

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 REPLY BRIEF OF PETITIONER
ON THE MERITS

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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 Respondent relies on several cases to support the argument that the lower court was correct in holding that a seven day “cure period” was proper in order for the respondent to obtain a legally sufficient probable cause determination. Further, Respondent asserts that the lower court was incorrect in certifying a conflict initially. The Respondent allegedly finds authority for its position in several cases from Florida, the Federal District Court of Appeal, and from The United States Supreme Court. However, upon an in depth analysis of the cases cited, one discovers that the authorities relied on do not support the Respondent’s position. More importantly, *Graham v State*, 826 So.2d 361(Fla. 2nd DCA 2002), in fact shows that the 2nd District Court of Appeal never contemplated a “cure period” in its decision in *Melvin v. State*, 804 So.2d 460(Fla. 2nd DCA 2001).

The Respondent apparently falls into a common trap encountered daily by One Ls by citing *Graham* from the headnotes that accompany the case. Respondent maintains that since the court paid tacit attention to the issue of the

amendment that it must necessarily follow that the State was afforded a cure period. However the decision is silent on the exact procedural posture of the case and answered only the question presented which was that the detainee was being held illegally and therefore ordered his immediate release, *id.* Logic would suggest that if a “cure period” was proper the court would have remanded for the proper determination on the issue of probable cause.

Respondent misinterprets the meaning of the following language in *Melvin*: “A person’s complaint that he has been detained without due process becomes mooted by a subsequent proceeding in which he is detained after being afforded due process.” *Melvin v. State*, 804 So.2d 460(Fla. 2nd DCA 2001) at 464. That language refers to the varying procedural posture of the *Melvin* petitioners, one Petitioner had requested and been afforded an adversarial probable cause hearing and another had been committed at jury trial.

Next the Respondent claims that a cure period is proper because anyone can be detained with out a warrant as long as probable cause exists. For this proposition the Respondent cites *United States v Watson*, 423 U.S. 411(1975) and *Gerstein v Pugh et. al. v. Pugh*, 420 U.S. 103(1975). These cases deal with

warrantless arrests when a **felony** has been committed and the arresting person has probable cause to believe that the person arrested has committed the felony. As the Respondent is so fond of saying anytime the detainees are trying to analogize to criminal law these are **civil commitment** cases.

Finally, Respondent argues that *Maag v. Wessler*, 960 So.2d 773(9th Cir. 1991)., is somehow instructive as to the issue before the court. However the *Maag* court was dealing with the issue of qualified immunity and held that a grant of qualified immunity was proper under the applicable state statute. In fact the court specially stated that “We do not, however, determine the broad question of whether the seizure of Maag violated the fourth amendment’s proscription against unreasonable seizures, as Maag would have it.” *id at 775*.

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 ____ day of January, 2003, to Richard L. Polin, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131.

RUSSELL L. AKINS

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.

RUSSELL L. AKINS

