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' REPLY BRIEF

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> **As this Court has explained, "[t]he deprivation of liberty which results from confinement under a state's involuntary commitment law has been termed a 'massive curtailment of liberty**.' " *Shuman v. State*, 358 So.2d 1333, 1335 (Fla.1978) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)).

Pullen v. State, 802 So. 2d 1113, 1117 (Fla. 2001) [emphasis added].

Introduction

With that quotation from this Court firmly in mind, the State's position expressed in its Answer Brief ("AB") rings hollow – hollow because it's legally unsound, and hollow because the State has not offered any practical justification for this radical idea that a judge can "preside" over a trial and decide whether to subject a patient to a "massive curtailment of liberty," remotely via the two dimensions of a TV monitor.

The State contends that even though mandamus is not available to these Petitioners, all future litigants can appeal "on the ground that the judge was required – even if not "clearly" required – to attend the hearing in person." AB, p, 9, n. 2. Thus according to the State, this Court should answer the certified question, "NO," because a Baker Act patient's right to be in the judicial presence is not clear enough to support mandamus. The State also insists that "a judicial officer has broad discretion to determine whether to utilize communications equipment," but it has not offered any reason (other

than the obvious: judge's personal convenience) to justify the exercise of that "broad discretion." AB, p. 7. Finally, the State says that the use of video equipment is not unconstitutional under federal due process law and; in any event, Petitioners have suffered no harm.[1] Of course, proof of an irreparable injury has never been a necessary element for mandamus relief, and due process concerns are not before this Court.

Mandamus issues

Scope of mandamus relief. The State's Answer Brief contains an impressive compendium of mandamus cases. But Petitioners have always agreed that they must demonstrate that they have a clearly existing legal right to the performance of a ministerial duty by a governmental official.

In this case, Petitioner's clear legal right is simply another way of saying that the judicial officer has a clear ministerial duty to show up in person at the trial over which the judge is assigned to preside.

The State claims there is no such clear legal duty because no written law or rule requires it. Instead, it says that under our rules judges have "broad discretion" to preside over trials electronically if they choose. AB, p. 7.

The State has not attempted to explain why this Court's communications equipment rule is not crystal clear when viewed "[u]nder the

[1] See for example, AB, pp. 10 and 16.

principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another. *Bergh v. Stephens*, 175 So.2d 787 (Fla. 1st DCA 1965)." *Moonlit Waters Apts. Inc. v. Cauley*, 666 So.2d 898, 900 (Fla. 1996). Additionally, the State has not explained, because there can be no explanation, why this Court would enact a rule authorizing the use of communications equipment in only three specific circumstances if Florida's judges already have inherent "broad discretion" to appear by video at trials any time they want to.

Rule 2.530, Fla. R. Jud. Admin. allows judges on their "own motion or on the written request of a party" to use communication equipment[2] for "a motion hearing, pretrial conference, or status conference." The judge must give notice to the parties and consider "any objections they may have to the use of communication equipment before directing that communications equipment be used" in the three types of hearings where it is specifically allowed. Rule 2.530(b), Fla. R. Jud. Admin.

Finally, the State has offered no explanation for the clear language from this Court's enacting opinion (originally enacted as rule 2.071) "that all parties have an

[22] The rule 2.530 definition of "communication equipment" includes only an audio component; there is no requirement that the parties must see each other. So, if a judge's "broad discretion" flows from this rule as the State claims, the judge could literally "phone in" his appearance "presiding" over the trial.

absolute right to prohibit the taking of testimony of a witness by communications equipment." *In re: The Florida Bar, Rules of Judicial Administration,* 462 So.2d 444, 445 (Fla. 1989).

The State has also chosen to ignore two hundred years of Florida's historical practice, and it has failed to explain why clear legal rights do not spring directly from this fundamental bedrock of American legal tradition.

In sum, contrary to the State's protestations that "Petitioners have not provided any statutory or legal authority prohibiting the use of a video conferencing system in these types of hearings[3]" and that "Petitioners do not provide any statutory or legal authority requiring that these hearing be conducted in the same physical location as the judicial officer presiding,"[4] Petitioners have demonstrated the clear legal right necessary for mandamus relief in this case, springing both from this Court's own rule and from the bedrock of American legal tradition.

The State's other sources of "video authority" are unavailing.

The State now claims that the trial judge's judicial assistant's e-mail abolishing the patients' right to appear in court together with the presiding judge was fully authorized by several other statutes and rules.

[3] AB, p. 16.
[4] AB, p. 17.

Civil rules are inapplicable. The State claims "Rule 1.451, Florida Rules of Civil (sic) also provides the court with the discretion to allow testimony through the use of communication equipment." AB, p. 7. The rule is inapplicable for several obvious reasons.

First, while probate, not civil, rules would be expected to apply to Baker Act commitment trials, even if the civil rules do apply, the cited rule relates to absent witnesses, not absent judges. Second, civil rules do not relate to cases involving a "massive curtailment of liberty," like this one. Third, there was no "written request of a party" or "good cause shown," as the rule requires. Finally, the rules of judicial administration always trump other rules (except appellate rules). *See* Fla. R. Jud. Admin. 2.110 ("These rules shall supersede all conflicting rules and statutes.")

Recommendations of the task force on complex litigation are irrelevant. The State's reliance on a report of the taskforce on complex litigation shows the paucity of legal support for its position. Even a cursory review of the materials show that the taskforce was recommending video for "conferences and depositions" not trials involving a "massive curtailment of liberty." Finally, the taskforce was considering a situation in which the judge, parties and attorneys were present together, only a witness was absent. However, State has shown that at least

in the Ninth Circuit, administrative written decisions and orders, not e-mails, are used to institute changes in the way that court uses its abundant technology.

Cited juvenile rules do not support the State. The State cites to *Amendment to Fla. Rule of Juvenile Procedure 8.100(a)* 796 So. 2d 470, 473 (Fla. 2001) in support of its position. It is unclear now, as it was it was to Judge Wallace, in the Disregarding the Lessons of History section of his concurring opinion in *Doe v. State*, p.* 10, how this opinion supports the State's position, but one quote from the opinion repealing the interim rule temporarily allowing the use of video for detention hearings is extremely relevant:

> We find the comments of two experienced Florida judges to be especially on point. Senior Circuit Judge Dorothy H. Pate writes:
>
> > As you are aware, public awareness and understanding of our courts is poor. Most people coming into court have difficulty in grasping the process. This is magnified with children and youth. The detention decision is one of the most important to be made in delinquency cases-both for the child and society. The value of observation of the child, interaction with family (and sometimes victims) is extremely helpful in making a fair and just decision.

Certainly, the words of this highly-respected jurist could not be more true now, applied to mental patients than when they were first written regarding children.

The Baker Act provides no support for the State's position. The State claims that an amendment to the Baker Act that allows the psychiatrists or psychologists to evaluate their patients by "electronic means" somehow supports

the idea that the experts can testify by video. *See* Fla. Stat. § 394.467(2), which relates exclusively to the requirements for a patient's admission to a reception facility for evaluation, not commitment to a state hospital for long-term treatment. Obviously, the Baker Act contains a definition of "electronic means" that the legislature could have applied to commitment hearings; but it chose instead, to limit "electronic means" to use by the doctors in conducting the evaluations necessary for admission to a reception facility, not for commitment to a treatment facility. The State's observation that Baker Act patients routinely do not attend their hearings anyway is unsupported by the record, irrelevant, and impertinent to those who are well enough to attend.

Federal due process cases are not helpful. It is neither persuasive nor instructive that some federal courts have found various uses of video technology to meet minimum federal due process standards on a case-by-case basis. Significantly, the State has not provided any constitutional analysis of the provisions that are applicable here. Specifically, Petitioners and the judges below were concerned about the access to courts provision of the Florida constitution, but the State did not chose to address it in its Answer Brief. Likewise, the State is silent on the equal protection aspects of treating mentally challenged litigants differently that others who appear before Florida's judges.

Conclusion

Petitioners have demonstrated that their clear legal right to appear before the presiding judicial officer has been violated in Lee County. They have shown that both centuries of legal tradition and this Court's own judicial administration rules impose a continuing ministerial duty on Florida's judicial officers to at least show up in person; and to show up at least for trials involving a massive curtailment of the liberty interests of Florida's most vulnerable citizens. Accordingly, Petitioners ask this Court to answer the certified question with a clearly articulated, YES!

Finally, even if mandamus is not available, this Court has plenary authority to stop this unique local practice, unless and until this Court, after study and careful consideration, authorizes it by an appropriate rule change.

Certificate of Compliance

I HEREBY CERTIFY that Petitioner's Reply 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 the original of this Reply brief was e-filed with the Court and copies served by automatic e-service on Ms. Caroline Elizabeth Johnson Levine, AAG, attorney for Respondent at Caroline.JohnsonLevine@myfloridalegal.com; and to Mr. Peter P. Sleasman, Esq., attorney for amicus curiae at PeterS@DisabilityRightsFlorida.org; and to the Hon. Kathleen Ann Smith, Public Defender, Twentieth Judicial Circuit at Kathleens@pd.cjis.20.org on this 5th day of December, 2016.

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