IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO2-2280

JERRY REGIER,
Secretary, Florida Department of
Children and Families,

Petitioners,

vs.

JACK KEPHART, et. al.,

Respondent.

**AMENDED ANSWER BRIEF OF RESPONDENTS ON THE MERITS**

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## STATEMENT OF THE CASE AND FACT

Respondent would adopt the statement of the case and facts advanced by the Petitioner with two clarifications which the Respondent feels are necessary to avoid any misrepresentations. First, the State Attorney did not commence filing of the amended petition in the aftermath of *Melvin.* Only after the Respondent filed his emergency motion asking the trial court to vacate the order determining probable cause did the State seek to amend the petition in this case. Secondly, the affidavit of Dr. Karen Parker was not filed until after the Fourth District Court of Appeal issued its Rule to Show Cause on the Respondent's Petition for Writs of Habeas Corpus.

## SUMMARY OF ARGUMENT

The ex parte probable cause determination prescribed by Section 394.915 of the Florida Statutes must be supported by sworn proof. In order to comply with minimal due process requirements of the United States and Florida Constitutions the sworn proof must be in the form of an affidavit from, or live testimony by, at least one mental health professional who has evaluated the one to be so held.

Even assuming arguendo that a verified petition could ever satisfy due process concerns the amended petition filed in this case would not be sufficient.

## ARGUMENT

THE LOWER COURT WAS CORRECT IN HOLDING THAT THE EX PARTE PROBABLE CAUSE DETERMINATION MUST BE SUPPORTED BY SWORN PROOF IN THE FORM OF EITHER AN AFFIDAVIT FROM, OR LIVE TESTIMONY BY, AT LEAST ONE MENTAL HEALTH CARE PROFESSIONAL WHO HAS EVALUATED THE INDIVIDUAL TO BE SO HELD

The United States Constitution requires that before warrants issue for the seizure of a person, the warrant must be "upon probable cause, supported by oath or affirmation." U.S. Const. amend. IV. The Florida Constitution is even more specific, requiring that the warrant requires "probable cause, supported by affidavit." Art. I, § 12, Fla. Const. A person's liberty cannot not depend on mere unsworn allegations.

As a matter of first impression, the first appellate level court in the State to address the question ruled as follows:

> For at least two reasons, we conclude this determination must be founded on sworn proof. First, determining whether there is probable cause to believe something requires a consideration of factual circumstances and the making of mixed conclusions of law and fact. Absent the parties' stipulations, courts may only find facts based on sworn evidence; mere unsworn allegations are insufficient to prove any fact. *Blimpie Capital Venture, Inc. v. Palms Plaza Partners Ltd.,* 636 So.2d 838 (Fla. 2d DCA 1994); *State v. Brugman*, 588 So.2d 279 (Fla. 2d DCA 1991). It is plain to see, then, that by charging the court with a duty to determine the existence of probable cause, the
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> legislature necessarily contemplated that the court would receive sworn proof.

> Second, it is apparent that the legislature prescribed the early ex parte judicial probable cause determination in order to furnish the alleged predator due process before depriving him of his liberty pending trial on the merits of the commitment petition. *See Addington v. Texas*, 441 U.S. 418 (1979) (holding that civil commitment for any purpose constitutes significant deprivation of liberty that requires due process protection); *Pullen v. State*, 26 Fla. L. Weekly S583 (Fla. Sept. 13, 2001) (noting that "individual [sic] who faces involuntary commitment to a mental health facility has a liberty interest at stake"). Id. at S584. But the promise of due process would be hollow if it required merely that the judge search the commitment petition for the requisite allegations.

*Melvin v. State*, 800 So.2d 460 (Fla. 2nd DCA 2001).

This constitutional requirement for sworn evidence is reflected in various statutes and rules of procedure. For instance, in criminal cases a complaint must be "made in writing and sworn to before a person authorized to administer oaths." Fla. R. Crim. P. 3.120. Similarly, if the state seeks to hold a person without bail, e.g. pretrial detention, the state must assert sworn facts. *See* Fla. R. Crim. P. 3.132. Likewise for detentions under the Baker Act, court orders must be "based on sworn testimony, written or oral." § 394.463 (2), Fla. Stat. (1999). Equal protection requires that civil commitments after the end of a prison sentence must observe the same protections as all other civil commitments. *See Humphrey v. Cady*, 405 U.S. 504, 508-12 (1972); *Baxstrom v. Herold*, 383 U.S. 107, 110-15 (1966); *see also* Art. I, § 2, Fla. Const.

Unlike the criminal provisions and the Baker Act, Section 394.194 of the Florida

Statutes (1999) is silent on whether the information on which a court bases an order to seize someone must be sworn.

The fact that a statute does not explicitly duplicate the constitutional requirement for sworn testimony does not mean that this constitutional requirement can be ignored or abandoned. A statute is interpreted to be constitutional if at all possible. No principal of law allows a statute to explicitly override a constitutional requirement, let alone to do so by ambiguous silence.

Petitioner's reliance on *Johnson v. State, 660 So.2d 648 (Fla. DCA 1995)* is erroneous for two reasons. First the language purported to signify the holding in *Johnson* is, in reality, only dicta. The *Johnson* opinion focuses on the fact that the errors and omissions of the oath were attributed to the magistrate and, as a result of the good faith exception, the officers were not held to the same standard as the legally trained magistrate.

> Any errors here clearly were technical and were committed solely by the magistrate, not by the officers. We hold that the officers acted in good faith and fall within the good faith exception of Leon. *Johnson v. State*, *Id*. at 654.

Here Petitioner seeks to cure the defect by filing an amended pleading identical to the initial defective pleading with the exception of an additional paragraph purported to be a verification by the legally trained Assistant State Attorney. Second, the document alleged to be defective in *Johnson* is a **sworn affidavit** not a **verified**

**pleading** a distinction which was crucial to the *Johnson* court.

> *Johnson* principally relies on *State v. Rodriguez*, 543 So.2d 141 (Fla. 1998) and *Scott v. State*, 464 So.2d 1171, (Fla. 1985) for the proposition to the best knowledge is insufficient. **However these cases are readily distinguishable because both dealt not with warrants but with affidavits supporting trial pleadings.** *Id* at 653. (Emphasis added).

The State attempted to cure its defects by filing an amended petition which is not sufficient even as "verified pleadings". First, the State added a paragraph to the original Petition which is the identical language used by the State attesting to a criminal Information. While that may constitute a "verified" pleading under the Florida Rules of Civil Procedure, this matter involves a different legal principle - that of constitutional due process in the issuance of a warrant, not pleading practice. As set forth in *Melvin*, *supra.*, facts must be found on sworn evidence, and, Respondent argues, sworn by those with personal knowledge of the facts. In a related area, this Court held in *Starchk v. Wittenberg*, 411 So. 2d 1000 (Fla. 5thDCA 1982),

> Generally, an order to show cause concerning an alleged indirect criminal contempt must be based on sworn testimony of a person having personal knowledge of the essential facts. This requirement is part of our common law, (FN2) and is provided for in Florida Rule of Criminal Procedure 3.840(a)(1). The essential sworn facts are usually provided by affidavit, but testimony given under oath before the issuing judge is sufficient. *Croft v. Culbreath*, 150 Fla. 60, 6 So.2d 638 (1942). The failure to base an order to show cause upon sworn facts has been held error so fundamental as to be reviewable on appeal, even where the failure was not raised at the trial bench. See, e.g., *Deter v. Deter*, 353 So.2d 614 (Fla. 4th DCA 1977).

Likewise, and more recently, the First District held that such failings constituted fundamental error in Hunt v. State, 659 So. 2d 363 (Fla.1st DCA 1995):

> The order to show cause, which initiated the contempt proceedings, was based upon a signed but unsworn police report. Florida Rule of Criminal Procedure 3.840(a) requires that the show cause order be based upon an affidavit or sworn testimony of an individual having personal knowledge of the essential facts. See *Paris v. Paris*, 427 So.2d 1080 (Fla. 1st DCA 1983); *Starchk v. Wittenberg*, 411 So.2d 1000 (Fla. 5th DCA 1982).

In an attempt to meet these requirements, the State added one pleading paragraph to the amended Petitions for Commitment. That was an attestation by the assistant state attorney handling each individual case, the "verification" provides that: "the recommendations and information in support of the recommendations provided by the State Attorney ... is true and correct **upon information and belief** of the Department and the undersigned." [Emphasis added.]

Section 92.525, Florida Statutes, which governs oaths and affirmations, reads as follows:

> 92.525. Verification of documents; perjury by false written declaration, penalty
>
> (1) When it is authorized or required by law, by rule of an administrative agency, or by rule or order of court that a document be verified by a person, the verification may be accomplished in the following manner:
>
> (a) Under oath or affirmation taken or administered before an officer authorized under s. 92.50 to administer oaths; or

(b) By the signing of the written declaration prescribed in subsection (2).

(2) A written declaration means the following statement: "Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true," followed by the signature of the person making the declaration, **except when a verification on information or belief is permitted by law, in which case the words "to the best of my knowledge and belief" may be added.** The written declaration shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration.

(3) A person who knowingly makes a false declaration under subsection (2) is guilty of the crime of perjury by false written declaration, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) As used in this section:

(a) The term "administrative agency" means any department or agency of the state or any county, municipality, special district, or other political subdivision.

(b) The term "document" means any writing including, without limitation, any form, application, claim, notice, tax return, inventory, affidavit, pleading, or paper.

(c) The requirement that a document be verified means that the document must be signed or executed by a person and that the person must state under oath or affirm that the facts or matters stated or recited in the document are true, or words of that import or effect. [Emphasis added.]

The Fourth District applied this statute in the context of a civil proceeding

(as the instant

actions are also civil proceedings) in the matter of *Muss v. Lennar Florida Partners*

*1, L.P.*, 673 So. 2d 84 (Fla. 4thDCA 1996). There, in a "verified" answer to a complaint for foreclosure, the appellant swore only that the facts were "true to the best of his knowledge and belief." *Id.* at 85. The court clarified when "information and belief" may be used:

> Section 92.525(4)(c), Florida Statutes (1993) states that "[t]he requirement that a document be verified means that the document must be signed or executed by a person and that the person must state under oath or affirm that the facts or matters stated or recited in the document are true, or words of that import or effect." Further, section 92.525(2) authorizes verification solely on information and belief only where "permitted by law." See *State, Department of Highway Safety & Motor Vehicles v. Padilla*, 629 So.2d 180 (Fla. 3d
>
> DCA 1993) (verification on information or belief permissible under section 322.2615(2), Florida Statutes (1991), where statute authorized affidavit stating "officer's grounds for belief" that person arrested had violated section 316.193), rev. denied, 639 So.2d 980 (Fla.1994). The term document includes pleadings. § 92.525(4)(b) (1993).

Finally, if verification by the Assistant State Attorney is to be allowed, certainly the court should require verification to substantially conform to the requirements of Rule 3.140(g) Fla.R.Crim.P. Rule 3.140(g) which provides:

> "An information charging the commission of a felony shall be signed by the state attorney, or a designated assistant state attorney, under oath stating his or her good faith in instituting the prosecution and **certifying that he or she has received testimony under oath from the material witness or witnesses for the offense**. An information charging the commission of a misdemeanor shall be signed by the state attorney, or a designated assistant state attorney, under oath stating his or her good

> faith in instituting the prosecution. No objection to an information on the ground that it was not signed or verified, as herein provided, shall be entertained after the defendant pleads to the merits.” (Emphasis added)

## CONCLUSION

Based on the foregoing, this court should approve the portion of the lower court’s opinion which provides that the ex parte probable cause determination must be supported by sworn proof in the form of an affidavit from, or live testimony by, at least one mental health professional who has evaluated the on to be so held.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of the Respondents on the Merits was mailed this 5th day of December, 2002, to Richard L. Polin, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, Russell L. Akins, Public Defender, 2000 16h Avenue, Suite 235, Vero Beach, FL 32960 .

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JUAN F. TORRES, III

## CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing Initial Brief of Petitioner on the Merits was typed in Times New Roman, 14-point size.

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JUAN F. TORRES, III