

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,155

MICHAEL RIECHE,

Petitioner,

-vs-

LOIS SPEARS, Director
Miami-Dade County Department of Corrections, and
THE STATE OF FLORIDA,

Respondents.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

All abbreviations will be as in the Petitioner's initial brief. Please note that the title of the respondent Lois Spears has been changed in the caption to reflect her current position.

ARGUMENT

A DEFENDANT HAS THE CONSTITUTIONAL RIGHT TO PRETRIAL RELEASE UNLESS THE STATE HAS MET ITS BURDEN OF PROOF AT A PRETRIAL DETENTION OR AN *ARTHUR* HEARING.

The state attempts to justify *Houser v. Manning*, 719 So. 2d 307 (Fla. 3d DCA 1998), by: 1) citing dicta in one case to support a claim that the *Houser* exception has always been the law; 2) asserting that in a recent, vetoed bill amending the pretrial detention statute the legislature authorized the *Houser* decision; 3) claiming that this pretrial detention statute does not apply to violations of conditions of pretrial release; and 4) claiming that *Houser* provides all of the required procedural protections.¹ None of these arguments withstand scrutiny.

¹ The state suggests that this court should not decide this case because the issue may be moot as to Mr. Reiche personally (State's brief at 14). The initial brief acknowledged that Mr. Reiche eventually pled guilty and is no longer in a pretrial situation. This Court has jurisdiction, however, because this case presents an issue capable of repetition yet evading review. *See, e.g., Gregory v. Rice*, 727 So. 2d 251, 252 (Fla. 1999); *A.W. v. State*, 711 So. 2d 598 (Fla. 5th DCA 1998); *In re M.C.*, 567 So. 2d 1038 (Fla. 4th DCA 1990). As stated in the initial brief, this issue probably arises in at least 20 cases every day in Miami-Dade County alone. The office of the public defender has refrained from filing writs in these cases because this appeal is pending. Except through sheer luck, these potential writs would also be technically moot as to the particular individual by the time this Court could provide appellate review.

Additionally, this Court has jurisdiction because this case involves a question of great public importance. *See, e.g., Gregory*, 727 So. 2d at 252; *Rivera v. Singletary*, 707 So. 2d 326, 327 n. 6 (Fla. 1998); *M.L.F. v. State*, 678 So. 2d 1307, 1308 (Fla. 1st DCA 1996). This case involves an important constitutional right—the right to liberty until the state proves guilt beyond a reasonable doubt. This case also involves a pronounced split between two neighboring District Courts of Appeal that

The state asserts that the *Houser* exception has always been the law, and argues that because no amendments, statutes, or rules explicitly change that exception, the *Houser* exception still exists (State’s brief at 24, 29). The state, however, never substantiates its basic factual assertion—that this exception ever existed before *Houser*. The state does no more than cite *Gardner v. Murphy*, 402 So. 2d 525 (Fla. 5th DCA 1981),² and repeat *Houser*’s bald assertion that this exception has always existed. (State’s brief at 22-23). The state ignores that the language in *Gardner* was dicta. *See* 402 So. 2d at 526. The state ignores that the courts abandoned this dicta when the pretrial detention scheme came into existence. *See State ex rel. Neicen v. Navarro*, 603 So. 2d 136, 136 (Fla. 4th DCA 1992). The

each cover half of a large, continuous metropolitan area. This Court should not allow an individual’s constitutional right to pretrial release to depend on whether the crime was alleged to have occurred north or south of the Miami-Dade/Broward county line.

The state’s decision to provide this Court with documents apparently designed to poison this court against Mr. Reiche personally is therefore doubly irrelevant (State’s brief at 8-9; State’s Supplemental Record exhibits 4-9). These documents are irrelevant to the state’s argument, and they are irrelevant because the issue is moot as to Mr. Reiche personally.

²The state also cites *Gomez v. Hinckley*, 473 So. 2d 809 (Fla. 4th DCA 1985) (state’s brief at 23). Other than a citation to *Gardner*, *Gomez* does not appear to support the proposition for which the state cites it. *Gomez* held that the state had not presented sufficient evidence to meet the requirements of the pretrial detention statute and therefore “the [trial] court lacked statutory and constitutional authority to withhold bail in this case.” *Id.* at 811. The court that decided *Gomez* certainly does not believe that its decision in that case supports *Houser*. *See Paul v. Jenne*, 728 So. 2d 1167, 1170-71 (Fla. 4th DCA 1999).

state ignores that *Gardner*'s "flagrant disregard" dicta was based on *Ex parte McDaniel*, 86 Fla. 145, 97 So. 317 (1923), which explicitly held that a defendant's violation of a condition of pretrial release allowed the court to impose more stringent conditions, but did not forfeit the right to pretrial release and allow the defendant to be held without a bond. *See* 86 Fla. at 149, 97 So. at 318; *see also Gallagher v. Butterworth*, 484 F. Supp. 1278, 1279-80 (S.D. Fla. 1980) (following Florida law to hold that a defendant who twice failed to appear and was charged with an additional crime did not forfeit the right to pretrial release).

The state employs a version on this argument in its only attempt to explain how *Houser* does not conflict with Florida Rule of Criminal Procedure 3.131(h) (State's brief at 29-30). The state suggests that because 3.131(h) existed at the time of *Gardner* dicta, 3.131(h) could not mean what it says: after a violation of the bond conditions a court "shall determine the conditions of release" unless there is a motion for pretrial detention. The state is factually wrong. This Court adopted the language of this rule in response to the constitutional amendment. *See The Florida Bar*, 436 So. 2d 60, 63 (Fla. 1983).

The state moves from claiming that the *Houser* exception has always existed to arguing that the legislature recently approved it. The state bases this argument on a vetoed bill amending the pretrial detention statute (State's brief at 16, 18-22). *See* C.S. for S.B. 748 (Fla. 1999) (vetoed June 5, 1999). The state

suggests that this bill was a legislative reaction to *Paul v. Jenne*, 728 So. 2d 1167 (Fla. 4th DCA 1999), (state's brief at 16), although the legislative report the state cites does not mention that case or any similar case. For this bill to have been a reaction to *Paul* would have demonstrated remarkable legislative foresight, as the bill was introduced in January 1999 and *Paul* was not decided until March 1999. *See Burdick v. State*, 594 So. 2d 267, 270 (Fla. 1992) (no legislative intent to overrule decision when no mention of decision in legislative history and legislation was roughly contemporaneous with the decision).

But for the state's extensive reliance on this bill, it would be unnecessary to mention that vetoed bills have no force or effect unless overridden by a two-thirds vote by both houses of the legislature. *See* Art. III, §§ 8 & 9, Fla. Const. The only case the state cites for the proposition that such vetoed legislation has any effect is *Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla. 1985). *Neu* held that a vetoed exception to Sunshine Law showed by negative implication that the exception did not already exist. *Id.* at 824-25. Otherwise the legislature, in passing the subsequently vetoed bill, would have done a pointless act and that courts should not assume the legislature acts pointlessly. *Id.* at 825. This case is consistent with general rule of statutory interpretation that when the legislature enacts a new provision, the legislature is presumed to have altered the law. *See Mangold v. Rainforest Golf Sports Center*, 675 So. 2d 639, 642 (Fla. 1st DCA 1996); *see also*,

e.g., *Arnold v. Shumpert*, 217 So. 2d 116, 119 (Fla. 1968).³

Applying *Neu* to the present case shows that *Houser* is simply wrong. The *Houser* exception to the right to pretrial release would have made the vetoed exception pointless. The vetoed bill would have allowed pretrial detention if the state could prove two elements: 1) a violation of a condition of pretrial release; and 2) that “no conditions of release can reasonably protect the community from risk of physical harm to persons or assure the present of the accused at trial.” C.S. for S.B. 748, § 2, p. 6 (Fla. 1999). The *Houser* exception, however, requires only the first element—a violation of a condition for pretrial release. *See* 719 So. 2d at 309. If *Houser* were good law, the now-vetoed bill would have been pointless because any detention under the bill necessarily could have been accomplished under *Houser* with less proof required and without the procedural safeguards of the

³The state cites numerous cases purportedly standing for the proposition that courts “consider subsequent legislation to determine the Legislature’s original intent rather than a substantive change.” (State’s brief at 21). All of the cases cited involve situations where the legislature explicitly states an intention to clarify its original intent. *See, e.g., Palma Del Mar Condominium Ass’n No. 5, Inc. v. Commercial Lauderieries, Inc.*, 586 So. 2d 315, 317 (Fla. 1991) (“The legislature has the authority to explain its original intent, and did so in this instance, without modifying the original wording” of the statute); *Lincoln v. Florida Parole Com’n*, 643 So. 2d 668, 672 (Fla. 1st DCA 1994) (“The title of chapter 93-406 indicates that one of its purposes lay in ‘clarifying . . .’” the statute in question).

In this case, neither the text of the vetoed bill nor the title indicated that the legislature intended to clarify anything. To the contrary, the legislative history says the bill “amends s. 907.041 to broaden court authority.” (Appendix B to State’s brief, p. 1).

pretrial detention scheme. Thus even assuming that this vetoed bill has any effect, *Neu* demonstrates the fallacy of the decision in *Houser*.

The state then moves from vetoed amendments to the pretrial detention statute justifying *Houser* to claiming that this statute is irrelevant. The state believes that the pretrial detention statute applies only to determinations of bail “in the first instance,” and therefore requiring a pretrial detention hearing under the pretrial detention statute is “absurd.” (State’s brief at 26-27). The state cites no authority for this proposition.

The face of the statute refutes the state’s reading. Under subsection 907.041(b)1, Fla. Stat. (1997), a person can be held without a bond if the state proves: “The defendant has previously *violated conditions of release* and that no further conditions of release are reasonably likely to assure the defendant’s appearance at subsequent proceedings.” *Id.* (emphasis supplied).⁴ Because the

⁴The state seems to dismiss the plain meaning of this language, arguing that the subsection quoted in the text would be “identical” to the provision in the vetoed bill and that would be an “absurd result.” (State’s brief at 28). A more careful reading to the two provisions reveals the difference.

Under the statutory provision quoted in the text, the state must prove: 1) a violation of a condition for pretrial release, and 2) that no conditions would assure the *defendant’s appearance at subsequent proceedings*. See § 907.041(4)(b)1, Fla. Stat. (1997). Under the vetoed amendment, the state could have proved the same violation of a pretrial release condition and that no conditions of release can *reasonably protect the community* or assure the defendant’s appearance at trial. See C.S. for S.B. 748, § 2, p. 6 (Fla. 1999). A more artful legislature might have amended the original subsection rather than creating a new one, but criminal law statutes with substantial overlap are certainly nothing unusual. *Compare, e.g.,* Ch.

state can file a motion for pretrial detention at any time before trial, *see* Fla. R. Crim. P. 3.132(b), if a defendant violates a condition for pretrial release, the state would then have grounds to file such a motion even if those grounds did not exist at the time of arrest.

The case law also refutes the state’s interpretation. The leading case, *Merdian v. Cochran*, 654 So. 2d 573 (Fla. 4th DCA 1995), involved alleged witness tampering while on pretrial release after the initial arrest. *Merdian* did not hold that the pretrial detention statute was inapplicable because the incident happened after the arrest. Instead the *Merdian* court remanded the case to the trial court to make the proper findings about these post-arrest incidents sufficient to justify pretrial detention. *See id.* at 576. A concurring opinion by Judge Glickstein makes it clear that the trial court had sufficient evidence on which to make the proper findings. *See id.* at 576-78 (Glickstein, J., concurring specially).

Several subsequent cases similarly involve the failure to make proper findings to justify pretrial detention and a remand to allow the trial court to make such findings. *See, e.g., Lepore v. Jenne*, 708 So. 2d 980 (Fla. 4th DCA 1998); *Dupree v. Cochran*, 698 So. 2d 945 (Fla. 4th DCA 1997); *Metzger v. Cochran*, 694 So. 2d 842 (Fla. 4th DCA 1997). One of these subsequent cases explicitly rejects

99-188, § 3, Laws of Florida (creating “three-time violent felony offender” classification) *with* § 775.084(1)(b)&(c), Fla. Stat. (1997) (“habitual violent felony offender” and “violent career criminal” classifications).

the state's categorical claim: "we cannot say categorically that the new arrest and the previously forgiven failure to appear together would not support revocation of bond and resulting pretrial detention." *Dupree*, 698 So. 2d at 946.

Moreover, the state's argument is illogical. Even if the pretrial detention statute applied only immediately after an arrest, the state never explains why it could not file a pretrial detention motion immediately after the *second* arrest. As a matter of practice, the assistant state attorney's reliance on the *Houser* exception and disinclination to file a motion for pretrial detention is not because such a motion would be futile. Rather, the assistant state attorneys rely on *Houser* because it requires nothing more than a mere allegation of a subsequent crime.

The state claims, however, that *Houser* "does provide for procedural due process protection" (State's brief at 26). The state has forgotten that the right to pretrial release is an independent and separate constitutional right, not merely a subset of due process. *See* Art. I, § 14, Fla. Const. *Houser* effaces this separate right to pretrial release, leaving only judicial discretion. *See* 719 So. 2d at 309. The most the state can do is to claim that *Houser* is consistent with minimal due process (State's brief at 26).

Florida has long required more than minimum due process before a court revokes a defendant's right to pretrial release. In an *Arthur* hearing, the state must prove by a standard higher than beyond a reasonable doubt that the proof of guilt

is evident or the presumption great. *See, e.g., Kirkland v. Fortune*, 661 So. 2d 395 (Fla. 1st DCA 1995); *Elderbroom v. Knowles*, 621 So. 2d 518, 520 (Fla. 4th DCA 1993). A plenary review is available if a trial court determines that the state has met this standard of proof. *See, e.g., State ex rel. Van Eeghen v. Williams*, 87 So. 2d 45 (Fla. 1956); *Kirkland*, 661 So. 2d at 397-99; *Mininni v. Gillum*, 477 So. 2d 1013 (Fla. 2d DCA 1985).

Likewise, in a motion for pretrial detention, the state must prove beyond a reasonable doubt one of the enumerated criteria in section 907.041(b) of the Florida Statutes. *See* § 907.041(4)(f), Fla. Stat. (1997); Fla. R. Crim. P. 3.132(c)(1). Besides the strict time limitations and hearing requirements mentioned in the initial brief, the statute contains many other protections. A defendant's testimony at a pretrial detention hearing is inadmissible to prove guilt. *See* 907.041(g), Fla. Stat. (1997). Evidence secured in violation of the United States or Florida Constitutions is inadmissible at this hearing. *See id.* A court may not base a pretrial detention order exclusively on hearsay testimony. *See* Fla. R. Crim. P. 3.132(c)(1). If a trial court finds that the state has met its burden of proof, an appellate court can review this finding to determine if substantial, competent evidence supports it, not merely review for abuse of discretion. *See, e.g., Lepore v. Jenne*, 708 So. 2d 980 (Fla. 4th DCA 1998); *Merdian v. Cochran*, 654 So. 2d 573 (Fla. 4th DCA 1995); Fla. R. Crim. P. 3.132(c)(4).

Houser replaces all of these protections with judicial discretion and, at best, notice and hearing.⁵ The protection of the constitutional right to pretrial release cannot be this negligible. *Houser* is wrong and must be disapproved.

⁵Mr. Reiche's experience is typical of most defendants in Miami-Dade County: the only process afforded is the state giving the trial judge a copy of an arrest affidavit (R. 56, 61)

CONCLUSION

For the reasons stated above and in the initial brief, this Court must disapprove *Houser v. Manning*, 719 So. 2d 307 (Fla. 3d DCA 1998).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Michael J. Neimand, Division Chief, 110 S.E. 6th Street, Fort Lauderdale, Florida 33301, this 10th day of September 1999.

JOHN E. MORRISON
Assistant Public Defender

CERTIFICATE OF TYPE SIZE

I HEREBY CERTIFY that this reply brief was printed in 14 point CG Times, a font similar to Times Roman.

JOHN E. MORRISON
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