

18-8317

No. _____

Supreme Court, U.S.
FILED

FEB 26 2019

OFFICE OF THE CLERK

In The
Supreme Court of the United States
IN THE SUPREME COURT OF FLORIDA

ROBERT GERING,

Petitioner,

-VS-

REBECCA KAPUSTA, Secretary,

FLORIDA DEPARTMENT OF CHILDREN AND

FAMILIES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
THIRD DISTRICT COURT OF APPEAL OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

ROBERT GERING, Pro Se.

FLORIDA CIVIL COMMITMENT CENTER,

13619 S.E. HIGHWAY 70,

ARCADIA, FLORIDA 34266.

ORIGINAL

QUESTIONS PRESENTED

THE CONSTITUTIONAL RIGHT TO A TRIAL BY JURY
IN A CIVIL COMMITMENT CASE CANNOT BE
CIRCUMVENTED BY A FLORIDA RULE OF CIVIL
PROCEDURE NULLIFYING THE INVIOATE CLAUSE
OF ARTICLE 1 § 22, FLORIDA CONSTITUTION,
WHERE A LIBERTY INTEREST IS AT STAKE UNDER
THE FOURTEENTH AMENDMENT OF THE UNITED
STATES CONSTITUTION.

LIST OF PARTIES

☒ All parties appear in the caption of the case on the
cover page.

☐ All parties do not appear in the caption of the case on
the cover page. A list of all parties to the proceeding in the
court whose judgment is the subject of this petition is as
follows.

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No. _____

In The
Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari
issue to review the judgment below.

OPINION BELOW

☐ For cases from federal courts:

The opinion of the United States court of appeals appears
at _____ N/A _____ to the petition and is

☐ reported at _____ N/A _____; or,

☐ has been designated for publication but is not yet
reported; or,

☐ is unpublished.

The opinion of the United States court appears at
_____ N/A _____ to the petition and is

☐ reported at _____ N/A _____; or,

☐ has been designated for publication but is not yet
reported; or,

☐ is unpublished.

☒ For cases from state courts:

The opinion of the Florida Supreme Court appears at Appendix- A to the petition and is

☐ reported at _____; or,

☒ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the Florida Third District Court of Appeal appears at Appendix-B & C to the petition and is

☒ reported at 43 Fla. L. Weekly D1642 a _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeal decided my case was N/A

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was thereafter denied on the following date N/A, and a copy of the order denying rehearing appears at N/A.

[] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in application No. A N/A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

[☒] **For cases from state courts:**

The date on which the Florida Supreme Court denied Discretionary Review was 12/17/18; the date on which the Florida Third District Court of Appeal denied Rehearing was UNKNOWN; and the date on which the Florida Third District Court of Appeal denied the Direct Appeal was 7/25/18.

A copy of the State Courts decisions appears at Appendix-A through C.

[] A timely petition for rehearing was thereafter denied on the following date _____, and a copy of the order denying rehearing appears at _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in application No. A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1 §22, Florida Constitution; Amendment XIV, United States Constitution; Section 394.916 (5), Florida Statute; and Section 394.917 (1), Florida Statute.

STATEMENT OF THE CASE

1. On May 1, 2015, the State filed a petition, pursuant to §394.917, Fla. Stat., (2015), to declare Mr. Gering a Sexually Violent Predator.
2. The trial court subsequently found Probable Cause to detain Mr. Gering for trial to determine whether he actually is a Sexually Violent Predator as delineated in §394.912 (10), Fla. Stat., (2015).
3. In February, 2016, a jury trial was held as requested by Mr. Gering and the State presented two witnesses: Dr. Jeffrey Musgrove and Sheila Rapa. Both doctors opined that Mr. Gering met all the factors for civil commitment and that he was likely to reoffend in a

sexually violent manner if not confined to a secure facility for long-term care, control and treatment.

4. Following Dr. Rapa's testimony, the State rested and Mr. Gering moved for a directed verdict, which the trial court denied. The State also moved for a directed verdict (consistent with its written motion for same), but the court deferred ruling on that motion.
5. Mr. Gering sought to call Dr. William Samek. The State objected to Dr. Samek testifying as an expert, asserting that he was unqualified to offer expert testimony. The trial court agreed and excluded Dr. Samek from offering expert testimony, but did rule that Dr. Samek would be permitted to testify regarding his meetings with Mr. Gering and the matters discussed. Mr. Gering's counsel chose not to present any testimony from Dr. Samek and did not proffer the expert testimony it would have elicited from him had he been permitted to testify.
6. The trial court then heard the full argument on the State's motion for directed verdict, and granted the motion, finding there was no conflict in the evidence which could properly be submitted to the jury and that

no reasonable juror could find Mr. Gering was not a Sexually Violent Predator. The court entered a final judgment of adjudication and civil commitment.

7. On appeal, Mr. Gering contended that the trial court had no authority to direct a verdict in favor of the State in a Jimmy Ryce trial, but the Third District Court of Appeal ruled that directed verdicts are authorized in civil commitment trials. (Appendix-C).
8. Rehearing was sought but was summarily denied by the Third District Court of Appeal (Appendix-B).
9. Finally, Mr. Gering sought Discretionary Review at the Florida Supreme Court and same was denied, so the filing of the instant Petition issued.

REASONS FOR GRANTING THE PETITION

THE CONSTITUTIONAL RIGHT TO A TRIAL BY JURY IN A CIVIL COMMITMENT CASE CANNOT BE CIRCUMVENTED BY A FLORIDA RULE OF CIVIL PROCEDURE NULLIFYING THE INVIOLEATE CLAUSE OF ARTICLE 1 § 22, FLORIDA CONSTITUTION, WHERE A LIBERTY INTEREST IS AT STAKE UNDER

THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

1. The importance of the instant case is not whether the State presented a sufficient case to sustain a commitment if the jury had so voted. The importance is what happens when the jury hasn't found that the State has proven its case by clear and convincing evidence? May the court step in and enter commitment nonetheless? May the court at that point enter its own findings to accomplish the result that the State was not able to accomplish? ¹
2. Article 1 § 22, Florida Constitution, states that "[t]he right of trial by jury shall be secure to all *and remain inviolate.*" Section 394.916 (5), Florida Statute, states that "[t]he person or the state attorney has the right to demand that the trial be before a jury of six members." Rule 4.430 (a), Florida Rules of Civil Procedure for Sexually Violent Predators states that "[t]he right of trial by jury as declared by the constitution or by statute *shall be preserved to the parties inviolate.*" Accordingly, the taking of this

¹ This is a case of first impression in Florida.

case from the jury also violates the Fourteenth Amendment to the United States Constitution.

3. Of the two requisite elements necessary to support an involuntary civil commitment the requisite criminal conviction (§394.912 (10) (a), Fla. Stat.) *existed and was undisputed*. But the second element of a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a facility for long-term control, care, and treatment (§394.912 (10) (b), Fla. Stat.) *was centrally disputed*. The instant case consisted of a jury trial; therefore, the fact finding process fell within the province of the jury and not the court.
4. Section 394.917 (1), Florida Statute, states that “[t]he court or jury shall determine by clear and convincing evidence whether the person is a sexually violent predator. If the determination is made by a jury, *the verdict must be unanimous*. If the jury is unable to reach a unanimous verdict, the court must declare a mistrial and poll the jury. If the majority of the jury would find the person is a sexually violent predator, the state attorney may refile the petition and proceed

according to the provisions of this part.” By the precise terms of this statute, where the matter commences by way of a jury trial, *the determination of whether the person is a sexually violent predator must be made by the jury and must be unanimous*. Moreover, the statute confers a substantive right to a unanimous jury verdict before there can be an imposition of an involuntary civil commitment and that right cannot be varied or diminished by rules of court. *State v. Furen*, 118 So. 2d 6, 11-12 (Fla. 1960).

5. Article 1 § 22, Florida Constitution, states that “[t]he right of trial by jury shall be secure to all *and remain inviolate*.” Under this provision, questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial. *Hollywood, Inc. v. City of Hollywood*, 321 So. 2d 65, 71 (Fla.1975).
6. Stated differently, confinement stemming from a court’s involuntary commitment order effectuates a massive curtailment of liberty interests. Therefore, commitment cannot occur without scrupulous

compliance with the Act's provisions. Here the statute expressly confers a right to a jury trial (§394.916 (5), Fla. Stat.) and such a right is required by the Florida Constitution as well.

7. Notwithstanding its denomination as civil, the nature of confinement under the Act, both pre-and-post-commitment, is functionally indistinguishable from state imprisonment for which a jury trial was always recognized in the common law incorporated into the constitutional provisions.
8. The Florida Civil Commitment Center (a privately-run-facility / §394.9151, Fla. Stat.) is physically and by statute in every respect a prison, notwithstanding that it has an additional purpose beyond security of treatment: escape from the facility is treated identically as from a prison (§394.927, Fla. Stat.); assault on staff is treated and reclassified the same as on sworn law enforcement or corrections officers (§784.074 (1), Fla. Stat.); the vendor's employees have the same rights of use of force as do sworn law enforcement or corrections officers (§394.9223, Fla.

Stat.), and they have the same overall qualified immunity (§394.923, Fla. Stat.).

9. Under the principle of *expression unius est exclusion alterius* Mr. Gering has a constitutional and statutory right to a trial by jury and Rule 1.480, Fla. R. Civ. P., cannot be utilized to eradicate those rights. The Act permits neither a substitution of the trial court's (or state's) view for that of the jury, and the statute forecloses any remaining iota of argument that Rule 1.480, Fla. R. Civ. P., can support a judicial "commitment" where the jury has not voted for commitment with unanimity.²

² *Florida Rules of Civil Procedure for Involuntary Commitment of Sexual Predators*, 13 So. 2d 1025 (Fla. 2009) (authorize a jury trial, motion for summary judgment, *but not a directed verdict*. Had the Supreme Court determined that a directed verdict was appropriate, it would have made that inclusion.)

CONCLUSION

The trial court exercised an authority it simply did not possess in entering a directed verdict in contravention of the constitutional and statutory rights of trial by jury.

Therefore, review should be *Granted*.

OATH

I declare under penalty of perjury that the foregoing is true and correct. Executed on 2/19/19.

/s/ Robert Gering

ROBERT GERING,

Petitioner.