

**IN THE SUPREME COURT OF FLORIDA**

Case No. SC16-1852  
CONSOLIDATED  
L.T. Case No. 2D16-1328, etc.

JOHN DOE, et al.,

Petitioners

vs.

STATE OF FLORIDA,

Respondent.

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AMICUS CURIAE'S BRIEF IN SUPPORT OF PETITIONERS

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## **INTEREST OF AMICUS CURIAE**

Disability Rights Florida, Inc. (Disability Rights) is a not-for-profit corporation serving as Florida’s federally-funded protection and advocacy system for individuals with disabilities. The Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), 42 U.S.C. §10801, *et seq.*, provides for the establishment and funding of systems within each state that are designed to protect and advocate for the rights of individuals with mental illness, as well as to investigate incidents of abuse and neglect of those with mental illness. In Florida, Disability Rights has been designated as the protection and advocacy system (P&A) in accordance with the PAIMI Act.

As the P&A in Florida, Disability Rights is tasked under law to protect and advocate for the rights of individuals with mental illness to “ensure the enforcement of the Constitution and Federal and State statutes.” 42 U.S.C. §10801(b)(2)(A). This mandate would include advocating for the rights of individuals subject to involuntary commitment proceedings under Florida’s Mental Health Act (the Baker Act), §§ 394.451–394.47891, Fla. Stat. (2015). Disability Rights routinely advocates for individuals confined in Florida’s mental health facilities pursuant to the Baker Act. In addition, Disability Rights has a long-standing interest in ensuring that Baker Act procedures are fair and protect the rights of individuals with mental illness.

## **SUMMARY OF THE ARGUMENT**

Amicus Curiae, Disability Rights Florida, as the designated P&A Organization for persons with mental illness in Florida, has a long-standing interest in ensuring that involuntary commitment procedures are fair and protect the rights of individuals with mental illness. Disability Rights make three arguments against the use of video conferencing in Baker Act commitment hearings.

First, patients who are subject to involuntary commitment hearings pursuant to the Florida Mental Health Act (Baker Act) have a fundamental right to be physically present at their hearing. Florida law is clear that that “presence” by video conference does not satisfy the right to be present absent a knowing and voluntary waiver. Video conferencing will impair a judge’s ability to observe demeanor which could be central to the fact-finding process. In Baker Act proceedings, a judge’s assessment of the patient’s credibility and demeanor may be critical to courts’ determinations regarding a person’s ability to care for him or herself and/or make determinations regarding an individual’s dangerousness.

Second, the Baker Act requires the hearing to be held in physical settings not likely to be injurious to the patient’s condition. A Subcommittee formed by the Florida Supreme Court Commission on Fairness to study the Baker Act strongly recommended against the use of video conferencing in commitment proceedings because patients may be too confused to understand a proceeding involving a video

conference, patients may negatively react to video conferencing due to their symptoms of mental illness, and the use of video conferencing may discourage patient participation in the hearings. Further, experts suggest that a patient's perception of the commitment hearing as unfair could negatively affect their willingness to participate in treatment. The Lee County Court's insistence on holding Baker Act hearings in a manner that may result in such negative consequences for the patient violates the Baker Act's clear mandate that hearings be conducted in a setting that is "not likely to be injurious to the patient's condition."

Third, this Court already determined that the use of video conferencing had a negative impact on the quality of justice when it rejected a proposed rule to allow use of videoconferencing with another vulnerable population: juveniles. The Court's indictment of the use of videoconferencing is equally applicable to hearings involving persons dealing with mental health issues. This Court must use its supervisory authority over trial courts and its rule-making authority to prohibit the use of a procedure that it knows will negatively impact the administration of justice. Such procedures, if they are to be used at all, should only be implemented after formal rulemaking on the local if not state level. Rulemaking would allow for a full vetting of the procedures to be used and would allow for a full argument on the due process concerns associated with such a procedure. *Amicus Curiae*,

Disability Rights Florida, requests this Honorable Court reject the use of video conferencing and answer the certified question in the affirmative.

## **ARGUMENT**

### **Introduction**

The Lee County Court has implemented a mandatory practice that all Baker Act commitment hearings will be by video conference. This procedure was announced by e-mail with little detail. *Doe v. State* ---So. 3d ---, 41 Fla. L. Weekly D2220, 2016 WL 5407617, at \*1, \*5-6 (Sept. 28, 2016). There is no formal local rule or administrative order setting out the process. *Id.* at \*5-6. Neither the Public Defender nor advocates for individuals with mental illness were informed prior to the imposition of the process nor were they given an opportunity to object or provide input. *Id.* The announced procedure does not include a process for making individualized determinations on whether the use of video conference is appropriate in a particular case. If a party objects to the use of video conferencing during a Baker Act commitment proceeding, it is unknown what showing must be made in order to have such an objection sustained.

Disability Rights files this Amicus Brief in support of the Petitioner and states the Lee County Court's Baker Act video conference procedure, as currently adopted, violates a patient's fundamental right to be present at their commitment

hearing, undermines the administration of justice and could ultimately prove injurious to the patient's condition.

## I

### **The Baker Act Imposes a Clear Legal Duty Upon the Judge to Preside Over a Commitment Hearings in Person.**

#### **Patients have a Fundamental Right to be Present at Baker Act Hearings**

It is well established that involuntary commitment pursuant to Florida's Mental Health Act ("The Baker Act") constitutes "a massive curtailment of liberty." *Chalk v. State*, 443 So. 2d 421, 422 (Fla. 2d DCA 1984), *quoting Humphrey v. Cady*, 405 U.S. 504, 509 (1972).<sup>1</sup> Individuals subject to Baker Act commitment hearings are entitled to substantial due process rights that are to be strictly enforced. As recognized in *In re Beverly*, 342 So. 2d 481 (Fla.1977), "[t]he seriousness of the deprivation of liberty and the consequences which follow [an] adjudication of mental illness make imperative strict adherence to the rules of evidence generally applicable to other proceedings in which an individual's liberty is in jeopardy." *Id.* at 489. These rights include: the right to an attorney, §394.467

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<sup>1</sup> This "massive curtailment" of liberties may also include being subjected to involuntary medication with powerful psychotropic drugs. See §394.495(3)(c) Fla. Stat. (2016). Once committed, patients are forced to rely on the State for all necessities of life including medical care and protecting their personal safety. Under some circumstances, commitment under the Baker Act may subject them to great peril. Lenora LaPeter Anton, Michael Braga, Anthony Cormier, *Insane. Invisible. In Danger.*, Tampa Bay Times, Oct. 29, 2015, available at <http://www.tampabay.com/projects/2015/investigations/florida-mental-health-hospitals/>.

(4) Fla. Stat (2016); the right to testify, present evidence and confront and cross examine witnesses, §394.467 (6) (a) (2); and, critical to this case, the right to be present at the commitment hearing, §394.467 (6) (a) (1) Fla. Stat. (2016). *See Ibur v. State*, 765 So. 2d 275, 276 (Fla. 1st DCA 2000) (holding that “[b]ecause involuntary commitment is a substantial deprivation of liberty at which fundamental due process protections must attach, the patient cannot be denied the right to be present, to be represented by counsel, and to be heard.”)

The right to be present at the Baker Act commitment hearing is a fundamental due process right. *Mouliom v. Ne. Florida State Hosp.*, 128 So. 3d 979, 981 (Fla. 1st DCA 2014). While a patient may waive his or her right to be personally present, a court must certify the waiver is “knowing, intelligent, and voluntary.” *Register v. State*, 946 So. 2d 50, 50–51 (Fla. 1st DCA 2006).

Violation of the right to be present at the Baker Act commitment hearing constitutes fundamental error. *Id.*, *Ibur v. State*, 765 So. 2d 275, 276 (Fla. 1st DCA 2000) (holding that a denial of the due process right to be heard in a Baker Act hearing prior to the deprivation of one's liberty is fundamental error).

### **Videoconference Does Not Satisfy the Fundamental Right to be Present**

In criminal cases where an individual has a right to be present at a court proceeding, the courts have held that “presence” by video conference does not satisfy that right. In *Jacobs v. State*, 567 So. 2d 16 (Fla. 4th DCA 1990), the court

held that a defendant's appearance at a sentencing hearing by closed circuit television was not "present" as defined by Rule 3.180(a)(9). *See also Brown v. State*, 538 So. 2d 833, 835 (Fla.1989) (noting that "the presence of a judge during trial is a *fundamental* right"). Therefore, in an adjudicative hearing where a person's liberty is at risk, Florida law is clear that that "presence" by video conference does not satisfy the right to be present absent a knowing and voluntary waiver.

Federal courts have reached the same conclusion. In *United States v. Gonzales-Flores*, 701 F.3d 112 (4th Cir. 2012), the court analyzed the issue by giving the word "present" its ordinary meaning, and upheld "the defendant's right to be physically present—rather than just virtually 'present,' through some electronic medium—at his sentencing." *Id.* at 116. Similarly, in *United States v. Lawrence*, 248 F.3d 300 (4th Cir.2001), the court noted that the federal criminal sentencing rule "reflects a firm judgment, however, that virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." *Id.* at 303-04. *See also United States v. Torres-Palma*, 290 F.3d 1244,1248 (10th Cir. 2002), *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999) (holding that sentencing by video conference between judge and defendant violated the rule requiring defendant's presence at sentencing.)

Although these cases are from the criminal context, they should be equally applicable to the Baker Act civil commitment context where a person is at risk of a significant deprivation of liberty. As acknowledged by this Court in *Shuman v. State*, 358 So. 2d 1333 (Fla. 1978), “those whom the state seeks to involuntarily commit to a mental institution are entitled to the protection of our Constitutions, as are those incarcerated in our correctional institutions.” *Id.* at 1335. Much like the deprivation of liberty at risk in the criminal context, this Court noted in *Shuman* that “[t]he deprivation of liberty which results from the confinement under a state’s involuntary commitment law has been termed ‘a massive curtailment of liberty.’” *Id.* Judge Lucas’ dissent similarly identifies that a Baker Act commitment hearing is akin to a criminal trial where “a patient’s liberty interests will ultimately be at stake.” *Doe*, 2016 WL 5407617 at \*9.

### **Physical Presence is an Essential Part of the Baker Act Proceeding**

The right to be physically present with the judge is particularly important where the court may need to make determinations regarding a person’s demeanor during the proceeding. Video conferencing typically impairs a judge’s ability to make determinations regarding a person’s demeanor. *See Edwards v. Logan*, 38 F. Supp. 2d 463, 467 (W.D. Va. 1999) (“Video conferencing . . . is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video

conferencing. This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion." ). In Baker Act proceedings, a judge's assessment of the patient's credibility and demeanor may be critical to courts' determinations regarding a person's ability to care for him or herself and/or make determinations regarding an individual's dangerousness. See §394.467(1)(a). While expert testimony is often relied on for these matters, there is also a significant element of subjectivity in making these findings. *Cf. Tuten v. Fariborzian*, 84 So. 3d 1063 (1st DCA 2012) (stating there is inherent unpredictability associated with mental illness). A person's demeanor during the hearing may tip the balance in his or her favor.

Even with advancing technology, presence by audio video link up is not the equivalent of actual presence. Video conferencing impairs the judge's ability to personally assess the individual and impairs the ability to assess demeanor and credibility, all of which may be essential to proper resolution of a commitment hearing. The Lee County court's requirement that John Doe and the other Petitioners participate in their commitment hearing through video conference violates their fundamental right to be present at the hearing.

## II

### **The Baker Act Imposes a Clear Legal Duty Not to Conduct Proceedings in a Setting Likely to be Injurious to a Patient's Condition.**

## **Individuals Subject to Baker Act Proceedings are a Vulnerable Population**

Disability Rights' clients and constituents include individuals subject to Baker Act proceedings, as well as individuals confined in Florida mental health facilities pursuant to the Baker Act. This is a population that is exceptionally vulnerable to procedural rights violations. Many individuals who have been committed under the Baker Act express to Disability Rights' advocates great confusion and concern about how they were committed, about violations of their procedural rights, and in some cases about whether they were provided a hearing at all.

Individuals subject to Baker Act commitment proceedings are individuals with serious mental illness. As recognized in Florida statute, they are among the State's most vulnerable citizens. See 415.102 (28) Fla. Stat. (2016) (including a person with a mental illness in the definition of "vulnerable adult" for purposes of the Adult Protective Services Act). This is especially so if the individual is also elderly. The language in the Baker Act reflects the Legislature's acknowledgement that individuals subject to commitment proceedings are entitled to heightened consideration regarding the manner in which the hearing will be conducted. Section 394.467(6)(a) requires the hearing to be held "in the county or the facility, as appropriate, where the patient is located, must be as convenient to the patient as is consistent with orderly procedure, and *shall be conducted in*

*physical settings not likely to be injurious to the patient's condition.”* (emphasis added).

This consideration of the patient's needs in the setting of the hearing is unique to commitment hearings. The “physical setting” of the hearing undoubtedly includes such things as whether the judge is physically present at the hearing or participating by a television screen. The use of videoconferencing carries a great potential for harming the patient's condition. There is substantial evidence that use of videoconferencing will cause patients confusion about the proceeding, discourage participation, cause exacerbation of symptoms, and may have significant ramifications regarding a patient's willingness to accept treatment once committed. All of these outcomes could negatively affect this vulnerable population.

**A Florida Supreme Court Subcommittee Determined the Use of Videoconferencing was Inappropriate for this Vulnerable Population.**

Advocates working for Disability Rights have on countless occasions spoken with residents confined in State institutions pursuant to the Baker Act who have expressed great confusion over the events at their hearings and even claimed they were denied a hearing altogether. Disability Rights' review of these claims have shown that there is often a direct correlation between these kinds of allegations and how the Baker Act hearing was conducted.

In 1999, Disability Rights (then known as the Advocacy Center for Persons with Disabilities) presented information on this topic to a subcommittee formed by the Florida Supreme Court Commission on Fairness to study the judicial administration of the Baker Act and its effect on Florida's elders. See *Judicial Administration of the Baker Act and Its Effect on Florida's Elders; Report and Recommendations of the Subcommittee on Case Administration* (1999) (the Report); available at [http://www.floridasupremecourt.org/pub\\_info/documents/BakerFinalReport.pdf](http://www.floridasupremecourt.org/pub_info/documents/BakerFinalReport.pdf).

As part of its review, the Subcommittee examined the procedures for involuntary placement hearings. *Id.* at 29. The Subcommittee found that many jurisdictions failed to observe typical courtroom formalities. *Id.* The testimony reflected that patients were often unaware that they were participating in a court proceeding where their liberty interest was being determined. *Id.* at 29-30. This lack of formality compounded the confusion and lack of understanding of the proceeding by the individual's subject to the hearing. *Id.*

Most involuntary placement hearings are held in receiving facilities around the state, as they are in Lee County. Although Lee County apparently uses a dedicated room in the facility for hearings, this is often not the case. In some jurisdictions hearings are held with little or no formality (for example, judges often do not wear robes) in the same conference rooms as treatment planning meetings

or visitation takes place. The Report found that patients, particularly elder patients, are often confused by these proceedings and do not realize they are “participating” in a court proceeding. *Id.* at 29. The introduction of video conferencing where the judge appears by television screen will exacerbate this confusion.

The Subcommittee also considered whether involuntary placement hearings should be conducted by video conferencing. *Id.* at 31. The Subcommittee heard testimony that individuals with symptoms of paranoia “may react negatively” to video hearings. *Id.* at 31-32. There was also testimony from a DCF official that the use of video could increase the number of individuals who decline to participate or waive their right to be present at involuntary placement hearings. *Id.* at 32. A judge from the Fifth District Court of Appeal observed that it would be “very difficult to make a video proceeding look or feel like a formal court hearing and therefore the chance that a patient might not understand court proceeding is occurring would continue to present a challenge.” *Id.*

After considering the testimony, the Subcommittee recommended that involuntary placement hearings held at mental health facilities be conducted in a room set up in the manner of courtroom and follow as much formal court room quorum and procedures as possible. *Id.* at 30. In addition, the Subcommittee “strongly” recommended against the use of video for involuntary placement proceedings. *Id.* at 32.

The Subcommittee's finding regarding patients' confusion about commitment proceedings and the negative effects on patients' mental illness indicate that the use of video conferencing in commitment proceedings is inappropriate and harmful to this vulnerable population. The Subcommittee's recommendations were based on comprehensive surveys of judges, attorneys, and others involved in Baker Act proceedings and testimony from meetings in multiple locations around the State. Its findings and recommendations are entitled to considerable weight. In spite of this, the Judge in Lee County disregarded these legitimate concerns without explanation. *See Doe*, 2016 WL 5407617 at \*9.

**The Use of Videoconference May Adversely Affect a Patient's Treatment.**

Utilization of videoconferencing may depersonalize the proceedings and may heighten a patient's perception that the proceeding was unfair. In addition, the fact that Baker Act hearings are the only adjudicatory hearings that are required to be done by video conference sends a message to the participants that these proceeding are not worthy of the court's time. A patient's perception of the fairness of these hearing is not just an esoteric concern. It may have an impact on their treatment and conduct. *See Morrissey v. Brewer*, 408 U.S. 471, 484, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484 (1972) (noting that "society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.")

Within the context of civil commitment proceedings, Tom R. Tyler, professor of psychology and law at Yale Law school has argued that clinical treatment outcomes might be affected by patient's perceptions of participation, dignity, and trust during commitment proceedings.<sup>2</sup> Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment*, 46 SMU Law Rev. 433 (1992). Tyler suggested that "commitment hearings experienced as unfair by those potentially being committed will have strongly anti-therapeutic consequences." *Id.* at 444.

In a follow-up study on Tyler's theory, researchers evaluated whether enhancing patient's perceptions of procedural fairness may enhance their subsequent involvement in the therapeutic milieu, lead to greater involvement in treatment, and reduce the occurrence of aggressive behavior that leads to the use of seclusion and restraints. Michele Cascardi, Norman G. Poythress, Alicia Hall, *Procedural Justice in the Context of Civil Commitment: An Analogue Study*. 18 Behavioral Sciences & the Law, 731-740 (2000). The Study concluded that "the development of strategies to enhance patients' perceptions of procedural justice in commitment hearings may indeed have positive therapeutic implications." *Id.*

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<sup>2</sup> "Participation" involves the presentation of evidence and one's own views. "Dignity" involves an individual's perception of "whether they are treated with respect, politeness, and dignity, and whether their rights as citizens are acknowledged." Trust occurs when individuals believe that "the authorities with whom they are dealing are concerned about their welfare and want to treat them fairly." *Id.* at 440-41.

Experts in the various fields addressed above all agree that the use of videoconferencing in proceedings such as the Baker Act commitment hearings could be injurious to the patient and counterproductive to treatment. The Lee County Court's insistence on holding Baker Act hearings in a manner that discourages participation by the patient, causes great confusion for the patient, and may well cause "negative reactions" on the patient's symptoms violates the Baker Act's clear mandate that hearings be conducted in a setting that is "not likely to be injurious to the patient's condition."

### III

**This Court Must Use Its Supervisory Authority over Trial Courts and its Rule-Making Authority to Prohibit the Use of a Procedure that it Knows Will Negatively Impact the Administration of Justice.**

**This Court has previously rejected videoconference for similarly vulnerable populations.**

It is clear that the use of video conferencing in commitment hearings has a negative impact on the quality of justice and patients' procedural rights. This Court made such a finding in a similar context when it rejected a proposed rule allowing use of videoconferencing with another vulnerable population: juveniles. *See Amendment to Florida Rules of Juvenile Procedure 8.100(A)*, 796 So. 2d 470, 471 (Fla. 2001). The Court's consideration of the proposed rule took place after adoption of an interim rule allowing videoconference hearings and more than a year of actual experience with video hearings. *Id.*

In rejecting the proposed rule, the Court found that “[a]t the conclusion of far too many hearings, the child had no comprehension as to what had occurred and was forced to ask the public defender whether he or she was being released or detained.” The Court also noted that, on many occasions, multiple parties would speak at once, adding to the confusion. *Id.* at 473. The court also found that the videoconference hearings “totally lacked the dignity, decorum, and respect one would anticipate in a personal appearance before the court.” *Id.*

Additionally, the Court noted that video conferencing may deprive the court of relevant non-verbal information regarding the demeanor of the participants stating,

“[a]t a time such as this, a great deal of information is exchanged by not only the spoken word, but also by personal contact and observations inherent in the personal interaction generated by a personal appearance, qualities missing when an event is perceived only through the limitations of the lens of a camera or television monitor. Most assuredly, the impact of the detention hearing has far reaching tentacles for all concerned, the individual youth, the family, and the public in general. The decision with regard to detention should be made in person, not by long distance.”

*Id.* at 474-75

As noted in Judge Wilson’s concurring opinion in *Doe*,

“The court's indictment of the use of videoconferencing for Florida's vulnerable juvenile population is equally applicable to hearings involving persons dealing with mental health issues. The technical problems experienced

with the use of the video equipment for juvenile detention hearings will be repeated in Baker Act hearings. Both juveniles and persons with mental health issues may experience problems in expressing themselves in unfamiliar situations and may not fully understand the significance of legal proceedings. For both of these groups, innovations like the use of video equipment that will make their participation in hearings that affect their liberty interest more difficult ought to be avoided. The trial court's decision to preside over the involuntary placement hearings from a remote location by video disregards the lessons that we should take from the history of Florida's failed experiment with the use of video equipment for juvenile detention hearings”

*Doe*, 2016 WL 5407617 at \*10.

### **The Lee County Procedure Violates the Florida Rules of Judicial Administration.**

As argued in the Petitioner’s Brief, The Florida Rules of Judicial Administration sets out the hierarchy of rules governing the court system including rules of court, local rules and administrative orders. Significantly, local rules or orders may not be inconsistent with the Florida Constitution, the Florida Rules of Court, or with administrative orders entered by the Supreme Court of Florida. As argued above, the use of videoconferencing violates patients’ right to be present as guaranteed by the Baker Act and may violate the statute’s requirement to conduct hearings in a setting that is not likely to be injurious to the patient. Further, conducting a hearing in a manner that fosters confusion in the patient and discourages full participation by the patient raises significant due process concerns.

In addition, there is no contingency in the Lee County plan for the inevitable technical problems that will arise with videoconferencing. The court must hold a hearing on a Baker Act petition within five working days. A technical problem could put a patient in the difficult position of going forward with a hearing using malfunctioning equipment or with a patient agreeing to a continuance that may extend his or her confinement at the receiving facility. The Lee County process does not address any of these concerns. This Court should not permit such a cavalier approach to hearings that have a profound impact on the patient's liberty.

This Court must use its supervisory authority over trial courts and its rule-making authority to prohibit the use of a procedure that it knows will negatively impact the administration of justice. Such procedures, if they are to be used at all, should only be implemented after formal rulemaking on the local if not state level. Rulemaking would allow for a full vetting of the procedures to be used and would allow for a full argument on the due process concerns associated with such a procedure.

## **CONCLUSION**

For all of the reasons argued above, Amicus Curiae, Disability Rights Florida, requests this Honorable Court answer the certified question in the affirmative.

## **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that Amicus Curiae's Brief in Support of Petitioners was prepared with Times New Roman 14-point type style and otherwise complies with the requirements of Rule 9.210(a)(2).

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing document has been furnished to the following counsel by service through the e-portal on December 12, 2016: Caroline Elizabeth Johnson Levine, Assistant Attorney General, Caroline.JohnsonLevine@myfloridalegal.com; Robert A. Young, Assistant Public Defender, RYoung@PD10.org, TLocke@PD10.org; and the Honorable Jeffrey Colbath, Chief Judge of the Fifteenth Judicial Circuit, ABorman@pbcgov.org.

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