IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO2-936

JACK KEPHART, et. al.,

Petitioners,

vs.

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

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

AMENDED INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACT

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 in the 19th Judicial Circuit. The first attachment to each Petition below was copy of Petitioner's former judgment and conviction. The second attachment was an unsworn and unattested to letter from the Department of Children and Families to the State Attorney, recommending civil commitment The third attachment comprised the unsworn and unattested reports of the doctors in each instance who had evaluated that respondent (herein Petitioner). These unsworn documents all make some reference to sources from which information was derived, but make no statements concerning whether the information was complete or verified.

In each instance, the trial court receiving the Petition for Commitment entered an Order finding Probable Cause at an ex parte hearing, for which the Petitioner was neither given notice nor opportunity to be heard, and ordered the Petitioner to be involuntarily detained, based upon the above information. The petitioner has not had an adversarial probable cause hearing or a trial on the commitment petition.

On Friday, December 7, 2001, the Nineteenth Judicial Circuit, Honorable Robert A. Hawley, heard the Emergency Motion to Vacate the Order Determining Probable Cause and to Release the Respondent from Custody on behalf of Petitioner, George Thayer. The trial court denied the motion by written Order.

Petitioner then took a consolidated Writ of Habeas Corpus to the Fourth District Court of Appeal. The Fourth District agreed that the Petitioner was being held on insufficient probable cause determinations but allowed the Department and the State seven (7) business days to "cure" the defects.

SUMMARY OF ARGUMENT

The petitioner has been illegally detained on a civil arrest warrant which has been found to violate his Due Process rights contained in both the United States and Florida Constitutions. That to allow a "cure" period of seven days would in effect create a constitutional injury without a remedy. It is well settled that the only adequate remedy to address the State's failure to afford the Petitioner minimal constitutional protections is to order his immediate release from custody pending his commitment hearing.

ARGUMENT

THE LOWER COURT ERRED IN HOLDING THAT THE PETITIONERS COULD BE ILLEGALLY DETAINED FOR AN ADDITIONAL SEVEN DAYS IN ORDER THAT THE STATE MAY CURE DEFECTS IN THE ORIGINAL PROBABLE CAUSE DETERMINATIONS

The trial court had no proper evidence before it on which to make the initial probable cause determination, resulting in Petitioner's original detention. The State had provided only copies of unsworn documents. Furthermore, these documents provided no way for the court to determine what information the evaluators had. These documents failed to identify the source of the material or facts that would enable an independent fact finder to assess its credibility.

This issue has already been decided by the Second District Court of Appeal. On Friday, November 16, 2001, the court issued an opinion in *Melvin v. State*, 804 So. 2d 460, (Fla. 2d DCA 2001), determining that 12 similarly situated Petitioners were to be released "in the absence of an *ex parte* determination of probable cause based on sworn proof", and those 12 Ryce Act Respondents were ordered to be released from custody unless held on a valid finding of probable cause.

The *Melvin* court relied upon *S.J. and J. F. v. State,* 596 So. 2d 1181 (Fla. 5th DCA 1992) in ordering the release of those detained. In *S.J.*, the court said

"[t]he petitioners argue they are entitled to immediate release because their

continued detention under these circumstances is illegal. We agree." *Id.* at 1182. The *Melvin* court cited to footnote one in *S.J.* which says "[i]t appears that J.F. entered guilty pleas subsequent to the filing of his petition and as to him, the issue of illegal detention is moot." *Id.* Finally, the court said "we grant the writ as to S.J. and direct his immediate release unless he has been afforded an adjudicatory hearing." *Id.* at 1184.

The court in *S.J.* did not provide for, nor envision any time period in which to "cure" the defects. Similarly, the *Melvin* court did not provide for any time period in which to "cure" the defects in the petition there. Instead, the *Melvin* court directed the release of those petitioners who had not had probable cause hearings, a trial, or a petition filed which was based on sworn proof. *See Melvin.*

The trial courts agree that the prior detention, based on unsworn evidence, was in violation of the Petitioners' due process rights, but failed to order their release. Instead, the courts proceeded immediately the State's Motion to Amend, filed in each case, and granted the same.

Now comes the Amended Petition and the supplemental supporting documents. First, in each instance, the State added a paragraph to the original

Petition which is the identical language used by the State attesting to criminal

Information. While that may constitute a "verified" pleading under the Florida Rules of Civil Procedure, this matter involves a different legal principle - that of constitutional due process in the issuance of a warrant, not pleading practice. *Kephart et. al. V. Kearney,* 826 So.2d 517 (Fla 4th DCA 2002)

Those who have been re-detained argue they have been so unlawfully. The Petitioner, having shown that his immediate and continuing detention is unlawful, seeks immediate release from custody. Petitioner argues that he has clearly been detained unlawfully since the date of release from prison, for 2 years or more. He continues at this time to be unlawfully detained. He submits that pursuant to *Tanguay v. State*, 782 So. 2d 419 (Fla. 2nd DCA 2001), he must be released pending trial in this matter. In *Tanguay*, the court held:

> Specifically, Tanguay argues that the State illegally detained him for sixteen days beyond the expiration of his sentence in order to evaluate him and file a commitment petition against him. The Act in effect at the time of Tanguay's detention made no provision for holding a person beyond the expiration of his or her sentence. (FN2) It appears from the record before this court that the State simply failed to release Tanguay upon the lawful expiration of his sentence and continued to hold him with no legal authority to do so.

> We agree with Tanguay that the State denied him due process, see, e.g., Valdez v. Moore, 745 So.2d 1009 (Fla. 4th DCA 1999), as

well as violated his Fourth Amendment right to be free from unlawful seizure, see, e.g., Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed. 2d 54 (1975), by detaining him for sixteen days without a commitment petition having been filed, without a judicial finding of probable cause, and without affording him any notice or opportunity to be heard. Tanquay has not, however, alleged any prejudice from the State's unlawful detention other than the deprivation of his liberty. He has not, for example, alleged that he has been prejudiced in defending the commitment proceeding in any way. We therefore decline at this time to find that the State's violation of Tanguay's constitutional rights requires the dismissal of the commitment petition.

We conclude, however, that the only adequate remedy to address the State's failure to comply with the requirements of the Act or to afford Tanguay even minimal constitutional protections is to order Tanguay's release from custody pending his commitment hearing. See, e.g., *Johnson v. Department of Children & Family Services*., 747 So.2d 402 (Fla. 4th DCA 1999) (holding that courts have inherent authority to order the release of a detainee when the State fails to scrupulously comply with the requirements of the Act or the applicable constitutional provisions); *Kinder v. State*, 25 Fla.L. Weekly D1637 (Fla. 2d DCA July 7, 2000) (FN*) (holding that the only adequate remedy to redress the State's violation of a detainee's statutory right to be afforded a commitment hearing within thirty days was to order his release pending hearing). We therefore treat Tanguay's petition as a petition for writ of mandamus, grant it to the extent that it seeks his release from confinement, and direct the trial court to order his release. See *Kinder*, 25 Fla.L. Weekly at D1637. We deny the petition in all other respects.

CONCLUSION

Based on the foregoing, this court should disapprove the portion of the lower court's opinion which provides the State seven days to cure defects in the original probable cause determinations.

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 5th day of December, 2002, to Richard L. Polin, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, Russell L. Akins, Public Defender, 2000 16h Avenue, Suite 235, Vero Beach, FL 32960 .

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JUAN F. TORRES, III

CERTIFICATE REGARDING FONT SIZE AND TYPE

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

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JUAN F. TORRES, III