

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-166

MICHAEL W. MOORE, etc., et al.,

Appellants/Cross-Appellees,

v.

ROBERTO VALDEZ,

Appellees/Cross-Appellants.

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ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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**AMENDED REPLY BRIEF OF APPELLANT AND  
ANSWER BRIEF OF CROSS-APPELLEE**

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**CERTIFICATE REGARDING FONT SIZE AND TYPE**

The undersigned authority hereby certifies that this brief has been typed in Times  
New Roman, 14-point type.

## **STATEMENT OF THE CASE AND FACTS**

The Appellant relies on the Statement of the Case and Facts as set forth in the Initial Brief of the Appellant, subject to the following:

This Court has previously stricken the Answer Brief of Appellees on the grounds that it relies on non-record materials. The Amended Answer Brief of Appellees still persists in relying on improper non-record materials. Rather than seeking to strike the Amended Answer Brief of Appellees, in an effort to expedite the further consideration of this appeal, counsel for the Appellant will point out the non-record, improper materials relied upon by the Appellees, and simply request that this Court disregard those matters and not consider them.

First, the Amended Answer Brief of Appellees asserts, at page 7-8, that the Petitioners “are currently housed in a Department of Corrections facility immediately adjacent to the Martin Correctional Institution.” The Appellees do not cite any record support for that proposition. Instead, they refer to Exhibit A in their Appendix, which consists of non-record materials: a report prepared in June 2000, by the Office of Program Policy Analysis and Governmental Accountability, which is not a part of the trial court or appellate court proceedings herein. The Report was prepared to study the

circumstances surrounding the escape of an individual from the Martin Treatment Center for Sexually Violent Predators.

Not only have the Appellees improperly relied on non-record materials, after already having one brief stricken for that reason, but, the very non-record materials which they have improperly interjected into this appeal refute their claim that the Department of Corrections is the custodian of the four individuals who filed the habeas corpus petitions which resulted in this appeal. Page 4 of the Report reflects that the Martin Treatment Center was used by the Department of Corrections to house a drug treatment program until 1998. “In 1999, the facility was turned over to the Department of Children and Families [DCF] to house sexually violent predators.” *Id.* The report then continues to note that DCF operates the facility through two contracts: one, with Liberty Behavioral Health Care, Inc., to provide treatment to individuals and management of the facility, and another contract with the Department of Corrections, to provide security at the facility. *Id.* at pp. 5-6. There is nothing in that report which supports the assertions that the Department of Corrections is the custodial party for purposes of a habeas corpus petition, and the report, consistent with statutory provisions, clearly reflects that the facility is a DCF facility, making DCF the sole custodial party for purposes of habeas corpus proceedings.

## **SUMMARY OF ARGUMENT**

The Fourth District Court of Appeal, in setting forth requirements for adversarial probable cause hearings, above and beyond those required by Florida's statute, mandated proceedings which are not constitutionally required. At a minimum, the lower Court's ruling, which effectively applies as a rule of court for all future cases, should be modified, to take into consideration practical matters which the opinion fails to consider.

As to the cross-appeal, regarding bail or pretrial release, the commitment cases are civil, not criminal, and the Appellees' reliance on criminal case law and statutory or constitutional provisions which apply only to criminal cases, is irrelevant. The commitment case commences with a probable cause determination that the individual is currently dangerous to the public. Given such a finding, pretrial release or bail need not be mandated. Many other states have commitment acts similar to Florida's. Several expressly prohibit release pending the commitment trial based upon the prior probable cause finding regarding dangerousness. None authorize pretrial release.

## ARGUMENT

### I. THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT §394.915, FLORIDA STATUTES, VIOLATES THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS BECAUSE IT FAILS TO PROVIDE A TIMELY ADVERSARIAL PROBABLE CAUSE HEARING.

The State's principal argument is, and remains, that the entitlement to a full evidentiary trial, within 30 days, is sufficient to satisfy the requirements of due process without the further requirement of an additional, substantial, evidentiary hearing, referred to as an adversarial probable cause hearing, within the same time period. The sufficiency of that 30-day period, for constitutional purposes was established by the Supreme Court of the United States in Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), aff'd sub nom. Briggs v. Arafeh, 411 U.S. 911 (1973). To the extent that the case does not proceed to trial within that 30-day period, and custody under the commitment proceedings has commenced, by virtue of the expiration of the prior incarcerative sentence, the need for an adversarial probable cause hearing can be considered, but there is no constitutional basis for mandating that it be conducted sooner than the 45-day period which was upheld in Arafeh.

The Amended Answer Brief of Valdez, et al., attempts, without any degree of

success, to circumvent the fact that the Supreme Court, in Arafeh, found that a commitment scheme complied with due process requirements when it provided for an evidentiary hearing which might not be held for 45 days after the person was taken into custody. First, the Appellees argue that Arafeh is distinguishable because the case “is from Connecticut and occurred in 1972.” Amended Answer Brief of Appellees, pp. 21-22. Contrary to the implications of the Appellees’ bizarre “distinction,” federal constitutional principles apply equally in Connecticut, Florida and all of the remaining 50 states. Similarly, an opinion of the United States Supreme Court does not lose its constitutional vitality due to the passage of 28 years. The Appellees do not point to any subsequent opinion of the United States Supreme Court which undermines its prior affirmance in Arafeh.

Second, the Appellees argue that Arafeh involved individuals committed under general civil commitment statutes, as opposed to those committed under a sexually violent predator statute. Amended Answer Brief of Appellees, p. 22. Once again, this is a distinction, but one without substance. Under both types of commitments, an individual’s liberty is being curtailed based upon allegations and/or proof of a requisite mental condition and dangerousness resulting from that mental condition. There is no reason why due process would mandate a different maximum period of detention prior

to an evidentiary hearing for one as opposed to the other.

Consistent with the foregoing points, as well as those asserted in the Initial Brief of Appellant herein, a few recent cases from other jurisdictions should be noted. In In re the Commitment of Brissette, 230 Wis. 2d 82, 601 N.W. 2d 678 (Wis. App. 1999), the court addressed Wisconsin's sexually violent persons act, which provides for involuntary commitments. The court specifically held that the time in which the 72-hour adversarial probable cause hearing (referred to as a preliminary hearing) had to be held, did not begin to run until Brissette's prior incarcerative sentence ended and he was subsequently taken into custody under the commitment statute. This was true even though the commitment petition had been filed prior to the expiration of the prison sentence. The Fourth District Court of Appeal, in the instant case, has similarly acknowledged that due process would not require the holding of an adversarial probable cause hearing while the person is still serving the prior prison sentence. Valdez v. Moore, 745 So. 2d 1009, 1012 (Fla. 4th DCA 1999).

More significantly, a New Jersey appellate court has recently reviewed provisions of the New Jersey Sexually Violent Predator Act, which, like Florida's, provides for the involuntary civil commitment of those who have the requisite mental

condition and dangerousness. In the Matter of the Commitment of M.G., 331 N.J. Super. 365, 751 A.2d 1101 (N.J. App. 2000). Under the New Jersey act, upon the filing of the commitment petition by the State, the trial court engages in an ex parte review of the petition and supporting documents, to determine whether there is probable cause to proceed. Section 30:4-27.28(5), New Jersey Statutes. Upon finding such probable cause, the judge signs an order to that effect, and further sets the date for the final hearing and authorizes temporary commitment pending the final hearing. Section 30:4-27.28(5)(g), New Jersey Statutes. Subsequent to that non-adversarial, ex parte, probable cause determination, there is no other provision for a pretrial adversarial probable cause hearing. The act simply provides for the commitment trial itself to be held within 20 days of the initial order finding probable cause. Section 30:4-27.29, New Jersey Statutes. Thus, the New Jersey act is essentially the same as Florida's, with the exception being that the trial in New Jersey is 20 days after the initial ex parte probable cause order, and the trial in Florida is 30 days after that order.

While the New Jersey appellate court found that the alleged predator had to be provided notice prior to the commencement of a temporary commitment at the conclusion of the incarcerative sentence, and that the person should thus also be able to appear at the initial probable cause determination, that initial hearing did not have

to be evidentiary in nature. The only question was whether the State's petition and supporting documents established the requisite probable cause. 751 A.2d at 1111. All evidentiary or credibility issues were to be addressed only at the final 20-day hearing. Id. What is significant here, is that even though the Court provided for the respondent to be present, through counsel, at the initial non-evidentiary probable cause hearing,<sup>1</sup> which simply reviewed the adequacy of the State's petition for purposes of probable cause, the Court ultimately concluded that there was no need for both an adversarial/evidentiary probable cause hearing and a separate evidentiary final hearing/trial. So, too, the State maintains that due process does not require both an adversarial/evidentiary probable cause hearing and a separate evidentiary trial, for which there is a statutory entitlement to a trial within 30 days.<sup>2</sup> The essence of the Fourth District's opinions is that an alleged sexually violent predator, against whom a commitment petition has been filed, is entitled to two trials within the initial 30-day

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<sup>1</sup> The right to be present, with counsel, at the hearing where the judge reviews the State's petition to determine whether it established probable cause existed only in the context of those who were being transferred to a commitment facility; it was not triggered simply by the filing of a petition as to one who was going to be remaining in a correctional prison, finishing up an incarcerative sentence, while the commitment case proceeded to trial.

<sup>2</sup> At least one state commitment act does not provide for any form of a probable cause hearing, whether ex parte or adversarial, subsequent to the filing of the commitment petition. See, Tex. Health and Safety Code, Texas Stat., ss. 841.001, et seq.

period; the first, upon demand for an evidentiary adversarial probable cause hearing; the second, coming fast on the heels of the first, within the remainder of that 30-day period.<sup>3</sup>

Just as due process does not mandate that a defendant in a criminal case receive both a mini-trial and a full speedy trial shortly thereafter, so, too, there is no reason to conclude that due process requires the functional equivalent of two evidentiary trials

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<sup>3</sup> In yet another instance, the Appellees have interjected non-record materials into this appeal. With respect to the question of how long it will take for commitment cases to proceed to trial, the Appellees, at page 25 of their Amended Answer Brief, and in Exhibit B to the Appendix to that Brief, refer extensively to a document which the undersigned authored and submitted to the Governor's Task Force on Jimmy Ryce Act Enforcement. The Appellees initially mischaracterize the undersigned's argument. The undersigned has not argued, in either this brief or the prior brief herein that the trials in these cases "will be held within 30 days." The undersigned does argue that that is what the legislature expected to be the norm. The undersigned also argues that regardless of whether the cases proceed to trial in 30 days or not, when DCF refers the cases to the State Attorney many months prior to the end of the prison sentence, if the State files the commitment petitions at that time, there will often be more than enough time in which to complete the commitment trial even before the incarcerative sentence expires. The undersigned would also note that the document which the Appellees have improperly included in their Appendix to the Amended Answer Brief of Appellees is one which was prepared almost one year ago, and circumstances which have transpired during the intervening year would cause the undersigned to further modify, clarify or explain some of the statements which were accurate at that time, but which have been affected by either statutory amendments or by the manner in which DCF has processed cases in the intervening year. The foregoing simply highlights the reasons why the Appellees' reliance on non-record materials is improper - and all the more so since the Appellees have already been admonished once against resorting to such non-record materials.

in commitment cases.

To the extent that this Court might agree with the lower court that an adversarial probable cause hearing is required, and that the requirement calls for a more expeditious hearing than that allowed under the current statute, the State would simply reiterate the position that it set forth in its prior Brief herein: the five-day period is not constitutionally mandated, and, whether that period caused problems in the hearings in the instant case or not is an irrelevancy. Given the nature of the statutory scheme, the time periods involved, the dependency of such hearings on expert witnesses, the length of such evidentiary proceedings, the limitations on the time available on short notice from judges, and the professional demands which can reasonably be assumed to exist on mental health professionals, a system which requires such hearings to be held within five days of demands, without due consideration to the concerns of court calendars and experts' availability, is a system which will ultimately result in the release of individuals due to physical inabilities to abide by those logistical demands. At a minimum, significantly greater flexibility is needed than that which the lower court appears to allow, whether under its original ruling, in Valdez, or in its modified ruling, in Kobel.

The Appellees further argue that the Florida act evinces a punitive intent. See, Amended Brief of Appellees, pp. 29-30. Not only is this contention irrelevant to the limited issue of the constitutional parameters regarding an adversarial probable cause hearing, but, once again, notwithstanding this Court's act of already striking the Appellees' initial Answer Brief due to reliance on non-record materials, the Appellees persist in making assertions which are beyond the record and not supported by the record.<sup>4</sup> Furthermore, it should be noted that Florida's statutory scheme is essentially the same as that which can be found in numerous other jurisdictions, and such jurisdictions have routinely found that their sexually violent predator commitment acts are civil in nature; they are not punitive or criminal in nature. See, Kansas v. Hendricks, 521 U.S. 346 (1997); In re Young, 857 P. 2d 989 (Wash. 1993); Martin v. Reinstein, 987 P. 2d 779 (Ariz. App. 1999); In the Matter of Hay, 953 P. 2d 666 (Kan. 1998); In re Linehan, 557 N.W. 2d 171 (Minn. 1996), reconsidered, 594 N.W. 2d 867 (Minn.

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<sup>4</sup> In particular, the Appellees argue that after probable cause is determined, "the Petitioner is confined in a prison facility controlled by DOC and DCF employees." Amended Brief of Appellees, p. 29. Not only does the State disagree with that assertion, but it is one for which there is no record support or any factual determination by an evidentiary forum. Similarly, the Appellees argue that "none of the Petitioners in this cause prior to the court's opinion in Valdez received any treatment of any nature related to the designation of sexually violent predator at the Martin County facility." Amended Brief of Appellees, p. 29. Once again, this is utterly beyond the record and without any record support. It should further be noted that as the instant case is in a pretrial posture, there has not yet been any determination that the individuals are sexually violent predators; that occurs only after an appropriate verdict at trial.

1999); In re Detention of Samuelson, 2000 WL 46029 (Ill. 2000); Grosinger v. M.D., 598 N.W. 2d 799 (N. Dak. 1999); Hubbart v. Superior Court, 969 P. 2d 589 (Cal. 1999); State v. Post, 541 N.W. 2d 115 (Wis. 1995).

The purpose of the probable cause determination is to determine whether the State has an adequate basis upon which to proceed with the case. To the extent that the commitment case proceeds while the person is still serving the remainder of a prison sentence, there is no detention under the commitment act and no need for an adversarial/evidentiary probable cause hearing. Once the prison sentence ends, if the person is going to receive a trial within a short period of time - i.e., the 30 days specified in the statute, there should not be any reason for a second, substantial, evidentiary mini-trial within that same 30-day period.

II. THE DISTRICT COURT OF APPEAL PROPERLY CONCLUDED THAT THERE IS NO ENTITLEMENT TO PRETRIAL RELEASE OR BAIL PENDING TRIAL IN A CIVIL COMMITMENT PROCEEDING. (CROSS-APPEAL ISSUE).

In a cross-appeal, the second issue in the Appellees' Answer Brief, the Appellees contend that the sexually violent predators act is unconstitutional as it does not provide for any form of pretrial release or bail.

Initially, the Appellant would note that it is not clear that a jurisdictional basis exists for this "cross-appeal." The undersigned attorney, prior to having received this Court's order of April 27, 2000, which granted leave for the pursuit of a belated cross-appeal herein, served a Response to Motion to File Belated Notice of Cross-Appeal. A copy of that Response is included in the Appendix previously filed by the State. While the undersigned did not object to any belated aspect of the cross-appeal, the Response questioned whether there was a jurisdictional basis for this Court to entertain such a cross-appeal when the appeal itself proceeds on the limited grounds of Rules 9.110(j) and 9.030(a)(1)(A)(ii), Florida Rules of Appellate Procedure, in a mandatory appeal of a District Court of Appeal decision declaring a state statute invalid. As there is no independent basis pursuant to which the Appellees could have sought review in this Court, mandatory or discretionary review, the Appellant argued in that Response

that there was no basis for any form of mandatory entitlement to a cross-appeal herein. The Appellant, in reliance on the Response of April 28, 2000, again asserts that jurisdiction for the cross-appeal does not exist.

As to the merits of the issue herein, the Appellees/Cross-Appellants rely on an extensive array of criminal cases in support of their argument that they are entitled to pretrial release or bail while awaiting trial on the civil commitment cases under the sexually violent predators act. They similarly rely on Article I, Section 14 of the Florida Constitution, which applies to “every person charged with a crime. . . .”

The Fourth District Court of Appeal, in its opinion herein, rejected the foregoing claim, as follows:

Article I, section 14 of the Florida Constitution provides that except for certain offenses, “every person charged with a crime . . . shall be entitled to pretrial release on reasonable condition.” Petitioners are not entitled to release under this provision because they are not charged with a “crime.” Nor is our general pretrial release statutes, section 907.041, applicable, for the same reason.

Valdez v. Moore, 745 So. 2d 1009 (Fla. 4th DCA 1999).

The Appellees/Cross-Appellants do not cite any authority for the proposition that any constitutional provision requires bail or pretrial release for those who are the subject of involuntary commitment proceedings. The essence of an involuntary commitment proceeding is that the person who is the subject of it is one who is alleged to have a mental defect which renders the person dangerous to others. Sections 394.910, 394.912, Florida Statutes (1999). The sexually violent predators act further provides for an initial determination of probable cause, before the person can be detained under the Act. Section 394.913, Florida Statutes (1999). That initial probable cause determination may further be corroborated by any subsequent adversarial probable cause hearing which may ensue as a result of the opinion of the lower Court and this Court, in the instant case.<sup>5</sup> Thus, the question of any entitlement to pretrial release must be viewed in the context of preexisting determinations regarding the danger which the person likely poses to the public, based upon the combination of a mental abnormality or personality disorder and dangerousness.

A steadily growing number of states have enacted involuntary civil commitment acts for sexually violent predators. The terminology varies - sexually violent predators,

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<sup>5</sup> Subsequent to the Fourth District's opinion herein, the adversarial probable cause hearings were held in the cases of the four Appellees/Cross-Appellants, and the Fourth District was so notified in the State's motion for rehearing. (R. 276-85).

sexually violent persons, sexually dangerous persons - but the statutory schemes are substantially similar, as they are all predicated upon prior criminal convictions for sexually violent offenses; a current mental abnormality or personality disorder; and current dangerousness, as manifested by the likelihood of committing further sexually violent offenses if not civilly committed. See, e.g., Chapter 71.09, Revised Code of Washington; Chapter 59, Article 29A, Kansas Statutes; Chapter 36-3701, et seq., Arizona Statutes; Section 980.01, et seq., Wisconsin Statutes; Chapter 725 Illinois Compiled Statutes section 207/1, et seq.; California Welfare and Institutions Code, section 6600, et seq.

All of the foregoing statutory schemes have been deemed to be civil proceedings. State and federal appellate courts have rejected numerous arguments to the contrary, and they have routinely concluded that these civil commitment schemes are not punitive or penal in nature. See Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed. 2d 501 (1997); Hubbart v. Superior Court, 969 P. 2d 589 (Cal. 1999); In re Linehan, 557 N.W. 2d 171 (Minn. 1996); In re Linehan, 594 N.W. 2d 867 (Minn. 1999); In re Young, 857 P. 2d 989 (Wash. 1993); State v. Carpenter, 541 N.W. 2d 110 (Wis. 1995); State v. Post, 541 N.W. 2d 115 (Wis. 1995); In the Matter of Hay, 953 P. 2d 666 (Kan. 1998); Martin v. Reinstein, 987 P. 2d 779 (Ariz. App. 1999); Grosinger v.

M.D., 598 N.W. 2d 799 (N. Dak. 1999); In re Samuelson, 2000 WL 46029 (Ill. 2000).

The foregoing statutory schemes, like Florida's, provide that after probable cause has been found at the commencement of the commitment proceeding, the individual against whom the state is proceeding shall not be released prior to the commitment trial. See, section 71.09.040(4), Revised Code of Washington ("In no event shall the person be released from confinement prior to trial."); section 980.04(1), Wisconsin Statutes ("A detention order under this subsection [after a finding or probable cause] remains in effect until the person is discharged after a trial under s. 980.05 or until the effective date of a commitment order under s. 980.06, whichever is applicable."); chapter 725 Illinois Compiled Statutes, section 207/30(a) (" . . . A detention order under this Section [after probable cause] remains in effect until the person is discharged after a trial under Section 35 of this Act or until the effective date of a commitment order under Section 40 of this Act, whichever is applicable."); section 6602(a), California Welfare and Institutions Code (" . . . If the judge determines that there is probable cause, the judge shall order that the person remain in custody in a secure facility until a trial is completed . . . ."); section 30:4-27.28(5)(g), New Jersey Statutes (" . . . In no event

shall the person be released from confinement prior to the final hearing.”).<sup>6</sup> None of the acts have any provisions for the release of a person pending a commitment trial. Similarly, it should be noted that general involuntary civil commitment proceedings, under Florida’s Baker Act, section 394.467, Florida Statutes, do not have any right to pretrial release pending the commitment trial.

In addition to the foregoing, the Appellant would further note that under Florida’s statutory scheme, a substantial portion of the time pending the commitment trial will often transpire while the individual is still serving the final year of the prior incarcerative sentence.<sup>7</sup> During that period of time, the fact of the pending commitment petition is obviously not going to result in any form of pretrial release. Furthermore, as noted previously, with the May, 1999 statutory changes, which start the evaluation

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<sup>6</sup> Other state statutes, while not containing the explicit language quoted in the foregoing statutes, consistently direct that the person be taken into custody upon the filing of the petition and/or probable cause determination. None of the statutes contain any provisions for pretrial release. See section 36-3701, et seq., Arizona Revised Statutes; section 229A.1, et seq., Iowa Code; section 59-29a01, et seq., Kansas Statutes; section 632.480, et seq., Missouri Statutes; section 25-03.3-01, et seq., North Dakota Statutes; section 44-48-10, et seq., South Carolina Statutes; section 841.001, et seq., Texas Health and Safety Code, Texas Statutes.

<sup>7</sup> This depends, in any given case, on how far in advance of the expiration of the incarcerative sentence the multidisciplinary team and Department of Children and Families send their recommendations to the State Attorney.

process a full estimated year before the release from incarceration, it is plausible that much, if not most, of the pre-commitment trial detentions will consist of time still being served on the prior incarcerative sentence. The legislative goal, based on the time frame in the statutory scheme, is clearly to have the commitment trial completed before the prior incarcerative sentence has even ended, thereby totally eliminating any question of entitlement to release prior to the commitment trial.

In light of the foregoing, it should be noted that an Arizona appellate court, in Martin v. Reinstein, 987 P. 2d 779 (Ariz. App. 1999), construed Arizona's sexually violent persons act, with respect to the question of pretrial bail or release, and reached the same conclusion as the Fourth District Court of Appeal in the instant case - there is no such entitlement, either by virtue of statutory or constitutional provisions:

Petitioners assert that the Act denies them the right to post bond. The Arizona Constitution provides that "all persons charged with a crime shall be bailable." Art. 2, § 22. That constitutional provision is implemented by Rule 7.2 of the Arizona Rules of Criminal Procedure, which requires that any person "charged with an offense bailable as a matter of right shall be released pending or during trial" on the least onerous conditions that will reasonably assure the person's appearance. The Eighth Amendment to the federal constitution prohibits governmental demands for excessive bail, a prohibition that assumes a right to bail.

It is true that the SVP Act requires that the accused

SVP be detained and does not provide for release on bond or bail. . . . Those charged under the SVP Act, however, are charged civilly. . . . They are not charged with a crime, and therefore these constitutional provisions afford them no protection. . . .

The Arizona legislators may have reasoned that to release Petitioners on bond once probable cause has been found to believe they are sexually violent persons who pose a danger to others would defeat one of the two main purposes of the act: protection of the public. Instead of bond, the Act substitutes other protections for Petitioners, such as commitment only after a judge determines that there is probable cause to believe that the person suffers from a mental disorder that makes him a threat to public safety. . . . In addition, the Act applies only to a “small, but extremely dangerous group of sexually violent predators,” . . . who have been charged with or convicted of any of a number of specified dangerous sex offenses and thus have demonstrated that they can pose a threat to the public. Petitioners suggest that an individualized determination of the appropriateness of bond is a better way to balance the public’s and Petitioner’s interests. That argument, however, is more appropriately directed to the legislature than to the courts. We cannot say that the legislature’s determination is unconstitutional.

987 P. 2d at 794.

In circumstances where a detained person is, by virtue of a probable cause determination, deemed dangerous to others, there is no basis for requiring any form of pretrial release. This Court, in a highly analogous situation, addressed the claim of entitlement to bail, in the context of a quarantine ordered for treatment of a

communicable venereal disease. Varholy v. Sweat, 15 So.2d 267 (Fla. 1943). After acknowledging the general entitlement to bail for criminal offenses, the Court observed that the quarantine order was “not a criminal proceeding and hence not bailable.” 15 So. 2d at 270. Most significantly, the Court observed that releasing a person into the public when there has been a determination that the person constitutes a danger to the public would be contrary to the purpose of the law:

To grant release on bail to persons isolated and detained on a quarantine order because they have a contagious disease which makes them dangerous to others, or to the public in general, would render quarantine and regulations nugatory and of no avail.

Id.

More recently, the Third District Court of Appeal relied on Varholy in the context of a Baker Act claim, in which a committed person sought bail pending appellate review of a civil commitment order. In re Holland, 356 So. 2d 1311 (Fla. 3d DCA 1978). The Court stated:

. . . If a person is subject to commitment under the Baker Act as being likely to injure himself or others, or in need of care or treatment but lacking sufficient capacity to make a responsible application on his own behalf, Section 394.467(1), Florida Statutes (1975), it would be a gross contradiction and distortion of the Baker Act to release such a person on bail pending appeal. On the other hand, a

person who qualifies for release on appeal under *Youngmans* or some other similar test and who is not a mentally dangerous person should not be committed under the Baker Act in the first place. In short, involuntary hospitalization and bail pending appellate review thereof are two mutually exclusive concepts which cannot co-exist with one another without inflicting serious damage to the entire legislative scheme as provided in the Baker Act.

356 So. 2d at 1313. Thus, the Court concluded that the constitutional safeguards which did apply to involuntary hospitalization proceedings “do not contemplate a right to bail in involuntary hospitalization proceedings.” *Id.* The same reasoning clearly applies in the instant case, in light of the probable cause determination establishing the likelihood of the person’s dangerousness to others in the community, when coupled with the person’s current mental abnormality or personality disorder.<sup>8</sup>

Even if a constitutional right to bail could, in theory, apply in the context of civil commitment proceedings, several decisions of the Supreme Court of the United States show why the provisions of the Jimmy Ryce Act do not result in any such violation of constitutional rights. In Schall v. Martin, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed. 2d

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<sup>8</sup> Consistent with the foregoing, it should also be noted that in criminal cases, when there is a determination, prior to trial, that the defendant “poses [a] threat of harm to the community,” pretrial release can be denied, when that determination is coupled with other relevant findings. Section 907.041(4)(b), Florida Statutes. Likewise, bail can be denied when a defendant constitutes a threat to witnesses in a criminal case. Section 907.041(4)(b)(2), Florida Statutes.

207 (1984), the Court construed a New York statute, pursuant to which pretrial detention of an accused juvenile delinquent was permitted, based on a finding that there was “‘serious risk’ that the child ‘may before the return date commit an act which if committed by an adult would constitute a crime.’” 467 U.S. at 255. The Court analyzed this detention in terms of due process, concluding that “[t]he substantiality and legitimacy of the state interests underlying this statute are confirmed by the widespread use and judicial acceptance of preventive detention of juveniles.” 467 U.S. at 266. The Act was designed to protect both the child and society from the potential consequences of the future dangerousness of the child. 467 U.S. at 264. Thus, “[t]he ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.” 467 U.S. at 264. “Crime prevention” was a “‘weighty social objective.” *Id.* The potential harm to the public was further emphasized in the context of high rates of recidivism among juveniles. *Id.* at 265.<sup>9</sup> The statute authorizing such pretrial detention was not deemed punitive in nature. 467 U.S. at 269.

Additionally, the juveniles under the New York Act were entitled to a relatively quick fact-finding hearing, within 17 days of the initial detention. 467 U.S. at 270. That

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<sup>9</sup> The Jimmy Ryce Act is similarly predicated on the significant likelihood of recidivism among the narrowly defined segment of individuals being released from prison.

period of time is not significantly different from the 30 days in which a person, under Florida's Act, can obtain a full trial. That is also in addition to the initial ex parte probable cause determination, and, in addition to any adversarial probable cause hearing which may be held. Thus, the Court, in Schall, noted the adequate procedural protections for the juveniles, emphasizing, that the probable cause hearings do not have any mandated constitutional safeguards or specific timetable; the "desirability of flexibility and experimentation by the States" prevails. 467 U.S. at 275.

The Supreme Court engaged in similar analysis in United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed. 2d 697 (1987). The federal Bail Reform Act of 1984 permitted a federal court to detain an arrestee pending trial upon a showing that no conditions of release would reasonably assure the safety of the community. The Respondent in Salerno had contested the facial constitutionality of the Bail Reform Act under both the eighth amendment's bail clause, and the fifth amendment's due process clause. The Court initially noted the general untenability of facial challenges to legislative acts:

A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some

conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an “overbreadth” doctrine outside the limited context of the First Amendment. . . . We think respondents have failed to shoulder their heavy burden to demonstrate that the Act is “facially” unconstitutional.

481 U.S. at 745. The Court then proceeded to analyze the argument in terms of both the eighth amendment’s proscription against excessive bail and the due process clause of the fifth amendment. Substantive due process was not violated because the pretrial confinement did not constitute “punishment”; the Bail Reform Act was regulatory, not penal. 481 U.S. at 746. This was based upon legislative intent and the remedial purpose of preventing danger to the community, which was again recognized as a legitimate regulatory goal. 481 U.S. at 747. Again, the “interest in preventing crime by arrestees [was] both legitimate and compelling.” 481 U.S. at 749. The Bail Reform Act was perceived as having a more narrow focus than the juvenile detention act in Schall, because it focused only on individuals who had been arrested for a specific category of extremely serious offenses. 481 U.S. at 750. So, too, Florida’s sexually violent predators act focuses on the narrow group of individuals who have prior convictions for sexually violent offenses, and further narrows the scope to those who additionally have mental abnormalities or personality disorders which will render future sexually violent offenses likely. Thus, according to the Court:

. . . When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

481 U.S. at 751.

Furthermore, the facial challenge to the procedures under the statute could not succeed as long as the Court found them “adequate to authorize the pretrial detention of at least some [persons] charged with crimes. . . .” 481 U.S. at 751. This was true “whether or not they might be insufficient in some particular circumstances.” *Id.* Thus, the Court noted that there was “nothing inherently unattainable about a prediction of future criminal conduct.” *Id.* (citations omitted). The procedures under the Bail Reform Act sufficed because they evaluated the likelihood of future dangerousness and were “specifically designed to further the accuracy of that determination.” *Id.* In Florida, adequate safeguards exist whether the probable cause determination is made at an adversarial or nonadversarial hearing. This is because, as noted above, Florida’s Act provides for extensive evaluation by mental health experts, including face-to-face evaluations, prior to the filing of the petition and prior to the initial, *ex parte*,

determination of probable cause. The foregoing is in addition to any further protections which would result from an adversarial probable cause hearing.

Proceeding to Eighth Amendment analysis, the Supreme Court rejected “the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admitted compelling interests through regulation of pretrial release.” 481 U.S. at 753. In rejecting any arguments based on the Eighth Amendment, the Court again emphasized that the protection of the welfare and safety of the public was a valid concern which could be effected through the legislation. 481 U.S. at 753-54. Thus, “[w]e believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.” 481 U.S. at 754-55. The same conclusion ensues here, where the purpose of the detention is directed towards the regulatory goal of the safety of the public’s welfare; the goal is not ensuring the presence of the person at future hearings.

Accordingly, the claims of the Appellees regarding pretrial detention are without merit.

**CONCLUSION**

Based on the foregoing, the holding of the Fourth District Court of Appeal regarding the time in which an adversarial probable cause hearing must be held should be reversed, and the holding of the same Court, in the same opinion, as to the absence of entitlement to pretrial release should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Reply Brief of Appellant and Answer Brief of Cross-Appellee was mailed this \_\_\_\_\_

day of August, 2000 to JOY K. GOODYEAR, Assistant Public Defender, Counsel for Appellees, 14250 49th Street No., St. Petersburg, FL 33762.

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