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

SUPPLEMENTAL BRIEF OF PETITIONER

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QUESTION PRESENTED

This Court asked for supplemental briefing on the following question:

How the recent enactment of Act effective June 2, 2000, chapter 2000-178, affects the issue presented by this case, and whether this appeal is moot by virtue of this recent amendment.

INTRODUCTORY NOTE

All abbreviations will be as in the Petitioner's initial brief. All emphasis in quotations is supplied.

SUMMARY ANSWER

Taking the second part of the question first, the constitutional issue in this case is not moot. On a daily basis, defendants in Miami-Dade County are held without bond because of *Houser v. Manning*, 719 So. 2d 307 (Fla. 3d DCA 1998). Because the new statute is merely a codification of *Houser*, it has not changed this situation factually or legally.

Turning to the first part of the question, the new statute does not apply retroactively and therefore does not affect this case. The new statute does underscore, however, that *Houser* was wrong in its claims of inherent judicial authority and that it did not conflict with the pretrial detention statute. The legislative history of the new statute also highlights how *Houser* is inconsistent with the constitutional right to pretrial release. The plain language of that provision requires proof that no conditions of release will assure the physical safety of the community, the defendant's presence at trial, or the integrity of the judicial process. *Houser* and the new statute both violate this constitutional provision because they do not require such findings.

ANSWER

I.
THE CONSTITUTIONAL ISSUE IN THIS CASE IS NOT MOOT.

Addressing the second part of this Court's question first, the controversy in this case is not moot. Mr. Reiche himself was released on probation as soon as he pled guilty (SR. 2-6). The state ultimately dropped the charges in the second arrest (R. 45, 61; SR. 1). As footnoted in the reply brief, however, in Miami-Dade County at least twenty defendants a day are held without bond based on *Houser v. Manning*, 719 So. 2d 307 (Fla. 3d DCA 1998). Writs filed from those cases would almost surely also be individually moot by the time this Court could resolve the issue. Therefore this Court has jurisdiction because the issue is 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). Additionally, the strong liberty interests at stake makes this case one 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).

The enactment of Chapter 2000-178, Laws of Florida, has not altered the factual situation. Section 3 of that law merely codifies the *Houser* decision. The section in question reads:

> Notwithstanding s. 907.041, a court may, on its own motion, revoke pretrial release and order pretrial detention if the court finds probable cause to believe that the defendant committed

a new crime while on pretrial release.

Chap. 2000-178, § 3, Laws of Fla.[1] Under either *Houser* or this new statute the procedure is identical: if a defendant on pretrial release is arrested on a new charge, that defendant will be held without bond. The statute had no impact on the day-to-day operation of the courts in Miami-Dade County.

The statute also does not change the constitutional issue in this case. Whether grounded on the *Houser* decision or the new statute, the claim in this case is that "[t]he right to bail in the Florida Constitution contains no blanket exception for persons that the state alleges committed a new crime while on pretrial release in another case." (R. 8). Before the new statute, both the constitution and the statutory law protected the right to pretrial release. The new statute may remove the statutory issue in future cases,[2] but the constitutional issue remains an important question affecting the liberty of hundreds of defendants. This case is far from moot.

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[1]The other provisions in the statute are not directly relevant to any issue in this appeal.

[2]*See* note 3, *infra,* and accompanying text.

II.
THE NEW STATUTE DOES NOT CURE *HOUSER*'S VIOLATION OF THE CONSTITUTIONAL RIGHT TO PRETRIAL RELEASE.

Turning to the first part of this Court's question, the new statute does not significantly affect the legal issue in this case. As noted in respondent's supplemental brief in the companion case of *State v. Paul*, Case No. 95,265, the statute enacts a substantive change in the law that applies only prospectively.[3]

Therefore, the most notable effect of this new statute is the additional doubt it casts on *Houser*'s central claim about the courts' inherent power to hold someone without bond. The title section of the new law does not state that the legislature was acknowledging some preexisting, inherent power. Instead it states that the legislature was "*authorizing* a court to order pretrial detention for persons who commit new crimes under certain circumstances." Chap. 2000-178, Laws of Fla. (title). The legislature may have liked the policy of *Houser*, but it did not think courts had the power to judicially legislate such a policy.

The new statute also confirms the conflict between *Houser* and the pretrial detention law in section 907.041, Florida Statues. The legislature pointedly did not amend the existing pretrial detention statute to show how that statute could be reconciled with *Houser*. Instead, the legislature created an entirely new statute. *See* Chap. 2000-178,

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[3]To avoid needless repetition, the argument in that brief is hereby adopted and incorporated by reference.

§ 3, Laws of Florida (creating section 903.0471, Florida Statutes.). Its first words, "[n]otwithstanding s. 907.041," amply illustrate that this new statute is not compatible with the normal pretrial detention scheme. Even if it approved the judicial legislating in *Houser*, the legislature could not reconcile *Houser* with the law then in existence.

Finally, the legislative history of this new law highlights how *Houser* is inconsistent with the constitutional right to pretrial release. This statute did not always mirror *Houser*. The versions of this statute vetoed last year and initially proposed this year contained language requiring findings beyond mere probable cause for a new arrest. As originally drafted the new statute read:

> 903.0471 Violation of condition of pretrial release.–Notwithstanding s. 907.041, a court may, on its own motion, revoke pretrial release and order pretrial detention if the court finds probable cause to believe that the defendant committed a new crime while on pretrial release and, in the discretion of the court, *the facts and circumstances support a finding that no conditions of release can reasonably protect the community from the risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process.*

CS/HB 607, § 3 (2000); *see* CS/SB 134, § 3 (2000) (identical language); SB 748, § 2 (1999) (very similar language, subsequently vetoed). The language emphasized above tracks the constitutional language. As noted in the initial brief (Initial Brief at 7-9), the constitution carefully delineates what the state must prove to hold someone without bond:

> Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. *If no*

> *conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.*

Art. I, § 14, Fla. Const. All of the subsections in the pretrial detention statute also require such findings. *See* § 907.041(b), Fla. Stat. (1999); Chap. 2000-229, § 2, Laws of Fla. (adding a new ground for pretrial detention).

An amendment on the floor of the Senate, however, removed this constitutionally required language from the statute in question. *See* Journal of the Senate, p. 418 (April 11, 2000); *see also* Journal of the Senate, p. 436-38 (April 12, 2000) (the senate substituting its version, now without the constitutional language, for the house version). Without that language, the new statute perfectly mirrors *Houser*. It also now violates the plain language of the constitutional right to pretrial release just like *Houser*.[4] A finding of probable cause for a subsequent arrest does not prove that "no conditions" of pretrial release can protect the community, assure the defendant's presence, or assure the integrity of the judicial process.

In some specific cases, the facts giving rise to probable cause for a new arrest may also warrant a finding of no conditions for pretrial release that can protect persons in the community from physical harm. The same is not true is every case, however. In many cases one or both of the crimes involve no physical harm to others, such as theft

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[4]*Houser* and the new statute also violates substantive and procedural due process as argued in respondent's supplemental brief in *State v. Paul*, Case No. 95,265. Those arguments are adopted and incorporated by reference.

or drug possession. Additionally, the failure of a defendant to follow the law on one form of release does not mean that all other forms would also fail. For instance, if a monetary bond proves insufficient, a bond plus electronic monitoring may be sufficient for some defendants. Probable cause for a subsequent arrest therefore does not automatically equate with a finding that no conditions of release that can protect persons in the community from risk of physical harm. It manifestly does not equate with a finding that no conditions can assure the defendant's presence at trial or assure the integrity of the judicial process.

The last-minute amendment to the new statute therefore perfectly illustrates *Houser*'s constitutional inadequacy. The new statute did not mirror *Houser* until the removal of the constitutionally required findings. *Houser* violates the constitution precisely because it does not require these findings. All that *Houser* requires is probable cause for a new arrest. *Houser* therefore must be disapproved and the new, identically unconstitutional statute does not change that conclusion.

CONCLUSION

Houser is bad law and creates bad precedent on courts' inherent authority to hold people without bond despite their constitutional rights. The new statute does not moot that constitutional issue nor does it alter that conclusion. Article I, section 14 of the Florida Constitution clearly delineates when a citizen may be detained without bond. *Houser* and the new statute ignore these limits and replace them with a mere finding of probable cause for a new arrest. Therefore both *Houser* and the new statute are unconstitutional.

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 18th day of August 2000.

____
JOHN E. MORRISON
Assistant Public Defender

CERTIFICATE OF TYPE SIZE

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

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JOHN E. MORRISON
Assistant Public Defender