IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,554

EUGENE JOHNSON,

Petitioner,

vs.

THE HONORABLE RICHARD YALE FEDER,
Circuit Judge, Eleventh Judicial
Circuit, Dade County, Florida

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

CERTIFIED CONFLICT

INITIAL BRIEF OF PETITIONER ON MERITS

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STATEMENT OF JURISDICTION

Petitioner, Eugene Johnson, invokes the discretionary jurisdiction of the Supreme Court of Florida to review the decision of the Third District Court of Appeal, Eugene Johnson v. The Honorable Richard Yale Feder, Case No: 84-2272, rendered February 5, 1985, in which the Third District certified direct and express conflict with the decision of the Second District Court of Appeal in McShay v. State, 447 So.2d 444 (Fla. 2nd DCA 1984).

Citations to the record are abbreviated as follows:

(R) - Original record from Third District Court of Appeal consisting of appendix attached to petitioner's petition for writ of mandamus in that court

(A) - Appendix attached hereto containing decision from Third District Court of Appeal

STATEMENT OF THE CASE AND FACTS

On April 22, 1981, petitioner was found not guilty by reason of insanity of the charges of first degree murder in Dade County Circuit Case No: 79-9723 and second degree murder in Dade County Circuit Case No: 79-9639. (R: 2, 5, 7, 9, 11) The circuit judge thereupon committed petitioner to the Department of Health and Rehabilitative Services for involuntary hospitalization pursuant to §916.15, Fla. Stat. (1980 Supp.), and Rule 3.217, Fla.R.Crim.P. (R: 8) The court further retained jurisdiction of the cause to make all determinations relative to petitioner's

continued hospitalization or release. (R: 8)

On May 18, 1981, petitioner was admitted to the Forensic Service of South Florida State Hospital; he was later transferred to the Forensic Service of Florida State Hospital and remains hospitalized at the facilities at Chattahoochee, Florida. (R: 9, 11)

On April 19, 1984, petitioner was reviewed by the doctors at Chattahoochee who determined that he continued to meet the criteria for involuntary hospitalization. (R: 18, 26) The doctor's report was filed with the court. (R: 18) Thereupon, on June 29, 1984, petitioner moved for the appointment of an independent expert pursuant to Rule 3.218(b), Fla.R.Crim.P., for the purposes of examining him relative to the criteria for continued involuntary hospitalization and also moved for the scheduling of an annual court hearing on petitioner's continued involuntary hospitalization pursuant to Rule 3.218(a), Fla.R.Crim.P. (R: 9) A hearing was held on July 2, 1984, at which the trial judge denied petitioner's motion. (R: 16-22)

On August 8, 1984, petitioner filed a renewed motion for appointment of two independent experts pursuant to Rule 3.218(b), Fla.R.Crim.P., and for a court hearing relative to his continued involuntary hospitalization, again claiming that he had an unqualified right to such appointment and subsequent court hearing and that his indefinite commitment to the state hospital violated his rights to due process and equal protection. (R: 11) A hearing was held on this renewed motion on August 13, 1984. (R: 23-31) The trial court again denied petitioner's

motion on the grounds that only insanity acquittees who the hospital administrator found no longer met the criteria for involuntary hospitalization were entitled to the appointment of independent experts and an annual court hearing. (R: 15, 23-31)

Petitioner then brought a petition for writ of mandamus to the Third District Court of Appeal requesting that court to issue a writ of mandamus to the respondent judge to enforce compliance with the clear provisions of Rule 3.218, Fla.R.Crim.P., requiring the appointment of no fewer than two nor more than three experts to examine the petitioner relative to the criteria for his continued involuntary hospitalization and requiring a court hearing on the issue of continued involuntary hospitalization with the petitioner's right to be present at that hearing. In an opinion issued on February 5, 1985, the Third District denied the petition for writ of mandamus and held that Rule 3.218 only provides for an annual hearing and the appointment of independent experts when the hospital administrator reports to the committing court that an insanity acquittee no longer meets the criteria for involuntary hospitalization. (A: 1) The Third District further certified that its decision is in express and direct conflict with McShay v. State, 447 So.2d 444 (Fla. 2d DCA 1984).

SUMMARY OF ARGUMENT

Petitioner submits the decision of the Third District Court of Appeal holding that petitioner is not entitled to the annual hearing and appointment of independent experts is incorrect.

Section 916.15, Fla. Stat. (1980 Supp), expressly gives insanity acquittees, such as petitioner, the right to a hearing before the committing court at which both the patient and the state have the right to present evidence and cross-examine witnesses. Rule 3.218, Fla.R.Crim.P., establishes the process and procedure for the involuntary hospitalization of insanity acquittees and complements §916.15 in requiring a hearing before the committing court, at which the patient has the right to be present, on the issue of continued involuntary hospitalization. Rule 3.218 also provides for the appointment of independent experts prior to the hearing. The Third District's interpretation of Rule 3.218 would violate the petitioner's right to due process of law and equal protection. Consequently, the decision of the Third District must be quashed or reversed and petitioner afforded the appointment of independent experts and a hearing before the committing court.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL ERRONEOUSLY HOLDS THAT PETITIONER IS NOT ENTITLED TO AN ANNUAL COURT HEARING AND THE APPOINTMENT OF INDEPENDENT EXPERTS ON THE LEGAL ISSUE OF PETITIONER'S CONTINUED INVOLUNTARY HOSPITALIZATION WHERE THE CLEAR PROVISIONS OF RULE 3.218, FLA.R.CRIM.P., PROVIDE FOR SUCH A HEARING AND APPOINTMENT OF EXPERTS.

In its opinion, the Third District Court of Appeal held that Rule 3.218, Fla.R.Crim.P., only provides for an annual hearing before the committing court and the appointment of independent experts when the hospital administrator reports to the committing court that an insanity acquittee no longer meets the criteria for involuntary hospitalization. (A: 2) In so holding, the court stated that "the function and purpose" of the rule was to "vindicate[s] the committing court's ability to control the circumstances surrounding the release from custody of an insanity acquittee" and "to protect the public from an inadvertent administrative release of an insanity acquittee." (A: 2) Thus, the court viewed the rule as giving certain rights to the committing court and providing procedures for the release of an insanity acquittee when the hospital administrator reports the patient is ready for release. The Third District expressly rejected petitioner's claim that the rule gives a patient the right to the appointment of independent experts and an annual hearing before the committing court on the issue of continued involuntary hospitalization regardless of whether the hospital

administrator found a patient no longer met the criteria. (A: 2) This opinion is in express and direct conflict with McShay v. State, 447 So.2d 444 (Fla 2d DCA 1984), wherein the Second District held the rule did require precisely such an annual hearing for insanity acquittees who continue to meet the criteria.

Petitioner was committed to the Department of Health and Rehabilitative Services for involuntary hospitalization pursuant to §916.15, Fla.Stat. (1980 Supp.) and Rule 3.217, Fla.R.Crim.P. (R: 8) Part (2) of §916.15 states in full as follows:

> (2) Every person acquitted of criminal charges by reason of insanity and found to meet the criteria for involuntary hospitalization or placement may be committed for hospitalization and treatment in accordance with the provisions of this section and the applicable Rules of Criminal Procedure. The Department of Health and Rehabilitative Services shall admit a defendant so adjudicated to an appropriate facility for hospitalization and treatment and may retain and treat such defendant. No later than 6 months after the date of admission, prior to the end of any period of extended hospitalization, or at any time the administrator shall have determined that the defendant no longer meets the criteria for continued hospitalization or placement, the administrator shall file a report with the court pursuant to the applicable Rules of Criminal Procedure. (Emphasis supplied)

In enacting this statute, the Florida legislature expressly provided that the hospitalization and treatment of insanity acquittees would be in accordance with the applicable Rules of Criminal Procedure. The legislature also established that reports are to be filed by the hospital administrator, again pursuant to the applicable Rules of Criminal Procedure, and

further established that these reports are to be filed on three critical occasions: (1) no later than six months after the date of admission, (2) prior to the end of any period of extended hospitalization, and (3) at any time the administrator determines the patient no longer meets the criteria for continued hospitalization. By explicitly setting forth three distinct report periods, the legislature made a distinction between a "period of extended hospitalization," i.e. when the patient continues to meet the criteria, and a determination by the administrator that the patient "no longer meets the criteria for continued hospitalization." Either way, however, a report is required.

Part (3) of §916.15 also gives both the patient and the state the right to a hearing before the committing court in all proceedings under §916.15 at which hearing both the patient and the state have the right to present evidence, the right to depose witnesses and obtain discovery of the patient's records, and also gives the patient the right to counsel:

> (3) In all proceedings under this subsection, both the patient and the state shall have the right to a hearing before the committing court. Evidence at such hearing may be presented by the hospital administrator or his designee as well as by the state and the defendant. The defendant shall have the right to counsel at any such hearing. In the event that a defendant cannot afford counsel, the court shall appoint the public defender to represent him. The parties shall have access to the defendant's records at the treating facilities and may interview or depose personnel who have had contact with the defendant at the treating facilities. (Emphasis supplied)

The "proceedings" under §916.15 referred to in part (3) refers to proceedings before the committing court, as no other type of proceeding is contemplated by the chapter. These court proceedings established in §916.15 include: (1) the initial determination by the court as to whether an insanity acquittee meets the criteria for involuntary hospitalization and (2) subsequent action by the court on the reports filed by the hospital administrator following the three separate report periods. All of these proceedings require a hearing and a hearing is prerequisite to any decision reached by the committing court.

As previously noted, §916.15 provides that involuntary hospitalization and the subsequent filing of reports shall be pursuant to the applicable Rules of Criminal Procedure. The process and procedure for the involuntary hospitalization of an insanity acquittee and the hearings on reports of the administrator are set forth in Rule 3.218, Fla.R.Crim.P. This rule provides that the Department of Health and Rehabilitative Services shall admit and treat a defendant found not guilty by reason of insanity and found to meet the criteria for involuntary hospitalization. The rule then prescribes a mandatory initial report by the hospital administrator within the first six months of hospitalization relative to the continued hospitalization of the patient, and also requires a report at any time when the administrator determines the patient no longer meets the criteria for hospitalization:

> . . . No later than six months from the date of admission, the administrator of the

> facility shall file with the court a report, with copies to all parties, which shall address the issues of further involuntary hospitalization of the defendant. If at any time during the six month period or during any period of extended hospitalization which may be ordered pursuant to this Rule, the administrator of the facility shall determine that the defendant no longer meets the criteria for involuntary hospitalization, the administrator shall notify the court by such a report with copies to the parties.

Thus, according to the rule, mandatory reports shall be filed with the court by the hospital administrator both at the initial six month period when the patient continues to meet the criteria for continued involuntary hospitalization and at any time when the patient no longer meets the criteria for continued involuntary hospitalization. Either way, the rule, just like the statute, requires a report.

Part (a) of Rule 3.218 then describes the court hearing that must be held upon the filing of any of the above reports by the administrator. Furthermore, if after the initial six-month report the court determines the patient continues to meet the criteria and must remain hospitalized for a period of extended hospitalization, the rule requires additional reports by the administrator and court hearings at one year intervals during this period of extended hospitalization:

> (a) The court shall hold a hearing within 30 days of the receipt of any such report from the administrator of the facility on the issues raised thereby, and the defendant shall have a right to be present at such hearing. If, following such hearing, the court determines that the defendant continues to met the criteria for continued hospitalization or treatment, the court shall order further hospitalization or treatment for a period not to exceed one year. The same procedure shall

> be repeated prior to the expiration of each additional one year period the defendant is retained by the facility.

Thus, part (a) specifically requires that a court hearing be held within 30 days of the receipt of any of the administrator's reports, whether or not the administrator found the patient continues to meet the criteria, and further establishes that the patient has the right to be present at that hearing. Moreover, the rule requires the court to make an independent legal assessment of the patient's condition and need for continued hospitalization (guided by additional reports of independent experts appointed pursuant to subsection (b) of the rule) regardless of whether the administrator found the patient did or did not meet the criteria for continued hospitalization. It also provides for successive one year periods of extended hospitalization when the court has held the hearing and has determined that the patient continues to meet the criteria for hospitalization. And finally, it expressly states that at the expiration of each one year period, "the same procedure shall be repeated." Thus, after the initial six-month period, an insanity acquittee who enters into extended hospitalization has the unqualified right to a report by the administrator and an annual court hearing on the issue of his continued involuntary hospitalization, and the maximum period of time an insanity acquittee may be retained by the hospital without review by the court is one year.

Indeed, this is precisely the procedure envisioned by the Florida legislature in §916.15. The rights established in

§916.15 -- the patient's right to an initial judicial determination that he meets the criteria for involuntary hospitalization, the right to subsequent reports by the administrator at six months, at the end of each period of extended hospitalization, and at any time the administrator finds he no longer meets the criteria, and the right to a hearing before the committing court in all proceedings, -- are effectuated by the procedural Rule 3.218 established by this Court. The rule adds the qualification, however, that the period of extended hospitalization shall not exceed one year and that hearings shall commence within 30 days of the receipt of the administrator's report.

And finally, part (b) of Rule 3.218 requires that "prior to any hearing held pursuant to this Rule," the court may on its own motion or shall upon motion of counsel for the state or patient, appoint no fewer than two nor more than three experts to examine the patient relative to the criteria for continued involuntary hospitalization and to report their findings to the court:

> (b) Prior to any hearing held pursuant to this Rule, the court may on its own motion and shall upon motion of counsel for State or defendant, appoint no fewer than two nor more than three experts to examine the defendant relative to the criteria for continued involuntary hospitalization or placement by the defendant, and shall specify the date by which such experts shall report to the court on these issues, with copies to all parties.

Therefore, as mentioned above, regardless of whether or not the administrator found the patient no longer met the criteria for continued hospitalization, the patient has the unqualified right to a second opinion, to have two or three independent experts

examine him and report to the court on this very important issue. And the court also has the benefit of a second opinion from independent experts in order to more capably assess the patient's condition and to make the serious and important legal decision whether to commit the patient for another year of extended hospitalization.

In the present case, both the Third District and the respondent judge interpreted parts (a) and (b) of Rule 3.218 to pertain only to reports finding a patient no longer meets the criteria for continued involuntary hospitalization and to provide the procedures to be followed in those circumstances. (R: 20-21, 27-30; A: 1-2) According to that view, only at that time does the insanity acquittee receive a hearing and the appointment of independent experts. (A: 20-21, 27-30; A: 1-2). Thus, under that view, the yearly report and hearing provided for in part (a) is not applicable when the hospital administrator reports the patient continues to meet the criteria for hospitalization. Since no other part of Rule 3.218 does provide for annual reports for such patients (who continue to meet the criteria), under the lower court's interpretation these patients actually have no right to any report at all, much less a hearing, after the initial six-month report specified in the rule.

Such an interpretation is untenable and would violate the patient's right to due process of law. Involuntary hospitalization is a serious deprivation of liberty which the state cannot accomplish without due process of law. Shuman v. State, 358 So.2d 1333 (Fla. 1978); In Re Holland, 356 So.2d 1311

(Fla. 3d DCA 1978). Section 916.15(a) and §394.467(1)(a), Fla. Stat., and Rules 3.217 and 3.218, Fla.R.Crim.P., require the trial judge, before he can order the insanity acquittee committed initially or re-committed for extended hospitalization, to make a legal determination that the patient "is mentally ill and, because of his illness, is manifestly dangerous to himself or others." This judicial determination must be made anew after each new report from the hospital administrator. Due process requires that such a determination be made following a hearing at which the patient is present with counsel, has an opportunity to be heard and to present evidence, and has an opportunity to confront and cross-examine witnesses. Powell v. State of Florida, 579 F.2d 342, 330 (5th Cir. 1978); Specht v. Patterson, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212, 18 L.Ed.2d 326 (1967); Bolton v. Harris, 395 F.2d 642, 650 (1968). A trial judge's re-commitment of an insanity acquittee, regardless of whether the hospital administrator found he no longer meets the criteria, based only on the administrator's report, as in the present case, denies the patient due process of law. See Powell v. State of Florida, supra at 330; Specht v. Patterson, supra.[1]

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Part (a) is not and cannot be limited to administrator's reports finding only that a patient no longer meets the criteria for hospitalization. Part (a) follows immediately the provision of the rule setting forth the reports that must be filed both when the administrator finds the patient continues to meet the criteria for hospitalization and when the administrator finds the patient no longer meets the criteria. Part (a) expressly states that the court shall hold a hearing within 30 days of the receipt of "any such report" (emphasis supplied) and there is nothing in part (a) which can even be interpreted as limiting its mandatory provisions to only those reports finding the patient no longer (Cont.)

The construction proposed by the lower court here would also relegate patients who receive reports continuing to meet the criteria, as petitioner here, to a period of indefinite commitment with no right of report or independent review by the committing court. It would place the patient's bid for release in the sole hands of the hospital administrator who need only stand silent and not file a report in order to ensure that the patient will have no access to examination by independent experts or to court hearing and evaluation. The potential for abuse is evident and the entire process - tantamount to an indefinite commitment - would also violate the patient's right to due process of law. See O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); In Re Connors, 332 So.2d 336 (Fla. 1976).

Moreover, the process as envisoned by the lower court here would impermissibly place the ultimate decision of whether the patient is ready for release or continues to meet the criteria for hospitalization on the administrator. However, as noted above, whether an insanity acquittee is still "mentally ill and, because of his illness, is manifestly dangerous to himself or others" is a legal question to be determined by the judge, not a medical question. See Hill v. State, 358 So.2d 190, 207 (Fla. 1978); Thomas v. State, 443 So.2d 406 (Fla. 4th DCA 1984). Although expert psychiatric testimony is essential, the judge is

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meets the criteria. Moreover, the right to yearly reports and hearings is expressly provided for in §916.15 and Rule 3.218 simply implements those rights in a parallel manner.

not bound to accept psychiatric opinions and the legal issue of release or continued involuntary hospitalization cannot be dictated by such testimony. Hill v. State, supra at 206. Hill recognizes that lay testimony on this issue may even be "more weighty than that of experts." Hill v. State, supra at 207. And the usefulness of having a second opinion on such an important issue from an expert independent of the hospital administration is obvious. See Hill v. State, supra at 206-207.

And finally, the lower court's interpretation of the rule would violate the patient's right to equal protection of law. Although equal protection does not require that all persons be treated identically, it does require that dissimilarities have some relevance to the purpose for which the classification is made. Baxstrom v. Herold, 383 U.S. 107, 111, 86 S.Ct. 760, 762, 15 L.Ed.2d 620 (1966); Jackson v. Indiana, 406 U.S. 715, 729, 92 S.Ct. 1845, 1853, 32 L.Ed.2d 435 (1972); United States v. Ecker, 543 F.2d 178, 197 (D.C. Cir. 1976). Thus, insanity acquittees must be afforded substantially the same protections and treated substantially similar to persons committed by civil proceedings, although different procedures may pass constitutional muster if they are relevant to a legitimate state interest. Powell v. State of Florida, 579 F.2d 324, 332 (5th Cir. 1978); Bolton v. Harris, 395 F.2d 642 (1968); United States v. Ecker, supra. The Baker Act, §394.467(4)(a), Fla. Stat. (1980 Supp.), in effect at the time the crime here was committed, provided that if the administrator sought to continue the involuntary hospitalization of civilly committed patients, the patient was entitled to a

hearing before a hearing officer. Subsection (f) stated that if at the hearing the hearing officer determines the patient continues to meet the criteria, the period of extended hospitalization was not to exceed one year and that the same procedure was to be "repeated prior to the expiration of each additional one year period the patient is retained."[2] However, the lower court's interpretation of Rule 3.218 would provide no hearings at all before either a court or a hearing officer when the administrator determines to continue the involuntary hospitalization of an insanity acquittee. Since Florida requires testimony in civil commitment proceedings "to assure the full interaction of medical and legal judgments before commitment is permitted," the total denial of any hearing at all for insanity acquittees is a radical difference. See Powell v. State of Florida, supra at 333. Since there is no rational or reasonable justification to deny such patients, as petitioner here, any hearing, such an interpretation would violate equal protection. See Powell v. State, supra at 333.

Petitioner submits the lower court's interpretation of Rule 3.218 is incorrect. The Committee Notes themselves expressly state that the rule "provides for an initial six month period of commitment with successive one year periods" (emphasis supplied) for insanity acquittees. According to the Note, this Rule "is meant to track similar provisions in the rules relating to competency to stand trial and the complementary statutes." In

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The present section provides for a hearing every six months rather than every year. §394.467(4)(f), Fla. Stat. (1983).

this regard, there are no cases that hold that a person committed for incompetency to stand trial is only entitled to an annual court hearing when the administrator files a report finding him competent to stand trial.[3]

Prior to the enactment of §916.15 and the promulgation of Rule 3.218, this Court encouraged periodic re-examination and re-determination of an insanity acquittee's mental condition before the committing court no later than six months after commitment

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[3] The Committee Notes also state that:

> "[T]he underlying rationale of this Rule is to make standard, insofar as possible, the commitment process, whether it be for incompetency to stand trial or following a judgment of not guilty by reason of insanity."

Commitment for incompetency to stand trial requires an initial six-month report from the hospital administrator as well as a report at any time during the six month period or during any period of extended hospitalization when the patient no longer meets the criteria, just like insanity acquittee commitments. Rule 3.212(b)(3), Fla.R.Crim.P. Part (4) of Rule 3.212 also requires the court to hold a hearing within 30 days "of the receipt of any such report" and further provides that:

> "If, following such hearing, the court determine that the defendant continues to be incompetent to stand trial and that he meets the criteria for continued hospitalization or treatment the court shall order continued hospitalization or treatment for a period not to exceed one year. When the defendant is retained by the facility, the same procedure shall be repeated prior to the expiration of each additional one year period of extended hospitalization."

Thus, the reports and time periods for commitments for incompetency to stand trial correspond to commitments following a not guilty by reason of insanity. The Committee Notes to both rules point out the rules were designed to correspond with the complementary sections of the Florida Statutes, §916.15 and §916.13 respectively.

and, "if further hospitalization is found to be necessary," at "reasonably separated periodic intervals." In Re Connors, 332 So.2d 336, 339-340 (Fla. 1976). Although this Court noted that at that time, insanity acquittees were "not subject to the same periodic re-examinations" as were those committed civilly, this Court gave notice that it had under consideration "an amendment to the present rule which would facilitate such periodic re-examinations." Id., at 340. Since Connors, the right to precisely such periodic report and re-determination of a patient's mental condition by the court at a hearing has been mandated by §916.15 and Rule 3.218.

In the present case, the trial court received the administrator's report sometime after the examination of petitioner at the Chattahoochee facility on April 19, 1984. (R: 18) This report stated the petitioner continued to meet the criteria for continued involuntary hospitalization, thereby placing petitioner into extended hospitalization. (R: 18, 26) The petitioner then moved for the appointment of two independent experts to examine him relative to the criteria for continued involuntary hospitalization pursuant to Rule 3.218(b) and moved for a court hearing on the issue of his continued hospitalization pursuant to Rule 3.218(a). (R: 9,11) Despite the clear, mandatory provisions of the rule, the trial court refused to appoint the independent experts and refused to schedule the court hearing. (R: 15, 21, 30) The trial court's refusal to comply with these clear, mandatory provisions of the rule of procedure was error. See McShay v. State, 447 So.2d 444 (Fla. 2d DCA 1984)

(defendant entitled to a hearing pursuant to Rule 3.218 after the court received the report from the administrator of the mental health facility indicating that the defendant continued to meet the criteria for continued involuntary hospitalization). The petitioner has an unqualified right to the court hearing and the appointment of independent experts pursuant to Rule 3.218 and §916.15 and the Third District's decision denying the petition for writ of mandamus to compel compliance with the rule must be quashed or reversed.[4]

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The Third District's conclusion that petitioner "has other remedies available if he wishes to test the lawfulness of his hospitalization," i.e. habeas corpus relief, is not persuasive. (A: 1-2, fn. 2) While it is true that habeas corpus relief is technically available to one in petitioner's position, Part V, Section 4(3), Fla. Const; §79.01, Florida Statutes, Rule 9.030, subsections (a)(3), (b)(3) and (c)(3), Fla.R.App.P, this remedy is sheer illusion for most insanity acquittees. In order to present a proper habeas petition, the petitioner has the burden of showing that his detention is illegal and he must overcome the prima facie presumption of the correctness of his detention. Matera v. Buchanan, 192 So.2d 18 (Fla. 3d DCA 1966) See also Johnson v. Zerbst, 304 U.S. 458, 468-469, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). The petitioner must first show by evidence or affidavit probable cause to believe that his detention is illegal. Wood v. Cochran, 118 So.2d 193 (Fla. 1960); Matera v. Buchanan, supra at 20; Cox v. State, 180 So.2d 467 (Fla. 2d DCA 1965).

However, once involuntarily committed to Chattahoochee or another state hospital, the insanity acquittee has little or no contact with an attorney and must seek out the remedy, prepare the habeas form and file the document by himself. The petitions are often so convoluted that is difficult to determine whether a basis exists and they are frequently summarily denied. The patient has no access to independant experts.

Most importantly, it must be remembered that insanity acquittees are still mentally ill. Although they may not meet the criteria for continued hospitalization as they are not "manifestly dangerous," they still often have serious mental illness. Their capacity to seek out a habeas petition and to prepare a document showing the requisite probable cause is limited by their mental illness. It is therefore unrealistic to expect or require such a person, as petitioner here, to file a (Cont.)

CONCLUSION

For the foregoing reasons, petitioner respectfully submits the decision of the Third District Court of Appeal is in error and should be quashed or reversed with directions to require the circuit court to appoint no fewer than two nor more than three independent experts to examine petitioner relative to the criteria for his continued involuntary hospitalization and to hold a court hearing on the issue of petitioner's continued involuntary hospitalization with petitioner's right to be present at such hearing, and for such other and further relief as this Court may deem just and proper.

Respectfully submitted

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proper petition for writ of habeas corpus and to communicate his grievance to the court. The "other remedy" envisioned by the Third District is unrealistic and habeas corpus simply does not adequately protect an insanity acquittee against unwarranted detention. See Bolton v. Harris, 395 F.2d 642, 649 (D.C. Cir. 1968).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, a copy delivered by hand to the Honorable Phillip Bloom, Circuit Judge in Judge Feder's division, and a copy mailed to the Honorable Richard Yale Feder, Circuit Judge, 73 West Flagler Street, Miami, Florida this 11th day of March, 1985.

Marti Rothenberg

MARTI ROTHENBERG
Assistant Public Defender