IN THE SUPREME COURT OF FLORIDA

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| DUANE EDWIN SUTTON, | Case No. SC04-1954 |
| KEITH NORWOOD SMITH, | Case No. SC04-1955 |
| JOHN R. BEIKIRICH, | Case No. SC04-1956 |
| EDWARD ALLEN SINGLETON, | Case No. SC04-1957 |
| JERRY WADE RHOADES, | Case No. SC04-1958 |
| GEORGE SAMUEL DEMARCO, | Case No. SC04-1959 |

Petitioners,

v.

STATE OF FLORIDA,

Respondent.
_____/

On Petition for Discretionary Review of the Decision of
the Second District Court of Appeal

# CONSOLIDATED INITIAL BRIEF OF PETITIONERS ON THE MERITS

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## PREFACE

The instant Petitioners were the Respondents in actions before the Circuit Court of the Twelfth Judicial Circuit to adjudicate them sexually violent predators pursuant to §§ 394.910 et seq. Florida Statutes. The State sought to depose them. They sought relief in the Second District Court of Appeal, which held that they were not entitled to the requested relief. Sutton, R. 396; Smith, R. 487; Beikirich, R. 517; Singleton, R. 453; Rhoades, R. 453; Demarco, R. 506. They petitioned this Court for discretionary conflict review pursuant to Fla. Const. Art. V, § 3(b)(3) and Fla. R. App. P. 9.030(a)(2)(A)(iv). In its orders entered 17 December 2004 and 12 January 2005, this Court, accepted jurisdiction, consolidated the cases, ordered substantive briefing, and scheduled oral argument.

To avoid confusion herein, the instant Petitioners (the Respondents in the trial court and the Petitioners in the district court), will be referred to by name or as "Defendants"; the State of Florida (the Petitioner in the trial court and the Respondent in the district court and in this Court) will be referred to as the State of Florida or the State.

The following symbol will be used, identifying the record in the particular Defendant's case by name and the page number of that record:

[Defendant], R.____ - Record on Appeal.

## STATEMENT OF THE CASE AND FACTS

Each Defendant has been the subject of a petition for post-sentence civil commitment as a sexually violent predator pursuant to § 394.910-394.931 Florida Statutes. The State sought to take each Defendant's deposition and the trial court entered an order requiring him to respond to certain deposition questions. Sutton, R. 359-360; Smith, R. 104; Beikirich, R. 105; Singleton, R. 110; Rhoades, R. 103; Demarco, R. 107. Each Defendant filed a petition for writ of certiorari or writ of prohibition in the Second District Court of Appeal, asserting the right not to be compelled to be a witness against himself, and arguing that the order of the trial court compelling his deposition failed to afford him due process of law, equal protection of the laws, and violated his right to privacy. Sutton, R. 001; Smith, R. 001; Beikirich, R. 001; Singleton, R. 001; Rhoades, R. 001; Demarco, R. 001.

In In re. Commitment of Smith v. State, 827 So. 2d 1026 (Fla. 2d DCA 2002), the district court held that a respondent in a sexually violent predator commitment proceeding can not assert a blanket right of privacy or the right against self-incrimination to avoid being deposed. However in that case the district court remanded for a hearing on the proposed deposition questions. See also In re Commitment of Sutton v. State, 828 So. 2d 1081 (Fla. 2d DCA 2002); In re Commitment of Beikirich v. State, 828 So. 2d 421 (Fla. 2d DCA 2002); In re Commitment of Singleton v. State, 829 So. 2d 402 (Fla. 2d DCA 2002).

Following the hearing on remand, in a consolidated opinion in In re Commitment of Duane Edwin Sutton, Keith Norwood Smith, John R. Beikirich, Edward Allen Singleton, Jerry Wade Rhoades, and George Samuel Demarco, 884 So. 2d 198 (Fla. 2d DCA 2004), the district court held that the assertion of the right to privacy and the right against self-incrimination has no merit. Sutton, R. 396; Smith, R. 487; Beikirich, R. 517; Singleton, R. 453; Rhoades, R. 453; Demarco, R. 506. The Defendants' motions for rehearing, rehearing en banc, certification of conflict, and certification of question were denied by order of the district court entered 21 September 2004. The instant petition for discretionary conflict review followed.

## JURISDICTION

This Court has jurisdiction over this direct appeal pursuant to Article V, § 3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(iv).

## STANDARD OF REVIEW

Because this case presents only pure questions of law, the standard of review is de novo. Moore v. State, 882 So. 2d 977, 980 (Fla. 2004); Martinez v. Fla. Power & Light Co., 863 So. 2d 1204, 1205 n.1 (Fla. 2003); Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

## SUMMARY OF ARGUMENT

The self-incrimination clauses of the federal and Florida constitutions provide that no person shall be compelled to be a witness against himself in a criminal case. Federal law provides that the right to avoid self-incrimination may not be circumvented by employing the stratagem of a civil proceeding resulting is the substantial equivalent of a criminal sanction. The right to avoid compulsory self-incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. It protects not only the compulsion of testimony that would itself be admissible in a criminal prosecution, but also the compulsion of testimony, whether or not itself admissible, that might aid in the development of other incriminating evidence that could be used at trial.

Florida courts have extended the same protection to a broad variety of sanctions that are not criminal. In Florida the right to avoid self-incrimination extends to civil and administrative proceedings that degrade an individual's professional standing, professional reputation, or livelihood. Actions against a professional license specifically afford the protection.

The complete long-term deprivation of liberty potentially resulting in this proceeding is inherently much more dire and onerous than an administrative action against a professional license and other clearly non-criminal proceedings where this Court has specifically applied the prohibition against self-incriminatio

Persons on probation, such as several of the Defendants herein, are explicitly extended the right to be free from self-incrimination. Further sanctions might be imposed upon such persons following a violation of probation.

Equal protection of the laws requires this Court to apply the same standards as apply to other civil commitment actions such as Baker Act proceedings. Strict scrutiny applies because of the potential loss of liberty inherent in this action.

The right to privacy guaranteed by the federal and Florida constitutions precludes much of the inquiry sought by the State. The right to privacy is a fundamental right that requires application of a compelling state interest standard which shifts the burden of proof to the state to justify an intrusion on privacy.

This court has recognized a broad privacy protection in persons' medical history and records. The State has neither made the requisite showing nor met the requisite burden to obtain the requested information.

The State seeks to ask many questions about each Defendant's innermost thoughts and attitudes. The State has already conducted two psychological evaluations of each Defendant in connection with this case. If the State's examining psychologists might have found this information useful, they had the opportunity to inquire. Otherwise this area of inquiry is nothing short an Orwellian "though police" interrogation inconsistent with anything that ought to happen in an American court.

## ARGUMENT

### I. Due Process of Law

The opinion below forces the Defendants to be witnesses against themselves in violation of rights guaranteed by the federal and Florida constitutions.

The self-incrimination clause of the Fifth Amendment to the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." The self-incrimination clause is applicable in state proceedings through the Fourteenth Amendment to the U.S. Constitution. Malloy v. Hogan, 378 U.S. 1, 6 (1964). Likewise Article I, § 9, of the Florida Constitution provides that "[n]o person shall ... be compelled in any criminal matter to be a witness against oneself". To require the Defendants to be deposed or to otherwise answer any inquiries would be offensive to the Defendants' constitutional protection from compulsory self-incrimination.

### I A. The Right to Be Free from Self-incrimination Is Not Circumscribed by Criminal Proceedings

The United States Supreme Court has uniformly held that the right protected by the self-incrimination clause is the right to avoid criminal sanctions, and that right is to be broadly construed. See, e.g., Ullmann v. United States, 350 U.S. 422, 426-427 (1956). The concept of "criminal" has been interpreted by the Supreme

Court to include various proceedings which, while not criminal per se, may lead to loss of constitutionally protected freedoms. In In re. Gault, 387 U.S. 1, 27 (1967), the Supreme Court observed:

> Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence – and of limited practical meaning – that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours". Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide. [Footnotes omitted.]

Substitute the words "sexually violent predator" for the word "boy" and "treatment facility" for "industrial school", and the effect of the instant proceeding becomes indistinguishable from the juvenile proceedings examined in Gault.

In Malloy v. Hogan, 378 U.S. at 8, the Supreme Court recognized that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. The Court held that the Fifth Amendment guarantees against infringement of "the right of a person to

remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty... for such silence." In Griffin v. California, 380 U.S. 609, 614 (1965), the Supreme Court observed that the Fifth Amendment outlaws any penalty imposed for exercising a constitutional privilege.

I B. Federal Application of the Right

The U.S. Supreme Court has also clearly established that Fifth Amendment rights may not be circumvented by employing the stratagem of a civil proceeding in which the end result is the substantial equivalent of a criminal sanction. The Fifth Amendment privilege against compulsory self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; 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, 444-445 (1972).

The self-incrimination clause of the Fifth Amendment protects against not only the compulsion of testimony that would itself be admissible in a criminal prosecution, but also the compulsion of testimony, whether or not itself admissible, that may aid in the development of other incriminating evidence that can be used at trial. See Kastigar at 445, Hoffman v. United States, 341 U.S. 479, 486 (1951). The privilege is inapplicable only "if the testimony sought cannot

possibly be used as a basis for, or in aid of, a criminal prosecution against the witness." Brown v. Walker, 161 U.S. 591, 597 (1896). Florida courts follow the same rule. See Burnette v. Stanton, 751 So. 2d 728, 729 (Fla. 5th DCA 2000); Magid v. Winter, 654 So. 2d 1037, 1039 (Fla. 4th DCA 1995).

In the context of the self-incrimination clause, "penalty" is not restricted to fine or imprisonment. It includes the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly." The threat of loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion, as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him." Spevack v. Klein, 385 U.S. 511, 515-516 (1967), citing Griffin and United States v. White, 322 U.S. 694, 698 (1944).

## I C. Florida Application of the Right

Long established Florida law provides a privilege against self-incrimination which applies to a variety of civil proceedings absent any "criminal" status in the orthodox sense. See State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 489 (Fla. 1973); Kozerowitz v. Florida Real Estate Commission, 289 So. 2d 391, 392 (Fla. 1974). In both cases, this Court specifically held that the right to remain silent applies not only to traditional criminal cases, but also to

proceedings which may result in suspension or revocation of a realtor's license and other proceedings which are "penal" in nature. Both cases involved proceedings by the Florida Real Estate Commission against the person's license to sell real property. The licensee was required by § 475.30(1) Florida Statutes to file a sworn answer to the complaint.[1] Vining at 488, Kozerowitz at 392.

This Court held that

> [i]n our judgment, logic and reason demand that the rationale of Spevack[ v. Klein] be applied... to other types of administrative proceedings which may result in deprivation of livelihood.... In succinct terms, it is our view that the right to remain silent applies not only to the traditional criminal case, but also to proceedings "penal" in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood.

Vining at 491. The Court reasoned that

> [t]he basic constitutional infirmity of the statute lies in requirement of a response under threat of license revocation or suspension, which amounts to compelling the defendant to be a witness against himself within the meaning of the Fifth Amendment to the U.S. Constitution and Article I, s 9 of the Florida Constitution.

Vining at 491-92. Therefore

[1] § 475.30(1) Florida Statutes (1973) provided in operative part that the "Defendant named in an information shall file with the commission a verified answer thereto...."

> Since the burden of proving the defendant's guilt is the obligation of the State in any event, requiring the defendant to speak would amount to compelling the defendant to prove the State's case for it. This, of course, is the evil sought to be remedied by the Fifth Amendment right to silence.

Vining at 492. This Court concluded that

> ***by requiring the defendant to answer, the [Real Estate] Commission is clearly seeking to shift to defendant the burden of proving his own guilt. As we have said, this result is constitutionally impermissible.*** Presumably, a legislative enactment allowing but not requiring a defendant to answer would not be constitutionally objectionable, but we are not confronted with such a provision here.

Vining at 492 (emphasis added). See also Kozerowitz at 392 (In Vining "we specifically held that Florida Statutes, Section 475.30(1), F.S.A., was unconstitutional to the extent that it required a defendant in a discipline proceeding before the Real Estate Commission to respond to the charges against him.")

Florida appellate courts have reached similar conclusions in cases involving licensure actions against a swimming pool contractor, see Best Pool & Spa Service Co., Inc., v. Romanik, 622 So. 2d 65, 66 (Fla. 4th DCA 1993), and a harbor pilot, see McDonald v. Department of Professional Regulation, Board of Pilot Commissioners, 582 So. 2d 660, 662 (n. 2) (Fla. 1st DCA 1991).

In both Vining and Kozerowitz this Court addressed proceedings of a "penal" character. Vining at 491; Kozerowitz at 392. A proceeding is penal if "the injury sought to be redressed affects the public. If the redress is remedial to an individual and the public is indirectly affected thereby, the statute is not regarded as solely and strictly penal in its nature." State v. Atlantic Coast Line Railroad Company, 47 So. 969, 980 (1908). There this Court held that a civil penalty imposed by administrative rule on a railroad for failure to promptly move a freight car was penal in nature. 47 So. at 980; see also Vining at 491.

Florida courts consider a broad variety of sanctions to be "penal" that are not also "criminal". In Department of Business and Professional Regulation v. Calder Race Course, 724 So. 2d 100, 104 (Fla. 1st DCA 1998), the court held that a statute regulating pari-mutual wagering should be deemed penal in its effect because its application could lead to the institution of administrative, civil or criminal actions. In Galbut v. City of Miami Beach, 605 So. 2d 466, 467 (Fla. 3d DCA 1992), affirmed with opinion 626 So. 2d 192 (Fla. 1993), the court held that § 112.317 Florida Statutes (1991), which allows penalties (including civil penalties of up to $5,000 and removal from public office or employment, among other things) is penal in nature, even though the penalties are specifically civil rather than criminal.

In Florida when a statute imposes sanctions and penalties in the nature of denial of a professional license, suspension from professional practice, revocation of license to practice, probation, and private or public reprimand, the statute is penal in nature. State ex. rel. Jordan v. Pattishall, 126 So. 147 (Fla. 1930). In Vining this Court held that administrative proceedings that "tend to degrade the individual's professional standing, professional reputation, or livelihood" are penal in nature. 281 So. 2d at 491.

In Lester v. Department of Professional & Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977), the court held that a statute permitting denial of license or disciplining of a physician was penal in nature. The court noted that the Medical Practice Act "is, in effect, a penal statute since it imposes sanctions and penalties in the nature of denial of license, suspension from practice, revocation of license to practice, private or public reprimand, or probation, upon those found guilty of violating its proscriptions." The court reached that conclusion even though the legislature stated that the statute was enacted in the interest of the public welfare and was to be liberally construed so as to advance that purpose (thus suggesting that the subject matter of the statute should be construed as civil and not criminal). Id. See also Solloway v. Department of Professional Regulation, 421 So. 2d 573, 574 (Fla. 3d DCA 1982).

Florida courts have applied similar analyses in licensure proceedings involving accountants[2], dentists[3], architects[4], public school teachers[5], harbor pilots[6], swimming pool contractors[7], and law enforcement officers[8], because such

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[2] In Buchman v. State Board of Accountancy, 300 So. 2d 671, 673 (Fla. 1974), this Court considered a proceeding for revocation of a certificate to practice as a certified public accountant. Although there was no provision for a fine in the statute under consideration, the Court held that when an individual's livelihood was threatened by an administrative hearing, the statute is penal in nature.

[3] State ex. rel. Jordan v. Pattishall involved a licensure matter before the Florida state board of dental examiners; see also Lurie v. Florida State Board of Dentistry, 288 So. 2d 223, 226 (Fla. 1973).

[4] In Florida State Board of Architecture v. Seymour, 62 So. 2d 1, 3 (Fla. 1952), overruled by Headley v. Baron, 228 So. 2d 281, 287 (Fla. 1969), reinstated by Lurie v. Florida State Board of Dentistry, 288 So. 2d at 226, this Court considered a proceeding for revocation of a certificate to practice as an architect. The Court held that a "penalty generally has reference to punishment imposed for any offense against the law. It may be corporal or pecuniary.... It is accordingly our view that a proceeding to revoke appellee's certificate as an architect amounts to a prosecution to effect a penalty or forfeiture as contemplated by [§ 932.29, Florida Statutes (1941)]. The revocation of his certificate could be nothing short of a penalty or forfeiture...."

[5] In School Board of Pinellas County v. Noble, 384 So. 2d 205, 206 (Fla. 1st DCA 1980), the court considered the employment of a public school teacher. The court held that a statute is in effect a penal statute if it imposes sanctions, including suspension or dismissal of an employee when the employee is found guilty of violating the statute's proscriptions.

[6] In McDonald v. Department of Professional Regulation, Board of Pilot Commissioners the court, citing to Vining, held that because license revocation or suspension proceedings are penal in nature, the Fifth Amendment right to remain silent applies.

[7] In Best Pool & Spa Service Co., Inc., v. Romanik the court held that

proceedings are "penal" (and the constitutional right to be protected against compulsory self-incrimination applies) even though they are not in any way criminal and no incarceration was or could have been involved.

The 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. The filing of a petition for involuntary commitment results in incarceration in the Florida Civil Commitment Center. Once the State petitions to commit a person pursuant to § 394.914 Florida Statutes, he can not be afforded any form of pre-trial release. § 394.915(5) Florida Statutes. Once committed, he may be incarcerated indefinitely, potentially for life. §§ 394.918, 394.919, 394.920 Florida Statutes. Such incarceration is much more grave than a mere degradation of a person's professional standing, professional reputation, or livelihood. Therefore the due process provisions of Florida law directed at protection of the rights of civil

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requiring a swimming pool contractor to answer questions posed by a litigant in a civil case violated his right against self-incrimination. Citing to Vining, the court held that the right against self-incrimination applies not only to criminal matters but also administrative proceedings such as licensing.

[8] In McClung v. Criminal Justice Standards and Training Comm., 458 So. 2d 887, 888 (Fla. 5th DCA 1984), the court held that statutes that impose conditions and restrictions on law enforcement certification must be strictly construed and ambiguities in the statutes must be construed in favor of the licensee "because the statute is penal in nature".

litigants in professional licensure actions should require strict interpretation of the limits of discovery where, as here, an individual's liberty is at issue.

I D. The Right Applies Whenever Further Sanctions Can Be Imposed

In the instant case, four of the Defendants are reported to be on active probation.[9] Therefore their sentences have not become final and they retain a legitimate protected Fifth Amendment interest in not testifying as to incriminatory matters that could yet have an impact on his sentence.

In Mitchell v. United States, 526 U.S. 314, 326 (1999), the Supreme Court held that the privilege does not end upon adjudication of guilt and continues until the sentence has been imposed[10]. "It is true, as a general rule, that where there can be no further incrimination, there is no basis for the assertion of the privilege." The Court concluded, however, that this principle applies "to cases in which the

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[9] Properly or not, as of the date of this brief, the Florida Department of Corrections reports that the following Defendants herein are on probation: Smith (to end 02 December 2007), Beikirich (to end 22 October 2031), Singleton (to end 12 April 2010), and Demarco (to end 16 May 2006). See the DOC internet site at http://www.dc.state.fl.us/ActiveOffenders. No attempt is made herein to address the legitimacy or lack of legitimacy of the assertion that these individuals are presently in a probationary status. That issue is beyond the scope of the present proceedings.

[10] The Court resolved a conflict among the federal circuits as to whether a guilty plea waives the privilege against self incrimination at sentencing in a criminal case.

sentence has been fixed and the judgment of conviction has become final.... If no adverse consequences can be visited upon the convicted person by reason of further testimony, then there is no further incrimination to be feared." Id. Thus the privilege applies past the possibility of a criminal prosecution and includes situations involving a potential enhancement of sentence. Mitchell at 326-327.

In Landeverde v. State, 769 So. 2d 457 (Fla. 4th DCA 2000), the court reviewed a situation very similar to that confronting the instant Defendants. The Defendants herein who are presently on probation are in exactly the same situation as the co-defendant in Landeverde, one Israel Cuevas, with respect to a potential for an enhanced sentence. There co-defendant Cuevas invoked his privilege to be free from self-incrimination when he had already been sentenced, but could be subject to a future violation of community control. Such a violation could result in a more severe sentence.

Defendant Landeverde had been charged in the trial court with burglary and first degree murder. He attempted to call co-defendant Cuevas as a witness on his behalf. Cuevas invoked his Fifth Amendment privilege against self-incrimination. At the time, Cuevas was serving a sentence of two years of community control. He did not have any appeals or post-sentencing motions pending at the time of appellant's trial; nevertheless he refused to testify on Fifth Amendment grounds.

At issue was whether Cuevas had reason to fear further prosecution in light of his prior plea and sentence.

The court began its analysis of the applicability of the rule in Mitchell to Cuevas' assertion of a Fifth Amendment privilege by inquiring whether a defendant placed on a "straight" term of community control or probation has been "sentenced" such that he loses the right to invoke his or her Fifth Amendment privilege against self-incrimination. The court considered whether a defendant who, at sentencing, received only probation or community control had been given a "fixed" sentence such that "no adverse consequences can be visited upon the convicted person by reason of further testimony".

Under Florida law, a probationary period is generally not considered a "sentence." See State v. Summers, 642 So. 2d 742, 744 (Fla. 1994); Villery v. Florida Parole & Probation Commission, 396 So. 2d 1107 (Fla. 1980)[11]; Committee Note, Fla. R. Crim. P. 3.790. "A sentence and probation are discrete concepts which serve wholly different functions." Villery at 1110. Probation is a form of community supervision, with rehabilitation, rather than punishment, as its underlying purpose. Id.; Martin v. State, 243 So. 2d 189, 190 (Fla. 4th DCA

[11] Villery was superseded in part by Chapter 83-131, Laws of Florida, providing for split sentencing alternatives. However, the holding in Villery regarding the statutory and rule requirements for withholding imposition of sentence when a defendant is placed on probation remains intact.

1971). When a defendant is placed on probation, the court must stay and withhold the imposition of sentence regardless of whether adjudication of guilt is withheld. § 948.01(2) Florida Statutes; Fla. R. Crim. P. 3.790(a).

Chapter 948 of Florida Statutes draws clear distinctions between the term of a sentence and the period of probation. In a technical sense, a trial court is not authorized to sentence a defendant to probation. See Lennard v. State, 308 So. 2d 579 (Fla. 4th DCA 1975); Brown v. State, 302 So. 2d 430, 432 (Fla. 4th DCA 1974). In Brown, the court held:

> A court may impose a sentence of imprisonment or fine upon a defendant found guilty of an offense, or it may withhold sentence in whole or in part and place defendant on probation, but it cannot sentence defendant to probation, since withholding of sentence or a portion thereof is an indispensable prerequisite to entry of an order placing a defendant on probation.

The court further explained that:

> If a defendant could be sentenced to probation, there would be no judicial recourse in the event the defendant violated his probation. Because the court has already passed sentence, there would be no lawful basis for the imposition of punishment for the violation of the conditions of probation. However, as Chapter 948 envisions, when a sentence or a portion thereof is withheld, there would be a lawful basis for the imposition of punishment for the violation of a condition of probation, namely, the withheld sentence.

Because an order of probation or community control placement "withholds the imposition of sentence" and is subject to modification, it is not a "fixed" sentence within the meaning of Mitchell. While a defendant is on probation or community control, the trial judge retains jurisdiction over the defendant until the period of probation or community control expires. See Clark v. State, 402 So. 2d 43, 44 (Fla. 4th DCA 1981). If a defendant violates terms and conditions of supervision, the court can revoke the defendant's probation or community control. In such event, the court may "impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control." § 948.06(2)(e), Florida Statutes. This is so even when a defendant violates terms of probation on which he or she was placed pursuant to a plea bargain. Bilyou v. State, 404 So. 2d 744, 746 (Fla. 1981); State v. Parrish, 616 So. 2d 1135 (Fla. 3d DCA 1993).

When sentencing a defendant after revocation of probation or community control, a trial court may, under certain circumstances, consider new facts relevant to the underlying offense that were not previously considered by the court at the time it imposed the original sentence. These newly disclosed facts can result in greater sentences without violating double jeopardy principles. See, e.g., Roberts v. State, 644 So. 2d 81, 82 (Fla. 1994); Merkt v. State, 764 So. 2d 865, 867 (Fla. 4th DCA 2000); Echols v. State, 660 So. 2d 782, 784-785 (Fla. 4th DCA 1995).

Further, the court can impose a departure sentence, upon revocation of probation, beyond the increase permitted by sentencing guidelines for violation of probation, based on a reason that would have supported departure had the judge initially sentenced the defendant rather than placing him or her on probation. See Williams v. State, 581 So. 2d 144, 145-146 (Fla. 1991); Routenberg v. State, 677 So. 2d 1325, 1326 (Fla. 2d DCA 1996). Therefore a probation or community control placement is not a "fixed" or final sentence as contemplated by Mitchell.

The Landeverde court concluded that, so long as the trial court retains jurisdiction and control over a defendant's ultimate sentence, the defendant retains a legitimate protected Fifth Amendment interest in not testifying as to incriminatory matters that could yet have an impact on his sentence. 769 So. 2d at 464. The Landeverde court followed the rule in Mitchell that a defendant is entitled to protection from a potential increase in sentence, just as he or she is entitled to protection from being compelled to furnish evidence that could lead to a criminal conviction. 526 U.S. 326-327.

The Landeverde court held that Cuevas' concern about self-incrimination was real and substantial. 769 So. 2d at 464. Cuevas could have reasonably believed that responding to questions about his crimes presented a danger since the possibility of a greater sentence following revocation of his community control existed. If the trial court had compelled Cuevas to testify in Landeverde's trial, his

testimony might have produced evidence of a greater participation in the charged crimes, a more extensive criminal history, or other unfavorable sentencing factors undisclosed at the time of his plea and original sentencing. The court concluded that this potential for an enhanced sentence served as sufficient justification for invoking the privilege. 769 So. 2d at 464.

Four of the Defendants[12] in the instant case are in exactly the same situation as co-defendant Cuevas in Landeverde with respect to a potential for an enhanced sentence. The possibility exists that all of these Defendants could violate the terms of their probation.[13] In that situation they could be sentenced to long terms of imprisonment, in two instances for life.[14] See Williams at 146.[15] This is no otiose peril.

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[12] See footnote 9.

[13] The Landeverde court cited statistics compiled by the Department of Corrections, tracking offenders for a year following their admission to probation or community control during the calendar year 1998, to show a revocation rate of 34.3% for offenders placed on community control and 20.2 % for offenders placed on probation. The court held that these numbers suggest that re-sentencing following revocation is more than a remote possibility or "imaginary hazard of incrimination". Landeverde, n. 5.

[14] Defendants Beikirich and Singleton were adjudicated guilty of life felonies; Defendants Smith and Demarco of second degree felonies. Beikirich, R. 67; Singleton, R. 066; Smith, R. 67; Demarco, R. 70.

[15] Upon a violation of probation, a court can "properly impose a departure sentence for valid reasons which existed at the time he was placed on probation".

Therefore, so long as the trial court retains jurisdiction and control over a defendant's ultimate sentence, the defendant retains a legitimate protectable Fifth Amendment interest in not testifying as to incriminatory matters that could yet have an impact on his sentence. Landeverde at 464.

In United States v. Antelope, No. 03-30334 (9th Cir. Jan. 27, 2005), the Ninth U.S. Circuit Court of Appeal took a similar position. Citing to Kastigar and McCune v. Lile, 536 U.S. 24 (2002), the court held that the defendant's privilege against self incrimination was violated because the defendant refused to comply with a probation requirement that he disclose prior sexual behavior for the purpose of treatment. Slip opinion at 1168. Citing to Minnesota v. Murphy, 465 U.S. 420, 426 (1984) ("a defendant does not lose this protection by reason of his conviction of a crime"), the court held that the defendant's Fifth Amendment right was violated when his probation was revoked for not revealing prior behavior that was potentially criminal. Slip opinion at 1170-71.

## I E. Conclusion re. Due Process

Thus the protection against compulsory self-incrimination of the Fifth Amendment to the U.S. Constitution and Article I, § 9, Florida Constitution applies to the Defendants in the instant case. The protection includes the right to be free from compelled statements which could lead to "penal" sanctions in

criminal, civil, and administrative proceeding. Penal sanctions include any governmental acts which tend to degrade the individual's professional standing, professional reputation, or livelihood; they are not limited to criminal penalties. The right must be broadly construed; it extends to a wide variety of proceedings which, while not criminal per se, may lead to loss of constitutionally protected freedoms. The right may not be circumvented by calling a proceeding "civil" or "administrative" but then imposing the substantial equivalent of a criminal sanction.

This Court and other Florida courts have consistently held that in the context of the privilege against self-incrimination applies to "penal" proceedings regardless of their "criminal" status in the orthodox sense. In Florida the privilege may be invoked in a civil action during a discovery proceeding if a civil litigant could be subject to revocation of a professional license. A court may compel a litigant to answer questions only if it is absolutely clear that the answers that the litigant may be compelled to give cannot possibly form a link in the chain of evidence leading to a "penal" sanction against a litigant.

That is exactly the situation of the Defendants in the instant case – the State seeks to compel them to give testimony, then to use the compelled testimony to completely abrogate their liberty. Unlike a defendant in the more usual variety of criminal case, the instant Defendants would not lose their liberty for the term of a

definite sentence. In the instant case the State seeks to incarcerate the instant Defendants for an indefinite term, perhaps for life.

Because the Defendants may be prejudiced by the use of this evidence obtained in derogation of their right to be free from self-incrimination, such forced testimony is offensive to the Fifth Amendment to the U.S. Constitution and Article I, § 9 of the Florida Constitution. This Court should not compel them to give it in any form.

## II. Equal Protection of the Laws

> The opinion below violates constitutional rights of the Defendants by treating them differently from other persons subject to civil commitment and from other persons protected from compulsory self-incrimination by Florida law.

Equal protection of the laws is guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, § 2 of the Florida Constitution. Equal Protection requires that persons similarly situated be treated alike. See, e.g., Duncan v. Moore, 754 So. 2d 708, 712 (Fla. 2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). The equal protection principles of the Fourteenth Amendment apply to actions of states. See, e.g., Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

## II A. Application of Equal Protection

A respondent in a proceeding for civil commitment for mental health treatment pursuant to the Baker Act[16] may not be compelled to provide testimony against himself. § 394.467(6)(a)(2) Florida Statutes (2004). No rational basis exists for disparate treatment of the Defendants herein; the State ostensibly seeks to treat them for mental abnormalities or personality disorders under the same chapter of Florida Statutes.

In Shuman v. State, 358 So. 2d 1333, 1335 (Fla. 1978), this Court held that the "deprivation of liberty which results from confinement under a state's involuntary commitment law has been termed a 'massive curtailment of liberty...' Those whom the state seeks to involuntarily commit to a mental institution are entitled to the protection of our Constitutions, as are those incarcerated in our correctional institutions." See also Addington v. Texas, 441 U.S. 418 (1979) ("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); Ibur v. State, 765 So. 2d 275, 276 (Fla. 1st DCA 2000) ("involuntary commitment is a substantial deprivation of liberty at which fundamental due process protections must attach").

[16] §§ 394.451 et seq. Florida Statutes (2004).

Because liberty is a fundamental right[17] a strict scrutiny analysis is required; governmental regulations that infringe upon the rights of a suspect class or violate a fundamental right are subjected to strict scrutiny and may be sustained only if found to be suitably tailored to serve a compelling state interest, City of Cleburne v. Cleburne Living Center at 439; Florida Dept. of Children and Families v. F.L., 880 So. 2d 602, 607 (Fla. 2004); Mitchell v. Moore, 786 So. 2d 521, 527-528 (Fla. 2001); De Ayala v. Florida Farm Bureau Casualty Ins. Co., 543 So. 2d 204, 206 (Fla. 1989); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981). But cf. Westerheide v. State, 831 So. 2d 93, 111-12 (Fla. 2002).

In the instant case the State has not made and can not make the requisite showing of a compelling governmental interest requiring testimony by the Defendants. The reason that the State seeks the Defendants' testimony is not clear from the record. The State has not suggested that a psychologist might make use of such statements in the course of an evaluation; the records in these cases are completely devoid of the slightest suggestion of any future psychological examination of any of the Defendants by the State. In each of these cases two psychologists employed by the State have already examined each Defendant and

[17] See, e.g., Fla. Const., Art. 1 § 2; State v. Hunter, 586 So. 2d 319, 326 (Fla. 1991); Pullen v. State, 802 So. 2d 1113, 1119 (Fla. 2001).

have already written reports. Sutton, R. 362, 377; Smith, R. 434, 455; Beikirich, R. 490, 501; Singleton, R. 433, 443; Rhoades, R. 404, 430; Demarco, R. 395, 416.

The fact that each of the Defendants has been convicted of a qualifying prior offense is not disputed; each Defendant has offered to stipulate to it.[18] The issues of mental abnormality or personality disorder and future dangerousness, and the nexus between them, are perforce the realm of expert opinion; no lay witness, including the Defendants, could be qualified to offer such an opinion.

If the class of persons who are in jeopardy of losing professional accreditation or licensure are protected by the right to be free from self-incrimination, then surely the class of persons who are in jeopardy of losing their liberty should also be so protected, absent some compelling governmental interest. No sane person could believe that complete incarceration, of indefinite duration and potentially for life[19], is less inimical to the fundamental rights of a free man than the loss of a license to sell real property. The fundamental constitutional guarantees that protect the latter must also extend to the former.

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[18] Acceptance of such a stipulation is mandatory if offered by the defendant. See Old Chief v. United States, 519 U.S. 172 (1997); Brown v. State, 719 So. 2d 882 (Fla. 1998).

[19] See §§ 394.915(5), 394.918, 394.919, 394.920 Florida Statutes.

## II B. Allen v. Illinois Distinguished

In Allen v. Illinois, 478 U.S. 364 (1986), the U.S. Supreme Court held that a proceeding under the Illinois Sexually Dangerous Persons Act did not require application of the Fifth Amendment guarantee against compulsory self-incrimination. The Allen Court reasoned that the fact that a person adjudged sexually dangerous under the Illinois statute may be committed to a particular maximum security institution does not make the conditions of that person's confinement amount to "punishment" and thus does not render the proceedings "criminal". The Court's narrow analysis only considered Allen's argument that "because the sexually-dangerous-person proceeding is itself 'criminal,' he was entitled to refuse to answer any questions at all." 478 U.S. at 368. That is not the primary issue before this Court today.

This Court has specifically applied the constitutional prohibition against self-incrimination to various licensure and other "penal" proceedings that are clearly not "criminal".[20] The complete long-term deprivation of liberty potentially resulting from this proceeding is inherently much more dire and onerous than an administrative action against a professional license. Florida courts have

[20] See discussion at section I C, pages 9-16 supra, and cases cited therein, particularly State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d at 491; Kozerowitz v. Florida Real Estate Commission, 289 So. 2d at 392.

consistently recognized the protection against self-incrimination in a variety of contexts outside the traditional "criminal" law. Given the constitutional privilege and substantial federal and Florida precedent, this Court should now hold that the right to equal protection of the laws requires that the same due process protection afforded the holder of a real estate license be applied to the potential complete loss of liberty in these cases.

## II C. Whether the Petitioner Can Depose the Defendants When the Defendants Can Not Depose the Petitioner

In State v. Donaldson, 763 So. 2d 1252, 1256 (Fla. 3d DCA 2000), the court ruled that a respondent in a post-sentence civil commitment case similar to the instant case was not entitled to take the deposition of the prosecutor. The Donaldson court held:

> Donaldson is, of course, entitled to discovery from the multidisciplinary team, and is entitled to learn from the team the information on which the experts have based their opinion. Donaldson may review the documentary record and may inquire of the team regarding conversations between the team and the prosecutor. Since this information is available by discovery from the team itself, there is no basis for taking the deposition of the prosecutor. [Emphasis in original.]

The prosecutor is the petitioner and at least the nominal party in interest in a case of this nature. If a defendant must "inquire of the team regarding

conversations between the team and the prosecutor" then equal protection requires that the prosecutor inquire of the multidisciplinary team regarding statements made by the defendant. Equal protection of the laws should not allow a petitioner to depose a respondent where a respondent can not depose a petitioner especially where, as here, infringement upon a fundamental right requires strict scrutiny analysis and a compelling governmental interest for disparate treatment.

## III. Right to Privacy

> The opinion below forces the Defendants to disclose private matters protected by the federal and Florida constitutions.

The State's inquiry at a deposition would require each Defendant to reveal some of his innermost thoughts, ideas, and the workings of his mind. The information requested here is protected by the state and federal right to privacy. See Art. I, § 23, Florida Constitution, Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Lawrence v. Texas, 539 U.S. 558 (2003); Cason v. Baskin, 20 So. 2d 243 (Fla. 1944). The right of privacy involves an individual's interest in avoiding public disclosure of personal information. "It is now well accepted that the inclusion of the phrase 'right to be let alone' from government intrusion in Florida's privacy amendment was by no means unintentional.... Hence, it has been held that Florida's right of privacy

'embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution'". Mozo v. State, 632 So. 2d 623, 632-633 (Fla. 4th DCA 1994)[21].

The right to privacy guaranteed by Article I, § 23, of the Florida Constitution is, in and of itself, a fundamental right that, once implicated, demands evaluation under a compelling state interest standard. City of North Miami v. Kurtz, 653 So. 2d 1025, 1027 (Fla. 1995), cert. denied 516 U.S. 1043 (1996); North Florida Women's Health and Counseling Services, Inc. v. State, 866 So. 2d 612, 635 (Fla. 2003). Assuming that the Defendants have a legitimate expectation of privacy in their thoughts, a court must look to whether a compelling interest exists to justify the requested intrusion on that expectation of privacy, and, if so, whether the least intrusive means is being used to accomplish the goal. Kurtz at 1028.

This Court has consistently ruled that the test for the compelling state interest standard shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met only by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. Winfield v. Division of Pari-Mutuel Wagering,

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[21] Citing to In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989).

477 So. 2d 544, 548 (Fla. 1985), Beagle v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996).

In the instant case the State has neither made the requisite showing nor met the requisite burden. As explained supra, the fact that each of the Defendants has been convicted of a qualifying prior offense is not disputed; the issues of mental abnormality or personality disorder and future dangerousness, and the nexus between them, are inescapably the realm of expert opinion. Only an expert witness can offer an opinion to the Court in such issues. No lay witness, including a Defendant, could be qualified to offer an opinion that he suffers from a mental abnormality or personality disorder, or that he is likely to engage in acts of sexual violence if not confined.

Therefore testimony from the Defendants on the matters at issue in this cause would be neither admissible as evidence nor likely to lead to the discovery of admissible evidence. Absent the requisite showing, the State's attempt to obtain such testimony is be offensive to the Defendants' right to privacy under both the Federal and Florida constitutions, especially when examined under the compelling state interest standard established by this Court in Kurtz. The State has offered nothing in connection with this case suggesting what purpose beyond a fishing expedition might be served by the deposition of the Defendants. Therefore requiring the Defendants to give testimony that could not itself be admissible on

any matter at issue in this cause, and would be most unlikely to lead to admissible evidence, would inevitably offend the Defendants' right to privacy under both the State and Federal constitutions.

## IV. Analysis of Individual Proffered Questions[22]

The trial court ordered each of the Defendants to respond to certain proffered deposition questions. None are proper; all were the subject of objections before the circuit court.[23] Sutton, R. 072-092; Smith, R. 075-102; Beikirich, R. 076-103; Singleton, R. 081-108; Rhoades, R. 075-101; Demarco, R. 078-105. The trial court overruled virtually all objections. Sutton, R. 359-360; Smith, R. 104; Beikirich, R. 105; Singleton, R. 110; Rhoades, R. 103; Demarco, R. 107.

In the interest of brevity the questions will be analyzed in groups so far as possible. Group headings refer on separate lines to the question set propounded to Defendants Smith, Beikirich, Singleton, Rhoades, and Demarco, and to the question set propounded to Defendant Sutton. The question set propounded to Defendant Sutton included fewer questions and used a different numbering

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[22] The inclusion of this analysis is by no means intended to imply that any attempt to force the Defendants to testify against themselves is in any way proper.

[23] The objections herein are to substance only; in the interest of brevity form is not addressed. Almost all of the propounded questions are improper in form (e.g., compound).

scheme. The record pages where the questions and objections appear immediately follow each heading.

Not every group of questions contains questions propounded to Defendant Sutton. One question (number 25) was propounded to Defendant Sutton and not to the other Defendants. The prosecutor withdrew questions 25, 26, and 28 as to Defendant Sutton. Sutton R. 136, line 11-12, 17-18. Nevertheless those questions are addressed herein in the interest of completeness.

Questions 1a - 1k re. Smith, Beikirich, Singleton, Rhoades, Demarco

Questions and objections at Smith, R. 075-078; Beikirich, R. 076-079; Singleton, R. 081-084; Rhoades, R. 075-078; Demarco, R. 078-08.

How any of the information sought in questions 1a - 1k might be relevant to or lead to evidence relevant to the instant case is obscure at best. The elements of the instant cause of action are (1) whether the defendant has been convicted of a sexually violent offense; (2) whether the defendant suffers from a mental abnormality or personality disorder; and (3) whether the mental abnormality or personality disorder makes the defendant likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. Standard Jury Instructions-Criminal Cases (99-2), 777 So. 2d 366, 373 (Fla. 2000).

The fact that each of the Defendants has been convicted of a qualifying offense is not at issue; every Defendant has offered to stipulate to it. None of the information sought in questions 1a - 1k even remotely addresses anything to do with a determination whether any Defendant suffers from a mental abnormality or personality disorder or whether the mental abnormality or personality disorder makes any Defendant more or less likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

The State has not suggested that a psychologist might make use of such statements in the course of an evaluation; the record is completely devoid of the slightest suggestion of any future psychological examination of any Defendant by the State. The State alleged in its petition in each case that two psychologists engaged by the State have already examined each Defendant and have already written reports. Sutton, R. 362, 377; Smith, R. 434, 455; Beikirich, R. 490, 501; Singleton, R. 433, 443; Rhoades, R. 404, 430; Demarco, R. 395, 416.

The information sought is largely already known to the State; the request is therefore intended only to annoy, embarrass, oppress, and create undue burden and expense. The State made no showing that any remaining information sought in questions 1a - 1k is in any way relevant to the issues in this case, or might lead to something at issue in this case. "[T]here must be a connection must exist between the discovery sought and the injury claimed. Otherwise, it is an improper fishing

expedition." American Medical Systems, Inc. v. Osborne, 651 So. 2d 209, 211 (Fla. 2d DCA 1995). "It is axiomatic that information sought in discovery must relate to the issues involved in the litigation, as framed in all pleadings." Krypton Broadcasting of Jacksonville, Inc. v. MGM-Pathe Communications Co., 629 So. 2d 852, 854 (Fla. 1st DCA 1993).

Where, as here, the information sought is not reasonably calculated to lead to the discovery of admissible evidence. Under such circumstances, the order of the trial court order is a departure from the essential requirements of the law. See, e.g., Estate of McPherson ex rel. Liebreich v. Church of Scientology Flag Service Organization, Inc., 813 So. 2d 1032, 1034 (Fla. 2d DCA 2002).

Questions 2a - 2b re. Smith, Beikirich, Singleton, Rhoades, Demarco
Questions 1-3 re. Sutton

Questions and objections at Sutton, R. 072-073; Smith, R. 078-079; Beikirich, R. 079-080; Singleton, R. 084; Rhoades, R. 078; Demarco, R. 081.

Each Defendant has already offered to stipulate that he has previously been convicted of an offense within the meaning of the definitions contained in § 394.912(2) Florida Statutes, § 394.912(9) Florida Statutes, and § 394.912(10)(a) Florida Statutes such as to conclusively prove, by clear and convincing evidence, the prior conviction which is an element of § 394.912(10)(a) Florida Statutes and § 394.916(1) Florida Statutes. Absent a stipulation, the best evidence of a

conviction would be a certified copy of the judgment, and if relevant, the sentence.[24]

The information sought in question 2 is already known to the State; the request is therefore intended only to annoy, embarrass, oppress, and create undue burden and expense. The fact that each Defendant was convicted of certain crimes is clearly relevant to this action. However once the fact that a Defendant has been convicted of a qualifying predicate offense has been established, the details of an act or specific event which may have transpired can not be established by mere evidence of the conviction.

That is because Florida courts have consistently held that a judgment of conviction in a criminal prosecution is not admissible in a civil action as evidence of the facts upon which it is based. See, e.g., State v. Dubose, 11 So. 2d 477, 481 (Fla. 1943) ("[i]t is the well established rule that a judgment rendered in a criminal action, when offered in a civil action to establish the facts upon which it was rendered, is not admissible as evidence of such facts"); Moseley v. Ewing, 79 So. 2d 776, 778 (Fla. 1955) ("a judgment of conviction in a criminal case is not admissible in a civil case to establish the truth of the facts on which it was

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[24] The State attached a copy of judgment and sentence in the qualifying criminal case to each petition. See Sutton, R. 347-351; Smith, R. 400-403, 413-419; Beikirich, R. 411-416; Singleton, R. 408-427; Rhoades, R. 400-401; Demarco, R. 379-393.

rendered"); Stevens v. Duke, 42 So. 2d 361 (Fla. 1949). Cf. Boshnack v. Worldwide Rent-A-Car, Inc., 195 So. 2d 216, 218 (Fla. 1967).

In every underlying criminal case herein, the Defendant entered a plea of nolo contendere. Sutton, R. 070; Beikirich, R. 067; Singleton, R. 066, 075; Rhoades, R. 070; Demarco, R. 070. A plea of nolo contendere "cannot be used against the defendant in a civil suit as an admission of the facts charged in the indictment...." Vinson v. State, 345 So. 2d 711, 715 (Fla. 1977). "A defendant entering a plea of nolo contendere does not admit guilt." State v. Raydo, 713 So. 2d 996, 1001 (Fla. 1998). "A nolo plea means 'no contest,' not 'I confess.'" Garron v. State, 528 So. 2d 353, 360 (Fla. 1988).

If "factual basis" in this inquiry means the specific facts in the criminal case elicited from the State Attorney at the time the Defendant entered a plea, that can best be ascertained from a transcript of the proceedings. That information is already known to the State and is irrelevant to the issues in the present case; the only possible relevance of the question might be as a test of the Defendant's memory. The Defendants' memories (and all other human memories) are acknowledged to be imperfect – that is why transcripts exist. If the request is for more than the specific facts stated at the time of the plea, the request may well include other uncharged criminal activity which is within the ambit of the

constitutional protection. Therefore the request is vague and overbroad because it is impossible to determine exactly what information is sought.

In several of these cases, the inquiry is complicated by the fact that the Defendants were originally charged with offenses different from the offenses for which the Defendants were convicted on their nolo contendere pleas. Sutton, R. 060-062, 065-066, 068, 070; Beikirich, R. 067; Rhoades R. 066-068, 070. Thus a request for information regarding the "factual basis" could easily include activities for which an individual might still be criminally liable. That is about as offensive to the constitutional provision that "[n]o person shall ... be compelled in any criminal matter to be a witness against oneself" as anything could possibly be.

A person can enter an agreed upon plea to an amended charge in exchange for a particular sentence. But then how can that defendant truthfully state a "factual basis" for what is in effect a fictitious event? If a defendant were to relate actual facts regarding actual events, the statements would not necessarily relate to the offense to which he entered the plea. Possibly the defendant would admit to acts for which he had not been convicted and for which he would still subject criminal liability. Compelled statements regarding criminal acts (in any official proceeding, civil or criminal, formal or informal) are privileged by the Fifth Amendment to the U.S. Constitution as well as by Article I, § 9, of the Florida Constitution. The substance of the answers to the State's questions 2a and 2b

relate or may relate, in one way or another, to criminal or potentially criminal acts. To describe the facts herein might itself be prejudicial to the Defendant. That is inherent in the very nature of this sort of "cat out of the bag" discovery inquiry.

Question 2c re. Smith, Beikirich, Singleton, Rhoades, Demarco
Question 4 re. Sutton

Question and objections at Sutton, R. 074; Smith, R. 079; Beikirich, R. 080; Singleton, R. 085; Rhoades, R. 079; Demarco, R. 082.

The request to "describe your relationship" with certain persons is hopelessly vague and overbroad if it seeks to inquire into the quality of the attachment and interaction (if any) between these individuals. If the meaning of the question has to do only with the kinship relation (e.g. father-daughter) between the individuals, then it is already known to the State from the original investigation and is therefore intended only to annoy, embarrass, oppress, and create undue burden and expense. In either event, it is irrelevant and immaterial in that it has nothing to do with the elements of the pending action, and is not reasonably calculated to lead to the discovery of admissible evidence. See Fla. R. Civ. P. 1.280(b)(1).

To the extent that the information sought may be internal to a family, it is well within the ambit of the privacy protection of the federal constitution and Article 1, § 23 of the Florida Constitution. Both constitutions protect the privacy

of "family relationships". See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Lawrence v. Texas, 539 U.S. 558 (2003); Cason v. Baskin, 20 So. 2d 243 (Fla. 1944).

Questions 2d - 2f re. Smith, Beikirich, Singleton, Rhoades, Demarco
Questions 5-7 re. Sutton

Questions and objections at Sutton, R. 074-075; Smith, R. 079-080; Beikirich, R. 080-081; Singleton, R. 085-086; Rhoades, R. 079-080; Demarco, R. 082-083.

To the extent that these questions seek information contained within conversations with an attorney, the answers are protected by § 90.502 Florida Statutes (lawyer-client privilege). To the extent that they seek information contained within conversations with a psychotherapist or other medical professional, the answers are protected by § 90.503 Florida Statutes (psychotherapist-patient privilege), the various Florida statutes making privileged medical and mental health information and records, including but not limited to §§ 394.4615, 395.3025, 397.501, and 456.057 Florida Statutes, and the rule in Acosta v. Richter, 671 So. 2d 149 (Fla. 1996).[25]

[25] Acosta v. Richter examined § 455.241 Florida Statutes (1993). The same was renumbered as § 455.667 Florida Statutes by Laws of Fla., Ch. 97-261, § 82, and renumbered again as § 456.057 Florida Statutes by Laws of Fla., Ch. 2000-160, § 79.

The mere fact that a defendant may have made such a statement does not make it either relevant or material; only the contents of any such statement might be relevant or material. However to the extent such contents might include mention of unresolved criminal activity, the question is clearly offensive to the constitutional provision that "[n]o person shall ... be compelled in any criminal matter to be a witness against oneself" Art I, § 9, Fla. Const.; see also U.S. Const., Amend. V. An answer can not properly be compelled.

Several of the Defendants were originally charged with offenses different from the offenses for which the Defendants were convicted on their nolo contendere pleas. Sutton, R. 060-062, 065-066, 068, 070; Beikirich, R. 067; Rhoades R. 066-068, 070. Several convictions were for attempts, not the crimes involving physical contact as originally charged. Sutton, R. 070; Beikirich, R. 067. Therefore the request for information regarding the facts in the underlying case could easily include activities for which the Defendant might still be criminally liable. Again, this inquiry is about as offensive to the constitutional provision that "[n]o person shall ... be compelled in any criminal matter to be a witness against oneself" as anything could possibly be.

Even if such compelled statements regarding criminal acts could pass constitutional muster with respect to self-incrimination, in Florida extrajudicial declarations of the commission of criminal acts are not admissible in evidence in

civil cases because such declarations are not against the interest of the declarant (in the civil case) within the meaning of the exception to the hearsay rule.

In Gerson v. Haines, 428 So. 2d 766 (Fla. 3d DCA 1983), in a proceeding to determine descent and distribution of two murdered decedent's estates, the trial court improperly admitted evidence as to the order of death of the decedents. The evidence consisted of testimony concerning a confession by the perpetrator of the homicides as to the details of the shooting. The district court held that this was hearsay and was not subject to the exception to the hearsay rule as an admission against penal interest because the admission was collateral to declarant's admission against penal interest in the civil case.

Peninsular Fire Ins. Co. v. Wells, 438 So. 2d 46 (Fla. 1st DCA 1983), review dismissed 443 So. 2d 980 (Fla. 1983), was an action against insurer by commercial fishermen to recover on a marine insurance policy for damage to a vessel. The captain of the vessel (who had been accused of stealing it) made an out-of-court statement to the effect that the purpose of the voyage was to smuggle marijuana. The court held that the statement was not a declaration against the captain's interest within the meaning of the exception to hearsay rule, and was therefore inadmissible.

The same should be true in the instant case. The Defendants' prior statements, if any, connected with one or more criminal cases should not be

admissible in the instant case because any such admissions would be collateral to the Defendants' penal interests in the instant civil case.

Question 2g re. Smith, Beikirich, Singleton, Rhoades, Demarco
Question 8 re. Sutton

Question and objections at Sutton, R. 075-076; Smith, R. 080; Beikirich, R. 081; Singleton, R. 086; Rhoades, R. 080; Demarco, R. 083.

The right to privacy guaranteed by Article I, § 23 of the Florida Constitution is, in and of itself, a fundamental right that, once implicated, demands evaluation under a compelling state interest standard. City of North Miami v. Kurtz, 653 So. 2d at 1027. Assuming that the Defendants have a legitimate expectation of privacy in their innermost thoughts, a court must look to whether a compelling interest exists to justify the requested intrusion on that expectation of privacy, and, if so, whether the least intrusive means is being used to accomplish the goal. Kurtz at 1028.

How the Defendants' subjective feelings of remorse or sorrow might be relevant to the instant case is obscure at best. The reason that the State seeks this information is not clear from the record, but given the circumstances of the request one must assume that the State intends to use this information against the Defendants in some way in connection with the pending litigation. The State has not suggested that a psychologist might make use of such statements in the course

of an evaluation; the record is completely devoid of the slightest suggestion of any future psychological examination of any of the Defendants by the State. The State alleged in each of its petitions that two psychologists engaged by the State have already examined each Defendant and have already written reports. Sutton, R. 362, 377; Smith, R. 434, 455; Beikirich, R. 490, 501; Singleton, R. 433, 443; Rhoades, R. 404, 430; Demarco, R. 395, 416.

This Court has consistently ruled that the test for the compelling state interest standard shifts the burden of proof to the state to justify an intrusion on privacy. Florida courts require application of the compelling state interest standard. See, e.g., Board of County Commissioners of Palm Beach County v. D.B., 784 So. 2d 585, 588 (Fla. 4th DCA 2001); Beagle v. Beagle, 678 So. 2d 1271, 1274-1276 (Fla. 1996). The test for the compelling state interest standard shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met only by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985); Beagle.

At the risk of restating the obvious, the present proceeding involves a deposition by lawyers, not an evaluation by psychologists or psychiatrists. See In re. Commitment of Smith v. State, 827 So. 2d at 1029-30. The State has already

conducted two psychological evaluations of each Defendant in connection with this case. If the State's examining psychologists might have found this information useful, they had the opportunity to inquire. Otherwise the question is nothing short an Orwellian "though police" interrogation. If each Defendant does not have the correct (as defined by the State) thoughts, his liberty is at risk. One hopes that such things would not be part of American law.

Questions 2h - 2j re. Smith, Beikirich, Singleton, Rhoades, Demarco
Questions 9-11 re. Sutton

Questions and objections at Sutton, R. 076-077; Smith, R. 080-081; Beikirich, R. 081-082; Singleton, R. 086-087; Rhoades, R. 080-081; Demarco, R. 083-084.

The inquiries in questions 2h and 2i regarding arrest and prosecution for "any other kind of crime" and the details of the same, if not resolved by trial or plea, are offensive to the right not to be compelled in any criminal matter to be a witness against oneself. Article I, § 9, Fla. Const.; see also U.S. Const., Amend. V.

The details of conviction of "any other kind of crime" are another improper fishing expedition. American Medical Systems at 211; Krypton Broadcasting at 854. If the offense were a "juvenile crime", long standing Florida law recognizes that juvenile adjudication of delinquency will not give rise to the same

consequences as an adult conviction. The distinction between adjudications of delinquency and criminal convictions stems, in large part, from the consistent historical view that delinquent juveniles are not considered adult criminals. See State v. J.M., 824 So. 2d 105, 113-114 (Fla. 2002). Juvenile delinquency adjudications cannot be used to impeach witnesses, or for many purposes related to felony sentencing. Id. at 113. Nor do juvenile adjudications "operate to impose any of the civil disabilities ordinarily resulting from a conviction." Id. at 114 .

Questions 3a - 3e re. Smith, Beikirich, Singleton, Rhoades, Demarco
Questions 34-38 re. Sutton

Questions and objections at Sutton, R. 087-088; Smith, R. 081-082; Beikirich, R. 082-083; Singleton, R. 087-088; Rhoades, R. 081-082; Demarco, R. 084-085.

Questions 3a-3e all relate to the incarceration of the Defendants. All of the inquires relate to facts that are easily available to the State from Department of Corrections records. As such they are simply intended only to annoy, embarrass, oppress, and create undue burden and expense. There can be no proper purpose in asking for such information except perhaps if the State is hoping to catch one or more of the Defendants in lapses of memory and then use otherwise inadmissible Department of Corrections records to impeach or initiate a prosecution for perjury.

Absent some showing of relevance, this inquiry is yet another improper fishing expedition. American Medical Systems at 211; Krypton Broadcasting at 854.

Question 3b ("Describe your adjustment to life in prison.") is not only irrelevant to this cause of action, it is so vague as to be almost impossible to answer coherently.[26] Any sort of detailed answer would perforce involve improper opinion testimony .

Questions 4a - 4e re. Smith, Beikirich, Singleton, Rhoades, Demarco
Questions 30-33 re. Sutton

Questions and objections at Sutton, R. 085-087; Smith, R. 082-084; Beikirich, R. 083-085; Singleton, R. 088-090; Rhoades, R. 082-084; Demarco, R. 085-087.

All of these inquiries address the state of the Defendants' physical health. All call for an opinion beyond that which a lay witness can properly give. All offend the right to privacy guaranteed by the federal constitution and Article 1, § 23, Florida Constitution. All offend the Florida medical history and record privilege. See §§ 394.4615, 395.3025, 397.501, and 456.057 Florida Statutes. Acosta v. Richter[27] recognizes "a broad and express privilege of confidentiality as

[26] If "it was O.K." or something similar were a permissible response, both the question and the answer would be an exercise in futility.

[27] See note 25.

to the medical records and the medical condition of a patient." 671 So. 2d at 155. See also Id. at 156. ("[S]ection 455.241(2), Florida Statutes (1993)[28], creates a physician-patient privilege of confidentiality for the patient's personal medical information....") (Footnote added.)

All of these inquiries are largely irrelevant to the issues before the trial court in that there is no element of this case which relates to the Defendants' physical health.[29] If such information were required, the State had opportunity to obtain it through the examination of the Defendants by a psychiatrist or psychiatrists (as opposed to psychologists) who, being physicians, could then testify as to the Defendants' physical condition and health (at least to the extent not privileged). See § 394.913(3)(b) Florida Statutes ("Each [multidisciplinary] team shall include, but is not limited to, two licensed psychiatrists or psychologists or one licensed psychiatrist and one licensed psychologist. The multidisciplinary team shall assess and evaluate each person referred to the team.") Thus these inquires

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[28] Acosta v. Richter examined § 455.241 Florida Statutes (1993). The same was renumbered as § 455.667 Florida Statutes by Laws of Fla., Ch. 97-261, § 82, and renumbered again as § 456.057 Florida Statutes by Laws of Fla., Ch. 2000-160, § 79.

[29] One could perhaps conjure up a scenario wherein a person might be so physically debilitated that he would not be able to perform a particular act or acts. Of course the same could be conjured in almost any case, except perhaps in probate where such conjuring would obviously be unnecessary.

amount to yet another improper fishing expedition. American Medical Systems at 211; Krypton Broadcasting at 854.

Questions 5a - 5f re. Smith, Beikirich, Singleton, Rhoades, Demarco
Questions 12-17 re. Sutton

Questions and objections at Sutton, R. 077-080; Smith, R. 085-087; Beikirich, R. 086-088; Singleton, R. 091-093; Rhoades, R. 085-086; Demarco, R. 088-090.

The information requested here is protected by the state and federal right to privacy. See Art. I, § 23, Florida Constitution, Griswold v. Connecticut, Eisenstadt v. Baird, Lawrence v. Texas, Cason v. Baskin. The right of privacy involves an individual's interest in avoiding public disclosure of personal information. Mozo v. State at 632-633 ("It is now well accepted that the inclusion of the phrase 'right to be let alone' from government intrusion in Florida's privacy amendment was by no means unintentional.... Hence, it has been held that Florida's right of privacy 'embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution'"). The right to privacy and the compelling state interest standard for intrusion on the same are discussed in section III, supra.

To the extent that the answers to these questions involve communications with a psychotherapist, diagnoses, and records, they are within psychotherapist-

patient privilege, § 90.503 Florida Statutes, and the various Florida statutes making privileged medical and mental health information and records, including but not limited to §§ 394.4615, 395.3025, 397.501, and 456.057 Florida Statutes. See, e.g., Acosta v. Richter, 671 So. 2d at 155, which "creates a broad and express privilege of confidentiality as to the medical records and the medical condition of a patient."

Questions 5g - 5i re. Smith, Beikirich, Singleton, Rhoades, Demarco

Questions and objections at Smith, R. 088-089; Beikirich, R. 089-090; Singleton, R. 094-095; Rhoades, R. 085-088; Demarco, R. 091-92.

To the extent that the answers to these questions involve communications with a psychotherapist, diagnoses, and records, as perforce they must, they are within psychotherapist-patient privilege, § 90.503 Florida Statutes, and the various Florida statutes making privileged medical and mental health information and records, including but not limited to §§ 394.4615, 395.3025, 397.501, and 456.057 Florida Statutes; Acosta v. Richter .

Questions 6a - 6d re. Smith, Beikirich, Singleton, Rhoades, Demarco
Questions 18-21 re. Sutton

Questions and objections at Sutton, R. 080-081; Smith, R. 089-091; Beikirich, R. 090-092; Singleton, R. 095-097; Rhoades, R. 088-090; Demarco, R. 092-094.

Questions 6a and 6b address the subjective recollection (or lack thereof) of the examinations by the State psychologists by each Defendant. How that might tend to prove any element of the instant case is obscure. How the subjective recollection (or lack thereof) of the examinations by the State psychologists by a Defendant might lead to evidence tending to prove any element of the instant case is equally obscure. A reasonable person must conclude that the information requested is outside the scope of Fla. R. Civ. P. 1.280(b)(1).

Question 6c, as stated, is irrelevant; the fact that the Defendant did or did not review a particular report has nothing to with the elements of this case. An effective attorney would certainly review such reports with a client; the client's opinion would then largely be the product of such lawyer-client communication. To the extent that this question requests the substance of the review of the report it is offensive to lawyer-client privilege, § 90.502 Florida Statutes.

Question 6d specifically calls for an opinion that the Defendant is not qualified to give. The answers would be likely to offend lawyer-client privilege,

§ 90.502 Florida Statutes; an effective attorney would certainly review such matters with a client and any answer would be likely to be the lawyer's opinion as much as that of the client. Taken literally, the information sought is irrelevant. Whether the Defendant agrees or disagrees with the diagnosis is meaningless; the Defendant's subjective understanding and impression of the diagnosis does nothing to prove or disprove any fact at issue here.

Questions 6e - 6f re. Smith, Beikirich, Singleton, Rhoades, Demarco
Questions 22-23 re. Sutton

Questions and objections at Sutton, R. 082; Smith, R. 091-092; Beikirich, R. 092-093; Singleton, R. 097-098; Rhoades, R. 090-091; Demarco, R. 094-095.

The information sought in question 6e regarding changes to answers would fall within the attorney work product privilege and lawyer-client privilege to the extent that this may have been the product of attorney investigation and lawyer-client consultation. The information sought in question 6f regarding changes to circumstances is vague to the extent that it is difficult to determine how anyone could determine exactly what is sought. If the information requested is based on medical records or physician-patient interaction, it would be within the protection of the rule in Acosta v. Richter. If the information requested is based on a response to psychotherapy, it would be within psychotherapist-patient privilege, § 90.503 Florida Statutes; and in any event may well be within the

privilege attaching to medical and mental health information and records, including but not limited to §§ 394.4615, 395.3025, and 397.501, and 456.057 Florida Statutes.

Question 6g re. Smith, Beikirich, Singleton, Rhoades, Demarco
Questions 24, 26, 28 re. Sutton[30]

Question and objections at Sutton, R. 082-084; Smith, R. 092-093; Beikirich, R. 093-094; Singleton, R. 098-099; Rhoades, R. 091-092; Demarco, R. 095-096.

The State has made no showing that subjective familiarity (or lack thereof) of a Defendant with the diagnoses by the State psychologists is in any way relevant to any of the elements of this cause of action. How that information might tend to prove any element of the instant case is completely obscure.

This again asks for an opinion that the Defendants are not qualified to give. An effective attorney would certainly review such matters with a client and any answer would be likely to be the lawyer's opinion as much as that of the client. Therefore the answer would be likely to offend lawyer-client privilege.

[30] The prosecutor withdrew questions 26 and 28 as to Defendant Sutton. Sutton R. 136, line 11-12, 17-18.

Question 6h re. Smith, Beikirich, Singleton, Rhoades, Demarco
Question 27 re. Sutton

Question and objections at Sutton, R. 084; Smith, R. 093; Beikirich, R. 094; Singleton, R. 099; Rhoades, R. 092; Demarco, R. 096.

Question 6h, which addresses any "problem functioning normally" arising out of use of "any kind of intoxicating substances" is vague and overbroad. If taken literally, any use of alcohol at any time which affected the normal faculties of a Defendant would be included. Obviously any use of any of a wide variety of other "intoxicating substances" would be per se illegal and would potentially include other uncharged criminal activity which is within the ambit of the constitutional protection from unconstitutionally forced self incrimination. Any use of medication (potentially an "intoxicating substance") properly prescribed by a physician would fall within the protection of the rule in Acosta v. Richter and §§ 394.4615, 395.3025, 397.501, and 456.057 Florida Statutes .

Question 6i re. Smith, Beikirich, Singleton, Rhoades, Demarco
Question 29 re. Sutton

Question and objections at Sutton, R. 085; Smith, R. 094; Beikirich, R. 095; Singleton, R. 100; Rhoades, R. 093; Demarco, R. 096-097.

The information sought in question 6i regarding "trouble controlling your temper sometimes" and "describe why and what happens" is so vague and

overbroad that it is difficult to understand how any human being could possibly answer "no". Having difficultly controlling one's temper from time to time may simply mean that one is in fact a human being. To the extent that "what happens" might relate to criminal behavior (which would include everything from shaking one's fist at another person, i.e. assault, to murder), the answer would be protected by constitutional protection from compelled self incrimination. Certainly the separate inquiry "[h]ave you ever touched or struck anyone out of anger? If so, please describe the nature of that contact and the circumstances surrounding it" would be so protected. If the information requested by "[w]hat steps, if any, have you taken to control your temper?" should include psychotherapy, it would be within psychotherapist-patient privilege, § 90.503 Florida Statutes, and potentially within the privilege attaching to medical and mental health information and records, including but not limited to §§ 394.4615, 395.3025, 397.501, and 456.057 Florida Statutes and the rule in Acosta v. Richter.

Questions 6j - 6m re. Smith, Beikirich, Singleton, Rhoades, Demarco

Questions and objections at Smith, R. 094-096; Beikirich, R. 095-097; Singleton, R. 100-102; Rhoades, R. 093-095; Demarco, R. 097-099.

The answers State's inquiry would require the Defendants to reveal some of their innermost thoughts, ideas, and the workings of their minds. Such

information is protected by the state and federal right to privacy. The right of privacy involves an individual's interest in avoiding public disclosure of personal information. Mozo v. State at 632-633. ("It is now well accepted that the inclusion of the phrase 'right to be let alone' from government intrusion in Florida's privacy amendment was by no means unintentional.... Hence, it has been held that Florida's right of privacy 'embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution'"). See also Art. I, § 23, Florida Constitution, Griswold v. Connecticut, Eisenstadt v. Baird, Lawrence v. Texas, Cason v. Baskin. The right to privacy and the compelling state interest standard for intrusion on the same are more fully analyzed in section III, supra.

At the risk of again restating the obvious, the present proceeding involves a deposition by lawyers, not an examination by psychologists or psychiatrists. The State has already conducted two psychological evaluations of each Defendant in connection with these cases. If the State's examining psychologists might have found this information useful, they had the opportunity to inquire.

As discovery in a "civil" matter, these inquiries about fantasies are more consonant with interrogation by the "thought police" in a George Orwell novel (and more appropriate to their goals) than with anything that ought to happen in an American court.

Questions 7a - 7b re. Smith, Beikirich, Singleton, Rhoades, Demarco
Questions 39-40 re. Sutton

Questions and objections at Sutton, R. 088-089; Smith, R. 096-097; Beikirich, R. 097-098; Singleton, R. 102-103; Rhoades, R. 095-096; Demarco, R. 099-100.

Questions 7a and 7b are for all practical purposes the same question. They are therefore multiplicious and cumulative as to each other. Both questions relate to facts that are easily available to the State from court records. As such they are simply intended only to annoy, embarrass, oppress, and create undue burden and expense. There can be no proper purpose in asking for such information; perhaps the State is again hoping to catch a Defendant in a lapse of memory and then have the opportunity to show otherwise inadmissible records to a jury in the guise of impeachment, or initiate a prosecution for perjury.

Questions 7c - 7m re. Smith, Beikirich, Singleton, Rhoades, Demarco
Questions 41-47 re. Sutton

Questions and objections at Sutton, R. 089-091; Smith, R. 097-101; Beikirich, R. 098-102; Singleton, R. 103-107; Rhoades, R. 096-100; Demarco, R. 100-104.

Questions 7c - 7m all seek speculative answers concerning unknown, and perhaps unknowable, future events. How anyone could possibly know where he

might live, or where he might be employed, or whether children might live in the same neighborhood, at some indefinite time in the future, is beyond comprehension and would require pure conjecture.

The reference to "neighborhood" on question 7f makes the question so vague as to be impossible to answer. A house on the same block is in the same neighborhood in most circumstances, but what about a house two blocks away? Five blocks away? A mile away?

Question 7m asks whether the Defendant has "any kind of insurance". Why this might be relevant is unknown. No scientific study showing that people with insurance (of any kind) are more (or less) likely to commit future acts of sexual violence, or crimes in general, is known to exist.

The relationship of sexually violent recidivism to any of the other possibly ascertainable answers is equally obscure. Why the purely speculative answers to these questions might be material to the issues in this cause is pure conjecture.

Question 7n re. Smith, Beikirich, Singleton, Rhoades, Demarco
Question 48 re. Sutton

Question and objections at Sutton, R. 92; Smith, R. 101; Beikirich, R. 102; Singleton, R. 107; Rhoades, R. 100; Demarco, R. 104.

Question 7n presumes a fact not in evidence (the existence of "stress factors") and then presumes that the subjective recognition (or lack thereof) of the

same by the Defendants is somehow relevant to the issues in this case. The stretch is worthy of inclusion in an advertisement for a patent medicine.[31] Even assuming that one can somehow discern what is meant by the term "stress factors" in this context, and what the same might be, how the subjective recognition of such "stress factors" by a Defendant might be legally relevant is unclear from the question and likely unknown to the Defendants.

Assuming that the first part of the question has any meaning at all, expert opinion testimony would be appear to be necessary to recognize and assess the existence of relevant "stress factors", the particulars of the same, and the potential contribution of the same to the commission of some unknown future crime by a Defendant. The legal result of the question as posed to the Defendants is irrelevant and immaterial.

Question 7o re. Smith, Beikirich, Singleton, Rhoades, Demarco
Question 49 re. Sutton

Questions and objections at Sutton, R. 092; Smith, R. 101-102; Beikirich, R. 102; Singleton, R. 107; Rhoades, R. 100; Demarco, R. 104.

[31] Do "stress factors" cause people to commit crimes? Does "bad breath" keep people from social success? At least we can infer with some certainty what "bad breath" means.

Question 7o is so vague as to be almost impossible to answer, and calls for an answer that must be completely speculative. Almost any answer would be irrelevant to this cause of action. How could a person's "lifestyle" outside of a prison (or the Florida Civil Commitment Center) not be completely different from one's "lifestyle" behind bars?

Question 25 re. Sutton

Question and objections at Sutton, R. 083.[32]

Question 25 asks about "sexual activity" with persons under the age of 18. Any "sexual activity" by a person over the age of 24 with a person under the age of 18 may be a felony of the second degree at least. See § 394.05 Florida Statutes (2004); § 800.04 Florida Statutes (2004). Defendant Sutton's date of birth is 30 March 1930; he is presently 74 years old. Sutton, R. 342, 362, 363, 377; In re Commitment of Sutton v. State, 828 So. 2d 1081, 1083 (Fla. 2d DCA 2001). Therefore any compelled admission by Defendant Sutton to any such conduct at any time in the last fifty years at least would be per se self incriminating and would therefor be offensive to the right not to be compelled in any criminal matter

[32] This question was propounded only to Defendant Sutton. The prosecutor withdrew question 25 as to Defendant Sutton. Sutton R. 136, line 11-12, 17-18.

to be a witness against oneself. Article I, § 9, Fla. Const.; see also U.S. Const., Amend. V.

In addition, the request is vague and overbroad. The meaning of "sexual activity" is not sufficiently well defined to limit the inquiry to behavior which might be entirely lawful or within the constitutional right to privacy or statutory lawyer-client privilege or attorney work product.

Is holding hands sexual activity? Other touching? Where? Kissing on the cheek? Kissing on the mouth? Kissing with evil intent followed by a resounding slap? What about ogling? Ogling from a distance away? How far? Ogling through a telescope when the ogliee is unaware of the oglior? What of a fatherly gaze that is mistaken by a third party for ogling?

To the extent that the answer is already known to the State, this question serves only to annoy, embarrass, oppress, and create undue burden and expense.

## CONCLUSION

An opinion in a voting rights case recently before this Court succinctly restated the rationale underlying our fundamental principles of due process and equal protection:

> Both the search for the truth and the right to vote are of paramount importance, but they are circumscribed by a higher, overarching concern – the general welfare of our democracy. The general welfare is informed by our law.

> The law infuses the fabric of our society and breathes life into all our legal principles. Inherent in the law are the basic concepts of fairness, reliability, and predictability; and the constitutional safeguards of due process and equal protection were designed to promote these interests. Although the pursuit of the truth and the preservation of the right to vote are worthy goals, they cannot be achieved in a manner that contravenes these principles.

Gore v. Harris, 773 So. 2d 524, 527 (Fla. 2000) (Shaw, J., concurring).

The zeal of the State of Florida to protect its citizens from those alleged to be "sexually violent predators" must not be allowed to create a class of persons who are exempt from the constitutional protections afforded politicians, Baker Act respondents, real estate agents, and persons accused of committing crimes, among others. The worthy goal of public safety must not be achieved in a manner that contravenes our right not be compelled to be a witness against oneself, the principles of due process of law, equal protection of the laws, and our constitutional right to privacy.

WHEREFORE the Defendants request this Honorable Court to reverse the decision of the Second District Court of Appeal, and require that court to either issue a writs of certiorari to quash the orders of the circuit court allowing deposition of the Defendants in connection with this cause, or to issue writs of prohibition disallowing the deposition of the Defendants in connection with this

cause, or grant such other and further relief as the Court may deem reasonable, just and proper.

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_____

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail, postage prepaid, to the Attorney General of Florida, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, on this 14th day of February, 2005.

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document satisfies the requirements of Fla. R. App. P. 9.100(g).

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