionally applied to such a person.

Section 394.925, Florida Statutes (1999) provides that persons who had been convicted of a sexually violent offense and were in custody on the effective date of the Act are subject to the Act. It is not required that the person be in custody for the commission of a sexually violent offense. It is not required that the person be in the custody of the Department of Corrections. It is not required that the person be in custody pursuant to imposition of a sentence. Consequently, the Act would apply to a person who was convicted of a sexually violent offense at any time in their past who was in custody for any reason on January 1, 1999 or May 26, 1999. But, Section 394.925, Florida Statutes (1999) also provides that persons who had been convicted of sexually violent offenses but were not in custody on the effective date of the Act must be convicted of a sexually violent offense and sentenced to total confinement in the future before being subject to the Act. By way of example, someone convicted of a sexually violent offense fifty (50) years ago and placed on probation is subject to the Act if they were arrested and in custody for violation of a municipal ordinance on January 1, 1999. However, a person who was released from state prison on December 31, 1998 after having completed a sentence for a sexually violent offense would not be subject to commitment proceedings unless they are convicted of a sexually violent offense and sentenced to total confinement in the future. Applying an equal protection analysis, it is difficult to determine the rational distinction between these two classes of individuals, especially since the stated legislative findings and intent of the Act makes no distinction between persons currently in custody on the effective date of the Act and those sexually violent predators who were not in custody on that date.

3

3 394.910 **Legislative findings and intent.**- The Legislature find that a small but extremely dangerous number of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment under the Baker Act, part I of this chapter, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the

There are also procedural problems with the Act. As the State notes, "the Act itself includes no time limits as to the filing of the petition for commitment." Brief of the Petitioner on the Merits at p.7. In fact, the State contends that a civil commitment petition can be filed against a person who is not in custody at the time of the petition. See, Brief of the Petitioner on the Merits at p.16.

If the language of the Act is to be given its plain meaning without statutory interpretation, as argued by the State, this contention would appear correct. It would therefore follow that the State could elect to pursue involuntary civil commitment of a person who was released from custody at any time after the effective date of the Act provided that the person had been previously convicted of a sexually violent offense and was in custody on the effective date of the Act.

While the State contends that the plain language of the Act provides the authority to pursue commitment in such a circumstance, there are no provisions in the Act setting forth procedures for non-custodial sexually violent offenders.

Civil commitment of sexually violent offender statutes from other states have withstood constitutional attack on equal protection and due process grounds. *See, i.e., Kansas v. Hendricks*, 521 U.S. 346 (1997). But it is the specific provisions of section 394.925 concerning the applicability of the Florida Act which distinguishes it from other states' statutes. Section 59-29a04, Kansas Statutes (2000) provides that the state may file a civil commitment petition against a "person presently confined." Similarly, section 6601(a)(2), California Welfare and Institutions Code (2000), provides, "[A] petition may be filed under this section if the individual was in custody pursuant to his or her determinate prison term, parole revocation term, or hold placed pursuant to Section 6601.3, at the time the petition is filed."

The Second District Court of Appeal, considering the particular facts of respondent's case, and considering the differences between Florida's Act and those of other states, correctly concluded that the portion of section 394.925 dealing with "all persons in custody" had to be read to limit the applicability of the Act to persons in "lawful custody" in order to prevent unreasonable, harsh, or absurd consequences.

community. In contrast to person appropriate for civil commitment under the Baker Act, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities, and those features render them likely to engage in criminal, sexually violent behavior. The Legislature further finds that the likelihood of sexually violent predators engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedures under the Baker Act for the treatment and care of mentally ill persons are inadequate to address the risk these sexually violent predators pose to society. The Legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population in a prison setting is poor, 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.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, respondent respectfully requests that the certified question as rephrased by the State be rejected and that the certified question presented by the Second District Court of Appeal be answered in the affirmative.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Richard Polin, Assistant Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, FL 33131, and to Dyann W. Beatty, Assistant Attorney General, Suite 700, 2002 N. Lois Avenue, Tampa, FL 33607, (813) 873-4739, on this 15th day of March, 2002.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

Respectfully submitted,

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