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.

DISCRETIONARY REVIEW (VIA CERTIFIED QUESTION) OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

OTHER AUTHORITIES

Introduction

By adopting an exceedingly narrow view of the "ministerial, indisputable legal duty clearly established in the law" found necessary for mandamus relief, the Second District Court of Appeal has denied any remedy for a local practice that its panel of judges variously observed was problematic, unwarranted, of questionable wisdom, ill-advised, unfair, highly inappropriate, and rightly deserving of admonition. Yet in Lee County, the practice of "presiding" over Baker Act trials remotely by video link continues undeterred.

This Court must authorize the missing remedy because as one judge observed, as the law now stands, any judge may "preside" over any evidentiary trial remotely, even over the timely objection of a party. Moreover, in the absence of this Court's intervention, the Twentieth Circuit's demonstrated practice of governance by "private e-mail" rather than by enactment of local rules or administrative orders deprives aggrieved parties of any review; because, according to the Second District, private e-mails are not reviewable by certiorari.

Finally, even if neither certiorari nor mandamus are available under these extraordinary facts, this Court must use its supervisory authority over trial courts and its rule-making power to answer the certified question with a resounding, YES,

because "yes" is the only answer that will insure that Florida's most vulnerable citizens actually receive, and appear to receive, the same full measure of the process that is due to any other citizen who appears for trial in the courts of Florida.

Statement of the Case and of the Facts

The facts are contained in the various opinions below, together with the appendices in the record provided by the Clerk.[1]

The basic facts are accurately summarized in a single paragraph of the majority opinion below. *Doe v State,* 41 Fla. L. Weekly D2220 (Sept. 28, 2016):

> At the time the petitions at issue were filed with this court, the petitioners were awaiting their Baker Act hearings. The petitioners and the State, as respondent in these cases, have provided this court with the recent history giving rise to these petitions. The judge and magistrate currently assigned to preside over Baker Act hearings in Lee County had recently announced, via e-mail, that they would no longer be commuting to the receiving facilities to hold the statutorily required hearing in person. Instead, the judicial officers would preside remotely from the courthouse via videoconference equipment while the patients, witnesses,

[1] Because the appendix of each consolidated case is substantially the same as the others, Petitioner will cite to the appendix of only the lowest case number, Doe v. State, 2D16-1328.

> and attorneys would continue to be physically present at the receiving facility. It is this new procedure that the petitioners challenge, asking this court to require the judicial officers to be physically present for the hearings "as required by law."

This case arises because a majority of the District Court panel reviewed the Briefs, considered its own research and could not find "an express legal right to have the judicial officer be physically present with the petitioners when holding the Baker Act hearing," nor any "legal duty on the part of the judge" to do so. *Id.* *1-2. The majority did, however, "hold" that "clearly established law" necessary for mandamus relief "can derive from a variety of legal sources, including . . . rules of court . . . ." *Quoting Nader v. Fla. Dep't of Highway Safety & Motor Vehicles,* 87 So.3d 712, 723 (Fla. 2012).

Because neither the State's Brief nor the record contained any explanation for the trial judge's decision to remain in his chambers during these trials, Judge Wallace (concurring) evaluated "three possible reasons" that could justify such an unusual local procedure. He considered "cost, efficiency, and security" and found "none of these explanations provides a satisfactory answer." *Id.* *6. He went on to consider the Lee County practice in the light of reports of study commissions of this Court and others, which had been brought to the attention of the Lee County

judiciary before the decision was made. Analogizing the Baker Act trials to juvenile detention hearings, he found the local practice "disregards the lessons that we should take from the history of Florida's failed experiment." *Id.* *10.

Finally, Judge Lucas (in dissent) concurred with Judge Wallace's "well-informed concerns about the use of videoconferencing technology within Baker Act court proceedings," but could not accept his colleagues' "narrow definition" of the ministerial duty necessary for mandamus relief, which he characterized as: "essentially holding that because no statute, court opinion, or procedural or administrative rule expressly requires judicial officers to appear in person over Baker Act hearings, no such requirement exists." *Id.* *10-11.

In addition to simply searching for rubrics in the written law as the majority did, Judge Lucas considered the historical meaning of "trial," in our American legal tradition; which, he noted, throughout all of Anglo-American legal history starting from Biblical times has been understood to mean one thing: people coming to a central place, occupied by a judge who personally hears and decides their cases. *Id.* *11, and n. 9.

In the appellate court the State defended the claim for certiorari relief by (correctly) observing "[p]etitioners have not provided a copy of a court order to

support his or her arguments." *Id.* *5. Judge Wallace pointed out "that is precisely one of the problems with the proceedings in the trial court," there is no reviewable court order, only e-mails that all of the appellate judges agreed were not susceptible to certiorari review. *Id.*

The record contains two such "unreviewable" e-mails. They are reproduced below:

First, the e-mail from the trial judge's Judicial Assistant that officially started the video practice under review here. Judge Wallace referred to it in his opinion:

> **From**: "Hroncich, Kate" <KHroncich@CA.CJIS20.ORG>
> **Date:** March 30, 2016 at 1:00:53 PM EDT
> **To:** "Smith, Kathleen A" <Kathleens@pd.cjis20.org>
> **Subject: Baker Acts on Friday**
>
> Per Judge Swett he will be doing Baker Acts beginning this Friday via Polycom. Thank you.
>
> Thank you,
> Kate
> JA to Judge Swett
> (239) 533-9157

[E-mail dated March 30, 2016 from "Hronrich," Appendix 12, Doe v. State, 2D16-1328 (last un-numbered page).]

There is also an earlier e-mail from the trial judge to counsel for the parties:

From: Hroncich, Kate [mailto:KHroncich@CACJIS20.0RG]
Sent: Thursday, January 21, 20168:47 AM
To: Poland, Paul A. ppoland@sao.cjis20.org<mailto:ppoland@sao.cjis20.org>>;
Smith,Kathleen AKathleens@pd.cjis20.org<mailto:Kathleens@pd.cjis20,org>>
Cc: Wilsker, ScottSWilsker@CA.OIS20.0RG<mailto:SWilsker@CA.CJIS20.ORG>>;
McHigh,Michael<MMcHugh@CA.CJIS20.0RG<mailto:MMcHugh@CA>CJIS20.ORG>>
Subject: on behalf of Judge Swett/Re: Baker Acts

Dear Mr. Poland and Ms. Smith:

I received word that we are moving forward with ploycom for Baker Act hearings. I understand Scott Wilsker will be forwarding to you our research. If you feel a meeting is needed please contact me and I would be happy to meet with you.

Thank you,

Judge Andrew Swett

While it is clear that the trial judge "**received word** that we are moving forward with polycom for Baker Act hearings," the record is silent from whom the "word" came; or whether the word was an oral "order" of the chief judge.

Summary of the Argument

For centuries in America and for millennia before that, judges have personally dispensed justice from a place called a court (more recently, a courtroom). While trial procedures have undergone refinements over the centuries, from trials by combat or by ordeal to modern notions of evidence-based decisions,

the judge has always been the central figure of the trial – the figure who was physically and prominently present in the court together with the litigants and the witnesses.

When our Constitutions, statutes and rules mention "trial," its meaning can only be understood in the historical context of all the preceding centuries of Anglo-American jurisprudence.

Certainly this Court can be assumed to have considered that context when it enacted rule 2.530, Fla. R. Jud. Admin. If the rule is properly read using routine text interpretation rules, its import is clear. When this Court carefully enumerated the three situations in which video equipment MAY be used without the consent of the parties, it quite obviously excluded all other situations in which it MAY NOT be used.

Finally, even if the remedy of mandamus is henceforth restricted to a clear violation of only black letter law, this Court's plenary rule-making and branch-management powers are entirely sufficient to enforce or clarify the rules of judicial administration, as well as to curtail the Twentieth Circuit's unique e-mail governance practices.

Argument

A JUDGE HAS AN EXISTING INDISPUTABLE LEGAL DUTY TO PRESIDE OVER SECTION 394.467 HEARINGS IN PERSON

Universally accepted, historical legal tradition is a source of enforceable legal rights.

It is fundamental that the common law is judge-made law that evolved from custom and usage in the King's Courts. Except when it became necessary for a court decision, it was not written, but was traditionally observed in courts throughout the realm. Florida has adopted the "common law and statute laws of England . . . down to the 4th day of July, 1776. . . ." Fla. Stat. § 2.01. Thus, the deeply ingrained legal traditions of England became the law of Florida on the date of enactment of the statute. Those traditions certainly included the concept of a trial presided over by the King or one of his judges.

Like the notion of the rule of law itself, the common law's genius has been that it provided a set of universally shared values and meanings so that litigation

outcomes are predictable based on the evidence presented and not the on the status or relationships of the parties involved.

There are many examples of common law rules. One such example of a non-written, but universally accepted rule of law is the rule of sequestration. Recognized in Florida at least since 1906,[2] the rule never appeared in black and white in a statute or procedural rule in Florida until the enactment of Fla. Stat. § 90.616, Exclusion of Witnesses, which did not become "law" until October 1, 1990. The rule has been universally considered "an effective device for promoting witness accuracy and truthfulness," and therefore part of our common law heritage from time immemorial. *See generally, Knight v. State,* 746 So.2d 423 (Fla. 1990). Because of the rule's universal recognition at common law, no one could seriously argue that a party could not employ mandamus to enforce the right to require a judge, who believed that a non-written rule did not exist, to at least consider the applicability of the rule of sequestration to the witnesses in a particular case. Of course, everyone would also agree that the actual enforcement of the rule (whether it should be strictly or loosely applied) is a matter of sound judicial discretion; and therefore, not suitable for mandamus relief.

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[2] *See Seaboard Air Line RY v. Smith,* 43 So. 235 (Fla. 1907)

The majority opinion below, however, would hold that because the rule of sequestration was not contained in a written constitution, statute or procedural rule, there is no "ministerial, indisputable legal duty clearly established in the law" so that a judge could not be compelled by mandamus to recognize the existence of, and to at least consider the applicability of the rule. Clearly, legal rights can be found in the un-written common law and the deeply imbedded legal traditions of our State.

The majority below believes that it could use its "mandamus authority to compel the judge to preside over the required hearing. . ., but it cannot direct how the judge should do so in the absence of an express direction in the law." *Id.* *3. If one ignores centuries of legal tradition, there is also no express direction in the law that would prevent an especially efficient judge from announcing that in order to speed up the process, a computer will be used to decide evidentiary issues as they arise; and a coin-flip or Ouija board to decide difficult custody cases. According to the majority, these examples, however frivolous, are beyond the reach of mandamus because they relate merely to how the judge decides, and there is no law that says otherwise.

Clearly, the sounder reasoning is contained in the dissent. As we tell jurors

every day: "For two centuries we have lived by the constitution and the law. No juror (read: court) has the right to violate rules we all share." Std. Crim. Jury Instr. 3.13.

This Court's Judicial Administration Rules are clear and enforceable

The court below has held that rules of procedure can be a source of "clearly established law" necessary for mandamus relief, but apparently it found that rule 2.530, Fla. R. Jud. Admin. was insufficiently clear to authorize its intervention. That rule allows the use of "communications equipment" in only three circumstances without the consent of the parties (motion hearings and pretrial and status conferences) and even in those circumstances the judge is required to consider a party's objections before deciding whether to allow its use.

In trials or hearings involving the taking of testimony, the rule requires the consent of all the parties. *See* rule 2.530(1) ("*Generally.* A county or circuit court judge, general magistrate, special magistrate, or hearing officer may allow testimony to be taken through communication equipment **if all parties consent** or if permitted by another applicable rule of procedure.") There is no other applicable

rule of procedure, and certainly there was no consent in this case; rather, there was a clear and principled objection.

"It is of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned." *Thayer v. State,* 335 So.2d 815, 816 (Fla. 1976) *quoting Ideal Farms Drainage Dist. v. Certain Lands,* 154 Fla. 554, 19 So.2d 234 (Fla. 1944). There is simply no reason why this long-established canon of construction does not also obviously apply to this Court's rules as well as statutes.

If rule 2.530, as seen through the lens of the doctrine of *expressio unius* is not clear enough, this Court's opinion adopting it, makes it so.

> It should be noted that none of the authorized usages involve the presence of a jury, that by definition the communication equipment must permit objections and cross examinations, **and that all parties have an absolute right to prohibit the taking of testimony of a witness by communication equipment.** The absolute right must be exercised, however, prior to commencement of the proceeding.

(Emphasis added). *RE: Rules of Judicial Administration,* 462 So.2d 444 (Fla. 1989). Clearly, this Court intended to authorize video testimony without consent in only three circumstances; otherwise video is never authorized without the consent of all parties.

Practical considerations

The lack of wisdom of this local practice was expressed by all of the judges on the panel, and does not need to be repeated here.[3] But the practical danger to the judicial branch of singling out the mentally disabled for the special practice of restricting access to the judge deserves at least some comment. Unquestionably, mental illness is a disability that falls within the purview of a series of state and federal civil rights statutes generally referred to as the Americans with Disabilities Act, which (for governmental agencies, like courts) also includes section 504 of the Rehabilitation Act of 1973.

[3] The judges' misgivings were summarized in the *Introduction* as: "problematic, unwarranted, of questionable wisdom, ill-advised, unfair, highly inappropriate, and rightly deserving of admonition."

In his dissent, Judge Lucas was right to consider the access to courts provision of our constitution;[4] but it is equally troubling that in Lee County, access to the courts is limited by the remoteness of a video connection only for the mentally challenged. Litigants in every other species of trial are admitted into the physical presence of the trier of fact. This fact alone should cause this Court to exercise its rule-making powers to eliminate the practice in Lee County; and elsewhere unless and until this Court, after study, approves the concept.

The trial court was clearly informed of the negative recommendation of the study commissions of this Court and others, but it chose to "move forward with ploycom (sic) for Baker Act hearings" anyway. Under sections labeled, ***B. Disregarding the Recommendations of the Experts*** and ***C. Disregarding the Lessons of Experience***, Judge Wallace's concurrence patiently explains the folly of this local procedure better and more succinctly than can be expressed here. From his opinion it is clear that the local authorities had no regard for, or found

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[4] Art. I, Sec 21, Fla. Const. As to the extent of the right, *see generally Mitchell v. Moore,* 286 So.2d 521, 525 (Fla. 2001). *See also G. B. B. Investments, Inv. v. Hinterkopf,* 343 So.2d 899, 901 (Fla. 3d DCA 1977) stating that the right has roots dating to the Magna Charta and that any restrictions on access to the courts must be liberally construed in favor of the constitutional right.

(unexpressed) countervailing values that caused them to ignore, both the experts and the experience.

Ignoring both experts and experience (and more recently ignoring the District Court of Appeal's strongly-worded advice) is especially troublesome in light of Florida's public policy for the mentally ill expressed in § 394.459 Fla. Stat., Rights of Patients. Subsection one of that statute requires that patients must be accorded "individual dignity," and it provides that "[a] person who is receiving treatment for mental illness shall not be deprived of any constitutional rights." Most observers would agree that requiring a presumably mentally ill person to testify earnestly to a TV screen, and then asking that patient to accept the decision of the TV as the carefully considered judgment of a real court of this state; is neither constitutional nor dignified. This is especially true when only the mentally ill are required to do so.

Governance by e-mail

As the court below pointed out, e-mails are not Administrative Orders, which are reviewable via certiorari; nor are they Local Rules, which are reviewable

by this Court's Local Rules Advisory Committee and ultimately by this Court. See rule 2.215(3), Fla. R. Jud. Admin.

Florida Rules of Judicial Administration defines the hierarchy of rules of court, local rules and administrative orders (in that order); and also establishes the governance of the court system including the duties of the chief judge. An administrative order is "A directive necessary to administer properly the court's affairs but not inconsistent with the constitution or with court rules and administrative orders entered by the supreme court." Rule 2.120, Fla. R. Jud. Admin. It is arguable that the exclusion of the judge from the courtroom for Baker Act trials can only be accomplished by a duly approved local rule, but even if an administrative order is adequate, an e-mail from a judicial assistant is not the functional equivalent of either.

Moreover, by abdicating his responsibility under the rule to be the "administrative officer of the courts within the circuit," and to direct the formation and implementation of policies and priorities for the operation of all the courts," and to "regulate the use of all court facilities," in favor of a County Judge or his Judicial Assistant, the chief judge violated rule 2.215, *Trial Court Administration.*

In doing so, the chief judge also deprived the Petitioners of a remedy less drastic than this one.

Conclusion

For the foregoing reasons and for the reasons so clearly expressed by the concurring and dissenting judges below, this Court should immediately consider and grant Petitioner's Application for a Constitutional Stay Writ, filed separately. It should stay the ongoing local practice in Lee County to forestall needless direct appeals; and after briefing and oral argument, hold that a failure by a trial court to observe centuries-long, fundamental American legal traditions is a violation of an indisputable legal duty clearly established in the law which cannot be accomplished by e-mail and cannot be accomplished without the prior approval of this Court.

Certificate of Compliance

I HEREBY CERTIFY that Petitioners' Initial Brief 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 Petitioners' Initial Brief was e-filed with the Court and copies e-served to Ms. Caroline Elizabeth Johnson Levine, AAG at Caroline.JohnsonLevine@myfloridalegal.com on this 15th day of November 2016.

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