

TOPICAL INDEX TO BRIEF

	<u>PAGE NO.</u>
STATEMENT OF THE CASE AND FACTS AND SUMMARY	1
ARGUMENT	1
ISSUE	
WHEN THE STATE UNLAWFULLY DETAINS A PERSON BEYOND THE EXPIRATION OF HIS OR HER SENTENCE IN ORDER TO SEEK CIVIL COMMITMENT PURSUANT TO THE JIMMY RYCE ACT, SHOULD THAT COMMITMENT PETITION BE DISMISSED WITH PREJUDICE?	1
CONCLUSION	15
CERTIFICATE OF SERVICE	
APPENDIX	A1

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE NO.</u>
<u>Garcetti v. Superior Court</u> , 68 Cal. App. 4th 1105, 80 Cal. Rptr. 2d 724 (1998)	5, 6
<u>In re Young</u> , 122 Wash. 2d 1, 857 P. 2d 898 (1993)	7
<u>Matthews v. Eldridge</u> , 424 U.S. 319 (1976)	7
<u>Valdez v. Moore</u> , 745 So. 2d 1009 (Fla. 4th DCA 1999)	7, 8
 <u>OTHER AUTHORITIES</u>	
§ 39.022(4)(a), Fla. Stat. (1995)	11, 12
§ 39.054(4), Fla. Stat. (1995)	9, 11
§ 39.0581, Fla. Stat. (1995)	11

STATEMENT OF THE CASE AND FACTS AND SUMMARY

Petitioner relies on his initial brief.

ARGUMENT

ISSUE

WHEN THE STATE UNLAWFULLY DETAINS A PERSON BEYOND THE EXPIRATION OF HIS OR HER SENTENCE IN ORDER TO SEEK CIVIL COMMITMENT PURSUANT TO THE JIMMY RYCE ACT, SHOULD THAT COMMITMENT PETITION BE DISMISSED WITH PREJUDICE?

In the first part of Respondent's Answer Brief it is argued that a commitment Petition under the Act can be filed after the expiration of the sentence. Respondent's reading of only one section of the Act, however, is taken out of context and does not reflect the reading of the entire Act. Sec. 916.32(1), Fla. Stat. (Supp. 1998), defines "agency with jurisdiction" as the agency having the person to be released. These agencies are listed as the DOC, DCF, or DJJ (Dept. of Juvenile Justice). Sec. 916.33, Fla. Stat. (Supp. 1998), requires the agency with jurisdiction to notify the multidisciplinary team 180 days or 90 days before the person's release from total confinement of that person's eligibility under the Act. That same section requires the multidisciplinary team to assess the person within 45 days and provide the state attorney with a copy of that assessment. Sec. 916.34, Fla. Stat. (Supp. 1998), is the section the Respondent takes out of context to say there is no time limit for the prosecutor to file the petition; but sec. 916.35(2), Fla. Stat. (Supp. 1998), which comes immediately thereafter says that "[b]efore

the release from custody of a person whom the multidisciplinary team recommends for civil commitment, but after the state attorney files a petition under s. 916.33, the state attorney may further petition the court for and adversarial probable cause hearing." (Emphasis added.) Clearly the order of when the petition is to be filed--prior to the person's release from custody is made clear from the Act as a whole.

What is clear from the Act is that the legislature did not want these "extremely dangerous" people to be released (sec. 916.31, Fla. Stat. (Supp. 1998)). The entire plan of the Act was that those sought to be committed under the Act would go from the prison to custody in a secure facility without pretrial release (sec. 916.35(4) and (5), Fla. Stat. (1998)). Contrary to what the State is arguing now--that it can file a petition for commitment under the Act even after the person is released, there is no such provision for doing so. This is probably why the State did not just release Mr. Tanguay upon his 19th birthday as per the trial court's order but continued to illegally detain him until they got around to filing the petition. The Act did not intend for there to be any pre-commitment release and made all provisions necessary to prohibit such release. Merely allowing the continued custody of a person for the State to get around to filing a petition for commitment under the Act after lawful custody has ended must not be allowed. Mr. Tanguay was not in "lawful" custody at the time the State filed its petition.

Apparently the State is arguing that "lawful" custody is not required under the Act, so the State can pursue proceedings under the Act as long as the person is in custody -- even if that custody is unlawful. Also, according to the State, the State can pursue pro-

ceedings under the Act even if the person gets released and has not been confined for months or even years as there are no time limits to instituting the provisions under the Act. Under the State's reasoning, committing individuals under the Act is the primary directive; therefore, the individual/respondent being committed under the Act has no due process constitutional rights. This Court must dismiss the Act proceeding in this case based on Mr. Tanguay not being in "lawful" custody in this case; for under the State's interpretation of the statutes at issue, the Act would have to be declared unconstitutional as a violation of due process. The Act states that it be applied to persons who have been convicted of a sexually violent offense and "currently in custody" or to persons convicted of a sexually violent offense and sentenced to "total confinement" in the future. §394.925, Fla. Stat. (1999). The first phrase of the applicability section is concerned with persons currently in custody. "Custody" is not a term defined in the Florida Act. Custody is defined by The American Heritage Dictionary of the English Language, 326 (6th Ed. 1981) as: "2. The state of being kept or guarded. 3. The state of being detained or held under guard, especially by the police." Black's Law Dictionary, 390 (7th Ed. 1999) defines custody as "The detention of a person by lawful process or authority." Moreover, confinement, imprisonment, and incarceration are synonymous with custody. Chambers 20th Century Thesaurus, 134 (1986). Therefore, a person confined, imprisoned, or incarcerated is in custody. Thus so, it may be said that a person currently in custody for applicability of the Jimmy Ryce Act is a person who is confined, imprisoned, incarcerated, or at least detained or held by lawful

process or authority. Thus, "lawful" custody, under the plain meaning of the term "custody," should be presumed and inferred.

Mr. Tanguay does not come within the meaning of the first phrase of §394.925, "currently in custody," because he was not in lawful custody or lawfully being held at the time the State filed its petition for civil commitment under the Act on 3-12-99. Mr. Tanguay was being illegally detained because his juvenile commitment ended 2-24-99. Mr. Tanguay was not in lawful custody, imprisoned, confined or incarcerated on 3-12-99; therefore, the first phrase of the applicability section did not apply.

The second phrase of the applicability section is concerned with persons convicted of a sexually violent offense and sentenced to total confinement in the future. Total confinement is defined:

"Total confinement" means 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), Fla. Stat. (1999). Thus, a person sentenced to total confinement is a person in the custody of the Department of Corrections serving an incarcerative sentence or a person currently being held in custody in a secure facility being operated for the Department of Corrections, the Department of Juvenile Justice or the Department of Children and Family Services.

Mr. Tanguay does not come within the meaning of the second phrase of §394.925, "sentenced to total confinement in the future." Mr. Tanguay was not sentenced to a new prison term after 1-1-99.

The State apparently claims "lawful" custody is not required in the Act, so Mr. Tanguay can be held under the Act no matter how unlawful the custody. The Act, under the State's reasoning, is everything so the ends justify the means; and the individual's rights under the Act are nothing. In support of this position, the State cites an appeals court case from the Second District, Division 3, in California. Garcetti v. Superior Court, 68 Cal. App. 4th 1105, 80 Cal. Rptr. 2d 724 (1998), does stand for the proposition that custody does not have to be lawful when proceeding under California's Sexually Violent Predators Act. In Garcetti, the inmate was illegally held when his parole was unlawfully revoked. It was while he was unlawfully confined that California sought to commit the inmate under its Act. The trial court dismissed the proceedings under the Act because the custody was not lawful, but the appellate court reversed and reinstated the proceedings. The appellate court admitted there wasn't any case law on point. The appellate court also noted that the People had acknowledged, "[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." Id. at 1109.

Garcetti is hardly controlling or persuasive in this case, and this Court should reject it. To not require the custody to be lawful in the definition and application of the Act would be to deny due

process constitutional protections under the Florida and U.S. Constitutions. See Art. I, §9, Fla. Const.; 5th Amend., U.S. Const. To accept the State's interpretation is to reject the common definition of custody as including the factor of it being lawful. It also allows for major abuses, such as rounding up people who have long been released in the name of the Act; or it allows the State to hold people indefinitely after the term of imprisonment is up until the State gets around to proceeding under the Act--something which happened in this case to Mr. Tanguay.

Mr. Tanguay should have been released automatically upon his 19th birthday on 2-24-99, but he was not. If the State wanted to proceed under the Act, why did it wait until 3-12-99? The State held Mr. Tanguay for 16 days before it filed its petition. For those 16 days, the State's custody was a complete sham without any pretense of legal authority. Even the Garcetti court noted that such a custody would be an extreme situation that would do away with the Department of Corrections' jurisdiction. If this Court, in Mr. Tanguay's case, does not dismiss the civil commitment petition with prejudice, it will have to find the Act unconstitutional as being a denial of due process.

The State's contention that even if Mr. Tanguay were released from custody the State could still proceed under the Act also establishes serious constitutional problems. Under Washington State's version of the Act, the State can start proceedings once someone has been released from prison; but a recent overt act is required. In the case of In re Young, 122 Wash. 2d 1, 857 P. 2d 898 at 1009 (1993), the Supreme Court en banc held "the State must provide

evidence of a recent overt act...whenever an individual is not incarcerated at the time the petition is filed." Florida's Act has no such requirement, so to allow the State in Florida unlimited access to someone after their confinement would be a violation of due process.

The United States Supreme Court has set the standard for determining the appropriate level of procedure that is due prior to depriving an individual of his right to life, liberty, or property:

[T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. Eldridge, 424 U.S. 319 at 335 (1976). The fact that Florida's Act was supposed to work a certain way but has not gone as the legislature intended reveals the due process flaws. In Valdez v. Moore, 745 So. 2d 1009 (Fla. 4th DCA 1999), the State argued against adversarial probable cause hearings that were specifically not required under the Act because the Act was intended to be started before the person's criminal sentence was over. Thus, the State argued that lack of an adversarial probable cause hearing was not unconstitutional. The continuing problem in Florida, however, is that the Act is not working as it is supposed to be working. In Valdez the petitioners were being held long after their prison sentence was completed, had still not gone to trial under the Act,

and had never had an adversarial probable cause hearing. Notwithstanding how the Act was "supposed to work," the way it is working was denying these confined persons of their constitutional rights to due process. Adversarial probable cause hearing were ordered in order to protect these due process rights.

This Court must dismiss the proceedings in this case with prejudice. The interpretation of custody inferring lawful custody is the only interpretation that will pass constitutional muster. As has been demonstrated in Mr. Tanguay's case, the State's ability to abuse the process under the Act will be unlimited if "lawful" is dropped from the concept of custody. If this case is not dismissed with prejudice, then the Act is unconstitutional in that it denies due process and must be struck down.

The procedures followed in this case clearly violate the provisions of §§916.31-916.49, Fla. Stat. (Supp. 1998). Under the 1998 act, it was anticipated that all the conditions precedent to the filing of a commitment petition would be completed prior to an individual's release from custody. The State's inability to comply with its own procedures should not be Mr. Tanguay's problem. What the State did in Mr. Tanguay's case was to hold him indefinitely until it could get around to him. According to Respondent's argument, it could do so for as long as it wanted--apparently for years--because there is no time limitation on the State. In addition, the Respondent blames the 19-year-old indigent incarcerated unrepresented-at-the-time Mr. Tanguay for not filing his own petition for writ of habeas corpus once he turned 19. (Respondent's Answer,

p.23) These arguments clearly demonstrate why the State's abuse in this case cannot be tolerated.

The State flagrantly violated Mr. Tanguay's federal and state due process constitutional rights. Art. I, Sec. 9, Fla. Const.; Fifth Amendment, U.S. Const. The writ of prohibition must be issued.

Respondent next contends Mr. Tanguay should not have been released on his nineteenth birthday. The Order Of Commitment To The Department Of Juvenile Justice entered by the juvenile court on 04-25-96, could not be clearer:

IT IS ORDERED that the child is hereby committed to the Department of Juvenile Justice for an indeterminate period but not longer than the maximum sentence which an adult may serve for the same offense(s), or until the child's nineteenth (19th) birthday, whichever first occurs.

(V1/R47,48, emphasis added.)

Respondent contends that language appearing in another paragraph of the commitment order somehow changes this simple and unequivocal statement. The juvenile court did order that petitioner not be released from confinement without the concurrence of the court. The juvenile court also stated its intent to resume jurisdiction. However, these provisions neither authorized nor were they intended to suggest that the juvenile court intended to maintain jurisdiction beyond Petitioner's nineteenth (19th) birthday. Rather, they were simply recitations of rights statutorily conferred upon the court.

Section 39.054(4), Florida Statutes (1995), provided that a delinquent child committed to the Department of Juvenile Justice could be "discharged from institutional **confinement**" upon the direction of the department but only with "**the concurrence of the**

court." It is this requirement that the juvenile court was addressing when it stated in the juvenile commitment order, "the child shall not be released from **confinement** without **the concurrence of the Court.**" However, such a release from confinement did not affect a child's commitment status. Had Petitioner been released from confinement, he would still have been committed to the Department of Juvenile Justice until his nineteenth (19th) birthday, as directed in the commitment order.

Similarly, sec. 39.022(4)(c), Fla. Stat. (1995), provided that the juvenile court could retain jurisdiction over a child and the child's parents or legal guardian for purposes of enforcing restitution. The order of juvenile commitment in this case adjudged Petitioner a delinquent child not only for sex offenses but also for earlier offenses of Burglary and Criminal Mischief. Petitioner had previously been placed on Community Control for these offenses. Within the same paragraph as the language upon which Respondent relies, the juvenile court "reimposed" all monetary obligations previously ordered by the court. In order to enforce restitution, the juvenile court had to retain jurisdiction. However, if that retention of jurisdiction extended beyond Petitioner's nineteenth (19th) birthday, it could only be for the sole purpose of enforcing restitution. See §39.022(4)(c), Florida Statutes (1995).

Jurisdiction of the juvenile court ended on Petitioner's nineteenth (19th) birthday. Sec. 39.022, Fla. Stat. (1995), addresses the jurisdiction of the circuit court in juvenile delinquency actions. Section 39.022(4)(a), Florida Statutes (1995), provided:

Notwithstanding ss. 39.054(4) and 743.07, and except as provided in ss. 39.058 and 39.0581, when the jurisdiction of any child who is alleged to have committed a delinquent act or violation of law is obtained, the court shall retain jurisdiction, unless relinquished by its order, until the child reaches 19 years of age, with the same power over the child that the court had prior to the child becoming an adult.

(Emphasis added). By committing Petitioner until his nineteenth birthday, the juvenile court was exercising jurisdiction over this particular individual for the longest period of time authorized by law. The exceptions contained within §39.022(4)(a), Florida Statutes (1995) did not apply to Petitioner.

Section 39.058, Florida Statutes (1995), addressed serious or habitual juvenile offenders. Section 39.058(3)(e), Florida Statutes (1995), provided that the juvenile court, after adjudicating a child delinquent, was to determine whether the child met the criteria for a serious or habitual juvenile offender. The juvenile court could commit a serious or habitual juvenile offender until his twenty-first (21st) birthday. See §39.058(3)(k), Florida Statutes (1995). Section III B of the predisposition report prepared in Petitioner's juvenile case shows that he did not meet the criteria for classification as a serious or habitual offender. (Reply Appendix 1)

Similarly, the exception to the general jurisdiction provisions of sec. 39.022(4)(a), Fla. Stat. (1995), contained within §39.0581, Florida Statutes (1995), does not apply to Petitioner. Section 39.0581, Florida Statutes (1995), authorizes the juvenile court to retain jurisdiction over an individual until age 21 for the specific purpose of having the individual complete a maximum-risk residential program. The order of commitment clearly shows that Petitioner was

committed to a level 8, high-risk, residential program, not a level 10, maximum-risk, program. See §39.01(59), Fla. Stat. (1995).

Contrary to the clear language of sec. 39.022(4)(a), Fla. Stat. (1995), Respondent argues that there was another exception whereby the juvenile court could have retained jurisdiction over Petitioner past his nineteenth (19th) birthday. Respondent contends §39.054 (j), Fla. Stat. (1995), authorized the juvenile court to retain jurisdiction over Petitioner until his twenty-first (21st) birthday because he was committed to a sexual offender program. This contention also fails.

Section 39.054(j), Fla. Stat. (1995), did authorize the juvenile court to retain jurisdiction of juvenile sexual offenders, committed to a program for juvenile sexual offenders, until age 21. However, this was not a general grant of jurisdiction. The jurisdiction granted the juvenile court after the child's nineteenth (19th) birthday was "specifically for the purpose of completing the program." See §39.054(j), Florida Statutes, (1995)(emphasis added). Respondent correctly recites that while Petitioner was originally placed in the MATS sexual offender program, he was removed from that program and transferred to Polk Youth Development Center. Since Petitioner was not in a juvenile sexual offender program, the juvenile court could not exercise its limited jurisdiction to continue his commitment past his nineteenth birthday specifically for the purpose of completing a sexual offender program.

The State makes the illogical argument that Sec. 39.054(1)(c), Fla. Stat. (Supp. 1994), be read in a vacuum. This Court is not required to interpret a section of a statute that produces

conflicting results. Five sections down from §39.054(1)(c) is §39.054(1)(h) which touches on when a child is committed as a serious habitual offender. In that section, the trial court may retain jurisdiction of the child until the age of 21. It is absolutely contrary to reason if this Court were to apply the State's logic. For example, if a 15-year-old child were adjudicated delinquent for a misdemeanor battery and committed to the department, then he would have to be held until he reaches the age of 21 if he is not discharged by the department. This would appear to occur even though the statutory maximum for the child's offense is no more than one year.

Furthermore, the State's argument would lead to an illogical conclusion with regards to §39.054(1)(h) concerning juveniles labeled Serious Habitual Offender. Reading §39.054(1)(c) as the State argues would mean the trial court has no discretion in retaining jurisdiction until a child reaches 21. However, if the trial court designates the child as a Serious Habitual Offender usually meant for juveniles charged with violent and serious felonies, then the trial court has the discretion to either retain jurisdiction until the child is 19 or increase it to the child's 21st birthday. Another illogical dilemma would occur if the child were committed and designated a Serious Habitual Offender by the court without the trial court retaining jurisdiction until 21. Under the State's reading of 39.054(1)(c), the trial court would have to retain jurisdiction until the child was 21 and would in effect abrogate the legislature's intent to give the trial court jurisdictional discretion when designating a child a Serious Habitual Offender.

The Department of Juvenile Justice should have released Petitioner on his nineteenth birthday, 2-24-99. Instead, the Department illegally detained Petitioner while the Department of Children and Family Services attempted to gather evidence to support a recommendation that a petition be filed seeking the commitment of Petitioner as a sexually violent predator.

Alan J. Waldman, M.D., and Peter M. Bursten, Ph.D., members of the multidisciplinary team designated by the Secretary of Children and Family Services to assess whether Petitioner met the definition of a sexually violent predator, both met with Petitioner at the Polk Youth Development Center. These meetings were on March 4, 5, and 8, 1999. Each of these meetings were on dates after Petitioner should have been released. After receiving the recommendation of the multidisciplinary team, the State filed a Petition For Commitment on 3-12-99.

The procedures followed in this case clearly violate the provisions of §§916.31-916.49, Fla. Stat. (Supp. 1998). Under the 1998 act, it was anticipated that all the conditions precedent to the filing of a commitment petition would be completed prior to an individual's release from custody. The State's inability to comply with its own procedures should not be Mr. Tanguay's problem. What the State did in Mr. Tanguay's case was to hold him indefinitely until it could get around to him. According to Respondent's argument, it could do so for as long as it wanted--apparently for years--because there is no time limitation on the State. In addition, the Respondent blames the 19-year-old indigent incarcerated unrepresented-at-the-time Mr. Tanguay for not filing his own petition

for writ of habeas corpus once he turned 19. (Respondent's Response, p.10) These arguments clearly demonstrate why the State's abuse in this case cannot be tolerated.

The State flagrantly violated Mr. Tanguay's federal and state due process constitutional rights. Art. I, Sec. 9, Fla. Const.; Fifth Amendment, U.S. Const. The writ of prohibition must be issued.

CONCLUSION

The State's petition for commitment under the Act must be dismissed with prejudice.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Richard L. Polin, Assistant Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on this _____ day of October, 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.

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APPENDIX

1. Predisposition Delinquency Report

A1