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Jack Kephart v. Jerry Regier

GOOD MORNING EVERYONE. WELCOME TO THE FLORIDA SUPREME COURT. APPRECIATE COUNSEL BEING READY ON THE FIRST CASE. WITHOUT ANY FURTHER ADO, WE WILL CALL THOSE CASES. KEPHART VERSUS REGIER. CONSOLIDATED CASES. COUNSEL READY TO PROCEED, YOU MAY PROCEED.

GOOD MORNING. MAY IT PLEASE THE COURT. CHIEF JUSTICE ANSTEAD, MY NAME IS RUSSELL AKIN, ASSISTANT PUBLIC DEFENDER FROM THE 19TH JUDICIAL CIRCUIT. I REPRESENT THE DETAINEES BEFORE THIS COURT TODAY. THERE ARE TWO CERTIFIED QUESTIONS THAT WE ARE HERE ON TODAY. THE FIRST IS WHETHER THE INITIAL EX PARTE DETERMINATION IN AN INVOLUNTARY CIVIL COMMITMENT PROCEEDING SHOULD BE BASED ON FOUNDED BY AN AFFIDAVIT BY OR SWORN TESTIMONY FROM ONE OF THE MENTAL HEALTH PROFESSIONALS THAT HAS ACTUALLY EVALUATED THE PERSON TO BE SO HELD. THE SECOND ISSUE IS ABSENT THAT PROBABLE CAUSE, PROPER PROBABLE CAUSE DETERMINATION, SHOULD THESE INDIVIDUALS BE IMMEDIATELY RELEASED?

BEFORE WE ANSWER THOSE QUESTIONS, DON'T WE HAVE TO STEP BACKWARD A SECOND AND ASK OURSELVES WHETHER ANY SWORN TESTIMONY IS EVEN REQUIRED OR THE STATUTE IS SILENT AND DOESN'T REQUIRE IT?

YOUR HONOR, YES, I WOULD BELIEVE THAT IS TRUE. I WOULD SUGGEST TO THE COURT THAT THESE CASES, INVOLUNTARY COMMITMENT PROCEEDINGS INVOLVE THE DEPRIVATION OF ONE'S LIBERTY WHEN TAKEN INTO CUSTODY. I WOULD SUGGEST TO THE COURT THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 12, PROVIDES ANY TIME SOMEONE IS DEPRIVED OF LIBERTY, THEY MUST BE FIRST AFFORDED DUE PROCESS OF THE LAW.

THIS IS A LITTLE BIT DIFFERENT FROM CASES WHERE SOMEBODY IS INITIALLY FREE AND IS ARRESTED. CORRECT? THESE ARE PEOPLE WHO ARE ALREADY IMPRISONED, CORRECT?

YES, YOUR HONOR, THEY ARE INITIALLY IMPRISONED.

ISN'T THE ANALYSIS DIFFERENT WHEN SOMEBODY HAS ALREADY HAD THEIR LIBERTY TAKEN AWAY? THEY'RE IN PRISON, AND SUFFERING CRIMINAL SANCTIONS. AND THE ISSUE IS WHETHER TO CIVILLY COMMIT THEM. AND HERE THE STATUTE PROVIDES PROCEDURAL SAFEGUARDS AFTER THE INITIAL DETERMINATION FOR A PRETTY PROMPT HEARING. TO DETERMINE WHETHER THE PERSON SHOULD BE CIVILLY COMMITTED AFTER THEY'RE RELEASED FROM PRISON. WHY ISN'T THAT ENOUGH DUE PROCESS? SO THAT WE DON'T NEED A SWORN TESTIMONY IN THE PETITION ITSELF?

YOUR HONOR, I WOULD SUGGEST TO YOU THAT IN THEORY, THAT MAY BE CORRECT. HOWEVER, IN REALITY, IN THESE CASES, THAT'S NOT THE WAY IT TENDS TO WORK. FIRST, WHEN THE STATUTE WAS INITIALLY CREATED, THE LEGISLATURE ENVISIONED THAT YOU WOULD HAVE SIX MONTH LEAD TIME WHERE SOMEONE WAS IN CUSTODY AND THE INITIAL PROBABLE CAUSE DETERMINATIONS WOULD TAKE PLACE WITH SUFFICIENT TIME CERTAINLY TO SATISFY THOSE CONCERNS. THAT WAS AMENDED IN MAY OF 1999, IT ADDED A ONE YEAR WINDOW. BUT IN REALITY WHAT WE HAVE FOUND AND I'M SURE THIS COURT IS AWARE OF DIFFERENT SENTENCING

ISSUES THAT HAVE COME IN FLORIDA, THE MOST NOTABLE RECENTLY BEING THE HAIG'S DECISION WHICH IN FACT ACCELERATED THESE TIME FRAMES SOMETIMES TO THE SITUATION WHERE WE ARE ON THE EVE OF A PERSON BEING RELEASED FROM CUSTODY AND THEY ARE TAKEN FROM THE DEPARTMENT OF CORRECTIONS CUSTODY OVERNIGHT INTO THE, WHAT IS TERMED A TREATMENT FACILITY --

ARE YOU SUGGESTING -- ARE YOU SUGGESTING THAT A DIFFERENT ANALYSIS HAS TO BE DONE IF THE, WHEN THE PROBABLE CAUSE AFFIDAVIT IS FILED OR THE PETITION, IF THE PERSON IS IN CUSTODY, LAWFULLY, VERSUS IF THEY'RE ALREADY ABOUT TO BE RELEASED, BECAUSE AGAIN, ADDRESSING JUSTICE CANTERO'S QUESTION YOU AGREE THAT THE STATUTE DOES NOT REQUIRE WHAT THE FOURTH DISTRICT ENGRAFTED ON THE STATUTE. DO YOU AGREE WITH THAT?

CERTAINLY I AGREE.

SO WE ARE DEALING THEN WITH AN ISSUE OF, IS IT THIS COURT'S PROCEDURAL PREROGATIVE TO IMPOSE ADDITIONAL REQUIREMENTS OR ARE WE DEALING WITH THE FACT THAT IF THESE AREN'T ENGRAFTED ON THE STATUTE, THERE WOULD BE CONSTITUTIONAL CONCERNS?

YOUR HONOR, I WOULD SUGGEST THAT THEY ARE CONSTITUTIONAL CONCERNS.

AND THEREFORE, THEN ISN'T IT REALLY ON AS-APPLIED BASIS BECAUSE IF UNDER THE SCENARIO WHERE THE PERSON IS STILL IN CUSTODY, LAWFULLY, THERE IS REALLY NO REASON TO BE CONCERNED ABOUT THE INITIAL PETITION BEING UNDER OATH OR WHO SIGNS IT OR ANYTHING, BECAUSE YOU STILL HAVE A, FROM THE TIME THAT PETITION IS FILED, A RELATIVELY SHORT TIME PERIOD UNTIL AN INITIAL HEARING IS HELD IN FRONT OF THE JUDGE. AND THEY'RE STILL IN CUSTODY.

I WOULD RESPECTFULLY DISAGREE TO A CERTAIN EXTENT IN THAT I WOULD BELIEVE THAT WE WOULD BE BETTER SERVED BY PROVIDING THE DUE PROCESS VEHICLE WHICH WOULD COVER ANY AND ALL CONTINGENCIES AS OPPOSED TO A CASE-BY-CASE BASIS.

BUT YOU HAVE A SITUATION UNDER THE STATUTE WHERE THERE HAS TO BE A TEAM THAT EVALUATES THE DEFENDANT, CORRECT?

ABSOLUTELY.

AND IS THAT ATTACHED TO THE PETITION THAT'S FILED BEFORE THE JUDGE?

YES, YOUR HONOR, THAT IS PART AND PARCEL OF THE PROBABLE CAUSE DETERMINATION.

SO THE JUDGE HAS THE FULL REPORT IN FRONT OF HIM OR HER. NOW WE ARE REALLY JUST TALKING -- AND I'M NOT SAYING JUST BECAUSE I APPRECIATE, BUT AS TO WHETHER THE STATE ATTORNEY NEEDS TO SWEAR TO IT, OR WHETHER ONE OF THE INDIVIDUALS WHO WILL BE ABLE TO BE QUESTIONED BY THE DEFENDANT WITHIN A SHORT PERIOD OF TIME, NEEDS TO ALSO SWEAR TO IT. IS THAT WHAT THE ESSENCE OF THIS CASE IS ABOUT?

ESSENTIALLY, I BELIEVE THAT'S WHY WE'RE HERE. I BELIEVE IT'S BEEN PRETTY MUCH ACQUIESCED TO ON BOTH SIDES THAT CERTAIN DUE PROCESS IS REQUIRED. WE ARE ACTUALLY TRYING TO SETTLE WHAT FORM IT SHOULD TAKE, I BELIEVE IS THE TRUE QUESTION. AND I WOULD SUGGEST TO THE COURT THAT THAT FORM HAS TO COME IN THE FORM OF AN AFFIDAVIT BY THE TREATING PHYSICIAN, OR TREATING MENTAL HEALTH PROFESSIONAL. THE EVALUATING MENTAL HEALTH PROFESSIONAL, OR LIVE TESTIMONY. AND THE REASON I SAY THAT IS BECAUSE WE LOOKED AT THE PROBABLE CAUSE DETERMINATION, WE ANALOGIZED IT TO THE CRIMINAL SENSE. IN THAT YOU HAVE A FILTER OF INFORMATION, SO TO SPEAK. AND I WOULD SUGGEST IN THE CRIMINAL SENSE, MORE LIKELY THAN NOT YOUR LAW ENFORCEMENT OFFICER, YOUR

INVESTIGATING PERSON IS YOUR FILTER OF THAT INFORMATION.

BUT THE POLICE OFFICER DOESN'T HAVE, INFORMANT, POLICE OFFICER HAS HEARSAY INFORMATION. SO ALL THE POLICE OFFICER IS TELLING THE JUDGE IS WHETHER THEY KNOW THAT THAT INFORMANT HAS BEEN RELIABLE BEFORE. HERE WE HAVE INSTEAD THE STATE, ASSISTANT STATE ATTORNEY PRESUMABLY TALKING WITH THE MENTAL HEALTH PROFESSIONALS AND SAYING BASED, I FIND THAT THIS IS WHAT THEY SAID. WHAT ELSE REALLY CAN THE ASSISTANT STATE ATTORNEY SAY? AND AS FAR AS ONE OF THE MENTAL HEALTH PROFESSIONALS, IT'S ALREADY IN THE REPORT.

ACTUALLY YOUR HONOR, THAT'S A VERY GOOD QUESTION. BECAUSE WHAT YOU HAVE IN THIS CONTEXT, IS YOU HAVE A STATUTORY SCHEME THAT ONLY SURVIVES THE CONSTITUTIONAL CHALLENGES OF DOUBLE JEOPARDY AND IPSO FACTO BECAUSE OF THE PRESENCE OF THE MENTAL HEALTH ELEMENT. AND THE PROBABLE CAUSE DETERMINES IN INVOLUNTARY CIVIL COMMITMENT, YOU HAVE TWO THINGS THAT HAS TO BE FOUND. ONE, WAS THERE A SEXUALLY VIOLENT OFFENSE, CONVICTION FOR SEXUALLY VIOLENT OFFENSE? AND TWO, DOES THAT PERSON SUFFER FROM MENTAL ABNORMALITY OR PERSONALITY DISORDER SUCH THAT IT MAKES HIM LIKELY TO COMMIT SEXUAL ACTS OF VIOLENCE IN THE FUTURE? I WOULD SUGGEST TO YOU THAT IT'S A GIVEN WHEN THESE PEOPLE ARE REFERRED THAT THEY HAVE THE QUALIFYING SEXUALLY VIOLENT OFFENSE. THEN, WHAT YOU DO IS YOU MOVE INTO A SITUATION WHERE THE MENTAL HEALTH PROFESSIONAL THEN IS THE FILTER OF THIS HEARSAY INFORMATION. HE DOES THE EVALUATION. HE REVIEWS RECORDS. HE TALKS TO PEOPLE --.

HOW LONG AFTER THE PETITION IS FILED IS THERE AN ACTUAL HEARING WHERE THE DEFENDANT IS PRESENT AND WHERE THERE IS AN OPPORTUNITY TO QUESTION THE INITIAL ASSUMPTION? WHAT IS THE TIME PERIOD THAT THE STATUTE PROVIDES?

IF DEMANDED, FIVE DAYS. AND THAT WAS CREATED IN THE HOCKER DECISION. IT WAS LIKEWISE NOT PROVIDED FOR IN THE STATUTE.

BUT ISN'T THAT REALLY THE -- I MEAN, I APPRECIATE WHAT YOU'RE SAYING. I THINK THESE ARE SIGNIFICANT DEPRIVATIONS. I'M NOT MINIMIZING IT. I JUST DON'T QUITE UNDERSTAND HOW THIS ADDITIONAL LAYER THAT WOULD BE REALLY A FIVE DAY DIFFERENCE IS NOT AT LEAST SATISFIED BY HAVING THE REPORT ATTACHED AND, MAYBE AT THE MOST, THE STATE ATTORNEY SWEARING TO IT.

YOUR HONOR, I WOULD ANALOGIZE THIS IN FLORIDA TO THE BAKER ACT PROCEEDINGS. IN THAT WE DO HAVE AN EX PARTE DETERMINATION. AND IN THAT EX PARTE DETERMINATION, YOU HAVE A MENTAL HEALTH PROFESSIONAL SWEARING TO A REPORT THAT IS POSITIVE BEFORE THE COURT. SIMILARLY HERE, WE HAVE AN EX PARTE DETERMINATION BUT IN THIS CASE, BECAUSE OF THE STATUTE, IT'S COMPLETELY ABSENT AS TO THE OATH OR AFFIRMATION.

IN THE BAKER ACT PROCEEDINGS, IS THE REPORT'S THERE AND THEN THEY SAY I SWEAR THIS IS THE REPORT THAT'S ACCURATE?

I WOULD SUGGEST TO THE COURT THAT THE BEST KNOWLEDGE AND BELIEF TYPE OF AFFIRMATION WOULD BE APPROPRIATE IF WE ARE DEALING WITH AN AFFIDAVIT. I WOULD ALSO SUGGEST TO THE COURT THAT THE STATE'S ATTEMPT TO AMEND IN THIS SITUATION, WHERE THEY ADDED A MERE PLEADING PARAGRAPH, THAT SAID BEST KNOWLEDGE AND BELIEF, THE FACTS ARE TRUE AND CORRECT, IS INSUFFICIENT EVEN UNDER THE LAWS THAT EXIST.

WHY WOULD IT BE INSUFFICIENT IF IN THE ACTUAL BODY, I TAKE IN THESE PETITIONS, IN THE ACTUAL BODY OF IT, THE STATE ATTORNEY ACTUALLY ALLEGES THOSE TWO ELEMENTS THAT ARE NECESSARY IN ORDER TO FIND A PERSON IS A SEXUAL PREDATOR AND NEEDING FURTHER COMMITMENT. SO, WHAT ELSE DO YOU NEED TO ADD TO THAT?

YOUR HONOR, ACTUALLY BECAUSE FLORIDA STATUTE 92525 STATES THAT ABSENT A SPECIFIC STATUTORY AUTHORITY, BEST KNOWLEDGE AND BELIEF IS INSUFFICIENT.

SO NOW YOU SAID EARLIER THAT YOU CAN ANALOGIZE THIS TO THE CRIMINAL LAW AND UNDER THE CRIMINAL LAW CAN'T YOU, IN FACT STATE ATTORNEY DO A PETITION FOR A WARRANT SAY OR EVEN AN INFORMATION THAT SAYS BEST KNOWLEDGE AND BELIEF, BECAUSE WE ARE NOT ASKING THESE STATE ATTORNEY'S TO SWEAR TO THE TRUTHFULNESS UNDER PENALTY OF PERJURY WHETHER THIS IS THEIR BEST KNOWLEDGE UNDER THESE FACTS, YOU SHOULD THEN HOLD THIS PERSON.

ACTUALLY I BELIEVE, YOUR HONOR, THE SWEARING THAT THE STATE ATTORNEY DOES IS UNDER THE CRIMINAL RULE OF 3.140G WHERE THE AFFIRMATION THEY ARE ACTUALLY MAKING IS THAT THIS IS BASED ON THEIR GOOD FAITH AND AFTER TAKING SWORN TESTIMONY FROM MATERIAL WITNESSES. SO THEY ARE IN FACT PROVIDING THIS SWORN PROOF THAT WE ARE ASKING TO BE PROVIDED FOR IN THE INVOLUNTARY CIVIL COMMITMENT PROCEEDING.

BUT YOU'RE ASKING FOR SOMETHING ADDITIONAL. YOU'RE HERE REALLY BECAUSE YOU WANT TO SAY THAT IF THIS ISN'T DONE, PERSON IS FOREVER, THAT THE STATE CANNOT THEREAFTER RETAIN THIS INDIVIDUAL?

NO, YOUR HONOR, I'M NOT.

WHAT'S YOUR POSITION?

I'M ACTUALLY STATING, AND I WOULD AGREE THAT THERE IS NO PROCEDURAL PREJUDICE INVOLVED IN THIS SITUATION, BUT I WOULD ALSO SUGGEST THAT A FINDING THAT THERE IS NOT A SUFFICIENT CONSTITUTIONAL SAFEGUARDS WITHIN THE PROBABLE CAUSE DETERMINATION STILL CREATES A CONSTITUTIONAL INJURY. AND I WOULD SUGGEST TO THE COURT, JUST LIKE IN THE TANGUAY CASE, THAT THE CONSTITUTIONAL REMEDY THAT SHOULD BE AFFORDED MY CLIENTS IS IMMEDIATE RELEASE PENDING TRIAL ON THE MATTERS. I THINK THAT WE FIND OTHER AUTHORITY FOR THAT IN THE DETERMINATION IN CRIMINAL CASES WHERE THERE IS A LACK OF PROBABLE CAUSE.

SO YOU'RE NOT GIVING UP ON THE CURE ISSUE THAT WE WERE TALKING ABOUT. THE ISSUE, THE OTHER ISSUE HERE OF COURSE IS THAT THE DISTRICT COURT ALLOWED THE STATE 7 DAYS IN WHICH TO CURE THE LACK OF SWORN STATEMENT OR THE AFFIDAVIT. SO YOU'RE NOT GIVING UP ON THAT PARTICULAR ISSUE, ARE YOU?

NO, MA'AM, I'M NOT.

YOU ASKED TO BE REMINDED OF YOUR REBUTTAL TIME AND THE MARSHAL HAS DONE THAT BY TURNING ON THAT LARGE LIGHT.

YES, YOUR HONOR. WE WOULD RESPECTFULLY SUBMIT THAT BASED ON THE ISSUES BEFORE THE COURT THAT THE COURT SHOULD FIND THAT THE PROBABLE CAUSE DETERMINATIONS MADE EX PARTE SHOULD BE SUPPORTED BY SOME FORM OF SWORN TESTIMONY EITHER BY AFFIDAVIT OR LIVE TESTIMONY. AND CERTAINLY AS TO MY DETAINEES, THEY HAVE, IF NOT PROCEDURAL PREJUDICED, THEY HAVE AT LEAST BEEN MORALLY PREJUDICED BY THE FACT THEY HAVE BEEN ILLEGALLY RETAINED WITHOUT AFFORDING DUE PROCESS. WE WOULD ASK THE COURT ORDER THEIR IMMEDIATE RELEASE PENDING TRIAL IN THE MATTER.

MAY IT PLEASE THE COURT, RICHARD POLIN FROM THE ATTORNEY GENERAL'S OFFICE ON BEHALF OF DEPARTMENT OF CHILDREN AND FAMILIES. WE ARE HERE IN CAPACITY OF BOTH PETITIONER AND RESPONDENT ON TWO CONSOLIDATED CASES AND THEREFORE WE TOO RESERVED TWO

MINUTES FOR REBUTTAL ON OUR PORTION AS AN APPELLATE. AS THE COURT'S NOTED, THERE ARE TWO DISTINCT ISSUES HERE, THE NATURE OF ANY OATH THAT'S REQUIRED ON THE PROBABLE CAUSE PETITION AND IF THERE IS IN FACT ANY KIND OF A DEFECT IN THE PETITION WHICH WAS USED, WHETHER THE STATE SHOULD HAVE A REASONABLE OPPORTUNITY TO CURE THAT DEFECT AS THE FOURTH DISTRICT --.

SO WHAT IS THE STATE'S POSITION ON THE ISSUE OF WHETHER OR NOT THE PETITION NEEDS TO EITHER BE VERIFIED OR NOT AT ALL? WE KNOW THAT THE STATUTE DOES NOT REQUIRE THAT THERE BE ANY KIND OF VERIFICATION.

THE STATE'S POSITION AT LEAST IN CASES SUCH AS THIS, WHERE THE INCARCERATED SENTENCE ENDS AND YOU DO HAVE A SUBSEQUENT SEIZURE OF THE INDIVIDUAL, PUT THE INDIVIDUAL INTO THE DEPARTMENT OF CHILDREN AND FAMILIES CUSTODY AT THAT POINT IN TIME, DO YOU HAVE FOURTH AMENDMENT IMPLICATIONS AT THAT POINT AND TIME. IF THE CASES WERE TO BE TRIED DURING THE LAST YEAR OF THE INCARCERATIVE SENTENCE, THERE WOULD NOT BE ANY PROBLEM WHATSOEVER SINCE THE INDIVIDUAL IS NOT GOING TO BE AT LIBERTY NO MATTER WHAT'S DONE AND THE INDIVIDUAL IS GOING TO GET A TRIAL WITH TESTIMONY SWORN UNDER OATH.

SO DEPENDS ON WHEN THE ACTUAL PETITION IS FILED. THESE WERE FILED ON THE DAY BEFORE THE DEFENDANT WAS TO BE RELEASED.

NOT EXACTLY. AND I SAY IT IS NOT EXACTLY WHEN THE PETITION IS FILED EITHER. THESE CASES KIND OF RUN THE GAMUT. THEY WERE FILED OVER A TWO YEAR PERIOD. THERE ARE A DOZEN OF THEM. SOME OF THEM THE PETITIONS WERE WITHIN THE LAST FEW DAYS OF THE INCARCERATIVE SENTENCE, SOME A FEW WEEKS, SOME SEVERAL MONTHS. AS THE TIME PERIOD PROGRESSES MOVING ON TO WHERE WE ARE NOW, THE TIME PERIODS HAVE IN FACT BECOME INCREASINGLY LONG WITH GREATER POSSIBILITIES OF TRYING THE CASES DURING THAT LAST YEAR OF INCARCERATION.

IF I UNDERSTAND YOUR CONCESSION, WHAT YOU'RE SAYING IS THAT THE STATUTE DOES NOT PROVIDE FOR ANYTHING BEYOND THIS, BUT SHOULD THE CIRCUMSTANCES BE THAT THE DEFENDANT OR THE RESPONDENT IN THE CASE HAS BEEN RELEASED OR RELEASE IS IMMINENT UNDER THE CRIMINAL SENTENCE, THEN CONSTITUTIONAL REQUIREMENTS COME IN, REQUIRE A HIGHER STANDARD..

WHEN YOU REACH THAT POINT IN TIME, YES, THERE IS A FOURTH AMENDMENT. WE ARE NOT CONTESTING THE FOURTH AMENDMENT CONCERN AT THAT POINT.

WHAT DOES THE FOURTH AMENDMENT REQUIRE?

THAT NO WARRANT SHALL BE, SHALL BE ISSUED FOR SEIZURE IN THE ABSENCE OF AN OATH OR AFFIRMATION. AND IT DOES NOT SPECIFY, HOWEVER, WHO THE OATH OR AFFIRMATION HAS TO COME FROM. THERE IS NO CONSTITUTIONAL MANDATE THAT AN OATH OR AFFIRMATION TO SUPPORT ANY FORM OF A WARRANT TO BE ISSUED WOULD COME FROM ANY SPECIFIED INDIVIDUAL, WHETHER IT BE A POLICE OFFICER, A MENTAL HEALTH EXPERT, A PROSECUTING ATTORNEY, AN INDEPENDENT THIRD PARTY WITNESS OR ANYONE. THIS --.

THE FACT THE STATUTE DOESN'T EVEN PROVIDE FOR A WARRANT, DOES IT?

NO, THE PRACTICE HAS BEEN IN BOTH THE STATE AND OTHER STATES THAT THE DOCUMENT WHICH IS USED TO JUSTIFY THE DETENTION OF THE INDIVIDUAL BEYOND AN INCARCERATED SENTENCE HAS DESIGNATED A WARRANT. I HAVE LOOKED INTO THIS MYSELF ON OCCASION. THERE ARE MORE GENERALIZED USES OF THE TERM WARRANT. YOU CAN FIND REFERENCE TO A CIVIL WARRANT IN BLACK'S LAW DICTIONARY, WHICH DOES REFER TO NON-SPECIFIED

COMMITMENTS. THERE IS A -- THERE IS A SEIZURE AT THAT POINT IN TIME. IT IS NOT CLEAR WHETHER THIS TRULY IS A WARRANT OR JUST AN ORDER WHICH IS AUTHORIZING THE POST INCARCERATIVE DETENTION IN ANOTHER CAPACITY. AND FIFTH DISTRICT IN ITS MORE RECENT -- WE HAVE NOW GOT THREE DISTRICT COURT OF APPEALS DECISIONS THAT TOUCHED ON THIS QUESTION. BOTH SECOND AND FOURTH DISTRICT HAVE CONCLUDED THAT THE FOURTH AMENDMENT AND STATE COUNTERPART ARTICLE I SECTION 12 REQUIRES SOME FORM OF OATH OR AFFIDAVIT. THE FIFTH DISTRICT EXPRESSED SOME RELUCTANT ON THAT QUESTION BUT NEVERTHELESS AGREED TO ABIDE BY THE FOURTH DISTRICT'S ANALYSIS ON THE QUESTION AS WELL. BOTH AS TO THE NATURE OF THE AFFIDAVIT AND THE OPPORTUNITY TO CURE. SO WE NOW HAVE THREE DISTRICT COURTS OF APPEAL THAT HAVE ALL FOUND THERE IS SOME KIND OF A FOURTH AMENDMENT INTEREST AT THAT POINT IN TIME.

IN FACT, THE FIFTH DISTRICT EXPRESSED GRAVE DOUBTS ABOUT THAT REQUIREMENT, DIDN'T IT? THE LANGUAGE THAT THEY HAD.

ESPECIALLY GIVEN THE FACT THAT THE OTHER DISTRICT COURTS STARTED ARGUING ABOUT WHAT KIND OF OATH WAS REQUIRED, IT SAID THE DISTANCE BETWEEN THE VIEWS OF THESE TWO COURTS CONCERNING WHAT IS CONSTITUTIONALLY REQUIRED HAS IF ANYTHING HEIGHTENED RATHER THAN ELIMINATED DOUBT THAT CONSTITUTIONAL SCHEME IS CONSTITUTIONALLY FLAWED.

SO I GUESS THE FIFTH DCA SAID WELL, WE ARE JUST GOING TO GO ALONG, BUT WE DON'T BELIEVE THERE IS A PROBLEM HERE.

THAT IS CERTAINLY REASONABLE READING. ALTHOUGH MY OWN CLOSER READING OF THAT CASE IS, I'M NOT SURE THAT THE COURT RECOGNIZED THE DISTINCTION BETWEEN THE PRE- INCARCERATIVE AND POST INCARCERATIVE.

BECAUSE UNDER THE STATUTE, IF IT ALL WORKS THE WAY THE STATUTE HAS LAID IT OUT, YOU HAVE TO GIVE THE DISCIPLINARY PEOPLE, LIKE FIVE HUNDRED SOME DAYS BEFORE THE PERSON'S SENTENCE ENDS, THEY ARE GIVEN THE INFORMATION ABOUT THE PRISONER, AND THEN THEY HAVE 180 DAYS FROM THAT POINT TO DO THEIR EVALUATION. SO WE ARE REALLY TALKING ABOUT A YEAR BEFORE THE DEFENDANT ACTUALLY SENTENCE IS OVER, THIS PROCESS SHOULD BEGIN.

THAT IS AS THE STATUTE IS CURRENTLY WRITTEN. IT'S GONE THROUGH A COUPLE AMENDMENTS TO REACH THAT TIME POINT.

SO UNDER THOSE CONDITIONS, ASSUMING ALL WORK, A YEAR BEFORE THE DEFENDANT'S SENTENCE ENDS, YOU GET THIS PETITION AND THE PROBABLE CAUSE DETERMINATION IS MADE, THEN WE DON'T REALLY HAVE THE CONCERNS ABOUT THESE DUE PROCESS CONCERNS THAT WE HAVE TALKED ABOUT BECAUSE THE DEFENDANT IS IN LAWFUL CUSTODY, AND HE HAS HIS CHANCE TO DO, TO CONTEST THE PETITION WHILE HE'S STILL INCARCERATED, CORRECT?

THAT IS ABSOLUTELY CORRECT. IF THE TRIAL'S BEING CONDUCTED WITHIN THAT LAST YEAR OR SO, THERE IS NO LIBERTY INTEREST AT ISSUE.

IS THAT WHAT'S HAPPENING NOW? I KNOW BEFORE, THEY WERE REALLY GETTING MUCH CLOSER TO THE END AND A LOT OF TIMES AFTER THE DEFENDANT'S SENTENCE HAD ACTUALLY EXPIRED BEFORE THESE PETITIONS WERE BEING FILED. ARE THEY BEING FILED NOW IN A MORE TIMELY FASHION?

FROM MY OWN EXPERIENCE IN DEALING WITH THIS OVER A FIVE YEAR PERIOD AND SEEING CASES FROM ACROSS THE STATE FROM ALL FIVE DISTRICT COURTS OF APPEAL, IT IS MY OWN BELIEF

THAT AS A GENERAL RULE THE TIME PERIODS ARE BECOMING CONSIDERABLY MORE SUBSTANTIAL, WHETHER A FEW MONTHS PRIOR TO THE END OF THE PRISON SENTENCE AND A SIGNIFICANT NUMBER OF CASES EVEN CONSIDERABLY MORE THAN THAT. HOWEVER, THE PROBLEMS HAVE NOT BEEN TOTALLY ALLEVIATED BECAUSE IN MANY AREAS OF THE STATE, THE TIME PERIODS IN WHICH IT HAS TAKEN THE CASES TO GO TO TRIAL JUST KEEP GETTING LONGER AND LONGER AND LONGER FOR A MULTITUDE OF REASONS, ALTHOUGH EVEN THERE THE EXPERIENCE IS NOT UNIFORM. SOME CASES ARE PROGRESSING MUCH MORE RAPIDLY THAN OTHERS IN DIFFERENT PARTS OF THE STATE. SO.

WE ARE NOT TALKING ABOUT ACTUALLY GETTING TRIAL BECAUSE THAT WAS A BIG FRUSTRATION IN MY OWN CIRCUIT COURT. LIKE PUSHING A WET ROPE UPHILL TO GET THESE TO TRIAL. WHAT WE ARE TALKING ABOUT IS DETENTION. I THINK WHAT HER QUESTIONS, HOW MANY CASES ARE WE TALKING ABOUT WHERE SOMEBODY IS BEING DETAINED POST SENTENCE COMPLETION? WITHOUT A VALID OR A SWORN STATEMENT?

I CAN'T GIVE YOU AN EXACT NUMBER OR PERCENTAGE. I CAN SAY THAT IT STILL REMAINS A SUBSTANTIAL PERCENTAGE TO ONE EXTENT OR ANOTHER, WE ARE NOT TALKING ABOUT MAJORITY, LET ALONE THE VAST MULTITUDE OF CASES GETTING TRIED WITHIN THAT LAST YEAR.

NOT TALKING ABOUT TRIED. I AM TALKING ABOUT BEFORE YOU HAVE THE ABILITY TO HAVE ADVERSARIAL.

THE ADVERSARIAL PROBABLE CAUSE HEARING AS IT'S BEEN CONSTRUED AND APPLIED HAS BEEN KICKING IN ONLY AFTER THE INCARCERATIVE SENTENCE ENDS BECAUSE ONLY AT THAT POINT IN TIME DO YOU HAVE THE LIBERTY INTEREST AT STAKE AND FOURTH DISTRICT'S CASES SAY A DEFENDANT CAN GET IT WITHIN FIVE DAYS OF DEMAND. THE ANSWER REMAINS THE SAME WHETHER YOU'RE TALKING ABOUT THAT OR THE TRIAL BECAUSE BOTH OF THEM REQUIRE THAT THE INCARCERATIVE SENTENCE END UNTIL YOU REACH THAT POINT IN TIME. MY ANSWER WOULD REMAIN THE SAME, IT IS A SUBSTANTIAL PORTION OF THE CASES GOING BEYOND THE INCARCERATIVE SENTENCE BUT SIGNIFICANT PROGRESS HAS BEEN MADE AND A FAIR NUMBER OF CASES WHERE DEFENDANTS HAVE SOUGHT AND INSISTED ON GOING TO TRIAL WITHIN THE STATUTORY 30 DAY PERIOD. MOST CASES RESULT IN SOME FORM OF A WAIVER BEYOND THAT BUT THERE ARE SOME THAT HAVE INSISTED AND HAVE IN FACT GONE IN SHORT PERIODS OF TIME.

SO THE STATE'S POSITION IS THAT IF THE PETITION IS FILED AFTER THE, OR AT THE END OF THE INCARCERATIVE PERIOD, FOURTH AMENDMENT KICKS IN. YOUR POSITION, BECAUSE I'M NOT SURE WE HAVE GOTTEN IT TOTALLY OUT, IS THAT THEREFORE SOME TYPE OF OATH OR AFFIRMATION IS APPROPRIATE. BUT THAT IT SHOULD BE, I WOULD ASSUME YOU'RE GETTING TO THAT ASSISTANT STATE ATTORNEY SWEARING IS SUFFICIENT? IS THAT? I GUESS JUST TO UNDERSTAND THIS, I ASSUME AT THIS POINT, FROM THE POINT OF THE FOURTH DISTRICTS, SECOND DISTRICT'S OPINION THAT THESE PETITIONS HAVE NOW BEEN, SUBSEQUENT ONES HAVE BEEN FILED IF THERE IS A CONCERN UNDER OATH. IS THAT CORRECT?

WELL IT'S OBVIOUSLY BEYOND THE SCOPE OF THE RECORD BEFORE THIS COURT SINCE IT OCCURRED AFTER THE FOURTH DISTRICT'S MOST RECENT OPINION LEADING TO THIS LITIGATION. IT IS OBVIOUSLY A REASONABLE INFERENCE.

I MEAN, THE STATE'S, SEEMS TO ME THAT YOU'RE GIVING US A GLOBAL IDEA OF WHAT'S GOING ON OUT THERE, WHICH IS VERY HELPFUL TO US. AND WE APPRECIATE THAT. AND I JUST, SO TO UNDERSTAND WHETHER, BY IMPOSING OR ADDING AN OATH REQUIREMENT THAT EITHER, THAT THE ASSISTANT STATE ATTORNEY SWEAR TO BASED ON I ASSUME SOME CONVERSATIONS WITH THE MENTAL HEALTH PROFESSIONALS, THAT IS NOT -- DO YOU SEE THAT FROM THE POINT OF VIEW OF THE STATE AS BEING AN UNREASONABLE REQUIREMENT GIVEN THE FOURTH AMENDMENT CONCERNS?

TO POSE IT AS A REQUIREMENT, I GUESS THE ISSUE HERE HAS TO BE FRAMED IN TERMS OF WHAT IS CONSTITUTIONALLY MANDATED OR NOT BECAUSE ONCE WE ARE GOING BEYOND THAT, YOU'RE EITHER TALKING ABOUT SOMETHING THAT HAS TO BE DONE BY STATUTORY MANDATE OR BY A RULE OF PROCEDURE IF IN FACT IT IS TALKING ABOUT SOMETHING THAT'S PROCEDURE RATHER THAN SUBSTANCE.

SO WHAT'S YOUR POSITION AS FAR AS WHAT THE CONSTITUTION REQUIRES?

AS FAR AS THE CONSTITUTION IS CONCERNED, CONSTITUTION WOULD MERELY REQUIRE AT THE POINT IN TIME WHEN YOU HAD THE LIBERTY INTEREST AN OATH OR AN AFFIDAVIT WITHOUT SPECIFYING WHO IT WOULD HAVE TO COME FROM, AND THEREFORE IT IS ERRONEOUS ON THE PART OF THE FOURTH DISTRICT TO MANDATE IT BE A MENTAL HEALTH PROFESSIONAL. THERE IS NO REASON WHY A PROSECUTOR COULD NOT BE IN SAME POSITION AS LAW ENFORCEMENT OFFICER IN ANALOGOUS CONTEXT IN AFFIDAVIT IN SUPPORT OF AN ARREST WARRANT ASSUMPTIONS ARE VIRTUALLY IDENTICAL. NEITHER CASE DO YOU HAVE ANYONE WHO IS GOING TO HAVE PERSONAL KNOWLEDGE OF MOST OR ALL AND SOMETIMES WON'T EVEN HAVE PERSONAL KNOWLEDGE OF ANY OF THE EVENTS THAT ARE BEING RELATED, WHETHER IT IS THE POLICE OFFICER OR THE ASSISTANT STATE ATTORNEY. AND MANY CASES THE MENTAL HEALTH EXPERT IS NOT GOING TO HAVE PERSONAL KNOWLEDGE OF ANYTHING THERE EITHER. YOU CAN HAVE A MENTAL HEALTH EXPERT FOR WHOM A DEFENDANT DECLINES A CLINICAL INTERVIEW, SO THE MENTAL HEALTH EXPERT PREPARES A REPORT SOLELY ON THE BASIS OF DOCUMENTARY REVIEW. REVIEWING OLD HEALTH RECORDS, CASE RECORDS, OLD POLICE REPORTS, OLD TRIAL TESTIMONY TRANSCRIPTS, DEPOSITIONS, SWORN WITNESS STATEMENTS, EMPLOYMENT HISTORY, EDUCATIONAL HISTORY. IT IS ALL SECOND AND THIRD HAND INFORMATION.

WHAT IS THE AUTHORITY, WHAT IS THE AUTHORITY THAT YOU ARE ASSERTING IS THE CONSTITUTIONAL BASIS FOR THIS REQUIREMENT? DO WE GET THIS AUTHORITY OUT OF THE SUPREME COURT CASES? OR DO WE GET THIS AUTHORITY OUT OF -- WHERE DOES IT COME FROM?

I THINK, I THINK MY POSITION, IF I UNDERSTAND YOUR QUESTION CORRECTLY IS SAYING, WOULD BE TO SAY THAT IF THE CONSTITUTION DOES NOT PROHIBIT THE STATE FROM DOING SOMETHING, IF THE CONSTITUTION DOES NOT SPECIFICALLY REQUIRE THE STATE TO DO SOMETHING, THEN WHAT THE STATE DOES IS NOT CONSTITUTIONALLY PROHIBITED. IT IS NOT SO MUCH A QUESTION OF THE CONSTITUTION SPECIFICALLY SAYING THAT THE STATE CAN DO THIS. THE CONSTITUTION IS ONE WHICH FOR THE MOST PART LIMITS POWERS RATHER THAN EXPRESSLY CONFERS POWERS. SO WE ARE TALKING ABOUT THE ABSENCE OF A CONTROLLING LIMITATION HERE OTHER THAN THE REQUIREMENT THAT THERE BE SOME FORM OF AN UNSPECIFIED OATH OR AFFIDAVIT.

TELL ME WHERE THAT CONSTITUTIONAL REQUIREMENT COMES FROM.

I THOUGHT AT THE BEGINNING OF THE ARGUMENT YOU REFERRED TO ARTICLE I, SECTION 12.

ARTICLE I, SECTION 12. AND FEDERAL COUNTERPART FOURTH AMENDMENT SEARCH AND SEIZURE CLAUSE. I WAS JUST LOOKING FOR THE EXACT VERBIAGE. AND THE FOURTH AMENDMENT PROVIDES THAT NO WARRANT SHALL ISSUE BUT UPON PROBABLE CAUSE SUPPORTED BY OATH AND -- OATH OR AFFIRMATION. SO, YOU HAVE THE WARRANT, YOU HAVE THE LIBERTY INTEREST, YOU NEED SOME FORM OF OATH OR AFFIRMATION AT THAT POINT IN TIME. ARTICLE I, SECTION 12, NO WARRANT SHALL BE ISSUED EXCEPT UPON PROBABLE CAUSE SUPPORTED BY AFFIDAVIT. SO THAT'S THE STARTING POINT, BUT IT DOESN'T HAVE ANY SPECIFICITY BEYOND THAT. AND SO THEREFORE WHEN THE FOURTH DISTRICT SAYS THAT IT MUST BE A MENTAL HEALTH PROFESSIONAL, FOURTH DISTRICT IS GOING BEYOND ANYTHING THAT IS CONSTITUTIONALLY REQUIRED. THERE IS NO BASIS FOR THE COURT TO SAY THAT THE ONLY WAY YOU CAN SATISFY THIS REQUIREMENT IS THROUGH A MENTAL HEALTH EXPERT. IT MAY BE AND IN MANY CASES IT IS PROBABLY GOING TO BE TRUE THAT A MENTAL HEALTH EXPERT MIGHT BE THE BEST

INDIVIDUAL --.

BUT IN ORDER TO COMPLY WITH THOSE CONSTITUTIONAL PROVISIONS, IS WHAT I UNDERSTAND YOU SAYING IS THAT THERE NEEDS TO BE A RULE OF PROCEDURE THAT WOULD ADDRESS THIS DEFECT IN THE STATUTE.

I DON'T THINK IT IS --.

YOU DON'T THINK IT IS A DEFECT IN THE STATUTE?

I DON'T THINK IT IS A DEFECT IN THE STATUTE IN THE NORMAL COURSE OF EVENTS THIS WOULD PRESUMABLY BE DONE THE LAST YEAR OF PRISON WHERE IT DOESN'T MATTER. AND IF IT GOES BEYOND THAT, ALL THE STATE HAS TO DO IS COME UP WITH AN APPROPRIATE CONSTITUTIONALLY SUFFICIENT OATH OR AFFIDAVIT AS OPPOSED TO ANY KIND OF PARTICULAR KIND OF AFFIDAVIT.

STATUTE DOESN'T SAY THAT.

THE STATUTE DOESN'T, DOES NOT SAY THAT. BUT YOU HAVE A SITUATION, YOU HAVE A SITUATION WHERE IN MANY OF THESE CASES IT IS GOING, IT IS PRESUMABLY GOING TO BE THE DEFENDANTS WHO ARE WAIVING STATUTORY ENTITLEMENT TO BE TRIED DURING 30 DAYS AND PRESUMABLY WITHIN THE LAST YEAR OF SENTENCE AND IT IS THE DEFENDANT'S ACTIONS PUSHING THIS OVER THAT THRESHOLD AND CAUSING THE NEED FOR ANY KIND OF AN OATH OR AFFIDAVIT AT THAT POINT, AT THAT POINT IN TIME IN CONJUNCTION WITH THEIR ENTITLEMENT TO OBTAIN A FULL ADVERSARIAL PROBABLE CAUSE HEARING WITHIN FIVE DAYS OF THE END OF THE PRISON SENTENCE IF THEY SO DESIRE.

YOUR OPPONENT HAS USED AN ANALOGY TO THE BAKER ACT. WHY WOULDN'T THAT BE A BETTER ANALOGY?

FIRST AGAIN THE BAKER ACT IS NOT SOMETHING CONSTITUTIONALLY MANDATED AND WE ARE TALKING ABOUT WHAT'S CONSTITUTIONALLY MANDATED.

WELL, IS THAT TRUE? WASN'T THE BAKER ACT AND SIMILAR ACTS REALLY DEVELOPED WITH ALL OF THOSE SAFEGUARDS, IN LIGHT OF, THE SAME LIBERTY INTEREST THAT YOU'RE TALKING ABOUT HERE?

THERE STILL IS DISCRETION AS FAR AS HOW THINGS ARE DONE, EVEN IN COMPLYING WITH THE CONSTITUTION. AND WHEN YOU LOOK AT WHAT THE BAKER ACT SAYS AND DOES, FIRST WHEN THE BAKER ACT DOES REQUIRE AN OATH OR AFFIDAVIT, IT'S IN THE CONTEXT OF THE INITIAL PICKUP OF A PERSON OFF OF THE STREET FOR PLACEMENT FOR INVOLUNTARY EXAMINATION. AT THAT POINT IN TIME, NO MENTAL HEALTH EVALUATIONS HAVE BEEN DONE, WHEREAS IN SEXUALLY VIOLENT PREDATOR CASES, TWO OF THEM HAVE TYPICALLY BEEN DONE BEFORE A PERSON IS TAKEN INTO CUSTODY UNDER THE ACT. THE PURPOSE OF THE BAKER ACT DETENTION IS TO FORCIBLY REMOVE THE PERSON FROM THE STREET FOR THE PURPOSE OF OBTAIN THE SUBSEQUENT, THE SUBSEQUENT MENTAL HEALTH EVALUATION. AFTER THAT SUBSEQUENT MENTAL HEALTH EVALUATION IS IN FACT DONE, AND THE PETITION FOR INVOLUNTARY PLACEMENT IS FILED BY THE FACILITY ADMINISTRATOR, THERE IS NO REQUIREMENT THAT THERE BE AN OATH OR AFFIDAVIT ON THAT PETITION FOR INVOLUNTARY PLACEMENT. AND INDEED WHEN THE MENTAL HEALTH EVALUATION IS DONE AT THE FACILITY, THERE IS NO REQUIREMENT THAT THAT BE UNDER OATH. IT IS JUST A REQUIRED CERTIFICATE FROM THE MENTAL HEALTH PROFESSIONAL WHO DOES THE EVALUATION AFTER THE SEIZURE. AND THE INITIAL SEIZURE, IT CANNOT BE COMPARED TO THE SEXUALLY VIOLENT PREDATOR CASE BECAUSE OF SIGNIFICANT DIFFERENCES. WHEN YOU ARE PICKING SOMEONE UP OFF THE STREET INVOLUNTARILY, PRESUMABLY BECAUSE OF SOME KIND OF BIZARRE BEHAVIOR, WHICH HAS TRIGGERED CONCERNS

OVER THE INDIVIDUAL'S MENTAL HEALTH, THAT IS SOMETHING FOR WHICH YOU HAVE GOT A FORM OF CURRENT BEHAVIOR, THAT'S SOMEONE RATHER THE LAW ENFORCEMENT OFFICER, FAMILY MEMBER OR WHATEVER IS GOING TO BE PROVIDING A CURRENT ACCOUNTING OF THE MOST RECENT EVENTS THAT HAVE TRIGGERED THIS AS OPPOSED TO THE JIMMY RYCE ACT WHERE YOU HAVE BASICALLY A LARGE PART OF THE INFORMATION HERE IS OLD RECORDS FROM CRIMINAL CASES AND PRIOR MENTAL HEALTH RECORDS AND ALL OTHER KINDS --.

SO THE BOTTOM LINE OF THE STATE'S POSITION, IF I UNDERSTAND IT, AND MARSHAL HAS TURNED ON YOUR WARNING LIGHT TOO BECAUSE YOU ONLY HAVE A COUPLE MINUTES LEFT. IS THE DEFINITION OF THIS OATH, THE STATE SAYS IS SUFFICIENT BY THE ASSISTANT STATE ATTORNEY, COMBINED WITH THE RIGHT TO DEMAND AN ADVERSARIAL PROBABLE CAUSE HEARING, IS SUFFICIENT UNDER THE CONSTITUTIONAL CONSTRUCTIONS? IS THAT THE BOTTOM LINE?

YES. TO THE EXTENT THAT I HAVE ANY REMAINING TIME I'LL RESERVE IT FOR REBUTTAL.

THANK YOU.

WHY ISN'T THE STATE'S POSITION ADEQUATE? THAT IS THE BOTTOM LINE THAT WE JUST DISCUSSED, AND THAT IS THAT THE COMBINATION OF HAVING THE KIND OF OATH THAT WAS DONE HERE BY AN ASSISTANT STATE ATTORNEY, COMBINED WITH THE RIGHT OF THE RESPONDENT TO DEMAND AN ADVERSARIAL PROBABLE CAUSE HEARING? WHY ISN'T THAT, THOSE ADEQUATE PROTECTIONS TO MEET ANY CONSTITUTIONAL LIBERTY INTEREST CONCERNS?

I WOULD RESPECTFULLY SUGGEST THAT IT IS NOT FOR A COUPLE OF REASONS. FIRST, I WOULD SUGGEST THAT THE RIGHT UNDER, WHICH WAS CREATED UNDER HOCKER, WHICH IS THE FOURTH DCA OPINION, TO THE ADVERSARIAL PROBABLE CAUSE DETERMINATION, REMEMBER THE STATUTE WAS SILENT ON THAT, DID NOT AFFORD THAT TO BEGIN WITH. THAT WAS ADDED AND THEN THAT WAS SPECIFICALLY DEFINED UNDER THE CASE LAW THAT YOU COULD NOT EVEN, THAT PERSON CANNOT EVEN DEMAND IT UNTIL THE, UNTIL HIS RELEASE. SO THEREFORE HE HAS NO CONSTITUTIONAL PROTECTION, NO DUE PROCESS AFFORDED TO HIM UNTIL HE'S ACTUALLY SUPPOSED TO BE FREE AND NOW HE'S BEING DEPRIVED AND THEN FOR THE SECOND REASON, IS THAT THE CONSTITUTIONAL PROTECTION IS HIS. HE SHOULD NOT HAVE TO DEMAND ANYTHING. HE SHOULD BE AFFORDED BY THE STATE, WHO IS TRYING TO TAKE HIS LIBERTY. AND THE BURDEN SHOULD BE PLACED ON THE STATE TO PROVIDE HIM THE DUE PROCESS. IT SHOULD NOT BE THE INDIVIDUAL WHO'S BEING DETAINED.

BUT DO YOU AGREE AT LEAST TO THE EXTENT, IF THE PROBABLE CAUSE PETITION IS IN FACT FILED A YEAR, SAY, BEFORE THE DEFENDANT GETS OUT OF JAIL, THERE REALLY IS NO NEED TO HAVE THE PETITION SWORN TO? CAN YOU AGREE TO THAT MUCH OF THIS?

MA'AM, I CERTAINLY COULD IF THAT IN FACT WERE, WERE REALITY. IT IS JUST NOT THE REALITY IN FLORIDA. AND IT IS NOT FOR SEVERAL REASONS. AS THIS COURT'S WELL AWARE OF THE SENTENCING ISSUES THAT ALWAYS COME UP IN CASES.

BUT DO YOU AGREE THEN AT THAT POINT, THERE IS REALLY NO CONSTITUTIONAL INFIRMITY TO A PETITION THAT IS FILED, THAT IS UNSWORN?

AS LONG AS IT DOES NOT AFFECT HIS LIBERTY INTERESTS, I WOULD HAVE TO AGREE WITH THE COURT ON THAT POINT. IN FACT I WOULD GO AS FAR TO SUGGEST THAT HOPEFULLY AT SOME POINT WE WILL ADOPT THE MINNESOTA MODEL THAT ACTUALLY GOES ON WITH CIVIL COMMITMENT RIGHT AFTER A PERSON IS COMMITTED TO PRISON.

YOU MENTIONED THIS ADVERSARIAL PROBABLE CAUSE HEARING THAT ONE OF THE APPELLATE COURTS HAS SAID IS REQUIRED. AND JUSTICE WELLS WAS ASKING A BETTER RULE OF PROCEDURE. IS THERE ANYTHING IN THE WORK THAT, RULE OF PROCEDURE THAT IS FIVE YEARS

NOW IN THE STATUTES IN OPERATION, THAT ANYONE, ANY OF THE BAR COMMITTEES IS WORKING ON TO TRY TO GET THIS, GET THE STATE AND THE PUBLIC DEFENDERS TOGETHER TO COME UP WITH A WORKABLE PROCEDURE?

JUSTICE, I'M ACTUALLY GLAD YOU HAVE ASKED THAT BECAUSE SEVERAL LOWER COURTS HAVE SIGNALLED THEIR WILLINGNESS TO HAVE THESE PROCEDURES. IN FACT, SOME OF US THAT DO THE JIMMY RYCE COMMITMENT PROCEEDINGS ON THE TRIAL LEVEL HAVE ACTUALLY PUT ON OUR BAR PREFERENCE FORMS THAT WE WOULD LIKE TO BE NAMED A MEMBER OF THE RULES COMMITTEE FOR THE INVOLUNTARY CIVIL COMMITMENT. AND THERE IS -- WE HAVEN'T GOTTEN ANYWHERE WITH IT. WE WOULD CERTAINLY WELCOME THAT. BUT IT JUST HASN'T HAPPENED.

LET ME COME BACK TO YOUR ANALOGY TO THE BAKER ACT. WHY DOESN'T THE STATE'S CONCESSION REFERENCE TO THE REQUIREMENT OF SOME OATH, WHATEVER, THAT WOULD, THEY USED THE ANALOGY THAT WOULD BE SUFFICIENT FOR AN ARREST WARRANT. THEN THE REQUIREMENT OF HAVING A PROMPT DEMAND OF THE RESPONDENT ADVERSARIAL PROBABLE CAUSE HEARING, WHY DOESN'T THAT IN ESSENCE, IT'S A CLOSE PARALLEL, IS IT NOT, TO WHAT HAPPENS UNDER BAKER ACT PROCEEDINGS, THAT IS, THAT ONCE YOU HAVE THE SEIZURE OF THE PERSON AND THEN THEIR EXAMINATION, THERE IS A REQUIREMENT FOR A PROMPT HEARING IF THEY'RE GOING TO BE DETAINED LONGER THAN THAT. DOESN'T THAT COME AWFULLY CLOSE TO MEETING THOSE SAFEGUARDS?

CERTAINLY I WOULD SUGGEST IF THIS COURT DECIDED THAT THEY WOULD POSSIBLY MAKE THE ADVERSARIAL PROBABLE CAUSE DETERMINATION MANDATORY PRIOR TO RELEASE, WE COULD LIVE WITH THAT. BUT I DON'T BELIEVE THAT ONCE YOU RELEASE FROM WHAT YOU BELIEVE YOU WERE BEING RELEASED, I DON'T BELIEVE THEN THAT THE BURDEN SHOULD BE PLACED ON YOU TO RECEIVE WHAT THE CONSTITUTION HAS GUARANTEED YOU. AND IF I COULD TAKE A MINUTE, MAYBE I COULD ANSWER JUSTICE WELLS' QUESTION AS TO THE AUTHORITY THIS IS BASED ON. AND I WOULD SUGGEST TO THE COURT THAT HUMPHREY VERSUS CADY, ADDINGTON VERSUS TEXAS, BOTH U.S. SUPREME COURT CASES AS WELL AS FLORIDA CASES SHUMAN VERSUS STATE AND POLIN VERSUS STATE HAVE RECOGNIZED CIVIL COMMITMENT IS A SERIOUS DEPRIVATION OF LIBERTY REQUIRING THE AFFORDING OF DUE PROCESS TO THE INDIVIDUALS TO BE SO DETAINED. SO I BELIEVE THAT THERE IS SUFFICIENT CONSTITUTIONAL AUTHORITY TO REQUIRE THIS.

ARE YOU FAMILIAR WITH CIVIL FORFEITURE PROCEEDINGS? DO YOU DO THAT?

I CONCENTRATE MOSTLY ON CRIMINAL CASES, SO VAGUELY. I HATE TO COMPARE THE DEPRIVATION OF PERSONAL LIBERTY TO DEPRIVATION OF PERSONAL PROPERTY. BUT MY EXPERIENCE IN THAT IS WHEN THOSE ARE FILED BY THE STATE SEEKING A PRELIMINARY PROBABLE CAUSE FOR DETENTION OF PROPERTY FORFEITURE STATUTE, THAT WE RECEIVE AFFIDAVITS FROM THE LAW ENFORCEMENT OFFICERS ATTACHED TO THE PETITIONS. I JUST, I WAS JUST THINKING THAT OFF THE TOP OF MY HEAD, HAVEN'T DONE THE RESEARCH TO KNOW WHETHER THAT'S A STATUTORY REQUIREMENT. BUT BY PRACTICE, WE WOULD HAVE THE HIGHWAY PATROL OR THE LAW ENFORCEMENT OFFICER INVOLVED IN THE FORFEITURE ACTION ITSELF. IN THE ARREST. THAT RESULTED IN THE FORFEITURE, FILE THE AFFIDAVIT ATTACHED TO THE PETITION FILED BY THE STATE.

AND JUSTICE, I WOULD SUGGEST TO THE COURT THAT LIKEWISE, THAT'S WHAT WE'RE ASKING FOR IN THIS SITUATION, WE ARE ASKING FOR THE MENTAL HEALTH PROFESSIONAL, WHICH IS THE ONLY ELEMENT ACTUALLY THAT IS IN QUESTION WHEN YOU'RE DEALING WITH ONE OF THESE CASES, IS WHETHER OR NOT THAT ELEMENT IS SUPPLIED FOR PROBABLE CAUSE. AND WE ARE ASKING THAT THE DOCTOR JUST SWEAR TO HIS FINDING THAT THOSE, AND THAT WOULD AFFORD THE REQUISITE DUE PROCESS.

ALL RIGHT, THE MARSHAL HAS REMINDED US YOUR TIME HAS EXPIRED. THANK YOU VERY MUCH.

WE WILL TAKE THE REST OF IT ON YOUR BRIEFS.

MR. MARSHAL, IS THERE ANY TIME LEFT? ONE MINUTE, ALL RIGHT.

JUST FOR BRIEF CONCLUSION, ONE POINT I REALLY WANT TO MAKE. IN THE EVENT THAT ANY DEFECT IS FOUND TO EXIST AS THE FOURTH DISTRICT FOUND, I DON'T THINK THAT THERE IS ANY QUESTION BUT THAT THE STATE SHOULD HAVE A REASONABLE OPPORTUNITY TO CURE THIS DEFECT.

WHAT DO YOU CONSIDER A REASONABLE OPPORTUNITY?

FOURTH DISTRICT SAID 7 WORKING DAYS WAS CERTAINLY, WAS CERTAINLY REASONABLE. THE FIFTH DISTRICT QUESTIONED WHETHER THAT WOULD BE ENOUGH, AND URGED ITS JUDGES TO BE FLEXIBLE. THAT'S FIRST THING.

ALL WE ARE REALLY TALKING ABOUT IS WHETHER IT IS THE MENTAL HEALTH PROFESSIONAL OR THE STATE ATTORNEY SAYING I SWEAR THAT WHAT'S IN THIS REPORT IS ACCURATE TO THE BEST, YOU KNOW, MY KNOWLEDGE.

THAT MAYBE ALL, DEPENDING ON THE VOLUME OF CASES. IT MAY BE A LOT OF PAPERWORK TO DO IN A SHORT PERIOD OF TIME AS HAPPENED IN THIS CASE. BUT SOMETIMES THE PROSECUTOR MIGHT WANT TO DO SOMETHING CONSIDERABLY BEYOND THAT. I GAVE THE EXAMPLE OF WHAT'S DONE IN MINNESOTA. WHILE IT IS CERTAINLY NOT MANDATED, PROSECUTOR MIGHT CHOOSE THAT APPROACH, WHICH IS A VERY TIME CONSUMING.

WHAT DO THEY DO IN MINNESOTA?

IT IS THE APPENDIX I GAVE TO THE BRIEF. IF YOU READ THEIR PROBABLE CAUSE, IT READS LIKE STATEMENTS OF FACT IN DETAILED BRIEF WITH THOUSANDS OF PAGES OF TRANSCRIPTS. IT IS A VERY EXTENSIVE DOCUMENT CORRELATING EVERYTHING IN THE LAST, JUST ONE LAST POINT, COUNSEL HAD SAID THAT EVEN IF THERE WERE A PROBLEM, THE DEFENDANT WOULD JUST BE RELEASED PENDING TRIAL. WELL, IF THERE IS AN ADMISSION, THE PERSON COULD BE COMMITTED ONCE AGAIN AFTER THE SWORN TESTIMONY AFTER TRIAL, I THINK THAT'S A COMPELLING ADMISSION THAT WHY CAN'T THE PERSON BE TAKEN BACK RIGHT BACK INTO CUSTODY AFTER A CORRECTIVE AFFIDAVIT ON A PROBABLE CAUSE PETITION? THANK YOU.

THANK YOU.

THANK YOU ALL VERY MUCH.