IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-936

JACK KEPHART, et al.,

Petitioners,

vs.

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

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF RESPONDENT ON THE MERITS

RICHARD E. DORAN
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Senior Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441

(305) 377-5655 (fax)

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities

INTRODUCTION

The instant discretionary review proceeding is one in which 12 individuals, who were habeas corpus petitioners in the Fourth District Court of Appeal, have sought review of the Fourth District's opinion in Kephart v. Kearney, 4D01-5056, 4D02-33, 4D02-192. Eleven of those 12 individuals - Jack Kephart, William Kendall, James H. Toward, Bernardo Garcia, Douglas Alan McCrory, Todd J. Kurz, Anthony Roberts, Keith Parker Bishop, Aaron Bradford, Curtis Jerome Lee, and Leroy Washington - are represented by the Office of the Public Defender, and filed a notice to invoke the discretionary jurisdiction of this Court. The twelfth individual, George Thayer, is represented by private counsel. Although Thayer did not file a notice to invoke discretionary jurisdiction, he remains a party to this proceeding. The Public Defender's Office for the Nineteenth Judicial Circuit, as filed a Brief of Petitioners on the Merits in this case. Counsel for Thayer has similarly filed a Brief of Petitioner on the Merits. The briefs filed by both attorneys are virtually identical. This Brief of the Respondent, the State of Florida, on the Merits, is therefore intended as the Answer Brief to the briefs submitted by both the Office of the Public Defender and Juan F. Torres, III, Esq., as counsel for Thayer.

Additionally, the State notes at the outset that in addition to the instant case, in case no. SC02-2280, the State has sought discretionary review of a different aspect

of the lower Court's opinion, pursuant to a certified question, and the Initial Brief of Petitioner (the State) therein, and Answer Briefs of the Respondents therein (the 12 Petitioners in this proceeding), have already been filed.

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, the Respondent herein, the State of Florida, is submitting an Appendix to this Brief 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

---

Respondent 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 were transmitted to this Court as part of the record herein, a similar set of documents can be found for each of the individuals herein who were the subjects of commitment proceedings in the trial court.

[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.

affidavits from psychologists or any other parties. On the earliest of these 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, 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 copetitioners 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

[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.

verification reads as follows: "I, [name of assistant state attorney signing petition], 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 Petitioners herein pursued relief in this Court. First, the Petitioners 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 Petitioner 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, the instant case. Pursuant to motion of DCF, proceedings in this case were stayed, pending disposition of the timely motion for rehearing in the Fourth District. After the Fourth District's opinion on rehearing herein, by order dated October 28, 2002, this Court set up a schedule for briefs, on the merits, in case no. SC02-936, and briefs have been submitted.

Due to the overlapping nature of the two cases herein, the instant case and SC02-2280, 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 in SC02-2280 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 the instant case, SC02-936, in this Court, of the lower Court's opinion, 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

The Petitioners herein argue that the Fourth District erred in permitting the State to have a seven-day period in which to cure the absence of an oath on the petition which had previously served to provide the basis for the trial court's probable cause determination. Although the Fourth District certified that there was a conflict on that issue, believing that the Second District opined that immediate release from custody should ensue without leave to amend, the Second District has clearly stated that leave to amend and cure is appropriate. As a result, there is no interdistrict conflict, and this Court's review of this matter should be deemed to have been improvidently granted.

Furthermore, leave to amend, without dismissal of the commitment petition or release from custody, is appropriate for several reasons. First, the United States Supreme Court has clearly stated that the absence of an oath from an affidavit for an arrest warrant does not negate an arrest or prosecution as long as probable cause does, in fact, exist. Second, the legislature has provided that the rules of civil procedure apply to sexually violent predator commitment proceedings. Under those rules, leave to amend pleadings must be freely granted. Third, many courts, in analogous situations in criminal cases, have routinely recognized that where probable cause determinations are somehow defective, rearrest, followed by further custody, is permissible when the defects in the original probable cause determinations are

corrected. Fourth, the Petitioners herein have typically challenged the original probable cause orders and petitions approximately 1 ½ years to two years after the fact. Such dilatory challenges should be deemed to constitute a waiver of the claims asserted.

ARGUMENT

THE LOWER COURT DID NOT ERR IN PERMITTING THE STATE TO HAVE A SEVEN-DAY PERIOD IN WHICH TO CURE THE DEFECT OF AN ABSENCE OF AN AFFIDAVIT IN SUPPORT OF A PROBABLE CAUSE PETITION.

After holding that an ex parte probable cause petition in a sexually violent predator commitment case must be supported by either an affidavit or live testimony from a mental health professional who evaluated the respondent, the Fourth District Court of Appeal "conclude[d] 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." (App. 6). The Court further certified that the provision for such a "curing" period was in conflict with the decision of the Second District Court of Appeal in Melvin v. State, 804 So. 2d 460 (Fla. 2d DCA 2001):

> . . . to the extent that the Melvin court ordered immediate release of those petitioners, where we would allow a seven day "cure" period, we certify conflict with Melvin.

(App. 6).

Although the Fourth District certified conflict on this question with the court in Melvin, it is clear that no such conflict exists. In Melvin v. State, 804 So. 2d 464 (Fla. 2d DCA 2002), the Second District had held that the initial ex parte probable cause

determination had to be supported by sworn proof in the form of an affidavit or verified petition. After setting forth that legal conclusion, the court found that the claim was moot as to one habeas corpus petitioner, Van Nguyen, as to whom there had been a subsequent adversarial probable cause hearing (after the initial detention). In so holding, the Second District recognized that acts occurring after the initial probable cause determination could serve to cure any prior defect.

As to the remaining habeas corpus petitioners, the Melvin court had ordered "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 on the merits in the commitment proceeding." 804 So. 2d at 464. The foregoing directions to the trial court did not order any immediate release or dismissal of a commitment petition. In fact, the holding specifically contemplated that the State would be able to maintain custody and proceed with the commitment cases by taking curative measures. Thus, the Melvin court expressly provided that commitment could ensue "following a trial on the merits." If the court had ordered dismissal there would be no reason to provide for a subsequent trial on the merits. Likewise, the court was aware that as to all petitioners other than Van Nguyen, there had not been adversarial probable cause hearings.

Nevertheless, the court was authorizing such subsequent adversarial probable cause hearings, and permitting probable cause determinations based thereon to support subsequent custody during the commitment proceedings.

The Second District made this painfully clear in a subsequent opinion, in Graham v. State, 826 So. 2d 361 (Fla. 2d DCA 2002), which the Petitioners herein have ignored. In Graham, after the Melvin opinion, the State had attempted to cure the defect of the absence of an oath by filing an amended petition, supported by sworn proof. Although the State filed such an amended petition, the trial court did not enter a revised probable cause order, finding that the amended petition related back to the original petition. The Second District, in Graham, addressed its own prior opinion in Melvin, and noted that it authorized such post-Melvin corrective measures:

> In *Melvin v. State*, 804 So. 2d 460, 463 (Fla. 2d DCA 2001), this court held hat 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. We pointed out that a detainee's objection that he is being detained without due process may be rendered moot by a later proceeding in which he has been detained after being afforded due process.

826 So. 2d at 362. The court, in Graham, then went on to find that the amended petition did not relate back, and that it required a new order finding probable cause based upon the amended petition. The only defect in Graham was the absence of the

renewed order finding probable cause. The filing of the amended petition, as a method of curing the defect of the lack of an oath, was proper, in and of itself.

In view of the foregoing, it is clear that although the Fourth District herein appears to have certified conflict with the Second District on this point, there is no such conflict, as both the Melvin and Graham opinions of the Second District make it clear that acts occurring subsequent to both the original probable cause determination and the Melvin opinion can cure any prior defect with respect to the need for an oath or affidavit with supporting testimony. Given that there is no conflict between the Fourth District herein and the Second District, it is submitted that the appropriate disposition of this case would be the dismissal of the discretionary review proceeding, as review has been improvidently granted, given the absence of a conflict.

Even if this Court proceeds to resolve the merits of the issue herein, however, it must be concluded that the Fourth District did not err in allowing a reasonable period in which to cure the defect of the absence of an affidavit in support of the probable cause determination.[4] The Supreme Court of the United States, construing the fourth amendment's search-and-seizure clause, held that an arrest is not illegal, absent an arrest warrant, as long as probable cause existed: "The necessary inquiry, therefore,

[4] In a companion case in this Court, Regier v. Kephart, SC02-2280, the State has taken issue with the Fourth District's holding that the oath requirement can not be satisfied by a verified petition, signed by an assistant state attorney.

was not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the arrest." United States v. Watson, 423 U.S. 411, 417 (1976). Similarly, the Court has stated that it "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." Gerstein v. Pugh, 420 U.S. 103, 113 (1975). If a warrantless arrest does not render an arrest illegal when probable cause does, in fact, exist, a detention for which, as in the instant case, there was a "custodial warrant," but lacking an affidavit in support of the warrant, would appear to be governed by the same principle. As long as probable cause exists, the detention, itself, is legal and is not undone.[5]

Thus, one court has held that police lawfully arrested a person, who was apparently mentally ill, without a warrant, for medical evaluation, where there was probable cause of the mental illness and dangerousness. Maag v. Wessler, 960 F. 2d 773 (9th Cir. 1991). In Maag, an officer was investigating concerns about Maag's welfare, and, based on that investigation, which included personal observations, the officer called a physician, who, after hearing the officer's descriptions, advised the officer to bring Maag to the hospital, which the officer did, over Maag's objections.

[5] The absence of a warrant is detrimental, when probable cause exists, only when the police effect an arrest within a person's residence. Payton v. New York, 445 U.S. 573 (1980). While warrants in other circumstances are "preferred," Gerstein, 420 U.S. at 113, their absence will not have any consequences when probable cause otherwise exists.

The appellate court reviewed the case in the context of a claim of a fourth amendment violation, due to the absence of an arrest warrant for the "arrest" or "seizure." The court recognized that the fourth amendment standard of probable cause would apply to a seizure of a mentally ill individual. The court thereafter concluded that such probable cause existed; the absence of a warrant did not render the "arrest" or "seizure" unconstitutional.

Given that probable cause, and not a warrant, determines the validity of an arrest for constitutional purposes under the Fourth Amendment (and, therefore under Article I, Section 12 of the Florida Constitution),[6] it necessarily follows that the lesser requirements of an oath or affidavit supporting such a warrant will not render a custodial detention illegal when the oath or affidavit are in any way deficient, as no consequences flow from the absence of the warrant or its supporting documents as long as probable cause exists. In the instant case, the Petitioners have not argued, either in this Court, or the trial court or Fourth District Court of Appeal, that the facts and circumstances detailed in the psychologists' reports appended to the petitions for commitment/probable cause, failed to set forth facts which would constitute probable cause that the person had a mental abnormality or personality disorder and that the

[6] Article I, section 12 provides that it "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Id. See also, State v. Lavazzoli, 434 So. 2d 321 (Fla. 1983).

person was likely to commit further sexually violent offenses if not committed to a secure facility. The Petitioners' arguments went to the form of the petition, oath and warrant, as opposed to any of the underlying facts related to probable cause. A review of those reports, appended to the original and amended commitment petitions, as to each of the Petitioners in this Court, compels the conclusion that probable cause does exist in each case, as the doctors' reports set forth the mental abnormality or personality disorder which they have concluded exists, and they have further set forth their conclusions, facts upon which they relied, regarding the likelihood that the various individuals would engage in further sexually violent offenses if not civil committed.[7]

Furthermore, any defect in the original commitment petition, and, indeed, in the

[7] Using James Toward, one of the Petitioners herein by way of example, the original commitment petition appended documents reflecting Toward's prior multiple convictions for sexual battery. (App. 7-31). A written report from a psychiatrist, Dr. Waldman, reflects that Dr. Waldman interviewed Toward and that Dr. Waldman reviewed extensive documentation regarding Toward. Dr. Waldman concluded that Toward suffers from pedophilia, sexual sadism, coprohilia, urophilia, and paraphilia, not otherwise specified. (App. 42). Furthermore, given the high level of deviancy involved in Toward's multiple sexual offenses, including threats of castration of victims, defectation and urination on victims, torture and humiliation of victims, and multiple sex acts with children, Dr. Waldman found that Toward was likely to be a recidivist if not committed. (App. 42-43).

Dr. Ramirez-Brouwer similarly diagnosed Toward as a pedophile, suffering a mental abnormality which predisposed him to committing sexually violent offenses. (App. 51).

first amended petition, was subject to further amendment, and a continuation of custody, within the discretion of the trial court. The commitment cases are governed by the Rules of Civil Procedure. Section 394.9155(1), Florida Statutes. Fla.R.Civ.P. 1.190(a), provides that "[a] party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend it at any time within 20 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave of court shall be given freely when justice so requires." (emphasis added). Fla.R.Civ.P. 1.190(e) further provides that "[a]t any time in furtherance of justice, upon such terms as may be just, the court may permit any process, proceeding, pleading, or record to be amended. . . ." Thus, courts have routinely held that leave to amend should be liberally granted. Dimick v. Ray, 774 So. 2d 830 (Fla. 4th DCA 2000); Frentz Enterprises, Inc. v. Port Everglades, 746 So. 2d 498 (Fla. 4th DCA 1999). The refusal to allow an amendment is an abuse of discretion, absent prejudice to an opposing party, or unless the privilege is being abused or an amendment would be futile. North American Specialty Insurance Co. v. Bergeron Land Development, Inc., 745 So. 2d 359 (Fla. 4th DCA 1999); Bill Williams Air Conditioning and Heating, Inc. v . Haymarket Co-Op Bank, 592 So. 2d 302 (Fla.

1st DCA 1992). The principal exception to the requirement of liberal leave to amend is where there is a change in the basic issue or claim in the case, with a material variation of the originally asserted grounds for relief. Frenz, supra.

The denial of such leave to amend would be egregiously unfair in the instant case. First, although the Melvin and Kephart courts read the requirements of affidavits, oaths, sworn testimony or verified petitions into the commitment act, the statute obviously does not make any express reference to such a requirement, and no rule of procedure does. That is all the more true in the case of the opinion herein, in Kephart, where the Fourth District held that the affidavit or testimony must come from a mental health professional who evaluated the individual. Whatever constitutional predicate may exist for the requirement of an oath, no provision of the constitution specifies who has to provide such an oath. Creating such a novel requirement out of thin air, without providing the State with an opportunity to comply with it prior to the release of a dangerous and mentally ill individual into the community, would be egregiously unfair to the State. This is all the more so since the denial of leave to amend could literally have resulted in the release of scores, if not more, of individuals, across the State, for whom there had already been preliminary findings of probable cause as to mental abnormalities, personality disorders, and likely recidivism. Furthermore, adding oaths, affidavits, or sworn testimony does not prejudice the

defense, as the underlying facts of the case and theories of the case would not be changing. Indeed, since this relates to an amendment of an initial ex parte petition for probable cause, it is questionable whether the defense would have any standing to object to such an amendment; the defense always has had the ability to contest probable cause determinations through an adversarial probable cause hearing, within five day of demand, once custody under the commitment proceedings had commenced. State v. Kobel, 757 So. 2d 556 (Fla. 4th DCA 2000); Valdez v. Moore, 745 So. 2d 1003 (Fla. 4th DCA 1999). By having failed to do so, for anywhere from a few months, to two or more years in all of the cases herein, the defense has clearly acquiesced to the existence of facts supporting probable cause in the cases at issue herein.

Even in cases where probable cause for an arrest has been found not to exist, after a probable cause hearing, courts have routinely held that such individuals would be subject to rearrest based upon the development of further facts to justify an arrest. Commonwealth v. Chermansky, 552 A. 2d 1128 (Pa. App. 1989) (defendant could be arrested after dismissal of charges at preliminary hearing); Commonwealth v. Orlowski, 481 A. 2d 952 (Pa. App. 1984) (rearrest permitted after dismissal of charges at preliminary hearing due to failure to establish probable cause at hearing); State v. Potter, 207 A. 2d 75 (Conn. Cir. Ct. 1964) (rearrest after unlawful warrantless arrest

would be proper); Commonwealth v. Clarke, 457 A. 2d 970, 971 (Pa. App. 1983) (after discharge for lack of prima facie case at probable cause hearing, defendant was subject to rearrest and another probable cause hearing); Beiser v. Smith, 4 F. Supp. 2d 841 (E.D. Wis. 1998) (rejecting claim of constitutional violation based on untimely probable cause determination in criminal case, where defendant was released into the community after absence of probable cause determination, but rearrested thereafter, with subsequent probable cause determination); State v. Turner, 86 S.E. 1019, 1020 (N.C. 1915) ("Even if one is wrongfully arrested on process that is defective, being in court, he would not be discharged, but the process would be amended then and there, or, if service was defective, it could be served again. Whatever the rights of the defendant against the officer for service of an illegal process or insufficient service of a valid process, the defendant being in court, the matter will be corrected, and he can proceed to trial. . . ."). Cf., State v. Wallace, 392 So. 2d 410 (La. 1980) (defendant who was released from custody in criminal case due to failure to appoint counsel in timely manner was not immune from rearrest and incarceration pending trial); State v. Watkins, 399 So. 2d 153 (La. 1981) (as to two defendants, where there had been releases in criminal case due to failure to comply with time limits for appointing counsel, rearrests based on new warrants were proper); State v. Sliger, 261 So. 2d 648 (La. 1972) (where information was quashed due to unconstitutionality of statute

charging offense, it was proper to retain defendant in custody for up to 30 days pending decision as to whether to file a new information); Wilk v. State, 217 So. 2d 610 (Fla. 3d DCA 1969) (defendant could remain in custody of state pending decision of whether to file new information after original information was quashed).

The foregoing principles are further consistent with this Court's recent pronouncements in Goode v. State, 2002 WL 31317996 (Fla. Oct. 17, 2002). After finding that the statutory 30-day period for a trial was mandatory, and had to be complied with, absent a timely continuance for good cause, this Court stated that when dismissal ensued as a result of noncompliance, "the State would have multiple opportunities to initiate and pursue these commitments before the respondent's criminal sentence expires." Id. at *7. Thus, this Court was pointing out that dismissals for noncompliance with the 30-day requirement were not on the merits and were not with prejudice. In the context of the instant case, that would mean that even if a defective petition for probable cause resulted in dismissal, it could be refiled. That, in turn, would lead to a new probable cause determination under § 394.915, Fla. Stat., and the new probable cause determination would lead to renewed custody.

The Petitioners in this Court have, at all times, been able to obtain expeditious trials, which they clearly have not desired. The original petition for commitment in the case of Toward was filed in July, 1999. It was not until November-December of 2001

that Toward even undertook to attack the original probable cause determination, which had been made in July, 1999. Some of the other Petitioners herein waited even longer periods of time before attacking the original probable cause petitions and orders. Given that diligent, timely attacks on the original probable cause petitions would generally have resulted in the ability of the State to take corrective measures during the last year of the individual's incarceration, and prior to the commencement of any custody in conjunction with the commitment proceedings, such delays, on the part of the defendants in the trial court, should not bar the State from doing what the State would clearly have been able to do had the defense proceeded with due diligence. While the defendants might object that they were unable to proceed with such arguments prior to the Second District's decision in Melvin, in November, 2001, that contention would be frivolous. Just as Melvin and his co-petitioners presented such arguments to the Second District, Kephart and the others herein could have presented such arguments prior to the Melvin opinion. The only legitimate inference from the delays in the presentation of such claims by the Petitioners herein is that they either did not care about such an issue for the first 1-2 years after the filing of the commitment petitions, or, they recognized that probable cause existed in any event and that such an argument did not deserve to result in the release of any individual.

The Petitioners herein rely primarily on two cases. S.J. v. State, 596 So. 2d

1181 (Fla. 5th DCA 1992), is clearly inapplicable and does not support the Petitioners' arguments. In S.J., two juveniles were held in pretrial detention based upon a contempt charge for failure to appear at an arraignment on a previously filed delinquency charge. The Court held that there is no basis in the juvenile rules for pretrial detention based solely on a pending contempt charge. The State did not argue that it had any other basis for justifying a detention. Thus, there was no plausible basis on which the State could cure any possible defect. Moreover, S.J. was not governed by the rules of civil procedure, with the express requirement for liberal leave to amend. In addition, S.J. did not involve the implementation of a newly-created obligation that the State had to comply with, as it did herein, first with the Melvin opinion, and then with the Fourth District's Kephart opinion. It is also clear that S.J. did not involve a situation with the release of an individual who had been deemed mentally abnormal and dangerous, whereas the instant cases have such findings in probable cause orders. There is no reason to believe that the prior conclusions would change by the simple alteration of a pleading by adding either a verification by a prosecutor or a corroborating affidavit from a psychologist which reiterates what was already set forth in the written reports of the psychologists which were already appended to the commitment petitions. Thus, the State has a compelling public interest at stake here, as the Supreme Court has repeatedly recognized that the likelihood of recidivism is a

form of dangerousness creating a compelling public interest, for the purpose of restraining liberty of an individual who would not otherwise be restrained. See United States v. Salerno, 481 U.S. 739, 746-49 (1987); Schall v. Martin, 467 U.S. 253, 266 (1984).

The Petitioners herein further rely on Tanguay v. State, 782 So. 2d 419 (Fla. 2d DCA 2001). Reliance on Tanguay is improper for several reasons. First, Tanguay does not involve the same issue as that which is currently before this Court. Tanguay involved the question of whether an initial commitment petition, filed subsequent to the date on which a prior incarcerative sentence ended, was timely - a statutory construction question not at issue herein. Second, review of that case is currently pending in this Court. Third, insofar as Tanguay is a Second District opinion, and the Second District, in Graham, has expressly ruled that leave to cure a defect regarding an oath or affidavit should be granted, the Second District has clearly ruled on the issue before the Court in this case.

Furthermore, given that the sexually violent predators commitment act is relatively new, and given that Florida's appellate courts have periodically either been creating additional obligations or modifying existing ones, those appellate courts have consistently recognized that when such new or modified obligations are the kind that can be complied with, a reasonable opportunity to comply with the new or modified

requirement should be granted. See, Hawker v. Greer, 801 So. 2d 168 (Fla. 4th DCA 2001) (the affidavit requirement of Melvin); Johnson v. Department of Children and Family Services, 747 So. 2d 402 (Fla. 4th DCA 1999) (requirement that all members of the multidisciplinary team sign the report of the team); Valdez v. Moore, 745 So. 2d 1009, 1011 (Fla. 4th DCA 1999) (defendant's entitlement to adversarial probable cause hearing within five days of demand); Graham, supra (affidavit requirement of Melvin).

Lastly, the State submits that any claim based on alleged defects in the original probable cause petitions has been waived by the Petitioners herein. First, the Petitioners, as noted previously, have typically waited between 1 and 2 ½ years before asserting claims related to the sufficiency of the petition for probable cause. Second, and more significantly, since late 1999, the Fourth District has conferred on respondents in sexually violent predator commitment cases, the right to demand an adversarial probable cause hearing within five days after custody commences. State v. Kobel, 757 So. 2d 556 (Fla. 4th DCA 2000); Valdez v. Moore, 745 So. 2d 1003 (Fla. 4th DCA 1999). No such hearing was demanded by the Petitioners herein - an obvious acquiescence on their part, as to the existence of probable cause to support custody pending their commitment trials.

By way of analogy, in In re the Detention of Campbell, 986 P. 2d 771, 776

(Wash. 1999), the Washington Supreme Court held that a sexually violent predator commitment defendant waived a claim that the adversarial probable cause hearing was not held within the applicable 72-hour period when the defendant failed to timely request such a hearing. Similarly, the failure to seek such a hearing should constitute a waiver as to any claim predicated upon an alleged impropriety regarding the existence of probable cause. By way of further analogy, when objections to the lack of an appropriate signature or verification on a criminal information are not raised in a timely manner, such claims are deemed to have been waived. Rule 3.140(g), Fla.R.Crim.P. The time periods which elapsed prior to the assertion of the claims regarding the oaths or affidavits herein should be deemed untimely, as the claims were not diligently pursued, coming long after the initial commitment petitions, probable cause petitions, and orders finding probable cause were filed.

CONCLUSION

Based on the foregoing, this Court should either conclude that review was improvidently granted as to the issue raised by the Petitioners, or, conclude that the lower court's opinion properly provided the State with a reasonable period of time in which to cure any defect with respect to the need for sworn proof in support of the probable cause petition.

Respectfully submitted,

RICHARD E. DORAN
Attorney General

_____

RICHARD L. POLIN
Senior Assistant Attorney General
Florida Bar No. 0230987
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent on the Merits was mailed this ____ day of December, 2002, to RUSSELL L. AKINS, Assistant Public Defender, Office of the Public Defender, 216 South Second Street, Ft. Pierce, FL 34950; and JUAN TORRES, III, Esq., Blake, Torres, & Mildner, P.A., 423 Delaware Avenue, Ft. Pierce, FL 34950.

_____
RICHARD L. POLIN
Senior Assistant Attorney General

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing Answer Brief of Respondent on the Merits has been typed in Times New Roman, 14-point type.

_____
RICHARD L. POLIN