

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.95,265

4Th DCA Case No.99-295

State of Florida,  
Petitioner,

v.

Jean David Paul,  
Respondent.

ON CERTIFICATION FROM  
THE DISTRICT COURT OF APPEAL OF FLORIDA  
FOURTH DISTRICT

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RESPONDENT'S SUPPLEMENTAL ANSWER BRIEF ON THE MERITS

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**CERTIFICATE OF TYPE SIZE AND STYLE**

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## PRELIMINARY STATEMENT

The respondent, Jean David Paul, is<sup>1</sup> a defendant in the Circuit Court of the 17th Judicial Circuit, Criminal Division, Broward County, Florida and was the petitioner in the Fourth District Court of Appeal. The petitioner is the plaintiff in the trial court and was the respondent in the district court. The parties will be referred to as they appear before this Honorable Court.

References to the petitioner's appendix will be designated by the symbol "Ex" followed by the appropriate page number. References to Petitioner's Initial Brief will be designated by the symbol "IB." References to Petitioner's Supplemental Initial Brief on the Merits will be designation by the symbol "SB." References to the appendix attached to Petitioner's Supplemental Initial Brief on the Merits will be designated by "Exhibit -."

References to Respondent's Appendix will be designated by the symbol "RA." References to Respondent's Supplemental Appendix will be designated by "RSA."

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<sup>1</sup> The respondent's criminal case is still pending in the Circuit Court, 17th Judicial Circuit, in and for Broward County.

**ISSUES ON APPEAL**

WHETHER CHAPTER 2000-178 AUTHORIZES HOLDING RESPONDENT WITHOUT BOND PENDING TRIAL AFTER VIOLATING THE CONDITIONS OF THE ORIGINAL BOND ABSENT AN ORDER FOR PRETRIAL DETENTION ENTERED IN COMPLIANCE WITH FLORIDA STATUTE 907.041?

WHETHER NEWLY ENACTED FLORIDA STATUTE 903.0471 IS AN UNCONSTITUTIONAL ABRIDGEMENT OF THE RIGHT TO PRETRIAL RELEASE?

## INTRODUCTION

This Court issued an order directing the parties to address the following:

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 the recent amendment.

Chapter 2000-178 amends Florida Statutes 903.046 (purpose and criteria for bail determinations), 907.041 (pretrial detention and release) and 903.26 (revising time period for bond forfeiture payment and notice). The chapter law also creates section 903.0471, which authorizes a court to order pretrial detention upon finding probable cause that an individual committed a crime while on bond. Finally, chapter 2000-178 repealed Florida Rules of Criminal Procedure 3.131 and 3.132 to the extent they are inconsistent with the act.

The only two sections of the chapter that affect the issue before this Court are the amendment to section 903.046 and the newly created statute, 903.0471. The amendment to section 903.046 adds as a consideration in determining the amount of bond whether there is probable cause to believe that a defendant committed a crime while on bond. It does not authorize denial of bond and does not affect this case.

Section 903.0471 authorizes the denial of bond. Its affect will be addressed in this supplemental brief.

## STATEMENT OF THE CASE AND FACTS

The respondent affirms the Statement of the Case and Facts set forth in his Answer Brief on the Merits, with the following additions:

This case is before this Court on the state's application for discretionary review of the Fourth District Court of Appeal's decision granting habeas relief and certifying conflict with the Third District Court of Appeal's decision in Houser v. Manning, 719 So. 2d 307 (Fla. 3d DCA 1998). Briefs on the merits were submitted and oral arguments were held November 5, 1999.

The respondent was released on bond on attempted second degree murder (Ex 2) and was subsequently arrested for possession of cannabis, carrying a concealed firearm, possession of a firearm with an altered serial number, and possession of drug paraphernalia. (Ex 3). After the respondent's second arrest, the state filed in the first case a Motion to Revoke Bond requesting the trial court to revoke bond and detain the petitioner without bond. (Ex 5)

The trial court revoked bond and ordered respondent held without bond. Habeas relief was sought in the district court. During the pendency of the habeas proceeding, the state filed a "No Information" for all but the possession of drug paraphernalia charge, which was filed as misdemeanor possession of marijuana. (RA 1)

The district court granted habeas relief finding that the respondent did not meet the criteria for pretrial detention pursuant to Florida Statute 907.041. Paul v. Jenne, 728 So. 2d 1167 (Fla. 4th DCA 1999). A mandate issued on March 3, 1999. The circuit court set bond and the respondent was released on bond.

Effective June 2, 2000, the Florida Legislature enacted chapter 2000-178 which amended Florida Statute 903.046, 907.041 and 903.026 and created Florida Statute 903.0471. The chapter law also repealed Florida Rules of Criminal Procedure 3.131 and 3.132 to the extent that the rules are inconsistent with the act.

## **SUMMARY OF ARGUMENT**

The district court correctly held that a court is without authority to deny bond after a defendant has violated a condition of his original bond absent compliance with the pretrial detention statute. A criminal defendant has a constitutional right to pretrial release. This right may be constitutionally denied in only two instances: (i) when a person is accused of a capital crime or a crime punishable by life imprisonment and the proof of guilt is evident and the presumption great or (ii) when no condition of release can reasonably protect the community, assure the presence of the accused, or assure the integrity of the judicial process. The judiciary has no authority to deny bond independent of the two constitutional exceptions to the right to pretrial release.

Chapter 2000-178 does not affect the correctness of the district court's decision, nor does it render this issue moot. The right to bond emanates from the constitution and is a substantive right. Statutes affecting substantive rights are deemed to apply prospectively absent clear legislative intent to the contrary. The Legislature did not intend Chapter 2000-178 to apply retroactively. The respondent's constitutional right to bond is not affected by the newly enacted law.

Should this Court decide to apply Chapter 2000-198 retroactively, the constitutionality of Florida Statute 903.0471

is at issue. The newly created statute is unconstitutional and does not render this appeal moot. Article I, section 14 of the Florida Constitution guarantees citizens the right to pretrial release absent proof that no condition of bond will protect persons from physical harm, assure the appearance of the accused, or assure the integrity of the judicial process. Florida Statute 903.0471 does not require any of these findings. The statute circumscribes the constitutional right to pretrial release.

Section 903.0471 violates substantive due process by requiring only a finding of probable cause to deny bond. The statute allows for the denial of bond upon a mere finding of probable cause regardless of whether, as occurred at bar, the state does not file the charges for which the court has found probable cause. Probable cause is not a constitutionally sufficient standard of proof to justify denial of a constitutional liberty interest.

Section 903.0471 violates procedural due process. The statute does not provide for a hearing or the right to counsel. A defendant has no opportunity to be heard before his constitutional right to pretrial release is denied.

The district court's decision should be affirmed.

## ARGUMENT

CHAPTER 2000-178 DOES NOT AFFECT THE  
CORRECTNESS OF THE DISTRICT COURT'S OPINION  
THAT THE TRIAL COURT COULD NOT DENY BOND  
AFTER THE RESPONDENT VIOLATED THE CONDITIONS  
OF HIS ORIGINAL BOND ABSENT AN ORDER OF  
PRETRIAL DETENTION ENTERED IN COMPLIANCE WITH  
FLORIDA STATUTE 907.041.

### I. Respondent Has A Constitutional Right To Pretrial Release

Pretrial release is a substantive right established by Article I, section 14 of the Florida Constitution. Article I, section 14 states:

Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable condition. 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.

The right to pretrial release can be constitutionally denied only as delineated in Article 1, section 14.

Florida Statute 907.041 implements Article 1, section 14 and sets forth the constitutional criteria for determining whether a defendant may be detained without bond. Subsection (4)(b), entitled "Pretrial Detention," provides:

(b). The court may order pretrial detention if it finds a substantial probability, based on a defendant's past and present patterns of behavior, the criteria in 903.046, and any other relevant facts that:

1. **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;**

2. The defendant, with the intent to obstruct the judicial process, has threatened, intimidated, or injured any victim, potential witness, juror, or judicial officer, or has attempted or conspired to do so, and that **no conditions of release will reasonably prevent the obstruction of the judicial process;**

3. The defendant is charged with trafficking in controlled substances as defined by s. 893.135, that there is a substantial probability that the defendant has committed the offense, and that **no conditions of release will reasonably assure the defendant's appearance at subsequent criminal proceedings;** or

4. **The defendant poses the threat of harm to the community.** The court may so conclude if it finds that the defendant is presently charged with a dangerous crime, that there is a substantial probability that the defendant committed such crime, that the factual circumstances of the crime indicate a disregard for the safety of the community, and that **there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons.** In addition, the court must find that at least one of the following conditions is present:

a. The defendant has previously been convicted of a crime punishable by death or life imprisonment.

b. The defendant has been convicted of a dangerous crime<sup>2</sup> within the 10 years immediately

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<sup>2</sup> The respondent has a prior adjudication of delinquency for burglary of a dwelling, which is an enumerated "dangerous crime." Fla. Stat. §907.041(4)(a)(1997). The district court held that a juvenile adjudication does not constitute a "conviction" and cannot be used to establish the need for pretrial detention. The district court did not certify that issue and it was not argued in the petitioner's initial brief.

preceding the date of his or her arrest for the crime presently charged.

c. The defendant is on probation, parole, or other release pending completion of a sentence or on pretrial release for a dangerous crime at the time of the current arrest.

(Emphasis added.)

Florida Statute 907.041 comports with the Florida Constitution by requiring, as emphasized above, a finding of danger of physical harm, non-appearance of the defendant, or of obstruction of the judicial process. One of these findings is required to constitutionally deny bond. The district court held that the state failed to establish these grounds and granted habeas relief.

The newly enacted statute, section 903.0471, authorizes the denial of pretrial bond if there is probable cause to believe that a defendant commits a new offense while on bond. The terse statute, in its entirety, states:

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.

The newly created statute narrows an individual's substantive right to bond. Interestingly, the statute does not require an arrest, the filing of charges, or any prosecution. More importantly, it does not require a finding that no condition of

bond can protect the community from physical harm, assure the attendance of the defendant, or assure the integrity of the judicial process.

## II. Section 903.0471 Cannot Be Applied Retroactively

In State v. Lavazzoli, 434 So. 2d 321 (Fla.. 1983), this Court held that laws affecting existing rights are presumed to apply prospectively in the absence of clear legislative intent to the contrary. Id. at 323. In Lavazzoli, the court addressed whether the amendment to Article 1, section 12 of the Florida Constitution could be applied retroactively. The amendment correlated state constitutional protection against unreasonable search and seizure with the federal constitutional right. The Court held that the amendment impacted substantive rights and could not be applied retroactively. "When faced with constitutional amendments not clearly expressing an intent to the contrary, this Court has repeatedly refused to construe the amendment to affect detrimentally the substantive rights of persons arising under the prior law." Id. at 324. Although recognizing the general rule that a case on appeal is disposed according to the law in effect at the time of the appellate court's decision, rather than the law in effect at the time the order appealed was rendered, the court acknowledged that the general rule does not apply when a substantive right is altered. Id. at 323. See also, Chavez v. State, 698 So. 2d 284 (Fla. 3d DCA 1997) (Amendment to rule 3.180(b), which broadened the

definition of "presence" in response to this Court's decision in Cooney v. State, 653 So. 2d 1009(Fla. 1995), could not be retroactively applied; the amendment must be applied prospectively); Bond v. State, 675 So. 2d 184 (Fla. 5th DCA 1996) (amendment to habitualization statute could not be applied retroactively despite fact that defendant did not qualify for habitualization under amendment).

Absent an express command that a statute apply retroactively, legislative intent is garnered from both the terms of the statute and the purpose of the enactment. Metropolitan Dade County v. Chase Federal Housing Corporation, 737 So. 2d 494, 500 (Fla. 1999). In the instant case, chapter 2000-178 is silent on the time frame of its application. The Committee on Crime and Punishment's final analysis<sup>3</sup> notes the conflict between the lower court's decision in this case and the Third District Court of

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<sup>3</sup> The House of Representatives, Committee on Crime and Punishment, Final Analysis date June 8, 2000, is attached as an appendix. It is different from the analysis submitted with petitioner's supplemental brief.(Exhibit C) Petitioner's submission is dated March 9, 2000, and involves a prior draft of the bill. Pertinent to the issue before this court, the prior draft provided: "The committee substitute creates 903.0471 which provides that notwithstanding s. 907.0341, 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 condition 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.**" Exhibit C at page 6.

Appeal's decision in Houser v. Manning, 719 So. 2d 307 (Fla. 3d DCA 1998), but is silent as to the purpose or intent behind the enactment. RSA at page 5. More importantly, the comments section indicates that the chapter law raises no constitutional issues. This indicates that the legislature did not anticipate any constitutional issues resulting from a retroactive application of the act. "Staff analysis of legislation should be accorded significant respect in determining legislative intent." State Department of Environmental Regulation v. SCM Glidco Organics Corporation, 606 So. 2d 722, 725 (Fla. 1st DCA 1992). It is impossible to glean from either the statute itself or the staff analysis that the legislature clearly intended section 903.0471 to apply retroactively.

If this Court determines that the legislature intended for section 903.0471 to apply retroactively, it must further decide whether the retroactive application is constitutional. If a statute is remedial and not substantive, it may be applied retroactively. Village of El Portal v. City of Miami Shores, 362 So. 2d 275 (Fla. 1978). In Village of El Portal, this Court stated:

A retroactive application of a legislative act is not necessarily invalid. In McCord v. Smith, 43 So. 2d 704 (Fla. 1950), this Court stated that retrospective statutes are only constitutionally defective: ... in those cases wherein vested right are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions or

considerations previously had or expiated. *Id.* at 709....Remedial or procedural statutes do not fall within the constitutional prohibition against retroactive legislation and they may be held immediately applicable to pending cases.

Village of El Portal, 362 So. 2d at 277-279. The court held that the Uniform Contribution Among Tortfeasors Act could be applied retroactively because it did not affect any vested rights of tortfeasors or create any new obligations. *Id.* at 278. The Act was deemed remedial because it did not retroactively increase the liability for an injury predating the Act<sup>4</sup>, but only provided a method for limiting the pro rata liability of each tortfeasor. Id.

Section 903.0471 is not remedial or procedural; section 903.0471 is substantive. It affects the vested constitutional right to pretrial release and cannot be applied retroactively.

In the case at bar, the state did not prove, nor does the respondent qualify for, pretrial detention pursuant to Florida Statute 907.041. Florida statute 903.0471 does not apply to the instant case because it affects the substantive right to pretrial release and cannot be applied retroactively. The Legislature did not articulate an intent to apply the statute retroactively. Moreover, section 903.0471 is not remedial, but gives new legal consequences to the commission of an offense while on pretrial

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<sup>4</sup> Prior to the Act, each tortfeasor was liable in full until the judgement was satisfied. Village of El Portal, 362 so. 2d at 278.

release, to wit: a court may order pretrial detention even though the facts do not warrant detention under the Florida Constitution or the pretrial detention statute. The respondent's second arrest occurred before the statute was enacted; the state moved for revocation of bond, the trial court revoked bond, the district court granted habeas relief and issued its mandate all before §903.0471 was effective. (Ex. 4,5,7,11) Thus, the enactment of chapter 2000-198, effective June 2, 2000, does not affect the issue presented in this case and this Court should affirm the district court.

FLORIDA STATUTE 903.0471 IS FACIALLY UNCONSTITUTIONAL

I. Statute Narrows Constitutional Right To Bond

Should this Court decide that section 903.0471 applies retroactively to this case, the constitutionality of that statute is at issue. This Court has jurisdiction to address the constitutional question. "Once the supreme court has jurisdiction, it may, if it finds it necessary to do so, consider any item that may affect the case." Trushin v. No. 59378, 425 So. 2d 1126, 1129 (Fla. 1983) The facial constitutionality of a statute may be raised for the first time on appeal if the error is fundamental. State v. Johnson, 616 So. 2d 1 (Fla. 1993) "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." Id. at 3.

The respondent could not have raised the constitutionality of section 903.0471 below because it was not enacted until after the mandate issued in the district court. The constitutionality of section 903.0471 is basic to the decision under review. If this Court applies retroactively section 903.0471 to the instant case, the respondent's freedom rests on whether the statute is constitutional. The district court has determined that he cannot be denied bail pursuant to section 907.041 because the state did not prove the criteria for pretrial detention. The respondent can only be detained if this Court determines that a finding of probable cause that a defendant committed a crime while on bond is constitutionally sufficient to deny bond.<sup>5</sup>

The constitutional right to bail is long recognized by this Court. State v. Arthur, 390 So. 2d 717 (Fla. 1980); Russell v. State, 71 So. 27 (Fla. 1916); Ex parte McDaniel, 97 So. 317 (Fla. 1923)(right to bail is "organic"). The constitution permits the denial of bail when a person is accused of a capital crime or one punishable by life imprisonment, if proof of guilt is evident and presumption great. Article I, section 14 Fla.Const. (1983). This burden is greater than beyond a reasonable doubt. Russell, supra, ("The question is whether . . .the evidence is sufficient to

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<sup>5</sup> In addition, the bond ramifications of an arrest while on bond is at issue daily in criminal courtrooms around the state. It is an issue that warrants the immediate attention of this Court.

establish that degree of proof where the judge to whom the application is made may say that guilt is evident or the presumption is great, which is a greater degree of proof than that establishing guilt merely to the exclusion of a reasonable doubt"); Elderbroom v. Knowles, 621 So. 2d 518 (Fla. 4th DCA 1993)(state held to degree of proof greater than that required to establish guilt beyond a reasonable doubt.) The second constitutional exception to the right to bond requires findings based on a "substantial probability"<sup>6</sup> that no condition of release will protect the community from risk of physical harm, assure the presence of the accused or assure the integrity of the judicial process. Florida Statute 907.041 implements these exceptions and provides for pretrial detention when the constitutional exceptions to the right to bond are met.

Florida statute 903.0471 provides for the denial of bond if probable cause exists that a defendant committed a new offense while on bond. The statute does not require any of the findings exacted by the constitution.<sup>7</sup> The statute narrows the

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<sup>6</sup> Section 907.041(4)(b) Fla.Stat. (1999)

<sup>7</sup> A prior draft of the law authorized the denial of bond if probable cause was found that the defendant committed a new offense while on bond, and the court, in its discretion, found that no condition of release would "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." Exhibit C at page 6. Although this draft is also unconstitutional because it makes discretionary constitutional considerations, it demonstrates that the

constitutional right to pretrial release and is facially unconstitutional.<sup>8</sup>

## II. Statute Violates Due Process

Section 903.0471 authorizes a court to deny pretrial release upon finding probable cause that a defendant committed a new offense while on bond. However, if a defendant is charged with a capital crime or crime punishable by life imprisonment, a court cannot deny bond unless it is proven by a degree of proof greater than beyond a reasonable doubt that the defendant committed the crime charged. Russell, 71 So. 27 (Fla. 1916). When pretrial detention is sought pursuant to section 907.041, the state must prove the criteria for pretrial detention by a substantial probability. Section 907.041(4)(b) Fla.Stat. (1999). This disparity in standards of proof confirms that a probable cause standard violates due process.

In Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991), this Court recognized that the burden or standard of proof in a criminal case is subject to substantive due process protections under the Florida Constitution. But see, Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599

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legislature was aware of the constitutional requirements and choose to excise them from the final bill.

<sup>8</sup> The statute is only constitutional if the judiciary can deny bond based on its inherent authority to enforce its orders. That is the issue addressed in the Respondent's Answer Brief on the Merits. There is not a judicial exception to the constitutional right to pretrial release.

(1982) (Fair preponderance of the evidence standard in proceedings to terminate parental rights denied parents' right to *procedural* due process of law.") "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to 'instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication'" Addington v. Texas, 444 U.S. 418,423, 99 S.Ct. 1804,1080, 60 L.Ed. 2d 323 (1979)

The test for determining the constitutionality of a standard of proof was announced by the United States Supreme Court in Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976). In Santosky, 455 U.S. at 753, 102 S.Ct. at 1395, the court held that the Eldridge balancing test should be applied to determine whether a particular standard of proof in a particular proceeding satisfies due process. The Eldridge test requires a court to balance three factors: the private interest affected by the proceedings; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting the use of the challenged procedure. Id.

Section 903.0471 fails the Eldridge test. Section 903.0471 violates due process by requiring only a finding of probable cause before denying a defendant's liberty interest. The right to pretrial release is a constitutional liberty interest. The

risk of error in a hearing utilizing a probable cause standard is high, as evidenced in the instant case; all but the possession of marijuana charges were dropped. This risk of error is magnified by the fact that the statute does not provide for a hearing, but allows a court to make a sua sponte ruling without any requirement that the defendant be present. Lastly, the state's interest in using the probable cause standard in section 903.0471, as opposed to the Russell standard or the substantial probability<sup>9</sup> standard enunciated in section 907.041, does not justify the denial of the constitutional right to pretrial release. The state need not establish probable cause that the defendant committed a heinous crime; it need only establish probable cause that the defendant committed a crime. The state's interest in using a probable cause standard is not related to the protection of the community because any minor offense will result in the denial of bond.

### III. Section 903.0471 Violates Procedural Due Process

Florida statute 907.041, provides procedural safeguards to insure due process of law before holding a defendant without bond. Specifically, it provides:

(4)(d) When a person charged with a crime for which pretrial detention could be ordered is arrested, the arresting agency may detain such defendant, prior to

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<sup>9</sup> The Respondent will refrain from challenging the substantial probability standard as this is not an issue which can be addressed at this time.

the filing by the state attorney of a motion seeking pretrial detention, for a period not to exceed 24 hours.

(e) The court shall order detention only after a pretrial detention hearing. The hearing shall be held within 5 days of the filing by the state of a complaint to seek pretrial detention. The defendant may request a continuance. No continuance shall be for longer than 5 days unless there are extenuating circumstances. The defendant may be detained pending the hearing. The state shall be entitled to one continuance for good cause.

(f) The state attorney has the burden of showing the need for pretrial detention.

(g) The defendant is entitled to be represented by counsel, to present witnesses and evidence, and to cross-examine witnesses. The court may admit relevant evidence without complying with the rules of evidence, but evidence secured in violation of the United States Constitution or the Constitution of the State of Florida shall not be admissible. No testimony by the defendant shall be admissible to prove guilt at any other judicial proceeding, but such testimony may be admitted in an action for perjury, based upon the defendant's statements made at the pretrial detention hearing, or for impeachment.

(h) The pretrial detention order of the court shall be based solely upon evidence produced at the hearing and shall contain findings of fact and conclusions of law to support it. The order shall be made either in writing or orally on the record. The court shall render its findings within 24 hours of the pretrial detention hearing.

(i) If ordered detained pending trial pursuant to subparagraph (b)4, the defendant may not be held for more than 90 days. Failure of the state to bring the defendant to trial within that time shall result in the defendant's release from detention, subject to any conditions of release, unless the trial delay was requested or caused by the defendant or his or her counsel.

. . .  
(k) The defendant shall be entitled to dissolution of the pretrial detention order whenever the court finds that a subsequent event has eliminated the basis for detention.

Section 907.041 provides strict time constraints for filing a

motion for pretrial detention, holding a hearing, rendering a ruling, and, if pretrial detention is ordered, for trying the underlying case. The statute affords the defendant the right to counsel and a full evidentiary hearing. The defendant is also entitled to dissolution of the order for pretrial detention if the basis for detention is eliminated.

Section 903.0471 provides no due process protections. The statute, in its entirety, states:

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.

This statute does not provide for a hearing or notice to the defendant. In a defendant's absence, a trial court can sua sponte find probable cause that a defendant committed an offense and order pretrial detention. Pretrial detention can be effected without counsel. The statute violates procedural due process because it does not provide for adequate and meaningful notice to a defendant, nor does it provide for a fair opportunity to be heard. "The essence of due process is that fair notice and reasonable opportunity to be heard must be given to interested parties before judgment is rendered . . . . Due process envisions law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties." Scull v. State, 569 So. 2d 1251

(Fla. 1990).

Florida Rule of Criminal Procedure 3.131(d)(2) requires a three hour notice to a defendant before a court hears an application to increase bond. See Montgomery v. Jenne, 744 So. 2d 1148 (Fla. 4th DCA 1999); Bowers v. Jenne, 710 So. 2d 681 (Fla. 4th DCA 1998). However, Chapter 2000-178 repeals rules 3.131 and 3.132 inasmuch as they are inconsistent with it. Thus, rule 3.131(d)(2) does not obviate a due process challenge to section 903.0471. A defendant is denied bond without any opportunity to be heard.

CONCLUSION

The respondent is charged with attempted second degree murder, a first degree felony, and has a constitutional right to pretrial release on reasonable conditions. Meridian v. Cochran, 654 So. 2d 573, 575 (Fla. 4th DCA 1995). The state failed to prove the requirements for pretrial detention and the district court correctly issued a writ of habeas corpus. The argument presented above supports the district court's decision. The respondent respectfully requests this Honorable Court to affirm the district court.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. Mail to Leslie T. Campbell, Assistant Attorney General and Celia Terenzio, Assistant Attorney General, Bureau Chief, Office of the Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Fl. 33401-2299, this 18th day of July, 2000.

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Diane M. Cuddihy