IN THE SUPREME COURT OF FLORIDA

DUANE EDWIN SUTTON,
KEITH NORWOOD SMITH,
JOHN R. BEIKIRICH,
EDWARD ALLEN SINGLETON,
JERRY WADE RHODES,
GEORGE SAMUEL DEMARCO,

Petitioners, Case No. SC04-1954 (Consolidated)

vs.

STATE OF FLORIDA,

Respondent.
_________________________/

DISCRETIONARY REVIEW OF THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL

CONSOLIDATED ANSWER BRIEF OF RESPONDENT ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

For the exclusive and limited purpose of this appeal, Respondent acknowledges and accepts Petitioners' Statement of the Case and Facts as recited at Petitioners' Initial Merits Brief, pp. 2-3.

SUMMARY OF THE ARGUMENT

The Ryce Act is a civil commitment Act and does not invoke the full range of constitutional rights afforded criminal defendants. Civil detainees under the Ryce Act are accorded the same constitutional rights as other civil litigants. In the consolidated cases now before this Court for review, each of the Petitioners seeks to invoke a privilege against self-incrimination to avoid a pre-trial, civil discovery deposition. Although civil detainees can properly, in good faith, raise the privilege of self-incrimination regarding specific questions asked of them in a civil pre-trial deposition, they cannot claim a blanket *Fifth Amendment* immunity from being deposed at all.

Below, the Petitioners attempted to raise claims of invasion of right to privacy, self-incrimination, attorney work product, attorney-client privilege and psychologist-patient privilege. The trial judge conducted a hearing in which the propounded deposition questions were exhaustively reviewed. With minimal exceptions, the questions were ruled to be relevant and proper for purposes of pre-trial discovery. The rulings of the trial court were repeatedly affirmed by the Second District Court of Appeals.

Civil commitment actions undertaken by the State are extremely serious matters. Neither party to this type of civil

commitment process should be deprived of the necessary information to assure that the truth of the process be achieved. For the State, representing the public interest, there is a duty to assure that those individuals who fall within the "small but extremely dangerous number of sexually violent predators" for which the Ryce Act was created, are properly identified through this process. To accomplish that duty, the State must be provided the full information required to establish whether or not a particular individual meets the requisite criteria for civil commitment as a sexually violent predator.

Petitioners' hollow gesticulations about long-term deprivation of liberty overcoming the State's duty to the public as a whole are without merit. Repeated, but inaccurate, claims that the Ryce Act is punitive and imposes sanctions, does not serve to make it so. The courts, both State and Federal, have definitively ruled that civil commitment proceedings are just that, civil in nature. The Ryce Act does not impose sanctions, it does not impose penalties.

Notably, Petitioners appear to totally disregard the issue of immunity for any information that is compelled and that is determined to be self-incriminating. It is the better of the options, to afford use and/or transactional immunity to disclosure of information in the civil commitment process, than

to allow silence to prevent a true and accurate assessment of an individual’s qualifications as a sexually violent predator.

The Ryce Act does not seek to discover past and uncharged crimes for the purpose of charging civil detainees with yet undiscovered crimes. Rather, the exclusive purpose of the Act is to detect and properly identify sexually violent predators, provide treatment and restrain those individuals while they remain a threat to society.

# ARGUMENT

## ISSUE I

DOES THE RYCE ACT VIOLATE DUE PROCESS OF THE FEDERAL AND FLORIDA CONSTITUTIONS BY PERMITTING PRE-TRIAL DISCOVERY IN ACCORDANCE WITH THE FLORIDA RULES OF CIVIL PROCEDURE? (RESTATED)

The Ryce Act does not promote either of the traditional aims of punishment - - retribution and deterrence; the civil commitment proceedings under the Ryce Act are civil, not criminal prosecutions and do not require the full panoply of rights applicable therein.

The Involuntary Civil Commitment of Sexually Violent Predators Act ("the Act") provides that in all sexually violent predator commitment proceedings, the Florida Rules of Civil Procedure shall apply unless otherwise specified. §394.9155(1), Fla. Stat. (2000). Those rules provide:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action. . . . It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fla. R. Civ. P. 1.280(b)(1). This rule is equally applicable to sexually violent predator civil commitment proceedings. In *State ex rel. Romley v. Sheldon*, 7 P.3d 118 (Ariz. App. 2000), the State sought to depose Thompson, a respondent detained

pursuant to Arizona's Sexually Violent Persons Act ("SVPA"). An Arizona appellate court held that the State could depose Thompson because the SVPA specifically provides that the rules of civil procedure, which permit the State to depose an individual, apply to SVPA proceedings. *Id.* at 119-20.

The Second District Court of Appeal in *Smith v. State*, 827 So.2d 1026, 1029, 2002 Fla. App. Lexis 13169 (Fla. 2d DCA 2002), one of the underlying consolidated cases now before this Court for review, ruled directly upon the issue of self-incrimination in the civil commitment context, holding:

> As to the privilege against self-incrimination, we think it beyond argument that these proceedings are civil in nature, given the U.S. Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 346, 138 L.Ed.2d 501, 117 S.Ct. 2072 (1997), and we agree with the thorough analysis by the Fifth and First Districts in reaching this conclusion. See *Westerheide v. State*, 767 So.2d 637 (Fla. 5th DCA 2000), review granted, 786 So.2d 1192 (Fla. 2001)(table decision)[1]; *Hudson v. State*, 2002 Fla. App. Lexis 10923, 27 Fla. L. Weekly D1774 (Fla. 1st DCA, Aug. 2, 2002). 'There are two aspects of the privilege against self-incrimination . . . . The first involves the absolute prohibition

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[1]In reaching its conclusion, the Second District Court of Appeal relied upon the logic of the Fifth District Court of Appeal in *Westerhiede v. State*, 767 So.2d 637 (Fla. 5th DCA 2000), review granted, 786 So.2d 1192 (Fla. 2001)(table decision). This Court subsequently upheld the logic and ruling of the Fifth District Court of Appeal in *Westerhiede v. State*, 831 So.2d 93, 2002 Fla. Lexis 2176 (Fla. 2002).

> of compelling a defendant in a criminal case to testify against himself.' *Delisi v. Smith*, 423 So.2d 934, 935 (Fla. 2d DCA 1982). **Because this is not a criminal case, the absolute prohibition does not apply.** 'The second pertains to the right of a witness in a proceeding other than a criminal prosecution in which he is a defendant to refuse to respond . . . on grounds that his answers might tend to incriminate him.' *Delisi*, 423 So.2d at 935. **Parties in a civil action retain the right to be free from self-incrimination.** *Fischer v. E.F. Hutton & Co.*, 463 So.2d 289 (Fla. 2d DCA 1984). **Instead of asserting a blanket privilege, the deponent 'is required to make a specific objection to a particular question and, at that time, assert his Fifth Amendment privilege.** At that point, the trial court should determine whether the answer could lead to criminal conviction. . . .' 463 So.2d at 291. We note that the privilege dissipates as to a particular crime once a conviction has become final and a fixed sentence has been imposed. 'Where there can be no further incrimination, there is no basis for the assertion of the privilege.' *Landeverde v. State*, 769 So.2d 457, 462 (Fla. 4th DCA 2000)[further citations omitted].

See also *In re Commitment of Sutton*, 828 So.2d 1081, 1082 (Fla. 2d DCA 2002)(Jimmy Ryce detainees in this type of civil commitment proceeding do not have any absolute privilege to avoid the discovery process). As the court in *Smith* also found, "[p]arties in a civil action retain the right to be free from self-incrimination." 827 So.2d at 1029, [citations omitted]. The court analyzed the issue of whether a civil detainee could

be compelled to answer all questions propounded during a pre-trial discovery deposition under Florida's Civil Rules of Procedure. The court ruled that a civil detainee has the right to assert their *Fifth Amendment* privilege against self-incrimination just as any other civil litigate in a civil action. However, civil detainees under the Ryce Act are not immune from the civil discovery process:

> Although Mr. Sutton may have the right to refuse to answer specific questions at his deposition, we conclude that the trial court did not violate due process or depart from the essential requirements of law by requiring Mr. Sutton to appear for his deposition in this civil proceeding.

Florida permits liberal discovery, and the discovery rules should be afforded "broad and liberal treatment" so that they may accomplish their intended purpose and ensure that trials are not "carried out in the dark." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947); *Brown v. Bridges*, 327 So. 2d 874 (Fla. 2d DCA 1976). Generally, the purpose of discovery is to simplify the issues in a case, eliminate concealment and surprise, and achieve a balanced search for truth and ensure a fair trial. *National Healthcare Ltd. Partnership v. Close*, 787 So. 2d 22 (Fla. 2d DCA 2001); *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996). Indeed, the seminal case on discovery provides that "[a] primary purpose in the adoption of the Florida Rules of Civil Procedure is to

prevent the use of surprise, trickery, bluff and legal gymnastics." *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 111 (Fla. 1970). "Discovery was never intended to be used as a tactical tool to harass an adversary in a manner that actually chills the availability of information by non-party witnesses; nor was it intended to make the discovery process so expensive that it could effectively deny access to information and witnesses or force parties to resolve their disputes unjustly. *Elkins v. Syken*, 672 So. 2d 517, 522 (Fla. 1996). Discovery is designed to provide the parties with access to all the relevant facts in the case so that they may be presented to the jury at trial. "Only when *all* relevant facts are before the judge and jury can the 'search for truth and justice' be accomplished." *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 995 (Fla. 1999), citing *Dodson v. Persell*, 390 So. 2d 704, 707 (Fla. 1980).

Consequently, a civil detainee is entitled to the protection of the Fifth Amendment's privilege against self-incrimination as is any other civil litigant. However, the Petitioner is not entitled to a blanket immunity from answering questions that do not invoke real issues of self-incrimination as determined by a trial judge. Just like any other civil litigant, a civil detainee must make a good faith assertion of his *Fifth Amendment* privilege against self-incrimination where necessary.

As determined by the court below, Petitioners did not make good faith assertions of their *Fifth Amendment* privilege against self-incrimination:

> The petitioners have objected to every question posed to them, including questions as innocuous as those requesting their date of birth, on the ground that the information sought is protected by the *Fifth Amendment*. In essence, the petitioners have done nothing more than raise a blanket assertion of their *Fifth Amendment* privilege, something we have previously held is not available to these petitioners because of the civil nature of these proceedings. See *Smith*, 827 So.2d at 1029.

*In re Commitment of Sutton, et al*, 884 So.2d 198, 201 2004 Fla. App. Lexis 11221, 29 Fla. L. Weekly D1721 (Fla. 2d DCA 2004).

I A. Civil detainees under the Ryce Act are not entitled to assert a blanket privilege against self-incrimination in the context of pre-trial discovery in a civil commitment proceeding

In the cases now consolidated before this Court for review, the Petitioners have failed to make good faith assertions of their *Fifth Amendment* privilege against self-incrimination; rather, they have effectively attempted to assert a blanket immunity. As set forth more fully below, Petitioners are not entitled to any form of blanket immunity in a civil commitment pre-trial discovery process.

The Petitioners' argument ignores the fact that sexually violent predator commitment proceeding are civil in nature, and the State is entitled to obtain discovery pursuant to the applicable Rules of Civil Procedure. The taking of depositions, including the depositions of parties to the action, is one of several permissible methods of obtaining discovery in a civil case. Fla. R. Civ. P. 1.280(a); Fla. R. Civ. P. 1.310. The Petitioners cannot refuse to be deposed when the rules provide for the taking of their depositions.

Further, the State's proffered deposition questions are relevant to the issues litigated in the civil commitment proceedings. The proffered questions seek information regarding the Petitioners' prior criminal offenses; participation in mental health treatment as well as general health questions; the multidisciplinary team's diagnoses of Petitioners; the Petitioners' behavior and activities in prison; and future plans upon release into the community. These matters, among others, are routinely considered in establishing the existence of a mental abnormality or personality disorder and assessing dangerousness, in terms of likelihood that a person will commit sexually violent offenses if not committed for treatment; in other words, such matters are relevant in determining whether a person is a sexually violent predator. See, e.g., *In re Young*,

857 P.2d 989 (Wash. 1993)(in assessing whether an individual is a sexually violent predator, details of his or her prior sexual offenses have some bearing on the mental state of the individual and are highly probative of the person's propensity for future violence).

The Petitioners' primary objection to being deposed in the commitment proceeding is that compelling them to answer questions posed by the State violates their privilege against self-incrimination afforded by the *Fifth Amendment* to the U.S. Constitution and Article I, Section 9 of the Florida Constitution. The *Fifth Amendment* privilege against compulsory self-incrimination "can be asserted in any proceeding, civil or criminal....and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 1656, 32 L.Ed.2d 212 (1972). As the court in *Smith* determined, a civil detainee must appear at the scheduled deposition and, when appropriate and necessary, make a good faith assertion of the privilege against self-incrimination. 827 So.2d at 1020. Upon the civil detainee properly raising a *Fifth Amendment* assertion of his privilege against self-incrimination, the trial court will inquiry and render a

determination as to whether or not the deponent is required to answer the particular question. If the court then compels that information be released to the state that would otherwise be privileged, the record is clearly set regarding the creation of a grant of immunity relating to that specific question and the responses generated thereby. *Ibid*. Not only is a civil detainee under the Ryce Act afforded the ability to exercise his *Fifth Amendment* right against self-incrimination following the proper procedures to do so, he also has the ability to establish, on the record, a subsequent claim of immunity.

Consequently, Petitioners' attempt to assert a blanket privilege against self-incrimination in the context of pre-trial discovery in a civil commitment proceeding is improper.

### I B. <u>Federal Application of the right against self-incrimination in civil cases</u>

The United States Supreme Court has held that the *Fifth Amendment* privilege against compulsory self-incrimination is inapplicable to involuntary civil commitment proceedings. <u>See</u> *Allen v. Illinois*, 478 U.S. 364 (1986). In *Allen*, the Court held that statements made to a psychiatrist during an evaluation under Illinois's Act could not be used in any future criminal proceeding, but rejected a claim that the *Fifth Amendment* allowed an alleged sexually violent predator to refuse to

participate in a psychiatric interview. *Id*. at 367-68, 375. The petitioner in *Allen*, like the Petitioners in the instant case, claimed that, under *In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d. 527(1967), sexually dangerous person proceedings are so punitive as to be considered "criminal" for purposes of the privilege against self-incrimination. *Allen*, 478 U.S. at 368. Specifically, Allen argued that, since a person adjudged to be a sexually dangerous person is committed for an indeterminate period to a maximum security psychiatric center operated by the Department of Corrections, such commitment, regardless of its label as "civil" or the State's express remedial purpose, constituted the type of punishment that *Gault* determined cannot be imposed absent application of the privilege against self-incrimination. *Allen*, 478 U.S. at 372.

The U.S. Supreme Court, however, wholly rejected the argument that sexually dangerous person proceedings are "criminal" for purposes of application of the *Fifth Amendment* privilege, and likewise, rejected Allen's reliance on *Gault*:

> . . . *Gault's* sweeping statement that 'our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty,' is plainly not good law. Although the fact that incarceration may result is relevant to the question whether the privilege against self-incrimination applies, *Addington* [*v. Texas*,

> 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)] demonstrates that involuntary commitment does not itself trigger the entire range of criminal procedural protections.

The *Allen* Court recognized that *Gault* was distinguishable based upon the contrast between the type of proceedings reviewed in *Gault*, i.e., punishment for juvenile offenders, and the civil commitment proceedings reviewed under *Allen*. The U.S. Supreme Court in *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804 (1979), clarified the distinction of proceedings in the juvenile justice system:

> In [In re] *Winship* [397 U.S. 358 (1970)], against the background of a gradual assimilation of juvenile proceedings into traditional criminal prosecutions, we declined to allow the state's 'civil labels and good intentions' to 'obviate the need for criminal due process safeguards in juvenile courts.' 397 U.S. at 365-366. **The Court saw no controlling difference in loss of liberty and stigma between a conviction for an adult and a delinquency adjudication for a juvenile. *Winship* recognized that the basic issue - - whether the individual in fact committed a criminal act - - was the same in both proceedings.** There being no meaningful distinctions between the two proceedings, we required the state to prove the juvenile's act and intent beyond a reasonable doubt.
>
> There are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. **In a civil commitment state power is not exercised in a**

> **punitive sense. Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution.** [other citations omitted]
>
> . . . Finally, the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question - - did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists.
> 441 U.S. at 428-429.

As a result of the findings of the Court in *Addington*, although *Allen* centered around the issue of self-incrimination in the context of a psychological examination, it is a reasonable extension of the same logic to pre-trial discovery in a civil commitment proceeding. The Court specifically distinguished the application of *Gault*, finding that it was inapplicable to civil commitment proceedings that have as their purpose treatment rather than punishment. Such is the case now presented for review to this Honorable Court.

In light of the Supreme Court's express finding that *Gault* is "plainly not good law," the Petitioners' reliance thereon is

woefully misplaced. Essentially, the Court determined that each state is free to deal with the problems presented by the *Fifth Amendment* privilege in its own way, and that a grant of use, and derivative use, immunity confers the same protection on the witness as does the privilege. This is true for Ryce Act civil detainees as well. <u>See</u> *Smith, supra* at 1030.

Arizona and California have similarly dealt with this issue in the context of their sexually violent predator laws. In *Romley*, the State sought to depose Thompson, a respondent in an action under Arizona's Sexually Violent Persons Act ("SVPA"), in order to "discover factual information; gauge Thompson's demeanor, credibility, and reaction to questioning; determine whether to call him at trial; compare his answers to prior statements; and to determine the issues for trial." *Id*. at 119. Relying on *Allen*, the Arizona appellate court held that the *Fifth Amendment* privilege was not applicable to sexually violent person proceedings and was not a proper basis for Thompson to refuse to be deposed by the State. *Id*. at 120.

Noting that the privilege against self-incrimination had been held not to apply to other civil commitment proceedings where the individual's mental condition was at issue and the purpose of the proceeding was treatment rather than punishment, the appellate court concluded that "[a]n SVP proceeding seeks a

civil commitment for the purposes of treatment rather than punishment for the underlying offense" and that the *Fifth Amendment* privilege is inapplicable to SVP civil commitment proceedings." *Id*. at 124-25. See also, *People v. Leonard*, 93 Cal. Rptr. 2d 180, 190 (Cal. App. 2000)(proceedings under Sexually Violent Predators Act were not criminal for purposes of the *Fifth Amendment* guarantee against compulsory self-incrimination); *In the Matter of Hay*, 953 P.2d 666, 679-80 (Kan. 1998)(privilege against self-incrimination does not apply to civil commitment proceedings under Kansas's Sexually Violent Predators Act).

Probably the most vital premise underlying the Petitioners' argument in the instant petition is that sexually violent predator proceedings are criminal or penal in nature. The Petitioners' premise, however, ignores the fact that the United States Supreme Court, in *Kansas v. Hendricks*, 521 U.S. 346 (1997), found a very similar sexually violent predator civil commitment statute to be civil, not criminal or penal. Petitioners' also fail to recognize this Court's holding in *Westerheide*, definitively determining that Florida's sexually violent predator law is civil, not criminal. The Petitioners' arguments to the contrary must therefore fail.

I C. Florida Application of the right

against self-incrimination in civil cases

"As to the privilege against self-incrimination, we think it beyond argument that these proceedings are civil in nature given the U.S. Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 345, 138 L.Ed.2d 501, 117 S.Ct. 2072 (1997)." *Smith*, 827 So.2d at 1029. Because a civil commitment proceeding under the Ryce Act is not a criminal case, the absolute prohibition against taking a pre-trial discovery deposition does not apply. *Id*. Although parties in a civil action retain their *Fifth Amendment* privilege against self-incrimination, a deponent is required to attend his scheduled deposition and make a specific objections to particular questions, asserting, in good faith, the privilege. As determined below by the Second District Court of Appeal, the right against self-incrimination in a sexually violent predator civil commitment proceeding is the same as a witness in any other civil litigation. A civil detainee under the Ryce Act ". . . cannot assert a blanket of protection, he should make a good faith assertion of the privilege where necessary." *In re Commitment of Sutton, et al.*, 884 So.2d at 201; *Smith*, 827 So.2d at 1029-1030.

Petitioners' continued reliance upon *State ex rel. Vining v. Florida Real Estate Commission*, 281 So.2d 487 (Fla. 1973) and

*Kozerowitz v. Florida Real Estate Commission*, 289 So.2d 391 (Fla. 1974) is erroneous. Both *Vining* and *Kozerowitz* base the rational of their decisions upon the U.S. Supreme Court's holding in *Gault*. Petitioners' improperly disregard the U.S. Supreme Court's ruling in *Allen*, holding that *Gault* is not only distinguishable in sexually violent predator civil commitment proceedings, but, is "plainly not good law." *Allen*, 478 U.S. at 373.

Civil commitment proceedings under the Ryce Act are readily distinguishable from laws that result in penal sanctions. "The state's purposes for the Ryce Act - - long-term mental health treatment for sexual predators and protection of the public from them - - are both compelling and proper." *Westerheide*, 831 So.2d at 104. As the U.S. Supreme Court in *Allen* ruled:

> The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill. *Addington*, 441 U.S. at 426.

Measures taken by the state to protect the welfare and safety of other citizens does not render the Ryce Act punitive. <u>See</u> *Allen*, *supra*.

This Honorable Court's ruling in *Westerheide* is further

instructive:

> The purpose of the rules of evidence is to promote the ascertainment of truth. The general rule provides that no person in a legal proceeding has a privilege to refuse to be a witness or to disclose any matter, except as otherwise provided in the evidence code, another statute, or the Florida or federal constitutions. See §90.501, Fla. Stat. (2001).

A civil detainee under the Ryce Act is afforded no greater rights under Florida's Civil Rules of Procedure than any other witness in a proceeding other than a criminal prosecution.[2]

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[2]For purposes of clarification, it is important to address and dispel the concerns raised by Judge Altenbernd in *In Re Commitment of Sutton*, 828 So.2d at 1082, fn. 3, in which he posits:

> Although we conclude that there are no constitutional impediments to a deposition of Mr. Sutton, it is not clear whether the Florida Legislature intended that such defendants would have rights against self-incrimination in these civil commitment proceedings. Compare §394.9155(1), Fla. Stat. (2000)(providing that rules of civil procedure apply to proceedings under the Act) with §394.13(3)(c), Fla. Stat. (2000)(providing that person designated as sexually violent predator 'must be offered' personal interview; if person 'refuses to fully participate' in interview, multidisciplinary team may proceed with recommendations without interview). It seems a bit incongruous that the defendant would not be required to participate in the evaluation of the multidisciplinary team, but then could be compelled to give a deposition.

The answer to clarify the court's concern is simple: timing. At the point the personal interview is *offered* pursuant to section 394.913(3)(c), there has been no determination of probable cause, no petition has been filed and the respondent

*Smith*, *supra*.

As a direct result of the U.S. Supreme Court's ruling in *Allen*, Respondent respectfully requests that this Honorable Court revisit its rulings in *Vining* and *Kozerowitz*, and overturn those decisions in light of the newly established law of the U.S. Supreme Court.

As a corollary, the Florida Supreme Court has expressly rejected the applicability of the *Fifth Amendment* privilege against self-incrimination in civil commitment proceedings under the Baker Act. *In re Beverly*, 342 So. 2d 481, 488-89 (Fla. 1977). The court determined that the *Fifth Amendment* privilege against self-incrimination had no applicability to statements made during a psychiatric examination:

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may well be, and most likely is, in the custody of the Department of Corrections. The preliminary screening process to flag a particular inmate for possible designation as a sexual violent predator is initially based upon his criminal conviction record. However, after a determination of probable cause, after the petition is filed, after respondent becomes a civil detainee and a civil litigation process has begun, the Florida Civil Rules of Procedure apply under section 394.9155(1), Florida Statutes. Under Florida's Rules of Civil Procedure a civil litigant can be deposed. A civil detainee under the Ryce Act stands in the same position as any other civil litigant after probable cause has been determined and the petition has been filed. Therefore, there is no incongruity, there is no discord in the sections of the Act as set out above. There is a rational, well-reasoned distinction based upon the status of the civil commitment process at the point in time during the procedure that each section is triggered.

> The *Fifth Amendment* privilege is not designed to protect any disclosures which are made by a mental patient during a psychiatric examination and which will lead only to an assessment of his mental or emotional condition. The privilege has no application in commitment proceedings so long as the proceedings do not entangle him in any criminal prosecution. *Dower v. Director, Patuxent*, *supra*; *In Re O'Neill*, 536 P.2d 552, 554 (Or. App. 1975); *Sas v. Maryland*, *supra*.
>
> The exclusion, at any subsequent criminal prosecution, of any admissions, information or evidence divulged by the person being examined, would suffice to protect his constitutional rights.

342 So. 2d at 488-89. Thus, to the extent any incriminating information is disclosed in discovery, the patient is granted immunity and the incriminating information may not be used in any subsequent criminal prosecution. The privilege, however, does not bar the disclosure of such information.

Although the holding in *Beverly* involved applicability of the *Fifth Amendment* privilege to involuntary civil commitment proceedings under the Baker Act, the reasoning of the Florida Supreme Court is equally applicable to sexually violent predator civil commitment proceedings. The Second District Court of Appeal in *Smith*, also determined that the proper way for a civil detainee to assert a *Fifth Amendment* privilege is to attend the deposition and, upon questioning, raise a good faith assertion

to the privilege. The court opined that, if the civil detainee is then compelled by the trial court to answer the question, "a clear record can be made regarding the State's grant of immunity." 827 So.2d at 1030. Therefore, although not in the context of a psychiatric evaluation as reviewed in *Beverly* the result will be the same through the proper exercise of a civil detainee's *Fifth Amendment* privilege.

_____Petitioners' reliance upon *Department of Business and Profession Regulation v. Calder Race Course*, 724 So.2d 100 (Fla. 1st DCA 1998); *Galbut v. City of Miami Beach*, 605 So.2d 466 (Fla. 3d DCA 1992); *State ex. rel. Jordan v. Pattishall*, 126 So. 147 (Fla. 1930); *Lester v. Department of Professional & Occupational Regulations*, 348 So.2d 923 (Fla. 1st DCA 1977); *Solloway v. Department of Professional Regulation*, 421 So.2d 573 (Fla. 3d DCA 1982) is likewise misplaced. The court in *Calder* relied upon the statutory language itself in that case which provided for alternative results that could be either "administrative, civil or criminal in nature." Clearly, the statutory language itself provided for the potential of a criminal prosecution. *Galbut*, *Lester*, *Gordon*, *Solloway* and all the cases footnoted by Petitioners reflect distinguishable cases in which the courts were faced with a statute or regulation that provided, on its face, for "penalties" or

"sanctions" that determined them to be "penal in nature." See Petitioners' Initial Brief, pp. 13-15.

Petitioners' sweeping conclusion, unsupported by case law or logic, that "[t]he penal nature of the regulatory statutes at issue in the above cases is insignificant compared to the penal nature of §394.910, *et seq.*, Florida Statutes," once again demonstrates Petitioners' total disregard of the current state of the law, both state and federal. See Petitioner's Initial Brief, pg. 15. As the U.S. Supreme Court in *Hendricks* advised:

> The Court has recognized that an individual's constitutionally protected interest in avoid-ing physical restraint may be overridden even in the civil context:
>
>> 'The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.' *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 49 L.Ed. 643, 25 S.Ct. 358 (1905).
>
> Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose

> a danger to the public health and safety. . . . It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty. [citations omitted]

521 U.S. at 356-57.

The Ryce Act does not provide for future criminal prosecutions, nor does it provide for sanctions or an assessment of penalties. Further, as the Second District Court in *Smith* found, if information sought by the state attorney in a civil commitment pre-trial deposition is objected to as seeking privileged information, then, the proper mechanism for review is to state the objection on the record for review and the future determination of possible immunity if the answer is compelled. This logic is directly aligned with the U.S. Supreme Court in *Allen*, finding:

> This Court has never held that the Due Process Clause of its own force requires application of the privilege against self-incrimination in a noncriminal proceeding, where the privilege claimant is protected against his compelled answers in any subsequent criminal case. We decline to do so today.

478 U.S. at 374.

As this Court has determined, the Ryce Act is civil in nature. *Westerheide*. The taking of a pre-trial deposition in compliance with the Florida Rules of Civil Procedure does not

convert a civil commitment proceeding into a criminal prosecution. Petitioners have no *Fifth Amendment* privilege against being deposed in the civil commitment proceeding.

### I D. The Ryce Act Does Not Impose Sanctions

Civil commitment in Florida has never been regarded as punishment, nor is civil commitment properly defined as a 'sanction'. As the Supreme Court of the United States found in *Hendricks*, civil commitment is a "classic example of non-punitive detention." 521 U.S. at 363. In *Westerheide*, this Court specifically found:

> The Legislature has determined that these individuals pose a risk to society because there is a high likelihood that they will engage in repeat acts of predatory sexual violence. See: §394.910, Fla. Stat. (2001). 'Incapacitation may be a legitimate end of the civil law' and does not necessarily lead to the conclusion that the Ryce Act is punitive.

*Westerhiede,* 832 So.2d at 102; citing *Hendricks*, 521 U.S. at 365-66. Petitioners' argument is without merit.

## ISSUE II

DOES THE RYCE ACT VIOLATE EQUAL PROTECTION BY CREATING DIFFERENT CLASSES OF MENTALLY ILL INDIVIDUALS REQUIRING TREATMENT? (RESTATED)

Classifications created by the Ryce Act and the Baker Act, different classes of mentally ill individuals, are not suspect

classes and are not similarly situated for purposes of an equal protection claim. §394.910, Fla. Stat.

Petitioners have failed to demonstrate express conflict in accordance with Rule 9.030(a)(2)(A)(iv) relating to a denial of equal protection under the law to warrant a granting of jurisdiction by this Court. This matter has already been definitively addressed by this Court in *Westerheide*. As determined by this Court the Ryce Act does not violate due process based upon the recognition of a narrowly-defined class of citizens that represent a real and direct societal threat and who are subject to special procedures of involuntary civil commitment separate and distinct from those applicable under the Baker Act. *Westerheide*, 831 So.2d at 111.

Further, sexually violent predators are defined by the legislature as a small but extremely dangerous number of individuals who do not have a mental disease or defect that renders them appropriate for involuntary treatment under the Baker Act. The Florida Rules of Civil Procedure apply in Ryce Act proceedings. §394.9155(1), Fla. Stat. The legislature specifically provided:

> In *contrast to persons appropriate for civil commitment under the Baker Act*, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities, and those features render them

> likely to engage in criminal, sexually violent behavior. The Legislature further finds that the likelihood of sexually violent predators engaging in repeat acts of predatory sexual violence is high. *The existing involuntary commitment procedures under the Baker Act for the treatment and care of mentally ill persons are inadequate to address the risk these sexually violent predators pose to society.*

§394.910, Fla. Stat. This recognized and well-reasoned distinction between those individuals subject to Baker Act proceedings and those individuals determined to be sexually violent predators is neither arbitrary nor artificial. Simply put, those individuals subject to Baker Act proceedings are not similarly situated as those determined to be sexually violent predators. The United States Supreme Court in *Hendricks*:

> recognized that an individual's constitution-ally protected interest in avoiding physical restraint may be overridden even in the civil context:
>
> > 'The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.' *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 49 L.Ed. 643, 25

S.Ct. 358 (1905).

> Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety.

*Hendricks*, *supra* at 356-57.

Petitioners' arguments raise no points of conflict or new issues that have not already been resolved by the United States Supreme Court and this Honorable Court regarding their alleged due process claims. See generally, *Hendricks*, *supra*; *Allen*, *supra*; *Westerheide*, *supra*. Consequently, Petitioners' should be denied.

II. A. Deposition of the State Attorney in a civil commitment trial is not the deposition of the State, counsel for the Petitioner is not a party-in-interest for purposes of civil discovery

This new sub-issue is not properly before this Court for review. This issue was not raised below and is now being presented for the first time to this Court upon appeal. As such, this issue has not been properly preserved and this Court should decline to address this issue as presented by Petitioners. *Trushin v. State*, 1981 Fla. Lexis 2836 (July 30, 1981).

Should this Court disagree with the foregoing argument, the

Respondent alternatively argues that the court in *State v. Donaldson*, 763 So.2d 1252 (Fla. 3d DCA 2000) properly determined that a civil detainee under the Ryce Act is not entitled to take the deposition of the state's counsel. "Taking the deposition of opposing counsel in a pending case is an extraordinary step which will rarely be justified." *Id.* at 1254. The Petitioners' ability to depose the multidisciplinary team, as well as any other experts or witnesses appearing on behalf of the state, sufficiently provides a civil detainee the ability to fully prepare for the civil commitment trial in accordance with the applicable Florida Rules of Civil Procedure. Petitioners' argument is nonsensical at best, and cannot demonstrate disparate treatment. Notably, there is no provision for the state to depose the public defender or any other private counsel representing a civil detainee. This claim should be dismissed or, alternatively, denied.

## ISSUE III

DOES THE RYCE ACT VIOLATE A CIVIL DETAINEE'S RIGHT TO PRIVACY UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS? (RESTATED)

Civil commitment proceedings under the Ryce Act do not violate a civil detainees right to privacy. Petitioners assert that the taking of their depositions in pre-trial discovery in the civil commitment proceedings violates their right to privacy. However, the right to non-disclosure of intimate

personal information has not been deemed to be a fundamental right in the context of sexual predator civil commitment proceedings. In *In re Detention of Campbell*, 986 P.2d 771 (Wash. 1999), Campbell, a detainee under the Washington sexually violent predator civil commitment law, argued that his privacy rights were violated by the disclosure of the intimate personal information contained in his court file. The Washington Supreme Court rejected Campbell's claim and held that his right to non-disclosure of such information was not fundamental and could be diminished when there is a legitimate state interest at stake. The court held that the state has a legitimate interest in public safety, to which sex offenders pose a threat, and this justifies sex offenders' reduced expectation of privacy. *Campbell*, 986 P.2d at 778. Under this rationale, the Petitioners' privacy interests are likewise outweighed by the State's interest in public safety.

Upon review below, the district court, when considering Petitioners' privacy arguments, ruled:

> Although a person's thoughts may be protected as private, in the context of these proceedings, any right these petitioners may have to keep their thoughts private is likewise outweighed by the State's interest in obtaining the information sought by this question. See *Shaktman v. State*, 553 So.2d 148 (Fla. 1989)(noting that the right of privacy demands that individuals be free from uninvited interference into their thoughts

> and actions unless the intrusion is warranted by a compelling state interest).

*Sutton*, 884 So.2d at 205. The court further determined:

> The petitioners have not offered any explanation regarding how these questions intrude into an area in which they have a legitimate expectation of privacy, nor have we been able to deduce one in light of the fact that section 394.921, Florida Statutes (2002), allows the disclosure of this type of information to, among others, the state attorney.

*Sutton*, 884 So.2d at 204. The fact that Florida has a specific constitutional provision protecting citizens' right to privacy, does not alter this conclusion. Art. I, § 23, Fla. Const. See *Smith*, *supra*.

In comparison, California also protects its citizens' right to privacy in its state constitution:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Art. I, § 1, Cal. Const. In *People v. Martinez*, 105 Cal. Rptr. 2d 841 (Cal. App. 2001), Martinez argued that his right to privacy had been violated because the deputy district attorney was allowed to examine his psychological records obtained for purposes of proceedings under California's Sexually Violent Predators Act ("SVPA"). The appellate court noted that, to prove a violation of the privacy guarantee contained in the

California Constitution, "one must establish a legally protected privacy interest, a reasonable expectation of privacy in the circumstances, and conduct constituting a serious invasion of the privacy interest." *Martinez*, 105 Cal Rptr. 2d at 846-47. However, "even if one establishes these elements, a constitutional violation may still not be found where the invasion is justified by competing or countervailing privacy and nonprivacy interests." *Id*. at 847. The court in *Martinez* further found that:

> *Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest.* Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. . . . Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.

*Id*. at 850.

Although a person's medical history, including psychological records, is one of the more intimate and personal areas protected by the right to privacy, the appellate court held that a sex offender's right to privacy was not violated in proceedings under the SVPA. Martinez had a diminished expectation of privacy concerning his psychological records and the deputy district attorney's examination of those records constituted only a minimal invasion. Further, the invasion was deemed justified by the compelling public interest underlying

the SVPA - which is the identification, evaluation, and commitment of potential sexually violent predators - and by the State's need to make an independent and informed decision whether or not to seek commitment of a particular individual. *Id*. at 849-51.

Likewise, in the instant case, the Petitioners' thoughts and ideas, including any deviant sexual thoughts or fantasies, are relevant to the issue whether they are sexually violent predators. Although necessarily invasive, the assistant state attorney is justified in pursuing these areas of inquiry given the compelling state interest in identifying, evaluating and committing sexually violent predators. Inquiry into these matters is necessary to develop a comprehensive, accurate, and up-to-date impression of the Petitioners.

The Sexual Predator: Law, Policy, Evaluation and Treatment, (Civic Research Institute: Kingston, N.J. 1999) (eds. Anita Schlank and Fred Cohen), contains a chapter authored by Harry M. Hoberman, a clinical and forensic psychologist who is on the faculty of the University of Minnesota Medical School. His chapter in the treatise, entitled "The Forensic Evaluation of Sex Offenders in Civil Commitment Proceedings," details the materials which any evaluating mental health professional should review and consider. Thus, Hoberman states that a "principle of

forensic psychological evaluations is the review of all relevant records made available for the purposes of the evaluation and report." *Id.*, Chapter 7, at 7-11. Furthermore, "[t]he types of records that should be made available to an evaluator include, but are not limited to:

> Criminal investigation reports, interviews with both offenders and victims about sexual offenses, including those that remain allega-tions and those that result in convictions;
>
> Mental health records and previous assess-ments, including actual test results or interpretive reports;
>
> Legal proceedings where charged sexual offenses were adjudicated;
>
> Pre-sentence investigations, parole, and probation reports and records;
>
> Correctional system records, including those pertaining to education, work, general mental health, medical, discipline, disposition plans and specific sex offender evaluations and treatment records; and
>
> Juvenile records of criminal behavior and correctional and treatment experiences, particularly if a history of juvenile sex offending exists.

*Id.* at p. 7-12. Hoberman details the uses to which such records may be put, as psychological significance attaches to contradictory information which the evaluated person gives to other individuals over a period of time. Additionally, the records "often demonstrate that sex offenders' perceptions of

themselves have often differed markedly from those who have evaluated them." *Id.* "Third, the records can be critical to the determination of a respondent's sexual offending history and the presence of psychiatric conditions; they are also essential for providing the basis for key actuarial rating scales for future dangerousness and for describing these and other elements which can provide the basis for a determination of the relative probability of sexual reoffending." *Id.* The documentary history then takes on a greater role when the clinical interview is conducted, serving as a red flag for possible falsehoods by the interviewed person, and serving to highlight psychologically significant minimizations or rationalizations. *Id.* at pp. 7-22, *et seq.* Absent such documentation, the expert would be limited to "self-reporting" by the interviewed person - an individual who has an obvious interest in falsifying events to manipulate the course of the evaluation.

Beyond such documentary records, the author also asserts that experts conducting forensic evaluations should rely on information from "collateral sources" as well. *Id.* at p. 7-12. "Collateral information is usually obtained from persons who have varying degrees of familiarity with the party, particularly in capacities that relate to the psychological questions at hand." *Id.* at 7-13. Hoberman continues:

> The forensic evaluation of PPSPs almost

> always involve substantial amounts of records, which are, in effect, collateral sources. However, the evaluator may feel the need to contact particular individuals, including victims, treatment providers, and correctional case managers or parole/probation officers to obtain additional information or clarifica-tions of such material in the records. *Ibid*.

Clearly, the state has a compelling interest that overrides an individual civil detainee's right to privacy in this limited context. As such, the pre-trial discovery is permissible and warranted to fully prepare the state's case in the civil commitment proceeding. Petitioners' claims should be denied and the rulings of the trial court and the Second District Court of Appeal should be affirmed.

## ISSUE IV

> WHETHER THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY PERMITTING THE STATE TO TAKE THE PRE-TRIAL DEPOSITION OF CIVIL DETAINEES UNDER THE RYCE ACT IN ACCORDANCE WITH THE FLORIDA RULES OF CIVIL PROCEDURE? (RESTATED)

Although the Petitioners improperly attempted to assert blanket immunity in direct contravention of the holdings of the Second District Court of Appeal, the trial court did conduct a thorough review of the proffered questions and stated objections thereto.[3] With regard to matters granting or limiting discovery,

[3]See generally *In re Commitment of Smith*, 827 So.2d 1026 (Fla. 2d DCA 2002); *In re Commitment of Singleton*, 829 So.2d

the trial court has the discretion to make such rulings. Further, '[t]he trial court has the ultimate responsibility to determine whether the witness's refusal to answer questions is in fact justifiable under the privilege.' *In re Commitment of Sutton, et al.*, 884 So.2d at 202, citing *M.S.S. v. DeMaio*, 503 So.2d 1384, 1386 (Fla. 5th DCA 1987). "The trial court has broad discretion to determine what answers provided in discovery may incriminate or tend to incriminate a litigant." *Ibid.*, citing *DeLisi v. Smith*, 423 So.2d 934 (Fla. 2d DCA 1982).

Considering this scope of review, the district court below further determined:

> The petitioners have failed to demonstrate that the trial court departed from the essential requirements of law in its rulings on their *Fifth Amendment* claims. The record reflects that the petitioners presented no argument to the trial court regarding most of their *Fifth Amendment* objections. With respect to the objections that they did argue, the trial court properly limited the scope of inquiry where the questions on their face appeared to call for a potentially incriminating response. To the extent that the trial court did not sustain the petitioners' objections, it was with respect to questions that on their face did not appear to call for an incriminating response. The petitioners' conclusory argument that the responses to those

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402 (Fla. 2d DCA 2002); *In re Commitment of Beikirich*, 828 So.2d 421 (Fla. 2d DCA 2002); *In re Commitment of Santiago*, 839 So.2d 788 (Fla. 2d DCA 2003).

> questions 'may well include' or 'could easily include' incrimina-ting information is not adequate to meet their burden to demonstrate that there is a realistic possibility that the answer to those questions could be used to convict them of a crime. [citations omitted]

In reviewing the specific propounded discovery questions and Petitioners' objection thereto, the court further ruled:

> The petitioners have failed to demonstrate that any irreparable harm will come to them from disclosure of the information they contend is irrelevant. Nor have the petitioners met their burden to demonstrate that they will be harmed by the discovery they claim is burdensome. An objection claiming an undue burden in responding to discovery requests must be supported by record evidence, such as an affidavit detailing the basis for claiming that the onus of supplying the information or documents is inordinate. *Topp Telecom, Inc. v. Atkins*, 763 So.2d 1197 (Fla. 4th DCA 2000). The petitioners did not make such a showing; instead, they relied on unsupported and conclusory claims of undue burden and expense.

*In re Commitment of Sutton, et al.*, 884 So.2d at 202-203. In light of these reviews, by both the trial court and the district court, Respondent makes the following arguments regarding each propounded pre-trial discovery question:

**IV A. <u>Question Group 1; Questions Regarding Personal Background Information</u>**

IV A.(1) <u>Questions 1a - 1k, re: Smith, Beikirich, Singleton, Rhoades and</u>

DeMarco[4]

1a. What is your date of birth?

1b. Where were you born?

1c. In what towns have you lived?

1d. What is your educational background?

1e. Do you have any kind of special professional training?

1f. What kinds of jobs have you held during your lifetime?

1g. Are you now or have you ever been married? If so, to whom and when?

1h. Have you ever gone by any name other than ___________?

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[4] The proposed deposition Questions and objection thereto were considered at a hearing held on May 27, 2003 before the Honorable Robert Bennett in *In re Commitment of John R. Beikirich*; Case No. 2001-CA-2681, *In re Commitment of Jerry Wade Rhoades*; Case No. 2001-CA-3898, *In re Commitment of Keith Norwood Smith*; Case No. 2001-CA-13204, and *In re Commitment of Edward A. Singleton*; Case No. 2000-CA-0094 in the circuit court of the Twelfth Judicial Circuit, in and for Sarasota County, Florida. The proposed deposition Questions and objections thereto in *In re Commitment of George Samuel DeMarco*; Case No. 2003-CA-2802, were heard in a separate hearing held before Judge Bennett on June 10, 2003. The court advised counsel that, for purposes of his ruling on the specific proposed Questions and objections, he was directing them to rely upon the transcripts from the five previous cases in which he had reviewed the individual proposed deposition Questions, that his ruling were consistent with those prior rulings. Judge Bennett did state this adoption of record would be with one proviso: ". . .absent new argument from the defense as to any specific Question." See DeMarco, R. 0238. Counsel raised no new argument to any of the specific questions. See DeMarco, R. 0239-40.

1i. What are the names of your biological parents? Are they living or deceased?

1j. Do you have any siblings? If so, what are their names and current addresses?

1k. Do you have any children?

See Smith, R. 0075-0078; Beikirich, R. 0076-0079; Singleton, R. 0081-0084; Rhoades, R. 0075-0078; DeMarco, R. 0078-0080.

The State's proffered deposition questions are relevant to the issues presented during the civil commitment trial. It is relevant to learn information concerning the civil detainee, his familial support, his familial background, and his educational and work history to enable the jury to make a determination about the future care and treatment of the detainee. The trial court, in considering the relevance of this section of questions, stated that:

> whether or not a person's personal and professional support system would be relevant to the issue of whether or not they should be confined in a secure facility for long term, control, care and treatment. Obviously there are certain types of mental abnormalities and personality disorders people are still able to function within various types of structured environments, one of which has to do with -- some of which relate to family, work. That sort of thing.
>
> You don't think the State has an interest in determining with each person, not just with these folks, but with each person, that

> comes to us at one of these kinds of cases whether or not community support and involvement with the person would be something that needed to be addressed?

See Smith, R. 0118.[5] The trial court after hearing further argument of counsel for the Petitioner and the State ruled: "I will overrule the objections to Questions 1a through k, and we'll have to see how this plays out at trial, whether or not the questions are asked. But for purposes of discovery, and whether or not they are relevant or material with regard to an individual respondent, that's something that we'll have to determine. But certainly for discovery purposes the Court thinks those are permissible issues." See Smith, R. 0120. The information requested in these questions is not privileged under to the *Fifth* and *Fourteenth Amendments* of the U.S. Constitution. Further, the Petitioners' right to privacy, due process of law and equal protection guaranteed by the U.S. Constitution, and

[5]For purposes of brevity in review given the extensive, yet repetitive nature of the records below, the cite to the record for Petitioner Smith is the same transcript of the hearing before Judge Bennett on May 27, 2003, since the hearing was consolidated for Petitioners Smith, Beikirich, Singleton and Rhoades. Although a separate hearing was held for Petitioner DeMarco, the trial judge advised that his rulings from the main hearing for Petitioner Smith, et al., would be adopted for purposes of the propounded questions, objections and rulings thereon. Consequently, the record cite to "Smith, R. ___" is intended to include argument for all Petitioners except Petitioner Sutton. Petitioner Sutton has different record cites which are noted accordingly in this Answer Brief.

the Florida Constitution has not been violated as those rights are accorded to civil commitment detainees. The propounded inquires are neither irrelevant and immaterial, nor are they cumulative. As the plain language of Florida Rule of Civil Procedure 1.280(b)(1) provides:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action. . . . It is not a ground for objection that the information sought will be inadmissable at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The Respondent is not bound to accept the Petitioners' stipulations as to prior convictions. Especially in the context of a sexually violent predator civil commitment proceeding, the prior convictions extend further than the adjudication or judgment itself. Critically, the nature of the sexually violent acts themselves are part of the civil commitment review process needed to determine the pivotal question of whether or not a civil detainee is a sexually violent predator and whether he can control his behavior. Consequently, it is not only necessary, it is required that the court look beyond the actual conviction to the acts themselves. The Ryce Act provides that in the civil commitment process the "court may consider evidence of prior behavior by a person who is subject to proceedings" under the Act. §394.9155(4), Fla. Stat.

Petitioners' argument that pre-trial discovery should be excluded because psychological evaluations were conducted by the state's experts is without merit. Again, timing is an issue to be considered. The initial evaluations are done at the pre-probable cause stage of the civil commitment process. During the time between the evaluations and rendering of the expert opinions and the civil commitment trial itself there may have been a change of circumstances or additional information may have become available that requires inquiry of the civil detainee to fully address the elements at trial. See also *Romey*, *supra*. To disallow this basic litigation tool would be akin to an open invitation to trial by ambush, a thing best left in the past.

As the court below determined, Petitioners' failed to support their claim that the discovery sought by the state was unduly burdensome; rather, ". . .they relied on unsupported and conclusory claims of undue burden and expense." *Sutton*, 884 So.2d at 203.

The trial court correctly overruled the Petitioners' objections to Questions 1a through 1k as set forth above. Absent a showing of an abuse of discretion, the trial court's determination must be deemed to be correct. See *Gray v. State*, 640 So. 2d 186 (Fla. 1st DCA 1994), and *Woodson v. State*, 739

So. 2d 1210, (Fla. 3rd DCA 1999).

**IV B. Question Group 2; Questions Regarding Prior Criminal Record Of Detainee**

IV B.(1) Questions 2a - 2b, re: Smith, Beikirich, Singleton, Rhoades and DeMarco

2a. Were you convicted of the following crimes: Index offenses listed pertaining to each civil detainee in sexually violent predator peti-tion. (Appendix #__) If so, describe your understanding of the factual basis for each charge, the nature of the disposition (i.e. plea or trial), and the sentence imposed (including any subsequent violations of parole or probation).

2b. If you plead to the afore-mentioned criminal cases, did you enter a plea of guilty or no contest? Did you enter a plea because you thought that you were actually guilty of the crimes alleged or because you thought it was in your best interest to enter a plea.

See Smith, R. 0078-0079; Beikirich, R. 0079-0080; Singleton, R. 0084; Rhoades, R. 0078; DeMarco, R. 0081.

After listening to argument of both counsel, the trial court overruled the Petitioners' objections to Question 2a and 2b. See Smith, R. 0127.

IV B.(2) Questions 1 - 3, re: Sutton[6]

[6]Deposition questions propounded by the State Attorney in *In re Commitment of Duane Edward Sutton*; Civil Action No. 14-2001-CA-221, in the circuit court of the Twelfth Judicial Circuit, in and for DeSoto County, Florida, were reviewed at a hearing held on May 13, 2003 before the Honorable Robert Bennett. See Sutton, R. 0096-0178.

Questions 1 and 3 originally propounded to Petitioner Sutton, were subsequently withdrawn by the state attorney; consequently, are not at issue for purposes of this review. See Sutton, R. 0157-0161.

Question 2 read:

> Were you convicted of two counts of Attempted Sexual Battery of a Child under 12 years in DeSoto County Criminal Case #94-302-F on December 15, 1995? If so, describe the factual basis for that charge, the nature of the disposition and the sentence that was imposed.

Question 2 was permitted by the trial court below. However, this question was limited by the judge accordingly: "but require an answer that it be limited specifically to the two incidents for which he was charged and convicted." See Sutton, R. 0159-0160. Importantly, it is noted that this question has not been properly preserved for appeal, this question was conceded by Petitioner below during the following discussion with Judge Bennett:

> COURT: Okay. How about the second Question?
>
> STATE: The second Question would be: Were you convicted of two counts of attempted sexual battery of a child under 12 by person over 18 in DeSoto County Criminal Case No. 94-302CF on December 15th, 1995.
>
> COURT: That one - - well, I don't know. I would never deign to speak for

Mr. Cosden. I believe that that one you indicated was not at issue.

COSDEN: That is correct, Your Honor. It's not an issue, the best evidence would be the judgment that Judge Parker issued on June 14th, 1996 and the sentence that's attached to it.

COURT: Okay.

COSDEN: I'm not going to argue about that.

See Sutton, R. 0157-0158. Although there followed some additional clarification as to extent of the question, the question itself was not properly objected to by Petitioner below. See Sutton, R. 0159-0161. Consequently, any objection to Question 2b was effectively waived and is not properly presented for review to this Honorable Court. *Trushin*, *supra*.

IV B.(3) Question 2c, re: Smith, Singleton, Beikirich, Rhoades, DeMarco

2c. Please describe your familial relationship, if any, with the victims and other witnesses involved in the aforementioned criminal cases.

See Smith, R. 0079; Beikirich, R. 0080; Singleton, R. 0085; Rhoades, R. 0079; DeMarco, R. 0082.

As to Question 2c, the trial court allowed the question, limiting it by instructing that the court would "permit them [the State] to establish whether the Respondent is related by

blood, or marriage to the particular witness." See Smith, R. 0128.

IV B.(4) Question 4, re: Sutton

As phrased, Question 4, is as follows:

> 4. Please describe your relationship with the witnesses involved in the DeSoto criminal case, including but not limited to: John Paul Kennedy, Jr., Mary Anne Kennedy, Helen Frasier, and Anne Frasier.

The trial court also allowed Question 4 to be asked. See Sutton, R. 0162, 0074.

Petitioners' claim that this question sought information that may be internal to the family, therefore, invaded their right to privacy. Upon review, the district court found that Petitioners failed to demonstrate that they have a legitimate expectation of privacy with respect to this type of information:

> We find no merit in this contention because the trial court limited the State's inquiry to whether the petitioners are related by blood or marriage to the victims or witnesses. Given this information, there is no possibility that the question might seek information that is 'internal to the family.'

*Sutton*, 884 So.2d at 204.

IV B.(5) Questions 2d - 2f, re: Smith, Beikirich, Singleton, Rhoades, DeMarco.

2d. Did you have nay kind of physical or sexual

contact with any of the victims in the afore-mentioned criminal cases? If so, please describe the circumstances of that physical or sexual contact?

2e. Did you ever make a statement to anyone (including law enforcement about your involvement in the afore-mentioned criminal cases? If so, please describe the contents of your statement, the person(s) to whom it was made, and the circumstances under which it was made.

2f. Did you ever admit to having sexual contact with any of the victims or other witnesses in the afore-mentioned criminal cases? If so, please describe the admission, the person(s) to whom it was made, and the circumstances under which it was made.

See Smith, R. 0079-0080; Beikirich, R. 0080-0081; Singleton, R. 0085-0086; Rhoades, R. 0079-0080; DeMarco, R. 0082-0083.

The trial court allowed Questions 2d, 2e, and 2f to be answered but limited the questioning to "the specific crime[s] charged in the information." See Smith, R. 0128-0129.

IV B.(6) Questions 5 - 7, re: Sutton

As phrased, Questions 5, 6 and 7, read as follows:

5. Did you have any physical contact with any of the witnesses in the aforementioned DeSoto County criminal cases? If so, please describe the circumstances of that physical contact? Did you have any kind of physical contact with any of the witnesses outside of the context of the DeSoto County criminal cases.

6. Did you ever make a statement to anyone (including a law enforcement officer) about your involvement in the aforementioned DeSoto County criminal case? If so, please describe the contents of your statement, the person(s) to whom it was made, and the circumstances under which it was made.

7. Did you ever admit to having sexual contact with any of the witnesses in the aforementioned DeSoto County criminal cases? Please describe the admission and the person to whom it was made and the circumstances under which it was made.

See Sutton, R. 0074-0075.

As to Question 5, the trial court permitted inquiry as to the physical contact that is alleged in the charging document. See Sutton, R. 0165. As to Questions 6 and 7, after hearing arguments by both counsel, the trial court permitted inquiry only to the physical contact alleged in charging documents. See Sutton, R. 0165-0166.

These limitations placed upon the line of questioning sufficiently restricted the area of inquiry to protect Petitioners' claims of self-incrimination as to other, uncharged crimes. Upon review below the district court considered and rejected Petitioners' claims of work product and attorney-client privilege finding that they had failed to meet their burden to establish the existence of the privilege in relation to the questions posed by the state. *Sutton*, 884 So.2d at 205.

IV B.(7) Question 2g, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

2g. Do you feel any kind of remorse or sorrow or guilt as a result of your actions in the afore-mentioned criminal cases?

See Smith, R. 0080; Beikirich, R. 0081; Singleton, R. 0086; Rhoades, R. 0080; DeMarco, R. 0083.

The trial court allowed Question 2g and further opined:

> . . .this could have an important bearing on the issue of mental abnormality or personality disorder. The jury has to decide if these men are sexually violent predators. Again just as an example, they may have to decide -- well, remorse or guilt, I feel bad for what I did or I don't give a damn. To me that's something that the trier of fact ought to be allowed to take into account. And I believe whether or not a person is remorseful or feels regret, guilt over what he or she may have done, is something that the trier of fact out to be allowed to consider. See Smith, R. 0132-0133.

IV B.(8) Question 8, re: Sutton

As phrased, Question 8, read as follows:

8. Do you feel any kind of remorse, sorrow, or guilt as a result of your actions in the aforementioned DeSoto County cases?

See Sutton, R. 0075-0076.

After argument by both counsel concerning Question 8, the trial court ruled that the trier of fact could appropriately consider "lack of remorse, sorrow or guilt, even in the absence

of a diagnosis involving sociopathy or psychopathy" and "for purposes of discovery, I think it's relevant. I think it's an appropriate question." See Sutton, R. 0116-17.

The district court found that:

> Although a persons's thoughts may be protected as private, in the context of these pro-ceedings, any right these petitioners may have to keep their thoughts private is likewise outweighed by the State's interest in obtaining the information sought by this question. See *Shaktman v. State*, 553 So.2d 148 (Fla. 1989)(noting that the right of privacy demands that individuals be free from uninvited interference into their thoughts and actions unless the intrusion is warranted by a compelling state interest).

*Sutton*, 884 So.2d 205. This line of questioning is relevant and is not thwarted by Petitioners' argument that because the psychological evaluations had already been conducted the state was limited in making such inquires.

IV B.(9) Questions 2h - 2j, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

2h. Have you ever been arrested for any other kinds of crime (including juvenile crimes) that has not yet been previously discussed? If so, describe the date, location and circumstances underlying your arrest.

2i. Have you ever been prosecuted for any other kinds of crime (including juvenile crimes) that has not been previously discussed, If so, describe the date, location, and circumstances underlying your prosecution.

2j. Have you ever been convicted of any other kind of crime (including juvenile crimes) that has not yet been previously discussed? If so, describe the date, location and circumstances underlying your conviction.

See Smith, R. 0080-0081; Beikirich, R. 0081-0082; Singleton, R. 0086-0087; Rhoades, R. 0080-0081; DeMarco, R. 0083-0084.

As to Question 2h, dealing with the other crimes that Petitioners may have been arrested for in their past, the court ruled that the State could ask the question. The trial court also instructed the Petitioners to answer Questions 2i and 2j. The trial court further stated:

> This is a discovery deposition. In a discovery deposition, it's not uncommon to ask a lot of Questions and elicit a lot of infor-mation, which may or may not be admissible at trial.
>
> That's not the issue in a discovery deposition. There is nothing that is privileged. The issue is whether or not it independently is relevant or could lead to the discovery of relevant evidence." See Smith, R. 0136-37.

IV B.(10) Questions 9-11, re: Sutton

As phrased, Questions 9, 10 and 11, read as follows:

9. Have you ever been arrested for any other kind of crime that has not yet been previously discussed?

10. Have you ever been prosecuted for any other kind of crime that has not yet previously discussed. If so, describe the date, location and circumstances underlying your

prosecution.

> 11. Have you ever been convicted of any other kind of crime that has not yet been previously discussed? If so, describe the date, location and circum-stances underlying your conviction.

See Sutton, R. 0076-77.

After lengthy discussion and argument, the trial court sustained the Petitioner's objections as to Questions 9 and 10 and overruled the objection as to Question 11. See Sutton, R. 0119-21. Consequently, Questions 9 and 10 are not properly presented before this Court for appellate review.

The Petitioners' objections to these questions and corresponding offers to stipulate to the existence of their prior convictions ignores the purpose served by disclosure of the details of prior offenses, and specifically, the Petitioners' versions of those events. It is not the mere existence of a prior conviction that is at issue in a sexually violent predator commitment proceeding. While the Act does require the State to prove the existence of a prior qualifying conviction for a sexually violent offense, the State must also prove that the person has a mental abnormality or personality disorder and that the mental condition renders the person likely to commit further sexually violent offenses. The facts of prior offenses - the manner in which they were perpetrated, the level

of violence, the age and gender of the victims, to name just a few - are all matters which are relevant to the proof of the mental condition and the current and future dangerousness. As such, the State can not be compelled to accept a stipulation to the existence of a mere conviction.

Moreover, as in *Romley* the State, in the cases now upon review, seeks to depose the Petitioners in order to discover additional factual information; gauge the Petitioners' individual credibility, demeanor, and reaction to questioning; determine whether to call them at trial; compare answers to prior statements; and to determine the issues for trial. The Arizona court determined that these were legitimate grounds for deposing the respondent. *Id*. at 120-21.

The Petitioner claims that the information requested is already known to the State as it was previously disclosed in the multidisciplinary team's evaluations. Notably, the respondent in *Romley* raised the identical claim that his deposition would only produce duplicate information. The Arizona appellate court rejected this argument, stating "[w]e are unwilling to assume that these facts will duplicate any facts sought in the mental health examinations. But even if they are, we are unwilling to concede that the state cannot pose questions in a deposition that may overlap with those posed in a mental examination." *Id*.

at 121. Thus, Petitioners' argument fails.

As to the Petitioners' *Fifth Amendment* concerns, that issue was previously addressed in this response. The State would add that no *Fifth Amendment* privilege remains with respect to the offenses for which Petitioners have been convicted and sentenced. See *Henderson v. State*, 543 So. 2d 344 (Fla. 1st DCA 1989)(requiring defendant to admit responsibility for criminal behavior in sex offender treatment program does not violate defendant's right against self-incrimination, in that any admission of the commission of the offense occurs after the defendant's conviction and *Fifth Amendment* protections apply prior to conviction); *State v. Harris*, 425 So. 2d 118 (Fla. 3d DCA 1982)(co-defendant who had pleaded guilty to, and been sentenced on, charges could no longer invoke privilege against self-incrimination with respect to such crimes); *Dearing v. State*, 388 So. 2d 296 (Fla. 3d DCA 1980)(privilege against self-incrimination no longer exists as to alleged crimes for which defendant could not be subsequently prosecuted such as in situation in which a defendant has previously pled guilty and has been sentenced for offense in question). To the extent any incriminating information is compelled regarding prior uncharged criminal offenses is disclosed during the Petitioners'

depositions, it is Respondent's argument that the State would be precluded from using such evidence at any subsequent criminal prosecution. *Beverly*, *supra*; See also, *Griego v. Superior Court*, 95 Cal. Rptr. 2d 351 (Cal. App. 2000)(prosecutor's questioning of defendant in sexually violent predator commitment proceeding deposition resulted in immunity as to previously uncharged offense).

Additionally, any admissions by Petitioners would be admissible under section 90.803(18) as an admission by a party opponent. None of the cases cited by the Petitioners to support their argument are applicable because they involve non-party witnesses. In addition, to the extent the Petitioners' authorities refer to the admissibility of "extra-judicial" statements, an answer given in a deposition regarding a matter is not considered an "extra-judicial" statement. Therefore, the Petitioners were properly ordered by the trial court to answer these questions in their depositions.

**IV C. Question Group 3; Questions Regarding Civil Detainee's Incarceration**

IV C.(1) Questions 3a - 3e, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

3a. How many times have you been imprisoned in your life? Describe the approximate dates and length of confinement.

3b. Describe your adjustment in prison.

3c. Have you ever received any disciplinary reports (DRs) while in prison? If so, for what?

3d. Did you pursue any vocational training while incarcerated in prison?

3e. Did you attend school while in prison?

See Smith, R. 0081-0082; Beikirich, R. 0082-0083; Singleton, R. 0087-0088; Rhoades, R. 0081-0082; DeMarco, R. 0084-0085.

After hearing argument of both counsel, the trial court overruled the objections posed in section 3 of the deposition questions regarding the Petitioners' incarceration. See Smith, R. 0140. The trial court did not allow the State to ask if the Petitioner committed a crime not charged in prison but allowed all other questions. The court stated that the Petitioners' lives in prison can be important. The court opined: "it can be significant in terms of a person's ability to accept guidance and treatment and to conform to rules and so forth." See Smith, R. 0142.

The fact that the State can obtain information about the Petitioners' prison history from Department of Corrections records is irrelevant to whether the Petitioners can be compelled to answer the questions regarding their past incarceration. The State is entitled to obtain this information from the Petitioners even if it overlaps some of the information

obtained through record reviews. See *Romley*, *supra*. In addition, the State is entitled to discover the Petitioners' characterization of his behavior while incar-cerated in order to compare their versions of events to DOC's records of these events. Denial, rationalization, or minimization of inappropriate acts in prison, especially acts of a sexual nature, are relevant to the issues in the commitment action.

IV C.(2) Questions 34-38, re: Sutton

As phrased, Questions 34, 35, 36, 37 and 38, read as follows:

> 34. How many times have you been imprisoned in your life? Describe the approximate dates and lengths of confinement.
>
> 35. Describe your adjustment to life in prison?
>
> 36. Have you ever received any D.R.s?
>
> 37. Did you pursue any vocational training while incarcerated in prison?
>
> 38. Did you attend school while incarcerated in prison?

See Sutton, R. 0087-0088.

Objections to Questions 34, 35, 36, 37 and 38 were properly overruled by the trial court for the purpose of pre-trial, civil discovery depositions. The fact that the State can obtain information about the Petitioner's prison history from

Department of Corrections records is irrelevant to whether the Petitioner can be compelled to answer the questions regarding his past incarceration. The State is entitled to obtain this information from the Petitioner even if it overlaps some of the information obtained through records reviews. See *Romley*, *supra*.

**IV D. Question Group 4; Questions Regarding Physical Health of Detainee**

IV D.(1) Questions 4a - 4e, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

4a. Have you ever had what you consider to be a health problem that affected your quality of life? If so, please describe the nature of the problem and any treatment you received for that problem.

4b. What is the current state of your health?

4c. Do you have any life threatening illness or diseases? If so, please describe them.

4d. Do you currently have or have you ever had erectile dysfunction or any kind of impotence? If so, describe that problem?

4e. Are you currently taking any kind of medication? If so, what for? What side-effects does that medication have?

See Smith, R. 0082-0084; Beikirich, R. 0083-0085; Singleton, R. 0088-0090; Rhoades, R. 0082-0084; DeMarco, R. 0085-0087.

The trial court overruled objections to questions in this section concerning physical health but directed the State "to

focus in on things that have been debilitating for extended periods and things like that." See Smith, R. 0147.

The Petitioners' physical health may or may not be an issue; that is what these questions, and discovery in general, are designed to determine. The State is entitled to know if a Petitioner will claim a medical condition that has contributed to his sexual offending or that would prevent him from committing recidivist sexual acts. For example, an offender may claim that he experienced some brain trauma in the past and that was a contributing factor in his sexually violent behavior. There is no reason for the State to retain a physician to conduct a physical examination for purposes of this case unless the State first has some indication from Petitioner that he has any physical limitations.

To the extent the Petitioners claim such questions invade their right to privacy, the State reiterates that in the context of civil commitment proceedings under the Ryce Act, their right to privacy is outweighed by the State's compelling interest in protecting the public from dangerous sexual offenders. See Issue III, above.

The district court, upon review in *Sutton*, determined that the Petitioners' failed to demonstrate that the information sought by the State was protected by a variety of statutes they

alleged protected the confidentiality of medical records. 884 So.2d at 205. To the extent that Petitioners' claim this information is protected by work product and attorney-client privilege, the same was rejected by the district court and should now be rejected by this Court. *Ibid*.

IV D.(2) Questions 30-33, re: Sutton

As phrased, Questions 30, 31, 32 and 33, read as follows:

> 30. Have you ever had what you consider to be a serious health problem that affected your quality of life? If so, please describe the nature of the problem and any treatment you received for that problem.
>
> 31. What is the current state of your health?
>
> 32. Do you have any life threatening illness or diseases? If so, please describe them.
>
> 33. Have you ever had erectile dysfunction or any kind of impotence? If so, describe that problem.

All objections to the aforementioned questions concerning the Petitioner's health were overruled. The trial court stated that "these are issues that I think can be taken up by the trier of fact. The trier of fact could find that he's a pedophile but now he's incapable of sexual performance and therefore we find that he is not likely to." See Sutton, R. 0143. Likewise, these objections were found to have no merit by the district court. *Sutton*, 884 So.2d at 205.

To the extent that Petitioners' argue that they cannot answer these questions because the responses require an expert, such is not the case. Contrary to Petitioners' argument, they are qualified to give their own feelings and perceptions of their own medical conditions and how any illness they may now or have suffered has affected them, they do not need to be an expert when discussing matters within the realm of their own knowledge.

Petitioners' right to privacy argument also fails since they could not demonstrate to the court's satisfaction that any of the medical records confidentiality regulations applied to them in the context of a sexually violent predator civil commitment proceeding. *Sutton*, 884 So.2d 205.

Petitioners' argument that the state could conduct a physical to obtain this information fails on at least two points of logic: (1) there would be no anticipation that a physical examination would be needed unless the basis for the inquiry came initially from information sought from Petitioners, and (2) without a proper basis to conduct a physical examination, it would be considerably more intrusive upon the civil detainee than propounding questions through pre-trial discovery.

**IV E. <u>Question Group 5; Questions Regarding Psychological or Psychiatric Health and Treatment of Detainee</u>**

IV E.(1) <u>Questions 5a - 5f, re: Smith, Beikirich, Singleton, Rhoades, DeMarco</u>

5a. Have you ever been treated by a mental health professional for any kind of mental illness, mental abnormality or personality disorder? If so, please describe the diagnosis made, the course of treatment recommended, the course of treatment provided, whether or not treatment was successfully completed, whether any medications were prescribed, the names of the persons or entities providing the treatment, the time and duration of the treatment.

5b. Have you ever been ordered by a court to obtain treatment of any kind of mental illness, mental abnormality or personality disorder? If so, describe the circumstances under which that occurred and the nature of the treatment obtained.

5c. Have you been offered any kind of treatment (including sex offender treatment) for a mental illness, mental abnormality, or personality disorder while you have been incarcerated in state prison? If so, describe the nature of the treatment offered.

5d. Have you ever received treatment (including sex offender treatment) for a mental illness, mental abnormality or personality disorder while you have been incarcerated in state prison? If so, describe the reasons for receiving treatment and the nature of the treatment received.

5e. Have you ever refused treatment (including sex offender treatment) for a mental illness, mental abnormality or personality disorder while you have been incarcerated in state prison. If so, describe the reasons for refusing treatment.

5f. Since this civil case has been filed against you, have you sought to obtain treatment for a mental illness, mental abnormality or personality disorder, including sex offender treatment? If

so, why? If not, why?

See Smith, R. 0085-0087; Beikirich, R. 0086-0088; Singleton, R. 0091-0093; Rhoades, R. 0085-0087; DeMarco, R. 0088-0090.

In section 5 concerning the psychological or psychiatric treatment, the trial court overruled the objection to question 5a, in part while sustaining the Petitioners' objection to the second portion of 5a which states: "If so, describe the diagnosis made." See Smith, R. 0152. The trial court additionally allowed the following questions in section 5: (1) both parts of 5b were allowed to be asked, (2) inquiry was limited as to 5c, 5d and 5e disallowing any inquiry into any statements made by the Petitioner or the psychotherapist in the context of diagnosis or treatment, and (3) question 5f was permitted. See Smith, R. 0152, 0160-62.

The State's legitimate, compelling interest to protect the public overrides Petitioners' claims of right to privacy in the context of these Ryce Act civil commitment proceedings. *Sutton*, 884 So.2d 205.

The Ryce Act specifically provides that the "psychotherapist-patient privilege under s.90.503 does not exist or apply for communications relevant to an issue in proceedings to involuntarily commit a person" under §394.910, Florida Statutes. Thus, Petitioners' objections are wholly without

merit.

IV E.(2) Questions 12-17, re: Sutton

As phrased, Questions 12, 13, 14, 15, 16 and 17, read as follows:

> 12. Have you ever been treated by a mental health professional for any kind of mental illness, mental abnormality, or personality disorder? If so, please describe the diagnosis made and the course of treatment recommended, the course of treatment provided, whether or not treatment was successfully completed, whether any medications were prescribed, the names of persons or entities providing the treatment, time and duration of the treatment.
>
> 13. Have you ever been ordered by a court to obtain treatment for any kind of mental illness, mental abnormality, or personality disorder? If so, describe the circumstances under which that occurred and the nature of the treatment obtained.
>
> 14. Have you been offered any kind of treatment for a mental illness, mental abnormality, or personality disorder while you have been incarcerated in state prison? If so, describe the nature of the treatment offered?
>
> 15. Have you ever received treatment for a mental illness, mental abnormality or personality disorder while you have been incarcerated in state prison? If so, describe the reasons for receiving treatment and the nature of the treatment received.
>
> 16. Have you ever refused treatment for a mental illness, mental abnormality or personality disorder while you have been incarcerated in state prison? If so, describe the reasons for refusing treatment.

> 17. Since this civil case has been filed against you, have you sought to obtain treatment for mental illness, mental abnormality or personality dis-order? If so, why? If not, why?

See Sutton, R. 0077-80.

After argument by counsel, the trial court overruled the Petitioner's objection to Question 12. The trial court stated that "we may get into things in the course of discovery that I'll decide at trial it's not appropriate, but for purposes of discovery I'll permit that." See Sutton, R. 0120. The trial court further permitted Questions 13, 14, 15, 16, and 17 but "excluded inquiry with regard to conversations had with mental health care professionals for purposes of diagnosis and treatment." See Sutton, R. 0127.

Prior treatment, or lack thereof, are relevant factors in assessing dangerousness. Moreover, as the district court pointed out below:

> The petitioners have not offered any explanation regarding how these questions intrude into an area in which they have a legitimate expectation of privacy, nor have we been able to deduce one in light of the fact that section 394.921, Florida Statutes (2002), allows the disclosure of this type of information to, among others, the state attorney.

*Sutton*, 884 So.2d at 204.

Therefore, these questions are relevant to the civil

commitment process and the trial court correctly ruled them permissible in the confines of pre-trial civil discovery.

IV E.(3) Questions 5g - 5i, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

> 5g. Since this civil case has been filed and you have been detained at the FCCC, have you been offered any kind of sex offender treatment?
>
> 5h. Since this civil case has been filed and you have been detained at the FCCC, have you received any kind of sex offender treatment.
>
> 5i. Since this civil case has been filed and you have been detained at the FCCC, have you refused any kind of sex offender treatment?

See Smith, R. 0088-0089; Beikirich, R. 0089-0090; Singleton, R. 0094-0095; Rhoades, R. 0085-0088; DeMarco, R. 0091-0092.

In ruling on Questions 5g and 5h, the trial court allowed the questions stating: ". . . the ruling on that would be the same as it would be with regard to the prison environment. It depends on how the offer was made." See Smith, R. 0163. As to Question 5i, the trial court ruled that it would depend upon the context in which the refusal was made and did not make a final ruling on that particular question. See Smith, r. 0165.

These questions are indisputably relevant to the civil commitment process. Remorse or acceptance of responsibility and prior treatment, or lack thereof, are relevant factors in assessing dangerousness. Indeed, the Petitioner's mental health

is the principal issue in this case. The State is entitled to know of any contrary or consistent diagnoses that may have been made in the past as well as any medication taken to treat those illnesses.

The State is entitled to discover this information and need not advise the Petitioners how it plans to use this information. The fact that some of this information may have been obtained by the State's experts in its prior evaluations does not render these questions improper. See *Romley*, *supra*.

**IV F. Question Group 6; Questions Regarding Sexually Violent Predator Evaluations For Each Detainee**

IV F.(1) Questions 6a - 6d, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

6a. Do you recall being evaluated by psychologists, psychiatrist or other mental health experts in this case?

6b. What do you recall about the evaluations they performed on you (go through each separate evaluation)?

6c. Have you reviewed the reports generated by the psychologists, psychiatrist or other mental health experts in this case?

6d. Do you agree or disagree with their findings? Why?

See Smith, R. 0089-0091; Beikirich, R. 0090-0092; Singleton, R. 0095-0097; Rhoades, R. 0088-0090; DeMarco, R. 0092-0094.

The trial court overruled the objections as to Questions 6a

through 6d in this section. The trial judge stated: "I believe these are all standard types of questions that you can see in any type of medical malpractice or injury proceeding, and to see not what the experts think, but what the respondent themselves think." See Smith, R. 0167-0168.

IV F.(2) Questions 18-21, re: Sutton

18. Do you recall being evaluated by the two psychologist in this case?

19. What do you recall about the evaluations they performed on you?

See Sutton, R. 0080-0081.

After hearing argument from counsel, the trial court overruled Petitioner's objections to both Questions 18 and 19. See Sutton, R. 0127-28. Respondent specifically argues that any objection to Question 18 has been effectively waived by Petitioner. When the trial judge made inquiry of Petitioner's counsel below regarding Question 18, the following response was given:

> I'm not sure that that's relevant but I suppose that's the kind of a question that would be, assuming that it's relevant, might lead to something relevant. I can't see how it would.
>
> I suppose counsel can ask that. It's pretty innocuous but, once again, what difference does it make?

After this statement by counsel, the trial judge rules: "Okay.

I'll permit that one." Petitioner has failed to preserve this issue for review. See Sutton, R. 0127.

20. Have you reviewed the reports generated by each doctor in this case.

21. Do you agree or disagree with their finding? Why?

See Sutton, R. 0080-81.

The trial court ruled that it would overrule the objections to Questions 20 and 21. See Sutton, R. 0130.

This area of inquiry does not seek to gain information that would be protected by either work product or attorney-client privilege. These questions are geared to determine if the Petitioners have understood the nature of their illness and accepted responsibility for their actions. These factors bear directly upon an individuals amenability to both treatment issues bearing on recidivism. Further, this area of inquiry does not require an expert opinion, quite the contrary. It is the personal perception of the Petitioners that is at issue, again with an eye to gauging their treatment goals and potential recidivism risk.

IV F.(3) Questions 6e - 6f, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

6e. When you met the psychologists, psychiatrist or other mental health experts, did you answer their

> questions to the best of you ability? Are there any answers that you wish to change at this time? Are there any statements that you deny having made to them?
>
> 6f. What, if anything, has changed about your circumstances (mental and physical) since you met with the psychologists, psychiatrist or other mental health experts in this case?

See Smith, R. 0091-0092; Beikirich, R. 0092-0093; Singleton, R. 0097-0098; Rhoades, R. 0090-0091; DeMarco, R. 0094-0095.

Questions 6e and 6f were allowed by the trial court with the limitation that the Petitioners not be asked to divulge information conveyed to them by the mental health professional during the course of treatment. See Smith, R. 0171.

IV F.(4) Questions 22-23, re: Sutton

> 22. When you met with the doctors, did you answer their questions to the best of your ability? Are there any answers that you wish to change at this time?
>
> 23. What, if anything, has changed about your circumstances since you met with the doctors in this case?

See Sutton, R. 0082.

The court also overruled the objection to Question 22. See Sutton, R. 0131. As to Questions 23 and 24, the trial court allowed these questions to be answered but "prohibit[ed] inquiry into any communications made to a mental health care provider or to a physician or a chiropractor or osteopath for the purpose of diagnosis and treatment." See Sutton, R. 0133, 0136.

The State is not requesting the contents of conversations protected by attorney-client privilege or work product. The attorney-client privilege may be invoked as to any such conversations. The psychotherapist-patient privilege is waived pursuant to section 394.9155(3) and does not bar disclosure. The State is asking for the Petitioner's subjective impressions which are not protected by any privilege.

IV F.(5) Question 6g, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

6g. Are you familiar with the following diagnoses that were given to you:

Explain what each diagnosis means to you.
Do you agree or disagree with that diagnosis?
Why or why not?

See Smith, R. 0092-0093; Beikirich, R. 0093-0094; Singleton, R. 0098-0099; Rhoades, R. 0091-0092; DeMarco, R. 0095-0096.

Once again, the trial court ruled that Question 6g was permissible; however, limited the scope of inquiry, prohibiting and inquiry that would require Petitioners to divulge information conveyed to them, or by them, during the course of treatment. See Smith, R. 0171. Again, Petitioner's argument that a lay person could not answer this question is disingenuous. The question specifically seeks the subjective perspective of the Petitioners regarding these matters, no expertise is required to answer this type of question as is

clearly within the knowledge of the Petitioners.

As a practical matter in preparing its case, the State is entitled to know if the Petitioner has reconsidered some of his answers or recalled other information not disclosed at the evaluations, so as to avoid trial by ambush.

IV F.(6) Questions 24, 26, 28, re: Sutton

Respondents argue that Questions 26 and 28 are not properly before this Court for review. Both Question 26 and 28 were withdrawn by the state attorney. As such, Questions 26 and 28 are moot. See Sutton, R. 0082-84, 0136.

As stated below, Question 24, read as follows:

> 24. Are you familiar with the diagnosis of Pedophilia given to you? If so, explain what that means to you. Do you agree with that diagnosis? Why? or why not?

See Sutton, R. 0082.

The information sought here is typical of the sort of discovery that regularly occurs in civil practice. The State is entitled to inquire into the Petitioner's impressions of the mental health evaluations conducted in connection with the sexually violent predator proceeding and the diagnoses given as a result of those evaluations.

IV F.(7) Question 6h, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

> 6h. Have you been addicted to alcohol or drugs? Have you ever had a problem functioning normally because you were under the influence of any kind of intoxicating substances, including but not limited to drugs or alcohol? If so, please describe the problems you had.

See Smith, R. 0093; Beikirich, R. 0094; Singleton, R. 0099; Rhoades, R. 0092; DeMarco, R. 0096.

The trial court further overruled Petitioners' objections to Question 6h, placing the same limitation upon the state, that any inquires could not cause Petitioners to divulge communications between themselves any mental health care provider, physician, chiropractor or osteopath for the purpose of diagnosis and treatment. See Smith, R. 0171.

IV F.(8) Question 27, re: Sutton

> 27. Have you ever had a problem functioning normally because you were under the influence of any kind of intoxicating substances, including but not limited to drugs and alcohol? If so, please discuss the problem you had.

See Sutton, R. 0084.

The trial court allowed Question 27 and stated that "it may be that the Court will decide to narrow the inquiry some for purposes of trial but this is a discovery deposition and I think that leads to the discovery of evidence of some probative value." See Sutton, R. 0136-38.

With respect to the Petitioner's claim of psychotherapist-patient privilege, the state reiterates its prior argument. See §394.9155(3), Fla. Stat.

IV F.(9) Question 6i, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

> 6i. Do you have trouble controlling your temper sometimes? If so, please describe why and what happens when you loose your temper. What steps, if any, have you taken to control your temper?

See Smith, R. 0094; Beikirich, R. 0095; Singleton, R. 0100; Rhoades, R. 0093; DeMarco, R. 0096-97.

Placing the limitation upon the state that no inquiry could be made of Petitioners that would lead to them divulging communications between themselves any mental health care provider, physician, chiropractor or osteopath for the purpose of diagnosis and treatment, the trial court permitted this inquiry. See Smith, R. 0171.

Once again, the district court found no merit in Petitioners' argument, finding that "any right these petitioners may have to keep their thoughts private is likewise outweighed by the State's interest in obtaining" this information. *Sutton*, 884 So.2d 205.

IV F.(10) Question 29, re: Sutton

> 29. Do you have trouble controlling your temper sometimes? If so, please describe why and

> what happens when you loose your temper. What steps, if any, have you taken to control your temper? Have you ever touched or struck anyone out of anger? If so, please describe the nature of that contact and the circumstances surrounding it.

See Sutton, R. 0085.

As to Question 29, the trial court permitted inquiry into the initial portion of the question including the portion that asks what steps have you taken to control your temper and sustained objections to the last two portions of the question.

IV F.(11) Questions 6j - 6m, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

6j. Do you have sexual fantasies about pre-pubescent children? If so, describe them.

6k. Are you sexually attracted to pre-pubescent children?

6l. Do you have sexual fantasies that involve violence of any kind?

6m. Do you have now or have you ever had difficulty controlling your sexual urges.

See Smith, R. 0094-0096; Beikirich, R. 0095-0097; Singleton, R. 0100-0102; Rhoades, R. 0093-0095; DeMarco, R. 0097-0099.

The trial court overruled Petitioners' objections to Questions 6j, 6k, 6l and 6m with the aforementioned limitations. See Smith, R. 0171.

The information sought here is typical of the sort of

discovery that occurs in civil litigation practice. The State is entitled to inquire into the Petitioners' impressions of the mental health evaluations conducted in connection with the sexually violent predator proceeding and the diagnoses given as a result of those evaluations. Likewise, the state is entitled to know if the Petitioner has reconsidered answers previously given or recalled other information not initially disclosed at the evaluations, as to avoid trial by ambush.

Significantly, the state is not requesting the contents of conversations protected by attorney-client privilege or work product. The attorney-client privilege may be invoked as to any such conversations. The psychotherapist-patient privilege is waived pursuant to section 394.9155(3) and does not bar disclosure in the context of a civil commitment proceeding under the Ryce Act. The State is asking for the Petitioners' subjective impressions, these are simply not protected by any privilege.

As to the disclosure of the use of any illegal substances, it is the position of Respondent that any such information could not be used in a subsequent criminal proceeding. See *Beverly*, *supra; Smith*, *supra*. Therefore, the Petitioners' *Fifth Amendment* objections are not a bar to disclosure of this information.

The State is entitled to know of types of situations that anger or enrage Petitioners, especially to the point where they act out in a physically or sexually inappropriate way. This information identifies the types of events that trigger his violent behavior and are relevant to the issues in the commitment action.

To the extent such questions elicit incriminating responses regarding uncharged criminal acts, such information can not be used in a criminal proceeding. See *Beverly*, *supra*; *Smith*, *supra*. As previously stated, the *Fifth Amendment* does not apply to sexually violent predator civil commitment proceedings, and Petitioners cannot refuse to answer questions on this basis. *Beverly*, *supra*; *Allen*, *supra*; *Smith*, *supra*.

With respect to the Petitioners' claim of psychotherapist-patient privilege, Respondent reiterates its prior argument. See §394.9155(3), Fla. Stat.

The information sought here is typical of the sort of discovery that occurs in civil litigation practice. The State is entitled to inquire into Petitioners' impressions of the mental health evaluations conducted in connection with the sexually violent predator proceeding and the diagnoses given as a result of those evaluations. Likewise, the state is entitled to know if the Petitioner has reconsidered some of his initial

answers or recalled other information not previously disclosed at the evaluations. Trial by ambush is a distant history and should remain so.

The State is not requesting the contents of conversations protected by attorney-client privilege or work product. The attorney-client privilege may be invoked as to any such conversations. The psychotherapist-patient privilege is waived pursuant to section 394.9155(3) and does not bar disclosure. The state is asking only for the Petitioners' subjective impressions which are not protected by any privilege.

To the extent Petitioners' are claiming a privacy right in this information, the same is outweighed by the State's compelling interest in obtaining this information in the context of sexually violent predator civil commitment proceeding. *Sutton*, 884 So.2d 205. Prior psychological evaluations do not act a bar to further inquiry by the State. This is especially true given the time difference between the pre-probable cause mental health examinations, the filing of the petition, and the civil commitment trial itself.

**IV G. Question Group 7; Questions Regarding Future Plans of Detainee**

IV G.(1) Questions 7a - 7b, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

7a. When you are released from prison or the FCCC, will you be under any kind of legal

restraint or designation? If so, describe the nature of that restraint or designation.

7b. Will you specifically be on any kind of probation after you release from prison or the FCCC? If so, describe the condition(s) by which you will be required to abide. Do any of those conditions require you to successfully complete sex offender treatment? Do any of those conditions limit you access to children?

See Smith, R. 0096-0097; Beikirich, R. 0097-0098; Singleton, R. 0102-0103; Rhoades, R. 0095-0096; DeMarco, R. 0099-0100.

The trial court overruled the objections to all Questions 7a and 7b concerning the Petitioners’ release from prison. See, Smith, R. 0178, 0181-0183, 0185-0187.

IV G.(2) Questions 39-40, re: Sutton

39. When you are released from prison, will you be under any kind of legal restraint? If so, describe the nature of that restraint.

40. Will you specifically be on any kind of probation or parole after your release from prison? If so, describe the condition by which you will be required to abide.

See Sutton, R. 0088-0089.

As to Questions 39 and 40, it appears from the transcript of

the hearing that the trial court did not make a ruling on the objections to these questions. See, Sutton, R. 0156.

IV G.(3) Questions 7c - 7m, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

7c. Will you seek any kind of employment after you are released from prison or the FCCC?

7d. Who will you live with after you are released from prison or the FCCC?

7e. Where will you live after you are released from prison or the FCCC?

7f. After you r release from prison or the FCCC, will any children under the age of 18 years be living with you or in the same neighborhood as you?

7g. Do you want to have biological children of your own? Why or why not?

7h. Do you want to adopt children? Why or why not?

7i. From what source(s) will you receive income after you are released from prison or the FCCC?

7j. Do you own any real property?

7k. Do you have any assets other than real property?

7l. Do you have any plans to receive sex offender treatment after you are released form prison or the FCCC? If so, why? If not, why not?

7m. Do you have any kind of insurance or other kind of benefit that would enable you to receive sex offender treatment?

See Smith, R. 0097-0101; Beikirich, R. 0098-0102; Singleton, R. 0103-0107; Rhoades, R. 0096-0100; DeMarco, R. 0100-0104.

The trial court overruled all Petitioners' objections to Questions 7c through 7m, finding them to be relevant and proper

areas of inquiry by the state in the context of a civil commitment proceeding under the Ryce Act.

IV G.(4) Questions 41-47, re: Sutton

41. Will you seek any kind of employment after you are released from prison?

42. Who will you live with after you are released from prison?

43. Where will you live after you are released from prison?

44. Will any children under the age of 18 years be living with you or in the same neighborhood as you?

45. From what sources will you receive income after you are released from prison?

46. Do you have any plans to receive sex offender treatment or therapy after you are released form prison? If so, why? If not, why not?

47. Do you have any kind of insurance or other kind of benefit that would enable you to receive sex offender treatment?

See Sutton, R. 0089-0091.

As to the remaining questions concerning the Petitioner's life after release from confinement, the trial court overruled the objections to those questions. See Sutton, R. 0156.

IV G.(5) Question 7n, re: Smith, Beikirich, Singleton, Rhoades, DeMarco

As stated below, Question 7n, reads as follows:

7n. Do you recognize the "stress factors" that

were present in you life during the commission of the criminal cases and how they contributed to your ultimate conviction for those crimes? If so, what were they? Do you feel that you have learning to control them at this time?

<u>See</u> Smith, R. 0101; Beikirich, R. 0102; Singleton, R. 0107; Rhoades, R. 0100; DeMarco, R. 0104.

IV G.(6) <u>Question 48, re: Sutton</u>

As stated below, Question 48, reads as follows:

48. Do you recognize the "stress factors" that were present in your life during the commission of the Sarasota County criminal cases and how they contributed to your ultimate conviction for those crimes? If so, what were they?

<u>See</u> Sutton, R. 0092.

IV G.(7) <u>Question 7o, re: Smith, Beikirich, Singleton, Rhoades, DeMarco</u>

As stated, Question 7o, reads as follows:

7o. How, if at all, will your lifestyle be different upon your release from prison compared to your lifestyle before prison?

<u>See</u> Smith, R. 0101; Beikirich, R. 0102; Singleton, R. 0107; Rhoades, R. 0100; DeMarco, R. 0104.

IV G.(8) <u>Question 49, re: Sutton</u>

As stated, Question 49, reads as follows:

49. How, if at all, will your lifestyle be different upon your release from prison compared to your lifestyle before prison?

See Sutton, R. 0092.

As to the remaining questions concerning the Petitioner's life after release from confinement, the trial court overruled the objections to those questions. See Sutton, R. 0156.

In addition, the Petitioner's awareness and understanding of any post-release supervision requirements are relevant in determining whether treatment rendered as a part of such supervision my be more or less appropriate than secure confinement for treatment.

IV G.(9) Question 25, re: Sutton

Question 25 originally propounded to Petitioner Sutton, was subsequently withdrawn by the state attorney; consequently, is not at issue for purposes of this review. See Sutton, R. 0136, 0157-0161.

As determined by the trial judge and confirmed by the Second District Court of Appeal, Petitioners are subject to deposition as civil detainees under the Ryce Act. The questions propounded are relevant, articulate and reasonably calculated to either elicit admissible information or lead to admissible information necessary in the context of the sexually violent predator civil commitment proceeding below. The rulings of the courts below should be affirmed and this appeal denied.

## CONCLUSION

The Petitioners improperly seek to create criminal constitutional privileges in a civil action. The trial court and district court below, upon thorough and repeated review, correctly ruled that civil detainees are not entitled to claim a blanket immunity from being deposed in the civil commitment proceedings under the Ryce Act.

Civil detainees under the Ryce Act are accorded the same constitutional rights as other civil litigants. This includes the ability of individual civil detainees raising, in good faith, assertions of privileges against self-incrimination, invasion of privacy, attorney-client privileges, areas of medical confidentiality available under the constraints of the Act, and work product claims. Civil detainees are not estopped from exercising proper claims to their constitutional privileges; however they are not entitled to blanket *Fifth Amendment* immunity.

The findings of the trial court and rulings of the district court below should be affirmed and this appeal should be denied.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Motion for Extension of Time has been furnished by U.S. Mail and facsimile transmission to Christopher E. Cosden,

Assistant Public Defender, Office of the Public Defender, 2071 Ringling Blvd., Fifth Floor, Sarasota, Florida 34237, this ______ day of March 2005.

CERTIFICATE OF FONT COMPLIANCE

**I HEREBY CERTIFY** that the size and style of type font used in this pleading is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(1).

Respectfully submitted,


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