IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2280

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

Petitioner,

vs.

JACK KEPHART, et al.,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

At various times throughout 1999, 2000, and 2001, the State of Florida filed petitions seeking the involuntary civil commitment of the Respondents herein, in cases filed int eh 19th Judicial Circuit.[1] The initial commitment petitions appended copies

[1] The Brief of Petitioner on the Merits herein is being filed without record citations. At the current time, there is no record on appeal either in this Court or in the Fourth District Court of Appeal. The proceedings in the lower court were habeas corpus petitions and, as such, there was no record on appeal in the lower court.

The documents referenced in this Statement of the Case and Facts were contained in several distinct filings in the Fourth District Court of Appeal. First, the habeas corpus petitioners in the Fourth District submitted an Appendix to their petitions. Second, the Department of Children and Families, as the Respondent in the lower court, included an appendix to its responses in the lower court. Third, the Department of Children and Families, in the lower court, filed a motion to supplement the record in that Court with an "Oath and Verifications" from Dr. Karen Parker. DCF's motion to supplement, filed February 27, 2002, was granted by order of the Fourth District, dated March 4, 2002. Lastly, on March 13, 2002, the Department of Children and Families filed another Motion to Supplement, which motion was granted by order of the Fourth District, dated March 15, 2002. That motion to supplement related to a further Appendix, from DCF, containing between five and ten trial court pleadings, for each of the twelve habeas corpus petitioners.

Due to the voluminous nature of the appendixes filed in the Fourth District, and the absence of any current record on appeal or index to record on appeal permitting citations to particular page numbers, the Petitioner herein, DCF, is submitting an Appendix to this Brief of Petitioner on the Merits, which, in addition to including the lower Court's opinion, includes a sample set of trial court pleadings from one commitment case, consisting of the original commitment petition and order finding probable cause, the amended commitment petition and order finding probable cause thereon, and the affidavit from Dr. Karen Parker, which was provided to the trial court as well. From the various appendixes which were submitted to the Fourth District, and which should be transmitted to this Court as part of the record herein, a similar set of

of prior judgments and convictions for sexually violent offenses and written reports from psychologists who had evaluated the individuals, reflecting whether they had any mental abnormalities or personality disorders, and further reflecting the doctors' opinions as to whether they were likely to engage in further sexually violent offenses if not civilly committed to a secure facility for treatment. (App. 7-52).[2] These commitment petitions sought orders from the trial court finding probable cause to believe that the individual; was a sexually violent predator under the commitment act, and further sought orders authorizing the detention of the individual in an appropriate secure facility in the custody of the Department of Children and Families, upon the completion of the individual's prior incarcerative sentence.

These initial commitment/probable cause petitions were signed by an assistant state attorney, without any oath or verification, and were not accompanied by any affidavits from psychologists or any other parties. On the earliest of these

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documents can be found for each of the individuals herein who were the subjects of commitment proceedings in the trial court. Should this Court conclude that an amended brief, with record citations, would be beneficial, the undersigned attorney will provide such an amended brief after the record is submitted to this Court. Until that time, however, there is no record and no index to a record, as the record is not due to be submitted to this Court until December 23, 2002, pursuant to this Court's order dated October 22, 2002.

[2] "App." refers to the Appendix being filed along with this brief, which appendix, as noted in footnote 1, above, includes a small sample of relevant pleadings from the lower court litigation.

commitment petitions, the end of the individual's incarcerative sentence was often within a few days of the date of the filing of the commitment petition. On the later commitment petitions, at times there would be several weeks, if not several months, of the person's prison sentence remaining to be served prior to any potential transfer of custody to the Department of Children and Families as a result of the civil commitment proceedings.

On the basis of those initial commitment petitions and attachments, the trial court judges, in each commitment case, entered orders finding the existence of probable cause to believe that the individuals were sexually violent predators in need of commitment. (App. 53-55). The orders also directed that at the conclusion of the individuals' incarcerative sentences with the Department of Corrections, that they be transferred to the custody of the Department of Children and Families, and held in an appropriate secure facility pending the commitment proceeding.

On November 16, 2001, the Second District Court of Appeal issued an opinion in the case of Melvin v. State, 804 So. 2d 460 (Fla. 2d DCA 2001), holding that "the ex parte probable cause determination prescribed by section 394.915(1) must be supported by sworn proof in the form of a verified petition or affidavit." 804 So.2d at 463. In the absence of such sworn proof, a due process violation existed, and Melvin and his competitioners were entitled to have the probable cause orders vacated.

The court "direct[ed] the release of any petitioner whose detention continues in the absence of an ex parte determination of probable cause based on sworn proof, a determination of probable cause following an adversarial hearing, or a determination that the petitioner is a sexually violent predator following a trial o the merits in the commitment proceeding." 804 So. 2d at 464.

In the aftermath of Melvin, the State Attorney commenced filing amended commitment petitions in the instant cases, seeking leave of the trial court to amend the original petitions, and the Respondents herein, simultaneously sought their release from custody, arguing that their continued custodial status violated Melvin in the absence of sworn proof in support of the petitions. (App. 57-109). In each of these cases, hearings were conducted, and the trial court granted the State leave to file amended petitions. The State filed its amended petitions between November 27 and December 5, 2001.[3] Each of the amended petitions was a verified petition. The allegations remained the same as in the original petitions, and the attached psychologists' reports and judgments of conviction remained the same. The State added a verification to the petitions, in accordance with the Second District's pronouncement in Melvin. The verification reads as follows: "I, [name of assistant state attorney signing petition],

[3] The Melvin opinion, which was dated November 26, 2001, did not become final until January 9, 2002, when a motion for rehearing was denied. 804 So. 2d at 461.

Assistant State Attorney in and for the 19th Judicial Circuit of Florida, hereby certify that I have read the foregoing petition and know the contents thereof and attest the same is true and correct to the best of my knowledge and belief." (App. 57, 61). The prosecutor's signature was notarized, with a representation from the notary that the prosecutor took an oath. Id.

Subsequent to the filing of these amended commitment petitions, the State also filed, in the trial court, affidavits from Dr. Karen Parker. (App. 111). In these affidavits, Dr. Parker, the clinical director of the sexually violent predators program for the Department of Children and Families, stated that a multidisciplinary team, consisting of a least two psychiatrists or psychologists, evaluated each of the individuals herein, "by reviewing available institutional histories, treatment records, criminal backgrounds, and any other factors considered relevant." Additionally, the affidavit provided that a personal interview by the mental health professional was offered to each individual, and the evaluation results were "reviewed and considered by the multidisciplinary team in assessing each of the" individuals. For each such individual at issue herein, "a finding was made that the Respondent met the criteria for involuntary civil commitment as a sexually violent predator, and a recommendation to pursue involuntary civil commitment was made to the State Attorney prior to the filing of a petition in each case." Each recommendation was made within a reasonable

degree of psychological certainty. Id. These affidavits were filed, in the trial court, subsequent to the filing of the amended petitions. After the amended petitions were filed, the trial courts again issued probable cause orders. (App. 108-110).

On or about December 27, 2001, five of the Respondents herein, Bernardo Garcia, William Kendall, Douglas McCrory, Anthony Roberts and James Toward, filed emergency petitions for writs of habeas corpus in the Fourth District Court of Appeal, under Fourth District Case No. 4D01-5056. A similar habeas corpus petition was filed in the Fourth District, on behalf of George Thayer, in Fourth District Case No. 4D02-33, and a similar petition was filed on behalf of the remaining Respondents (Jack Kephart, Todd Kurz, Keith Parker Bishop, Aaron Bradford, Curtis Jerome Lee, and Leroy Washington) herein in Fourth District Case No. 4D02-192.

In those petitions, the Petitioners herein argued that they should have been released from custody pursuant to Melvin and that the State's amended petitions were still insufficient under Melvin. The State filed written responses to the habeas corpus petitions. As noted above, each party, in the lower court, submitted an appendix containing relevant trial court pleadings. Additionally, DCF, after the filing of its responses in the lower court, submitted two further motions seeking to present supplemental trial court materials to the Fourth District, and those motions were granted.

On April 10, 2002, the Fourth District issued an opinion, having consolidated all three of the habeas corpus petitions, covering 12 separate habeas corpus petitioners. (App. 1-3). In that opinion, the Fourth District held that an order of probable cause, resulting in the custody of an individual pending a commitment trial, must be based on "sworn proof in the form of either an affidavit from, or live testimony by, at least one mental health care professional who has examined and evaluated the individual to be so held." Id. For those who were being held beyond their incarcerative release dates with the Department of Corrections absent commitment petitions with such affidavits or testimony to support probable cause determinations, the Fourth District concluded that "it is reasonable to allow the state a period of seven working days in which to present such affidavits or testimony to the circuit court that initially made the ex parte probable cause determination." Id. The Court therefore denied the habeas corpus petitions, without prejudice to refiling in the event the state failed to comply with the opinion in a timely manner. Id.

The Court also certified that its opinion conflicted with the Second District's Melvin opinion in two ways. First, Melvin permitted the use of a verified petition "without sworn proof by one who has performed such examination and evaluation." Second, Melvin ordered the "immediate release" of the petitioners therein, whereas the Fourth District provided the State a seven day "cure"period in the instant proceedings.

Id.

On April 15, 2002, the State filed a motion for rehearing or clarification in the Fourth District. As noted above, the Fourth District's opinion held that the probable cause determination must be based on "sworn proof in the form of either an affidavit from, or live testimony by, at least one mental health care professional who has examined and evaluated the individual to be so held." (emphasis added). In the motion for rehearing, DCF argued that the term "examined" was not defined, and DCF asserted that it was improperly included, to the extent that it suggested that the sworn proof must come from an expert who conducted a clinical interview of the individual. Such language in the Court's opinion would simply result in individuals refusing to participate in clinical interviews, thereby resulting in the potential inability of experts to "examine" them, and thereby effectively barring the filing of any commitment petitions since no "examination" could be done.

The Court issued an opinion on rehearing, on September 25, 2002, granting DCF's motion for rehearing or clarification, and revising the above-quoted sentence, so that the ultimate holding of the Fourth District now reads as follows: "We hold 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." (App. 4-6). In other

respects, the opinion remained the same, and certified that its opinion conflicted with the Second District's Melvin opinion in two respects: (a) on the question of whether a verified petition without sworn proof from one who has performed the evaluation would be sufficient; and (b) on the question of whether it was proper for the appellate court to provide a seven day period in which to cure any defects in the probable cause petitions.

While DCF's timely motion for rehearing was pending in the Fourth District, the Respondents herein pursued relief in this Court. First, the Respondents herein filed their own petition for writ of habeas corpus in this Court, in case no. SC02-756. That petition was dismissed by this Court, by order dated September 20, 2002. George Thayer, another Respondent herein, filed his own habeas corpus petition in this Court, under case no. SC02-881. This Court dismissed that habeas corpus petition by order dated September 11, 2002.

Additionally, on April 22, 2002, twelve days after the Fourth District issued its original opinion in this matter, and one week after DCF filed its timely motion for rehearing in the Fourth District, the Office of the Public Defender, representing 11 of the 12 habeas corpus petitioners involved herein, filed a notice to invoke the discretionary review jurisdiction of this Court, seeking review of the Fourth District's decision, in Kephart v. Regier (formerly Kearney), SC02-936. Pursuant to motion of

DCF, proceedings in that case were stayed, pending disposition of the timely motion for rehearing in the Fourth District. By order dated October 28, 2002, this Court has set up a schedule for briefs, on the merits, in case no. SC02-936.

Due to the overlapping nature of the two cases herein, the instant case and SC02-936, DCF has moved for consolidation of the two cases. Thus, the current posture of this matter is that in the aftermath of the Fourth District's final decision below, DCF is seeking review herein as to one of the certified questions - i.e., whether a verified petition, under oath, from an assistant state attorney, is a sufficient basis for a probable cause order resulting in the custody of an individual pending a commitment trial. The individuals who were the subject of the commitment petitions in the trial court are also seeking review, in this Court, of the lower Court's opinion, and they are presumably seeking review with respect to the second certified question - i.e., whether it is proper for an appellate court to permit a seven-day period to cure any defect in the previously filed commitment petitions.

SUMMARY OF ARGUMENT

In addition to holding that a petition seeking probable cause to take a person into custody for civil commitment proceedings must be supported by an oath, in the form of an affidavit or live, sworn testimony, the Fourth District Court of Appeal held that the oath requirement, in sexually violent predator commitment proceedings, could be satisfied solely by a mental health expert who evaluated the defendant. The Petitioner herein asserts that the Fourth District erroneously mandated that the oath requirement be satisfied solely by the mental health expert. The Petitioner further asserts that any such oath requirement could be satisfied by a verified petition, under oath, filed by an assistant state attorney. The function of the affidavit and oath in the circumstances of this case is analogous to the function of an affidavit in support of an arrest warrant, which is prepared by a law enforcement officer. In many respects, an assistant state attorney is in a better position to put together the totality of the relevant evidence and promote the goal of establishing probable cause than will be a mental health professional. Thus, the oath requirement should be capable of being satisfied by others, including an assistant state attorney, in addition to a mental health professional.

ARGUMENT

THE LOWER COURT ERRONEOUSLY CONCLUDED THAT THE OATH REQUIREMENT FOR A PROBABLE CAUSE DETERMINATION RESULTING IN A PERSON BEING TAKEN INTO THE CUSTODY OF THE STATE CAN NOT BE SATISFIED BY A VERIFIED PETITION SIGNED BY AN ASSISTANT STATE ATTORNEY, AND THAT THE OATH MUST CONSIST OF SWORN TESTIMONY OR AN AFFIDAVIT FROM A MENTAL HEALTH PROFESSIONAL WHO EVALUATED THE PERSON.

Both the Fourth District Court of Appeal, below, and the Second District Court of Appeal, in Melvin v. State, 804 So. 2d 460 (Fla. 2d DCA 2001), have concluded that an ex parte probable cause petition or motion, which results in an individual being taken into custody pending a civil commitment trial under the sexually violent predators act, must be supported by an oath. However, the two courts have differed as to what would constitute a sufficient oath. In Melvin, the Court stated that the initial probable cause finding must, as a matter of due process of law, be based on "sworn proof in the form of a verified petition or affidavit." 804 So. 2d at 463. The Fourth District, in the instant case, rejected the notion that a verified petition, signed by an assistant state attorney under oath, could satisfy the oath requirement. Thus, the Fourth District, in its opinion herein, on rehearing, held "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." (App. 6).[4]

It is the position of the Department of Children and Families (DCF) herein, that to whatever extent an oath is required pursuant to either the state or federal constitutions, that oath requirement can be satisfied by a verified petition, signed by an assistant state attorney under oath. It is additionally inappropriate for the Fourth District to specify that the oath requirement can be satisfied only by a specifically designated person - i.e., a mental health professional who has evaluated the individual subject to potential commitment.

Any oath requirement would derive from either the Fourth Amendment to the United States Constitution, or Article I, §12, of the Florida Constitution. The latter clause provides that "[n]o warrant shall be issued except upon probable cause, supported by affidavit . . . ." The Fourth Amendment bars the issuance of warrants for searches or seizures "but upon probable cause, supported by oath or affirmation . . . ."

DCF herein is not taking issue with the conclusions of the Fourth or Second

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[4] In the Court's original opinion, prior to rehearing, the Court had required that the probable cause determination be based on such sworn proof from "at least one mental health care professional who has examined and evaluated the individual to be so held." (App. 3). The reference to "examined" was deleted, pursuant to the Department of Children and Families' motion, on rehearing.

Districts that an oath is required, although it would note that other jurisdictions have concluded that initial temporary commitments could be based upon documentation falling short of either an oath or, indeed, of the existence of probable cause.[5]

To the extent that an oath requirement does exist, the Fourth District's opinion does not provide any authority for the proposition that the oath requirement must be satisfied by the affidavit or testimony of the evaluating mental health professional. Compelling reasons exist for not mandating that the oath requirement be satisfied by the mental health professional. As will be detailed herein, verified petitions, executed by prosecutors, are used in a variety of analogous contexts. Even more significantly, mental health professionals are not attorneys. They draft their written reports based upon their knowledge of psychology or psychiatry. They are not trained in the art of establishing probable cause; they are not trained in the art of distinguishing between facts which support probable cause, facts which are reliable, even if hearsay, and those which may not be reliable. Requiring that such an affidavit come from the

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[5] See, e.g., In re R. D., 739 A. 2d 548, 555 (Pa. App. 1999) (temporary commitments of up to five days did not even need to be supported by probable cause, as the procedures following that short-term confinement would then provide sufficient protections to the individual); Riffe v. Armstrong, 477 S.E. 2d 535, 555 (W. Va. App. 1996) (permitting temporary commitment on the basis of a petition with a "certificate" from an examining professional); In the Matter of the Commitments of M.G. and D.C., 751 A. 2d 1101, 1105 (N.J. App. 2000); In the Matter of G.J.P., 880 P. 2d 1311, 1315 (Mont. 1994) (initial temporary commitment based on written statement of psychiatrist contained in request for commitment).

mental health professional would either force the mental health professional to act as an attorney, or, alternatively, compel the prosecutor to ghost write psychological evaluations or affidavits for signature of psychologists. Neither of those goals would be laudable.

In considering the question of who would be a proper party for signing the required oath for a probable cause determination, it is important to understand the nature of the probable cause determination itself. Section 394.915, Florida Statutes, requires that the trial court make an initial ex parte determination that the defendant is a sexually violent predator - i.e., that the defendant suffers from a mental abnormality or personality disorder which makes him likely to engage in future sexually violent offenses if not committed to the custody of the State for care, treatment and control. The Kansas Supreme Court has analogized this to the probable cause determinations which are made in the course of a criminal prosecution, requiring "evidence sufficient to cause a person of ordinary prudence and action to conscientiously entertain a reasonable belief that the accused is a sexually violent predator." In the Matter of Hay, 953 P. 2d 666, 676 (Kan. 1998). The Supreme Judicial Court of Massachusetts, in Commonwealth v. Bruno, 735 N.E. 2d 1222 (Mass. 2000), similarly analogized the sexually violent predator probable cause determination to the determination of probable cause to support an arrest. 735 N.E. 2d at 1235-38. Whereas probable cause

for an arrest required, at the time of the arrest, that "'the facts and circumstances known to the police officers were sufficient to warrant a person of reasonable caution in believing that the defendant had committed or was committing a crime,'" the comparable standard in a sexually violent predator commitment case required a sufficient basis for the judge to believe that the evidence, assuming it was true, established the requisite elements for commitment. Id. at 1237-38. This standard was enunciated in the context of an adversarial probable cause hearing.

The Wisconsin Supreme Court, also addressing the probable cause determination at an adversarial probable cause hearing, stated that the State "must establish a plausible account on each of the required elements to assure the court that there is a substantial basis for the petition." State v. Watson, 595 N.W. 2d 403, 420 (Wis. 1999). The State was entitled to rely on all reasonable inferences that could be drawn from the evidence. Id.

It is well established that probable cause determinations may be based on hearsay; personal knowledge of an affiant is not required. See, e.g., State v. Wolff, 310 So. 2d 729 (Fla. 1975) (affidavit in support of search warrant may be based on reliable hearsay to establish probable cause); State v. Peterson, 739 So. 2d 561 (Fla. 1999) (affidavit in support of search warrant need not be based on personal knowledge of affiant); State v. Elkhill, 715 So. 2d 327 (Fla. 2d DCA 1998) (affidavit for search

warrant could be based on hearsay information); United States v. Thomas, 989 F. 2d 1252, 1254 (D.C. Cir. 1993) ("Hearsay in an affidavit does not render the information insufficient to establish probable cause 'so long as a substantial basis for crediting the hearsay is presented.'"); United States v. Pless, 982 F. 2d 1118, 1125 (7th Cir. 1992) (probable cause affidavit for warrant could be based on hearsay reports).

Determinations of whether an individual is a sexually violent predator will hinge on a wide range of sources of information. Factors to consider will include the individual's prior criminal record, which, in turn, will include offenses for which there have been convictions and others which may not have resulted in convictions. Other aspects of an individual's behavior, indicative of either violence or impulse control problems will bear on the determination, even if not specifically sexually violent behavior. The evaluations of mental health professionals clearly play a large part in that determination. They, in turn, rely on extensive documentation from prior criminal cases, whether trial court records or police records, in addition to interviews of the individual at issue and tests which they may administer. The experts may also interview family members or other acquaintances of the individual to obtain a broader background of the individual who is being evaluated.[6]

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[6] With respect to the scope of the mental health evaluation, see generally, Hoberman, Harry M., "The Forensic Evaluation of Sex Offenders in Civil Commitment Proceedings," Chapter 7, at 7-11 through 7-13, published in The Sexual

As can be seen from the sources upon which sexually violent predator diagnoses may be made, the sources include matters which have varying degrees of reliability. Information which resulted in a conviction after a trial or a guilty plea obviously carries a high degree of reliability, even when the source is hearsay - e.g., a transcript of testimony from the victim of the offense resulting in a conviction. See,

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Predator: Law, Policy, Evaluation and Treatment (Civic Research Institute: Kingston, N.J. 1999) (eds. Anita Schlank and Fred Cohen). A "principle of forensic psychological evaluations is the review of all relevant records made available for the purposes of the evaluation and report." Id. at 7-11. Such records should include, inter alia, criminal investigation reports, including interviews with offenders and victims, both as to offenses for which there were convictions and those that remained allegations; mental health records; legal proceedings adjudicating sexual offenses; presentence investigations; correctional records, including those relating to education, work, general mental health, and sex offender evaluations; and similar juvenile records. Id. at 7-11, 7-12. "Collateral information" may also be obtained from third parties "who have varying degrees of familiarty with the party." Id. at 7-13. This may entail interviews which the expert will conduct with victims, treatment providers, corrections officials, or others. Id. For similar discussions of the scope of the evaluation and information relied upon, see, Becker, Judith, and Murphy, William, "What We Know and Do Not Know About assessing and Treating Sex Offenders," 4 Psychology, Public Policy, and Law 116, 121-22 (1998); Dougher, Michael, "Clinical Assessment of Sex Offenders," Chapter 11, The Sex Offender: Corrections, Treatment and Legal Practice (ed. Barbara K. Schwartz and Henry R. Cellini) (Civic Research Institute: Kingston, N.J.), pp. 11-6 - 11-7; Maletzky, Barry, Treating the Sexual Offender (SAGE Publications 1991), p. 39. Guideline 6.D.5 (1984), of the Guidelines of Psychiatric Hospitalization of Adults of the American Psychiatric Association, quoted in "National Center for State Courts' Guidelines for Involuntary Civil Commitment," 10 Mental and Physical Disability Law Reporter 409, 488 at n. 1 (1986), further approves of the use of hearsay in conjunction with an expert's diagnosis and prognosis. The foregoing authorities further note the importance of the clinical interview itself, while noting questions as to its reliability due to deception in verbal self-reporting on the part of sex offenders.

e.g., Jenkins v. State, 803 So. 2d 783 (Fla. 5th DCA 2001). An individual's admissions or statements against penal interest would similarly carry high degrees of reliability. Other types of information may have lesser degrees of reliability, depending upon the degree of corroboration. Thus, where one family members advises an expert of the individual's problems controlling violent or sexually violent behavior, such hearsay may have to be taken with a grain of salt. When similar accounts from multiple individuals make the same point, they may all be hearsay, but the degree of corroboration entitles the information to a greater presumption of reliability.

Thus, although affidavits based on hearsay may provide the basis for a probable cause determination, as noted above, the purpose of such affidavits, in the context of criminal arrest warrants or search warrants, in addition to providing probable cause, is to furnish the magistrate with sufficient background regarding the evidence, which may be hearsay, so that the magistrate can determine the reliability of that hearsay evidence. See, Illinois v. Gates, 462 U.S. 213, 241-42 (1983) (hearsay affidavit in support of warrant must present "a substantial basis for crediting the hearsay.").

With the foregoing background of the mental health evaluation and the purpose of the probable cause determination in mind, the Fourth District's requirement that the oath/affidavit/testimony come only from the mental health expert, and not from a verified petition by an assistant state attorney, can be evaluated. One of the primary

purposes of the affidavit requirement, as detailed above, is to furnish "a substantial basis for crediting the hearsay" evidence which will be included in virtually any affidavit submitted. Providing such a basis for crediting the hearsay, however, is more in the nature of an attorney's job than that of a mental health expert. Mental health experts are generally not trained in the law and are not necessarily aware of what forms of evidence set forth in an affidavit will be accepted as reliable by courts. Therefore, the Fourth District's act of placing the burden on the mental health expert to provide the affidavit is effectively transferring a legal burden to the mental health professional. The mental health expert may know what documents he or she has been furnished, but the expert may not make the same reliability determinations that lawyers or judges would make. Even more significantly, while the expert is trained in the art of drafting mental health evaluation reports, the expert is not trained in drafting documents which clearly correlate the background documents upon which they have relied to the facts which they have determined. Some reports from experts may accomplish this goal successfully; others will not. The materials provided to the lower court as to the 12 individuals subject to commitment herein include numerous mental health reports prepared by numerous experts. A careful review of those reports will undoubtedly compel the conclusion that some of them serve the needs of the judiciary for probable cause determinations better than others do.

By contrast, when a prosecutor prepares a verified petition in support of a probable cause determination, the prosecutor, being trained in the law, and being aware of the distinctions between reliable and unreliable evidence, is clearly in a superior position to draft any needed affidavit, correlating the background documents to any particular facts being relied upon, highlighting the way those documents may be corroborated by other sources of information, and establishing the case for reliability of sources of information in ways which few mental health professionals will have the requisite legal skills.

The relevant comparison here should be to the affidavits which law enforcement officers draft in support of arrest or search warrants. Those warrants are routinely dependent upon hearsay information gathered by the officer, or that officer's colleagues. The affidavit presents the information, organizes it, and attempts to demonstrate the reliability of the information in the process. As courts are undoubtedly aware, law enforcement officers often resort to assistance in this process - from in house attorneys or prosecutors.

By way of example, the appendix to this brief includes a sample of a verified petition for probable cause, prepared and executed by a prosecutor in Minnesota, for use in a sexually violent person commitment proceeding. (App. 112-39). The verified petition provides extensive details as to prior offenses and other behavioral matters.

It reads as if it were a comprehensive Statement of Facts in an appellate court brief based on a complex record. The documents upon which the verified petition relies are meticulously identified and are cited in support of any factual allegation made in the petition. Indeed, the documents upon which the petition relies are included as an appendix to the probable cause petition, when provided to the court, so that the court can likewise assess the reliability of any and all information contained in the verified petition. This verified petition accomplishes what it does because it is based upon the skills of a trained attorney. Few affidavits or written psychological reports, prepared by mental health experts, will attain the level of usefulness for the judiciary which the attorney's verified petition, when carefully and thoroughly done, will.

A second, independent reason, for permitting, if not favoring, verified petitions from prosecutors, concerns the nature of the oath which must be taken. The affidavit alluded to by the Fourth District is an affidavit that the information set forth is true and correct and/or within the personal knowledge of the affiant. The mental health expert can obviously say that he or she ascertained certain facts from prior police reports, transcripts, depositions, witness statements, etc. The affidavit from the expert can not assert that the affiant has personal knowledge of those events or that the expert swears that those prior facts are true and correct. No expert could ever provide such an affidavit. Insofar as mental health experts are not trained in the practice of law or in

the preparation of affidavits for use by courts, the Fourth District's act of placing this burden on them will inevitably lead to carelessly (and unwittingly) drafted affidavits, by experts, which fail to make this distinction, and which inadvertently open the door to claims of perjury on the part of the experts - who do not have personal knowledge of many of the events and who can not swear to the truthfulness of the events they learned from prior documents.

On the other hand, prosecutors, trained in the above distinctions should not find themselves in such a precarious position. That dilemma is, in fact, the subject of this Court's opinion in Johnson v. State, 660 So. 2d 648 (Fla. 1995), which addressed the issue of an appropriate oath on an arrest warrant affidavit executed by a police officer. Since the arrest warrant and affidavit may be based on hearsay for the probable cause determination, the officers could not sign such an oath going to the truthfulness of hearsay subject to penalty of perjury. Thus, the Court agreed that an oath which included the characterization that the information was true "to the best of knowledge and belief" was deemed acceptable. This Court's reasoning is directly applicable to the subject matter before this Court:

> . . . Under the burdens of proof in a criminal trial, the obligation to establish probable cause in an affidavit may be met by hearsay, by fleeting observations, or by tips received from unnamed reliable informants whose identities often may not lawfully be disclosed. . . . Under the fellow-

> officer rule, information shared by officers investigating a crime is imputed to any one of their number, even those from different agencies working together. . . . This effectively means that hearsay from other officers can be repeated by the affiant officer to establish probable cause.
>
> We believe it would be illogical to hold on the one hand that officers may put hearsay in their affidavits, but on the other that they must vouch for the truthfulness of the hearsay on penalty of perjury. As to hearsay, officers obviously are vouching for nothing more than the fact that the hearsay was told them and they have no reason to doubt its truthfulness. It is then within the discretion of the magistrate to determine the weight accorded the hearsay. . . . [T]here obviously will be cases in which unverifiable hearsay alone will establish probable cause.
>
> Because this is true, most affidavits will include at least some information that can be characterized as true only "to the best knowledge and belief" of the officer. The fact that the oath below was frank about the matter hardly can be deemed the undoing of the warrant. To say otherwise effectively would force officers to face perjury charges for any hearsay information or to bring all sources of hearsay information into court to individually swear before the magistrate. The law requires neither of these.

660 So. 2d at 655.

The same reasoning would apply in the instant case. First, whoever signs the affidavit or any permissible verified petition is essentially in the same position as an officer preparing an affidavit for an arrest warrant. Such an officer, or prosecutor in a commitment proceeding, or a psychologist in the commitment proceeding, is

essentially relying on various sources of information furnished by others, much of which qualifies as hearsay. Neither such an officer, prosecutor, or mental health expert, should be in the position of having to personally vouch for information, upon which they can properly rely, while that information is beyond their personal knowledge.

The purpose of affidavits for arrest warrants or search warrants, in addition to providing probable cause, is to furnish the magistrate with sufficient background regarding the evidence, which may be hearsay, so that the magistrate can determine the reliability of the hearsay evidence. See, Illinois v. Gates, 462 U.S. 213, 241-42 (1983) (hearsay affidavit in support of warrant must present "a substantial basis for crediting the hearsay."). In the context of sexually violent predator commitment cases, evidence will come from a wide array of sources, as noted above - testimony of victims of sex offenses from prior criminal case trials or depositions; guilty or no contest pleas of defendants in prior criminal cases; police reports from prior criminal cases; DOC records regarding disciplinary proceedings; psychologists' interview of individuals other than the alleged predator; prior mental health evaluations; etc.

While the first fact to flow from the foregoing is that any party signing an oath in conjunction with the probable cause determination should be able to sign an oath in accordance with Johnson, the second fact which flows from that opinion is that the

prosecutor is an appropriate party for signing such an oath in the commitment proceedings. The prosecutor is essentially in the same position as the officer preparing the arrest warrant affidavit. Both the prosecutor and the officer put together the various pieces of information which constitute the totality of the case; both the prosecutor and the officer put that information together with a goal of accentuating the reliability of any hearsay information and corroborating it with other sources of information. While an affidavit consisting of testimony from an evaluating mental health expert can satisfy any constitutional requirement for an oath, the foregoing discussion reflects that there is no basis for mandating that such an oath or sworn testimony come from the expert or any other particular individual. Nor is there a constitutional prohibition on the prosecutor satisfying that constitutional requirement. And, for practical reasons detailed above, the prosecutor is more capable of satisfying the purposes of the oath requirement than a mental health expert. Consistent with the foregoing, it should be noted that the oaths required for verified petitions or similar documents have been varied, and, some, especially those required of government prosecutors, do not require the prosecutor to vouch for the truthfulness of such information upon penalty of perjury. As noted above, the Court in Johnson authorized law enforcement officers to execute arrest warrant affidavits, based on hearsay, "to the best knowledge and belief" of the officer. Another example of this can be found in

Form 8.902 of the Florida Rules of Juvenile Procedure. That form provides a verification, to be used in petitions requiring verification under the Rules of Juvenile Procedure. The oath constituting the verification states:

> Before me, the undersigned authority, personally appeared _____, who, being sworn, says the (document) is filed in good faith and on information, knowledge, and belief is true.

This verification oath has been promulgated by this Court and required in petitions for delinquency, under Fla.R.Juv.P. 8.035, petitions for termination of parental rights, Fla.R.Juv.P. 8.500, and other petitions under the juvenile rules.

Similarly, since an affidavit in support of a warrant, including arrest or search warrants, may be based on a lack of personal knowledge and on hearsay information, the oath should not require the affiant, who may be either the prosecutor or a psychologist who evaluated the individual subject to the proceedings, to attest to personal knowledge of the underlying offenses or other similar matters upon penalty of perjury. The oath should be one which authorizes the affiant to assert that the affiant has either reviewed various documentary materials, identifying the sources so that their reliability can be ascertained, or that the affiant interviewed various individuals, with sufficient background as to the circumstances of the interview, the party being interviewed, and the interests of the party being interviewed. In this

manner, the course of the investigation can be detailed, and the reliability of sources of information can be assessed, as the magistrate makes a permissible determination of probable cause based on permitted uses of hearsay and other non-personal knowledge.

The Fourth District, in the Kephart opinion, implicitly rejects the foregoing argument based on its conclusion that due process requires that the sworn proof in support of the petition for a probable cause warrant be in the form of "some reliable individual's personal knowledge." (emphasis in original). The Fourth District does not cite any case law mandating such a requirement as a matter of constitutional law - whether under the due process or search and seizure clauses. The Court, instead, relied on several analogies. The first such analogy was Fla.R.Crim.P. 3.120, which, according to the Fourth District, permits the issuance of an arrest warrant on the "basis of sworn written complaint stating facts that show violation of criminal law within magistrate's jurisdiction." However, as detailed above, arrest warrants can be obtained entirely on the basis of hearsay knowledge possessed by an officer, and, indeed, the validity of an arrest is made by assessing, after the fact, the existence of probable cause, not the sufficiency of the warrant or affidavit. Nothing in Rule 3.120 provides that the sworn written complaint must be based on personal knowledge, or, that it must come from any particular individual. In Ryce act commitment petitions,

both the prosecutor and psychologist have access to the same sources of information. Neither has any personal knowledge as to such matters except to the extent that the prosecutor or psychologist has read those materials. Furthermore, although many individuals subject to commitment may have participated in clinical interviews with psychologists, thus giving the psychologists some person knowledge based on the individual's behavior during the clinical interview, the individuals subject to commitment can obviously refuse to participate in the clinical interviews, thereby leaving the psychologists with the same information as that possessed by the prosecutors - i.e., the written, historical, background documents.

The second example relied upon by the Fourth District was Fla.R.Crim.P. 3.132(a), which permits a motion for pretrial detention where the facts are set forth and the prosecutor certifies receipt of testimony under oath in support of the facts alleged. Once again, this is a rule of court, not a constitutional mandate. Moreover, considerable differences exist between the two situations. Past behavior forms a significant, but not exclusive, basis for civil commitment. That past behavior, at a minimum, consists of one sexually violent offenses for which there was a conviction. That prior conviction exists, based upon a jury verdict - based upon sworn testimony - or, a defendant's plea - an admission in open court. In most cases, as evidenced by the psychological reports in the record before this Court, there have been multiple

prior sexual offenses for which there are convictions. Thus, much of the basis for a probable cause determination, and the factual basis for much of the psychologists' reports, emanates from the existence of prior convictions, which in turn are based on either sworn testimony or a defendant's admissions in open court, in front of a judge. As to the psychologists' conclusions and opinions, not only are they reflected in recently written evaluations, by experts retained by a government agency, but, there is little reason for questioning the authenticity of those opinions - the only reason for an oath as to the psychologists's conclusion would be to question whether the psychologist did, in fact, render that opinion. Given the safeguards that are in place, with a Department of Children and Families multidisciplinary team reviewing the doctor's report and forwarding its own conclusion to the State Attorney, who then reviews both, there is little basis for believing that psychological reports are fraudulent or forged. Thus, a situation exists pursuant to which a prosecutor's petition is based, implicitly, on some matters for which judicial determinations have been made based on evidence or a defendant's in-court plea to a court, as supplemented by psychologists' reports, whose authenticity is not at issue. The same can not be said as to the matters being litigated under Rule 3.132(a), which may be based on allegations that a defendant has threatened witnesses in the case, where the witnesses making such allegations have biases of their own.

The last example relied upon by the Fourth District is a provision of the Baker Act, §394.463(2), Florida Statutes, which requires an ex parte order for involuntary examination to be based on sworn testimony, either written or oral. Once again, the Fourth District does not refer to any constitutional mandate for that requirement, merely the fact that it is set forth in a statute. And, once again, when the purpose of that statutory provision is considered, in comparison to the manner in which the sexually violent predators act operates, compelling differences can once again be observed.

The purpose of the ex parte order in §394.463(2) is to effect the seizure of an individual believed to be mentally ill and dangerous, but, who has not yet been subjected to any form of psychological evaluation. At the time §394.463(2) comes into play, a family member or law enforcement officer may be describing bizarre behavior to a judge, which behavior had been recently observed - for the purpose of compelling an involuntary psychological examination of one who has thus far not been seen by a mental health expert and who does not voluntarily consent to undergo such examination. That is considerably different than the situation in the sexually violent predators commitment act, where, prior to the probable cause petition, two mental health professionals have extensively reviewed the person's background documentation, and, at least one, if not both, of those professionals, has, more often

than not, had the opportunity to perform a clinical interview of the person. Additionally, other members of the multidisciplinary team of the Department of Children and Families have reviewed all of that information. Thus, the affidavit at issue in the Baker Act comes to the court in a completely different posture.

Thus, in view of the foregoing, the Fourth District's opinion relies on procedural rules or statutes, by way of analogy, when those rules or statutes do not reflect a constitutional mandate, and, when those rules or statutes reflect compelling distinctions between those provisions and those of the sexually violent predators commitment act.

In view of the foregoing, this Court should conclude that the Fourth District Court of Appeal erroneously held that the oath requirement for the probable cause determination in a sexually violent predators commitment case may be satisfied solely by an oath from a mental health expert who has evaluated the individual. The lower court's opinion erroneously rejects the use of verified petitions, executed by prosecutors, under oath, in support of probable cause determinations which result in the individual being taken into the custody of the State pending a commitment trial. This Court should therefore conclude that the oath requirement may be satisfied by any person having relevant information regarding the elements of the cause of action, that such a person may include an assistant state attorney who is preparing the case,

and, that the oath to be executed, whether by an assistant state attorney or a mental health professional, need only assert that the facts alleged are true and correct to the best of the affiant's knowledge and belief.

CONCLUSION

Based on the foregoing, this Court should disapprove the portion of the lower court's opinion which limits oaths in support of probable cause determinations in sexually violent predator commitment proceedings to affidavits or testimony from mental health experts who have evaluated the defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner on the Merits was mailed this _____ day of November, 2002, to RUSSELL L. AKINS, Assistant Public Defender, Office of the Public Defender, 2000 16th Avenue, Suite 235, Vero Beach, FL 32960.

_____
RICHARD L. POLIN

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 type.

_____

RICHARD L. POLIN