IN THE SUPREME COURT OF FLORIDA

JOHN DOE, ET AL.
Petitioners

v.

STATE OF FLORIDA
Respondent

CASE NO.: SC16-1852 (CONSOL.)
L.T. No.: 2D16-1328

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Petitioners filed an "Emergency Petition for Writ of Certiorari and/or Prohibition and/or Mandamus" in the Second District Court of Appeal on March 30, 2016 in order to compel the judicial officers of the Twentieth Judicial Circuit to be physically present when judicial officers preside over Section 394.467 involuntary commitment hearings. On March 31, 2016, the Second District Court of Appeal ordered that the Attorney General shall respond to the petition within 15 days. On April 15, 2016, the undersigned Assistant Attorney General filed a response to the Petition. On April 26, 2016, the Petitioners filed a reply to the response and attached an undated exhibit titled "Objection to Video Remote Baker Act Hearings and to County Court Judge H. Andrew Swett Presiding Over These Hearings."

On September 28, 2016, the Second District Court of Appeal determined that a writ of certiorari could not be issued as no written orders had been issued to review. Additionally, the Second District found that a writ of prohibition could not be issued because the judicial officers presiding over involuntary commitment hearings were not acting in excess of their jurisdiction. *Doe v. State*, No. 2D16-1328, 2016 WL 5407617, at *1 n.2 (Fla. 2d DCA Sept. 28, 2016). The Second District found that in this case, "the proper remedy – if any – would be a writ of mandamus." *Id*. at *1. However, the Second District determined that a writ of

mandamus should not be issued because "there is no ministerial, indisputable legal duty clearly established in the law which requires judicial officers presiding over involuntary inpatient placement hearings pursuant to section 394.467 to be physically present with the patients, witnesses, and attorneys." *Id*. at *3. Notwithstanding this holding, the Second District certified "the following question of great public importance to the Florida Supreme Court:

> DOES A JUDICIAL OFFICER HAVE AN EXISTING INDISPUTABLE LEGAL DUTY TO PRESIDE OVER SECTION 394.467 HEARINGS IN PERSON?"

Id.

On October 13, 2016, the Petitioners filed a Notice to Invoke Discretionary Jurisdiction in the Florida Supreme Court. On October 27, 2016, the Florida Supreme Court accepted jurisdiction of this matter, pursuant to its authority under Article V, § 3(b)(4) of the Florida Constitution.

SUMMARY OF ARGUMENT

The district court properly denied petitioners' application for extraordinary relief. Of particular relevance here, mandamus may not be used to establish the existence of a legal right, but only to enforce a right already clearly and certainly established in the law. As the district court correctly concluded, it is not clearly and certainly established that a judicial officer may not preside over Section 394.467 hearings by video teleconference. In addition, reasonable concerns

regarding the propriety of employing videoconference methods may be addressed by amending the rules of procedure and/or the statutes governing the conduct of Baker Act hearings. Thus, this Court should affirm the decision below.

ARGUMENT

I. PETITIONERS ARE NOT ENTITLED TO THE EXTRAORDINARY REMEDY OF MANDAMUS

A. Legal Background Concerning Writs of Mandamus.

The Florida Supreme Court is granted the power to issue writs of mandamus "to state officers and state agencies." Art. V, § 3(b)(8), Fla. Const. Additionally, the district courts of appeal can issue writs of mandamus pursuant to the constitutional authority granted in Article V. *Id.* § 4(b)(3). Importantly, if a petition is filed to obtain a writ of mandamus in order to direct the actions of a judicial officer or lower tribunal, the particular judicial officer or lower tribunal must be named as a party within the body of the petition. *See* Fla. R. App. P. 9.100(e)(1).

Typically, writs of mandamus have been used to compel a trial judge to submit issues to a jury that are to be adjudicated by a jury, *see Sarasota-Manatee Airport Auth. v. Alderman*, 238 So. 2d 678 (Fla. 2d DCA 1970); writs have also been issued to compel a trial judge to enforce a child custody order. *See Yon v. Fleming*, 595 So. 2d 573 (Fla. 4th DCA 1992). Further, district courts of appeal have issued writs of mandamus ordering clerks of court to perform ministerial

duties and process pleadings and documents, *see Graham v. Rutherford*, 901 So. 2d 412 (Fla. 1st DCA 2005), *see also Tucker v. Ruvin*, 748 So. 2d 376 (Fla. 3d DCA 2000); writs which direct local government officials to comply with zoning ordinances, *see Lamphear v. Wiggins*, 546 So. 2d 1183 (Fla. 5th DCA 1989); writs that require a public agency to follow its administrative rules, *see Williams v. James*, 684 So. 2d 868 (Fla. 2d DCA 1996); and writs that require electric companies to provide electricity to its customers. *See Fla. Power & Light Co. v. State ex rel. Malcolm*, 144 So. 657 (Fla. 1932).

Mandamus is not an appellate proceeding, even if a petition for the writ is oftentimes directed at judicial or quasi-judicial officers. *See Ridaught v. Div. of Fla. Highway Patrol*, 314 So. 2d 140 (Fla. 1975). Significant to the analysis as to whether an appellate court may issue a writ of mandamus in this case, is the consideration that mandamus is a writ that is utilized to force a public official to perform duties that he is required to perform under the law. *See Puckett v. Gentry*, 577 So. 2d 965 (Fla. 5th DCA 1991); *see also State ex rel. Buckwalter v. City of Lakeland*, 150 So. 508 (Fla. 1933). There must exist a law that provides that the judicial officer has a clear legal duty to perform some required act. *See Radford v. Brock*, 914 So. 2d 1066 (Fla. 2d DCA 2005); *see also Miller v. Bieluch*, 825 So. 2d 427 (Fla. 4th DCA 2002); *Adams v. State*, 560 So. 2d 321 (Fla. 1st DCA 1990). Further, the judicial officer must have failed or refused to perform that act.

See Fair v. Davis, 283 So. 2d 377 (Fla. 1st DCA 1973). The exception to the requirement that a petitioner must request the taking of an action from a judicial officer exists when a duty is required under the law. *See KKP Holdings, LLC v. Russell*, 1 So. 3d 1287 (Fla. 1st DCA 2009); *see also Al-Hakim v. State*, 783 So. 2d 293 (Fla. 5th DCA 2001); *Dickey v. Circuit Court, Gadsden Cty., Quincy, Fla.*, 200 So. 2d 521 (Fla. 1967). It is important to recognize that the petitioner must have no other adequate or specific remedy available. *See Agency for Health Care Admin. v. Mt. Sanai Med. Ctr. of Greater Miami*, 690 So. 2d 689, 692 (Fla. 1st DCA 1997); *see also City of Coral Gables v. State ex rel. Worley*, 44 So. 2d 298 (Fla. 1950).

The action that would be compelled by the writ of mandamus must be ministerial and cannot require the exercise of any discretion. *See Leshin v. Dailey*, 840 So. 2d 454 (Fla. 4th DCA 2003); *see also Johnson v. Levine*, 736 So. 2d 1235, 1238 (Fla. 4th DCA 1999); *City of Miami Beach v. Mr. Samuel's, Inc.*, 351 So. 2d 719 (Fla. 1977); *Solomon v. Sanitarians' Registration Bd.*, 155 So. 2d 353 (Fla. 1963). Accordingly, mandamus "may not be used to establish the existence of such a right, but only to enforce a right already clearly and certainly established in the law." *See Fla. League of Cities v. Smith*, 607 So. 2d 397, 401 (Fla. 1992); *see also City of Tarpon Springs v. Planes*, 30 So. 3d 693, 695 (Fla. 2d DCA 2010); *Escambia Cty. v. Bell*, 717 So. 2d 85, 88 (Fla. 1st DCA 1998).

B. Overview of Rules Governing Videoconferencing.

Rule 2.530 of the Florida Rules of Judicial Administration and Rule 1.451 of the Florida Rules of Civil Procedure provide some guidance regarding the manner in which to conduct hearings through audio or video conferencing. However, these Rules do not provide the statutory or constitutional authority required to establish a ministerial, indisputable and non-discretionary legal duty. Moreover, the concurring opinion below acknowledged that "one naturally turns to the rules of procedure for *guidance*." *Doe*, 2016 WL 5407617, at *4 (emphasis added). Additionally, the "rules offer little help." *Id*.

Rule 2.530 of the Florida Rules of Judicial Administration addresses the use of communication equipment to conduct a hearing with parties who are not physically present:

> (a) Definition. Communication equipment means a conference telephone or other electronic device that permits all those appearing or participating
> to hear and speak to each other, provided that all conversation of all parties is audible to all persons present.
> (b) Use by All Parties. A county or circuit court judge may, upon the court's own motion or upon the written request of a party, direct that communication equipment be used for a motion hearing, pretrial conference, or a status conference. A judge must give notice to the parties and consider any objections they may have to the use of communication equipment before directing that communication equipment be used. *The decision to use communication equipment over the objection of parties will be in the sound discretion of the trial court*, except as noted below.
> (c) Use Only by Requesting Party. A county or circuit court judge may, upon the written request of a party upon reasonable notice to all

> other parties, permit a requesting party to participate through communication equipment in a scheduled motion hearing; however, *any such request (except in criminal, juvenile, and appellate proceedings) must be granted, absent a showing of good cause to deny the same, where the hearing is set for not longer than 15 minutes*.
> (d) . . . .
>
> (4) Confrontation Rights. *In juvenile and criminal proceedings, the defendant must make an informed waiver of any confrontation rights that may be abridged by the use of communication equipment.*
>
> *(5) Video Testimony. If the testimony to be presented utilizes video conferencing or comparable two-way visual capabilities, the court in its discretion may modify the procedures set forth in this rule to accommodate the technology utilized*.
>
> . . . .

See Fla. R. Jud. Admin 2.530 (emphasis added).

The Rule specifies that a judicial officer has broad discretion to determine whether to utilize communication equipment and certainly must grant the use of communication equipment for hearings scheduled for less than 15 minutes. An exception to this requirement is made for criminal, juvenile, and appellate matters, where criminal and juvenile defendants would have to waive their confrontation rights in order to utilize the equipment. More significantly, the court is granted discretionary decision making to "modify the procedures set forth in this rule to accommodate the technology utilized," if video conferencing technology is available.

Rule 1.451 of the Florida Rules of Civil also provides the court with the discretion to allow testimony through the use of communication equipment:

(b) *Communication Equipment. The court may permit a witness to testify at a hearing or trial by contemporaneous audio or video communication equipment* (1) by agreement of the parties or (2) for good cause shown upon written request of a party upon reasonable notice to all other parties. The request and notice must contain the substance of the proposed testimony and an estimate of the length of the proposed testimony. In considering sufficient good cause, the court shall weigh and address in its order the reasons stated for testimony by communication equipment against the potential for prejudice to the objecting party.

(c) Required Equipment. Communication equipment as used in this rule means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other simultaneously and permits all conversations of all parties to be audible to all persons present. *Contemporaneous video communications equipment must make the witness visible to all participants during the testimony. For testimony by any of the foregoing means, there must be appropriate safeguards for the court to maintain sufficient control over the equipment and the transmission of the testimony so the court may stop the communication to accommodate objection or prevent prejudice*.

. . . .

See Fla. R. Civ. P. 1.451 (emphasis added).

C. Analysis

Applying the principles set out above, the district court properly denied Petitioners' application for extraordinary relief.[1] Rule 2.530 of the Florida Rules of Judicial Administration and Rule 1.451 of the Florida Rules of Civil Procedure

[1]The State of Florida did not request the trial judge to hold section 394.467 hearings by videoteleconference. By operation of rule, however, all parties to the underlying commitment proceedings are also parties to petitioners' application for a writ of prohibition. *See* Fla. R. App. P. 9.100(e)(1). Accordingly, the district court ordered respondent to file a brief addressing petitioners' challenge to the trial court's practice. Insofar as respondent is a party to the writ proceeding, it seeks only to address the narrow question certified to this Court.

provide some guidance regarding the manner in which to conduct hearings through audio or video conferencing. However, those rules do not "clearly and certainly" establish that a judge may not preside over Baker Act hearings by videoconference. *See Fla. League of Cities*, 607 So. 2d at 401.[2] In particular, rules expressly authorizing the use of videoconferencing in some proceedings do not clearly and impliedly bar the use of videoconferencing in other proceedings. As the district court recognized, moreover, an appellate court cannot use the writ of mandamus "to control or direct the manner in which another court shall act in the lawful exercise of its jurisdiction." *See Mathews v. Crews*, 132 So. 3d 776, 778 (Fla. 2014). Thus, this Court should affirm the decision below, notwithstanding the reasonable concerns articulated by the concurring judge.[3]

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[2] A decision denying the extraordinary relief of mandamus need not prevent future litigants from challenging particular commitment determinations on the ground that the judge was required—even if not "clearly" required—to attend the hearing in person. *Cf. Wickland v. Florida*, 642 So. 2d 670 (Fla 1st DCA 1994) (reversing involuntary placement for treatment under Baker Act based on "procedural irregularity," because "the trial judge failed to comply with" applicable statutory requirements).

[3] Petitioners argue that the trial judge's decision to conduct certain hearings by videoconference should have been made by administrative order, not communicated by email. *See* Br. 15-17. However, the certified question at issue in this case is whether a judicial officer has "an existing indisputable legal duty to preside over section 394.467 hearings in person." Whether a judicial officer has an indisputable duty to preside over section 394.467 hearings in person does not turn on how such an officer communicates a decision not to personally preside over such hearings. Accordingly, respondent does not offer any view on whether the circuit court could or should have issued an administrative order.

To the extent that Petitioners seek to challenge the reliability of any particular videoconferencing technology, they have not met their burden of demonstrating that the particular practice challenged here fails to comport with applicable procedural requirements. The petition in this matter did not provide transcripts of any prior hearings; nor did it offer evidence of any significant problems tied to the particular technology the court sought to employ. Absent such evidence, and in light of Petitioners' burden, this Court should not assume that videoconferencing is always and inherently unreliable, no matter how advanced the technology in question. That is particularly so, as discussed in greater detail below, because videoconferencing is routinely used in connection with a wide range of judicial proceedings.

II. VIDEO CONFERENCING, VIDEO RECORDING, OR TRANSCRIBED STATEMENTS HAVE BEEN ENCOURAGED AND PROPERLY UTILIZED IN ADJUDICATORY PROCEEDINGS, PURSUANT TO FLORIDA STATUTORY AUTHORITY, WITH ALL NECESSARY DUE PROCESS PROTECTIONS EMPLOYED.

A. Florida Practice and Procedure.

A task force assembled by the Florida Supreme Court has encouraged the use of videoconferencing in various kinds of judicial proceedings: "The supreme court should continue to encourage all courts to maximize the use of video-conferencing where practicable. Attorneys and judges should also be encouraged to conduct video conferences for depositions and hearings in order to facilitate a quicker resolution to their cases. Attorneys located in judicial circuits other than

where a case is venued should be encouraged to participate in hearings via video-conference from the circuit court nearest to their office." *See Supreme Court of Florida's Task Force on the Management of Cases Involving Complex Litigation Report and Recommendations* (2008), at 54, *available at* https://www.flcourts.org/core/fileparse.php/260/urlt/ComplexLitigation.pdf.

Further, the Supreme Court Task Force acknowledged that a "2004 survey [by the Office of the State Courts Administrator] indicated that many trial courts support attorneys using court equipment for court-ordered depositions, expert witness testimony, and court interpreting." *Id*. at 53.

The successful use of videoconferencing technology has been exemplified in the Ninth Judicial Circuit, which has an advanced technology apparatus that provides videoconference services for trial appearances and judicial hearings. More importantly, the Ninth Circuit allows videoconferences for judicial hearings in Probate and Complex Civil Litigation Courts. *See* Ninth Judicial Circuit, Video Conference Hearings, Probate & Complex Civil Litigation Courts, http://www.ninthcircuit.org/sites/default/files/VideoConferenceHearings-Probate-Business-Courts.pdf. (last visited November 28, 2016). Additionally, the Florida Department of Management Services Division of Administrative Hearings provides videoconferencing in trials litigating administrative law disputes.

The development of advanced communication equipment provides litigating parties, witnesses, and courtroom personnel with the ability to conduct hearings without being physically present in a courtroom. In fact, criminal arraignments and first appearances are routinely conducted through the use of communication equipment throughout the State of Florida. *See Amendment to Fla. Rule of Juvenile Procedure 8.100(a),* 796 So. 2d 470, 472 (Fla. 2001).

The Florida Rules of Evidence provide statutory authority to submit substantial testimonial evidence through the use of video recordings or transcription of witness statements. *See Kelley v. Webb*, 676 So. 2d 538 (Fla. 5th DCA 1996). Medical experts routinely testify in trial proceedings through the use of video recordings, which were obtained outside of the presence of the adjudicating judge or jury. Additionally, deposition testimony can be offered in trial proceedings, as attorneys or courtroom personnel act as the deponent and read from the deposition transcript during a trial. Florida Statute § 90.804 provides that due process protections are assured when receiving testimony obtained in deposition or through the preservation of testimony for trial when the declarant is physically unavailable.

> (1) DEFINITION OF UNAVAILABILITY.—"Unavailability as a witness" means that the declarant:
> . . . .
> (d) Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity; or

> (e) Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.

See § 90.804, Fla. Stat. (2016).

Another example of legislatively prescribed authority for the use video conferencing in a courtroom proceeding is found in Florida Statute § 92.54 and § 92.55, which allows child witnesses to testify in trial proceedings without being physically present in the courtroom. Florida Statutes § 92.55 provides that:

> (2) Upon motion of any party, upon motion of a parent, guardian, attorney, guardian ad litem, or other advocate appointed by the court under s. 914.17 for a victim or witness under the age of 18, a person who has an intellectual disability, or a sexual offense victim or witness, or upon its own motion, the court may enter any order necessary to protect the victim or witness in any judicial proceeding or other official proceeding from severe emotional or mental harm due to the presence of the defendant if the victim or witness is required to testify in open court. Such orders must relate to the taking of testimony and include, but are not limited to:
>
> (a) Interviewing or the taking of depositions as part of a civil or criminal proceeding.
>
> (b) Examination and cross-examination for the purpose of qualifying as a witness or testifying in any proceeding.
>
> (c) The use of testimony taken outside of the courtroom, including proceedings under ss. 92.53 and 92.54.

See § 92.55, Fla. Stat. (2016); *see also* § 92.54, Fla. Stat. (2016) (providing that a finding that there is a substantial likelihood that a victim or witness under the age of 18 or who has an intellectual disability will suffer at least moderate emotional or mental harm due to the presence of the defendant if such victim or witness is

required to testify in open court, or is unavailable as defined in s. 90.804(1), the trial court may order that the testimony of the victim or witness be taken outside of the courtroom and shown by means of closed-circuit television).

The Florida Supreme Court has recognized that the "Fourteenth Amendment of the United States Constitution provides that no state shall 'deprive any person of life, liberty, or property, without due process of law.' Article I, section 9 of the Florida Constitution provides a similar guarantee that '[n]o person shall be deprived of life, liberty or property without due process of law.'" *See M.W. v. Davis*, 756 So. 2d 90, 97 (Fla. 2000). Further, the "Due Process clauses of the United States and Florida Constitutions encompass both substantive and procedural due process. *See, e.g., Dep't of Law Enf't v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991). "Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government." *Id.* The purpose of procedural due process is to "serve[ ] as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." *Id.* Further, "the extent of procedural due process protections varies with the character of the interest and nature of the proceeding involved." *See M.W. v. Davis*, 756 So. 2d 90, 97 (Fla. 2000) (citing *In Interest of D.B.*, 385 So. 2d 83, 89 (Fla. 1980)).

Florida Statute § 394.467 provides many protections necessary to protect a mentally ill patients' Due Process and Equal Protections rights under the Florida and United States Constitutions by requiring the appointment of an attorney for the patient and requiring an evidentiary hearing that obtains testimony from witnesses, to include an examining doctor. *See* §§ 394.467 (4) & (6), Fla. Stat. (2016). Pursuant to Florida Statute § 394.467:

> (1) A person may be placed in involuntary inpatient placement for treatment upon a finding of the court by clear and convincing evidence that:
> (a) He or she is mentally ill and because of his or her mental illness:
> 1. a. He or she has refused voluntary placement for treatment after sufficient and conscientious explanation and disclosure of the purpose of placement for treatment; or
> b. He or she is unable to determine for himself or herself whether placement is necessary; and
> 2. a. He or she is manifestly incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, is likely to suffer from neglect or refuse to care for himself or herself, and such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; or
> b. There is substantial likelihood that in the near future he or she will inflict serious bodily harm on himself or herself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm; and
> (b) All available less restrictive treatment alternatives which would offer an opportunity for improvement of his or her condition have been judged to be inappropriate.

See § 394.467(1), Fla. Stat. (2016).

The Petitioners in this matter are provided with, and certainly have not been denied, all of the protections provided in Florida Statute § 394.467 during Baker Act hearings. Petitioners will have the benefit of a court appointed attorney, an evidentiary hearing will be conducted, and testimony will be received from witnesses, to include doctors or expert witnesses who have examined the Petitioners. Evidence will be presented to the Court in order to demonstrate that Petitioners are mentally ill, are unable to determine for himself or herself whether placement is necessary, are manifestly incapable of surviving alone, have a substantial likelihood that he or she would inflict serious bodily harm on himself or another, and that there is no less restrictive treatment alternative available to residential treatment in order to medically treat the Petitioners. *See Id.*

In order to comply with the requirements of Florida Statute § 394.467, the State must present clear and convincing evidence of the statutory criteria before a person may be involuntarily placed for treatment. *See Rosicka v. State*, 898 So. 2d 1098 (Fla. 1st DCA 2005); *see also Lischka v. State*, 901 So. 2d 1025 (Fla. 1st DCA 2005); *Boller v. State*, 775 So. 2d 408 (Fla. 1st DCA 2000); *Lyon v. State*, 724 So. 2d 1241 (Fla. 1st DCA 1999); *Singletary v. State*, 765 So. 2d 180 (Fla. 1st DCA 2000); *Blue v. State*, 764 So. 2d 697 (Fla. 1st DCA 2000).

Importantly, Petitioners have not provided any statutory or legal authority prohibiting the use of a video conferencing system in these types of hearings.

Further, Petitioners do not provide any statutory or legal authority requiring that these hearings be conducted in the same physical location as the judicial officer presiding. Significantly, Petitioners acknowledge the statutory authority which provides that a second doctor does not have to evaluate a patient in person. Rather, that doctor can administer, through "electronic means," a thorough medical examination to determine whether a patient should be involuntarily committed during a Baker Act proceeding. *See* § 394.467(2), Fla. Stat. Additionally, Florida Statute § 394.455(37) defines "electronic means" as "a form of telecommunication that requires all parties to maintain video as well as audio communication." It is evident that a medical expert, examining a patient through electronic means in order to offer testimony for a trial court to rely upon, would be the only relevant party qualified to determine the medical condition of a patient. Therefore, Petitioners cannot establish that the trial court departed from the essential requirements of the law.

The only distinction in an involuntary commitment hearing conducted through videoconferencing technology, is that the judicial officer is not physically present in the courtroom with the Petitioners. However, the Petitioners continue to have all procedural due process protections afforded to himself and his counsel. Indeed, the burden is on the State of Florida to present clear and convincing

evidence through witness testimony that the Petitioner requires additional medical care prior to release from a mental health facility.

A judicial officer is not required to base his findings on the testimony that may or may not be provided by a Petitioner. More importantly, Petitioners are routinely not in attendance at Section 394.467 hearings as his or her court appointed attorney often waives the appearance of the Petitioners. A Petitioner has a fundamental right to be present at the civil commitment hearing, however, the Petitioner may waive his or her presence at the hearing. A Court must inquire whether the waiver is "knowing, intelligent, and voluntary." *See Brown v. State*, 953 So. 2d 688, 689 (Fla. 1st DCA 2007); *see also Register v. State*, 946 So. 2d 50 (Fla. 1st DCA 2006); *Joehnk v. State*, 689 So. 2d 1179 (Fla. 1st DCA 1997) (improper to conduct a commitment hearing without inquiring as to a voluntary waiver).

B. Practice and Procedure in Other Jurisdictions.

The implementation of videoconferencing has been occurring for the last few decades in other jurisdictions and the embrace of emerging technology to conduct court hearings in a manner which provides every due process protection is a necessary and positive development in modern jurisprudence. It is clear that the State of Florida has successfully transitioned to videoconferencing in many types

of adjudicatory hearings. The following cases can illuminate how other jurisdictions are managing court proceedings through videoconferencing.

In *United States v. Baker*, 45 F.3d 837 (4th Cir. 1995), a commitment hearing was conducted with the "use of video cameras, microphones and televisions." *Id*. at 840. The Fourth Circuit Court of Appeal in *Baker* found that conducting a civil commitment hearing through videoconferencing did not violate a mentally ill individual's constitutional rights. Important, to its analysis, the Court noted that "[a] commitment hearing is a civil matter." *Id*. at 842; *see also Addington v. Texas*, 441 U.S. 418, 428, 99 S. Ct. 1804, 1810 (1979); *United States v. Copley*, 935 F.2d 669, 672 (4th Cir.1991); *United States v. Muhammad*, 165 F.3d 327 (5th Cir. 1999). "Thus, the constitutional rights to which a defendant in a criminal trial is entitled do not adhere to a respondent in a commitment hearing." *Baker*, 45 F.3d at 843. Accordingly, the constitutional requirements imposed upon a civil commitment hearing are determined by the Fifth Amendment's procedural due process, not the Sixth Amendment. *Id*. at 842. A distinguishing factor is that the "government's efforts to civilly commit a person are not punitive in nature." *Id*. at 843; *see also Heller v. Doe by Doe*, 509 U.S. 312, 113 S. Ct. 2637, 2645 (1993). "Additionally, civil commitment lasts only so long as the person committed continues to suffer from a mental disease or defect such that he or she is a danger to self or others." *Baker*, 45 F.3d at 844.

The *Baker* court was confronted with arguments that a mentally ill individual in a commitment hearing may be uncomfortable with the nature of the proceeding conducted through videoconferencing. However, the court correctly assessed that the relevant inquiry was whether a petitioner's constitutional rights were protected. "With regard to the notion that a respondent may lose confidence in a hearing conducted by video conference, the government properly notes that such a concern is, in general, largely irrelevant to the constitutionality of the proceeding. Quite often, as the government appropriately observes, criminal defendants lack confidence in a criminal proceeding conducted with the full panoply of constitutional protections. In other words, there is no constitutional right to a hearing in which the participants have confidence." *Id*. at 846.

A civil commitment hearing is "civil in nature," and "the constitutional rights to which a defendant in a criminal trial is entitled do not adhere to [the] respondent in [the] commitment hearing." *United States v. Wood*, 741 F.3d 417, 423 (4th Cir. 2013); *see also United States v. Blackledge*, 751 F.3d 188, 200 (5th Cir. 2014) (Shedd, J., dissenting). "The primary inquiry in a commitment hearing 'involves a question that is essentially medical,' *Vitek v. Jones*, 445 U.S. 480, 495, 100 S. Ct. 1254 (1980), and it is based primarily upon the theoretical opinions of experts." *See United States v. Blackledge*, 751 F.3d 188, 200 (5th Cir. 2014). "The aim of cross-examination is changed accordingly: its goal is not to 'poke holes' in

the testimony of a witness, but to test the expert opinion given and determine its basis and its limits." *Id.*

In *Shellman v. Commonwealth of Virginia*, 284 Va. 711 (2012), the Court found that a videoconference hearing "may not provide for optimal circumstances for the respondent and his counsel to communicate privately, [however, that] does not mean that the respondent has been deprived of due process." *Id*. at 720. "Contrasting a commitment hearing with a criminal trial, where observation of the demeanor of the defendant and the witnesses by the trier of fact is a major concern, the [] goal of a commitment hearing is far different: [to determine] whether the respondent is mentally competent." *Id*. at 720; *see also Baker*, 45 F.3d at 844–845. The *Shellman* court properly recognized that the "determination [of civil commitment] is made by the court and is based primarily upon the opinions of experts proffered by the government and the respondent." *See id*. Additionally, it is the "qualifications of the experts, and the substance and thoroughness of the opinions offered" that determines the validity of a civil commitment finding. *Id.*. Finally, the court noted that the mental health patient was afforded due process through his attendance at a commitment hearing by videoconference because the patient "and his counsel were able to participate fully in the proceedings, including the ability to see and hear the judge, opposing counsel, and the witnesses and to cross-examine" the doctor. *See Shellman*, 284 Va. at 723.

In *United States v. Wood*, 741 F.3d 417 (4th Cir. 2013), the court relied on the United States Supreme Court's holding in *Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254 (1980), to determine the validity of conducting videoconference hearings for civil commitment proceedings. *Vitek* outlined the following "minimum safeguards to which due process guarantees a defendant in a civil commitment proceeding: [A] hearing at which evidence is presented and the respondent is provided a chance to be heard and to present documentary evidence as well as witnesses; the right to confront and to cross-examine government witnesses at the hearing, except upon a showing of good cause; an independent decisionmaker; a written, reasoned decision; the availability of an independent advisor, not necessarily an attorney; and effective and timely notice of the pendency of the hearing and of all these rights." *See Wood*, 741 F.3d at 424; *see also Baker*, 45 F. 3d at 843.

The minimum safeguards required by due process are met through a videoconferencing system, by providing "counsel and adequate notice. . .an opportunity to present evidence in support of his case and to present witnesses. . . [and to] to confront and cross-examine the government's witnesses." *See Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 479 (D. Md. 2010). Importantly, "with video-conferencing, a jury will . . . be able to observe the witness'[s] demeanor and evaluate [her] credibility in the same manner as traditional live testimony." *Id*. at

480. Further, the *Lopez* court acknowledged that "[d]espite videoconferencing's deficiencies, courts in this circuit and elsewhere have approved or affirmed its use in the civil context." *Id*.; *see also Rusu v. INS*, 296 F.3d 316 (4th Cir. 2002) (asylum proceeding); *Baker*, 45 F.3d at 837 (civil commitment hearing); *Edwards v. Logan*, 38 F. Supp. 2d 463 (W.D. Va. 1999) (civil rights action); *see also In re Merck Prods. Liab. Litig.*, 439 F. Supp. 2d 640, 642 (E.D. La. 2006).

Even in criminal cases, where the right to confrontation is stronger than in a civil commitment proceeding, federal courts began to embrace videoconferencing technology more than twenty years ago. *Edwards*, 38 F. Supp. 2d at 465, provides that:

> Throughout the country, courts are beginning to use video conferencing to conduct judicial business. A recent news article reported the increased use of video conferencing in the federal courts of appeal, district courts, and bankruptcy courts. *Video Conferencing Links Federal Courts and Public*, The Third Branch (Admin. Office, U.S. Courts, Wash., D.C.) June 1998, at 6–7. A subsequent article recounted the support video conferencing has received from judges and attorneys who note that it not only saves time and money, but also enhances security by reducing the need to move prisoner participants for hearings. *Courtroom Technology Draws Positive Response*, The Third Branch, *supra*, August 1998, at 9. . . . The federal rules allow the use of video conferencing or comparable technology to present witness testimony, but do not expressly permit or restrict a court's ability to conduct an entire civil trial through video conferencing. *See* Fed. R. Civ. P. 43(a) ("The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.").

Video conferences for criminal hearings "has been upheld as an alternative means of taking witness testimony." *Id*. at 465; *see also Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157 (1990) (holding that closed circuit television is constitutionally permitted for taking testimony of a child witness); *United States v. McDougal*, 934 F. Supp. 296 (E.D. Ark. 1996) (holding that exceptional circumstances justified the taking of the President's testimony through the use of a deposition by video conferencing). "Additionally, the use of video conferencing in judicial proceedings was further enhanced with the enactment of the Prison Litigation Reform Act of 1996. Included in this legislation was a provision requiring courts to make greater use of video conferencing technology in adjudicating prisoner litigation." *Edwards*, 38 F. Supp. 2d at 466.

Video conferencing allows prison inmates and "those present in the courtroom to simultaneously see and hear one another in real time, and in that sense represents a great leap forward from the alternatives to in-court appearance that were available forty years ago." *See Perotti v. Quinones*, 790 F.3d 712, 722 (7th Cir. 2015); *see also Montes v. Rafalowski*, Case No. C 09-0976, 2012 WL 2395273, at *2 (N.D. Cal. June 25, 2012) ("Despite [its acknowledged] shortcomings, . . . videoconferencing nonetheless facilitates plaintiff's meaningful participation at trial: plaintiff is able to testify, present evidence, and look each juror in the eye."); *Thomas v. O'Brien*, Case No. 5:08-CV-0318, 2011 WL

5452012, at *6 (N.D. N.Y. Nov.8, 2011) ("The use of video conferencing technology to permit a prisoner plaintiff's participation in a trial is not only a potential alternative [to his physical presence] ..., but appears to present an option which has been and continues to gain growing acceptance."), *j. aff'd*, 539 Fed.Appx. 21 (2d Cir. 2013) (non-precedential decision); *Twitty v. Ashcroft*, 712 F. Supp. 2d 30, 33 (D. Conn. 2009) (describing video conferencing as a "reasonable alternative" to prisoner's physical presence in court), *j. aff'd*, 455 Fed.Appx. 97 (2d Cir. 2012) (non-precedential decision); *Fed. Trade Comm'n v. Swedish Match N.A., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) (testifying by video conferencing is essentially equivalent to testifying in person).

It is evident that a myriad of state and federal trial and appellate courts have efficaciously marshalled videoconferencing in adjudicatory proceedings in order to include remote witnesses, individuals with disabilities, "judges who are ill or unable to travel, security concerns, and court financial constraints." *See* Shari Seidman Diamond, et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869, 877 (2010). Further, trial and appellate courts can continue to upgrade and employ effective strategies that ensure constitutional protections throughout the course of adjudicative proceedings. *See* Center for Legal & Court Technology, *Best Practices for Using Video Teleconferencing for Hearings and Related*

Proceedings, Draft Report (2014), *available at* https://www.acus.gov/sites/default/files/documents/Draft_Best%2520Practices%2520Video%2520Hearings_10-09-14_1.pdf.; *see also* Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48, 795 (Aug. 9, 2011), *available at* http://www.acus.gov/recommendation/agency-use-video-hearingsbest-practices-and-possibilities-expansion.

In sum, judicial authority approving the widespread use of videoconferencing technology, inside and outside of Florida, suggests that such technology may play a valuable role in judicial proceedings and need not undermine constitutional due process protections. Given the rapidly changing nature of such technology and the reasonable arguments on both sides, legitimate concerns regarding the use of videoconferencing in judicial proceedings should be thoroughly debated and addressed in connection with proposed changes to applicable Florida statutes and procedural rules.

CONCLUSION

The district court's decision should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have electronically filed the foregoing with the Clerk of the Florida Supreme Court using the Court's E-File Portal, which will send a notice of electronic filing to: Robert Young, Office of the Public Defender, Post Office Box 9000 – Drawer PD, Bartow, Florida 33831- 9000, this 28th day of November, 2016.

/s/ Caroline Johnson Levine
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was computer generated and printed in Times New Roman 14-point font and complies with the font requirements of Rule 9.210 (a) of the Florida Rules of Appellate Procedure.

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