

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.: 95,266

4th DCA Case No.: 99-0998

KEN JENNE, SHERIFF,  
etc.,  
Petitioner,

vs.

BRIAN RIX,  
Respondent.

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

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## **CERTIFICATE OF TYPE SIZE AND STYLE**

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), counsel for the Respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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Steven J. Hammer

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## **PRELIMINARY STATEMENT**

Respondent, BRIAN RIX, is a Defendant in the Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida, and was the Petitioner in the Fourth District Court of Appeals. Petitioner is the jailor in Broward County, Florida, responsible for housing inmates pre and post trial in Broward County. The parties will be referred to as they appear before this Honorable Court.

References to the Respondent's Appendix will be designated by the symbol "Exh" followed by the appropriate page number. References to Petitioner's Initial Brief will be designated by the symbol "IB" followed by the page number.

**ISSUE ON APPEAL**

WHETHER A DEFENDANT WHO IS ALLEGED TO HAVE  
COMMITTED A NEW OFFENSE WHILE ON BOND MAY BE  
HELD WITHOUT BAIL ABSENT AN ORDER FOR PRE-  
TRIAL DETENTION IN COMPLIANCE WITH FLORIDA  
STATUTE 907.041 (RESTATED)

## STATEMENT OF THE CASE AND FACTS

This case is before the Court on the State's application for discretionary review of the Fourth District Court of Appeal's decision granting Respondent's requested Petition for Habeas Corpus and certifying conflict with the Third District's decision in Houser v. Manning, 719 So.2d 307 (Fla. 3d DCA 1998)

The Respondent is charged by information with driving under the influence, possession of cocaine and battery on a police officer in case number 95-13468CF10A which allegedly occurred on August 1, 1995. (Exh. 1) The Respondent is also charged in case 97-3547CF10A with possession of cocaine and possession of drug paraphernalia which allegedly occurred on February 21, 1997. (Exh. 2) The Respondent was released on bond on the two cases listed above, and attended each and every calendar call.<sup>1</sup> On December 18, 1998, the Respondent was arrested and charged with possession of cocaine, DUI and driving with an expired license tag in case number 98-25356CF10A. (Exh. 3) After his arrest on December 18, 1998, the Respondent posted bond and was released.

On January 25, 1999, the state filed in case numbers 97-3547CF10A and 95-13468CF10A a Motion to Revoke Bond, requesting the trial court to revoke bond and detain the respondent without bond. (Exh. 4) The motion alleged that "there are no conditions of pretrial release that would protect the community from the risk of physical harm." However, the motion did not allege any grounds for pretrial detention.

The trial court conducted a hearing on February 1, 1999. The state called no witnesses, and the court only reviewed the probable cause affidavit of Respondent's new arrest prior to revoking his bond.

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<sup>1</sup> As part of its argument, the State alleges that Mr. Rix failed to appear for Court on September 18, 1995 (IB. 14; Exh. 7 page 6). Instead of reading the actual file, both the State prosecutor at Respondent's bond hearing and the Assistant Attorney General writing the Brief relied on the front of the Court file which indicated that Respondent had failed to appear on that date. However, the fact is, that the Capias was issued in error, and rescinded by the Circuit Court on September 22, 1995. (See Respondent's Exh. 8)

The court found that the Respondent was a danger to the community, and that because he posed a threat to the community "there are no other terms of release that could ensue (sic) he would not continue to impose a threat to the community and that's based on the continued use of substances and driving." Prior to the court's ruling, Respondent argued that the state had failed to adduce any evidence that he was a danger to the community, and, in fact, had failed to produce any evidence whatsoever. Despite Respondent's argument, and lack of evidence concerning pre-trial detention, the trial court revoked bond and ordered a no-bond hold against him. (Exh. 5)

Based upon the trial court's ruling, Respondent filed with the Fourth District Court of Appeals an Emergency Petition for Writ of Habeas Corpus on February 8, 1999, in Case No.: 99-461. Without requiring a responsive pleading from the State, the court denied Respondent's Emergency Writ. After the Fourth District's ruling, Respondent filed with the Circuit Court a Motion to Set Bond After Recommitment pursuant to Florida Rule of Criminal Procedure 3.131(h). (Exh. 6)

On March 16, 1999, a hearing was conducted before the Honorable Judge Royce Agner on alternative conditions for bond pursuant to Rule 3.131(h). Again, the State presented no witnesses and no evidence regarding the Respondent's danger to the community and Judge Agner adhered to the ruling previously entered by the Honorable Susan Lebow. (Exh. 7)

Respondent then filed an emergency Writ for Habeas Corpus with the Fourth District Court of Appeals. The Fourth District granted Habeas relief stating:

We find that the State did not satisfy its burden of proving the requirements for pre-trial detention in accordance with Section 907.041. Accordingly, we grant the Writ and remand the case for further proceedings consistent with this Court's holdings in Paul. See also, Merdian v. Cochran, 654 So.2d 573. As in Paul, we certify conflict with Houser v. Manning, 719 So.2d 307 (Fla. 3d DCA 1998). (Exh 9)



The State filed a Notice to Invoke Discretionary Jurisdiction, and this Court postponed ruling on jurisdiction pending receipt of briefs on the merits.

## SUMMARY OF THE ARGUMENT

The Fourth District was correct in granting Respondent's Emergency Writ for Habeas Corpus since the State failed to establish danger to the community beyond a reasonable doubt, and the trial court failed to comply with the dictates of Florida Statute 907.041.

In Florida, a criminal defendant has a constitutional right to bond with only two (2) exceptions. One exception exists when a person is accused of a capital crime or a crime punishable by life imprisonment and the proof of the defendant's guilt is evident and the presumption great. The second circumstance where a defendant may be denied bond involves a finding that a defendant is a danger to the community, or that the integrity of the judicial process could be affected, thereby allowing a defendant to be held without bail pursuant to Florida's pre-trial detention statute.

The State's reliance upon the Third District's decision in Houser v. Manning, has no basis under Florida's Constitution, Statutes, or Rules of Criminal Procedure. The Houser decision creates judicial authority where none was intended, and would deny due process and equal protection to those defendants charged with crimes of a lesser nature.

## ARGUMENT

WHETHER A DEFENDANT WHO IS ALLEGED TO HAVE COMMITTED A NEW OFFENSE WHILE ON BOND MAY BE HELD WITHOUT BAIL ABSENT AN ORDER FOR PRE-TRIAL DETENTION IN COMPLIANCE WITH FLORIDA STATUTE 907.041 (RESTATED)

Article I, Section 14 of the Florida Constitution guarantees pretrial release on reasonable conditions:

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 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.

Article I, Section 14 Florida Const. (1983). See also, Rule 3.131(a) Fla.R.Crim.P. (1998) The Respondent is charged with possession of cocaine and has a constitutional right to pretrial release on reasonable conditions. Merdian v. Cochran, 654 So.2d 573, 575 (Fla. 4th DCA 1995).

While a defendant who has been released on bail may be arrested and committed for violating a condition of pre-trial release, Florida Rule of Criminal Procedure 3.131(g)(1), the trial court may not thereafter refuse to impose any conditions of release unless the state proves beyond a reasonable doubt the need for pre-trial detention. Rule 3.132(c)(1), Florida Rules of Criminal Procedure, Florida Statute 907.041(4)(f), Metzger v. Cochran, 694 So.2d 842 (Fla. 4th DCA 1997), Merdian v. Cochran, 654 so.2d 573 (4th DCA 1995).

The right to pre-trial release may be constitutionally denied in only two (2) instances, first, when a person is accused of a capital crime or an offense punishable by life imprisonment and proof of the defendant's guilt is evident and the presumption great, State v. Arthur, 390 So.2d 717 (Fla. 1980); and, second, when no conditions of release can

reasonably protect the community, assure the presence of the accused or assure the integrity of the judicial process. In order to deny a defendant's bond, under the first exception, the State must prove that the defendant's guilt is evident or the presumption great by a standard even higher than beyond a reasonable doubt Elderbroom v. Knowles, 621 So.2d 518 (Fla. 4th DCA 1993). The second exception, pre-trial detention, requires that the State file a motion, that the Court hear the motion within five (5) days, and rule on it within twenty-four (24) hours. Additionally, the defendant has the right to counsel, as well as, the right to present and cross-examine witnesses. Fla. Stat. Section 907.041(4)(e).

Florida Statute 907.041 specifically sets forth criteria for determining whether a defendant may be detained without bond. Subsection (4)(b) provides that a court may order pre-trial detention if it finds a substantial probability, based upon a defendant's past and present patterns of behavior, the criteria in Section 903.046, or other relevant facts that:

1. The defendant has previously violated conditions of his 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 Statute 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 within the 10 years immediately 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.

In the case at bar, Respondent is not charged with a dangerous crime pursuant to F.S. 907.041, the state did not move for pre-trial detention pursuant to Florida Rule of Criminal Procedure 3.132, nor did it prove the requirements of pre-trial detention at either hearing. In fact, neither the state nor the two (2) Circuit Court Judges made the requisite findings which kept Respondent in custody for close to two (2) months without bond.

In Metzger v. Cochran, *supra*, the District Court granted habeas relief after the trial court revoked bond and ordered the defendant held without bond. The District Court recognized a trial court's authority to arrest and commit a defendant on bail for breach of undertaking. *Id.* at 842. However, the court held that "refusal to impose any conditions of release thereafter constitutes pretrial detention, the need for which the State must prove, §907.041(4)(f), beyond a reasonable doubt." *Id.* The court also held that although a finding of danger to the community can be used as a factor in determining bail or other conditions of release, it cannot be the entire basis for pretrial detention. *Id.*, *see also*, Gomez v. Hinckley, 473 So.2d 809, 811 (Fla. 4th DCA 1985), wherein this Court granted habeas relief upon the trial court's failure to make the requisite findings under section 907.041(4)(b)(4).

Respondent submits that the Fourth District's long line of opinions beginning with Merdian v. Cochran, 654 So.2d 573 (Fla. 4th DCA 1995) should be followed by this Court. The legislature and the courts have long held that a citizen's right to liberty must be protected unless the State proves beyond a reasonable doubt that a particular person is a real threat to public safety or the administration of justice. The Fourth District's opinions protect and balance a defendant's right to bail against the public's safety with a procedure designed to

insure fundamental fairness to both sides. Petitioner's reliance on the Third District's decision in Houser v. Manning, *supra*, is misplaced since the Houser decision has no basis in either the Florida Constitution, Florida Statutes or Florida Rules of Criminal Procedure.

The Houser decision is based upon the Third District's misapplication of State v. Ajim, 565 So.2d 712 (Fla. 4th DCA 1990); Gardner v. Murphy, 402 So.2d 525 (Fla. 5th DCA 1981); and Ex parte McDaniel, 86 Fla. 145, 97 So. 317 (1923).

In State v. Ajim, *supra*, the Third District misinterpreted the Fourth District in holding that "it has been explicitly held that Section 907.041 is complementary to, and does not replace, a trial court's already-existing power to deny bail." Houser at 311. The Third District's interpretation is incorrect. In Ajim, the District Court stated, "the criteria for denying bail set forth in Section 907.041 are complementary to and do not replace the discretion of the Court to deny bail, recognized in State v. Arthur, as to crimes punishable by death or life in prison where the proof is evident and the presumption great." Ajim at 712. Read correctly, the Fourth District's decision does not support the Third District's contention that trial courts have discretion to deny bond beyond the holding of State v. Arthur and the criteria enunciated in Florida Statute 907.041.

The Houser court's reliance on Gardner v. Murphy, *supra*, is likewise misplaced. The Gardner court ruled that a petition for habeas relief should be granted since the trial court denied bond without examining various alternatives to pre-trial detention, even when the defendant in that case was a proven flight risk.

The Houser court further mistakenly relied on Ex parte McDaniel, *supra*, which supplied the language used by the court in Gardner v. Murphy. McDaniel involved a defendant who twice violated pre-trial release by failing to appear for trial. Under the reasoning of Houser, Mr. McDaniel would have forfeited his right to any further pre-trial release. However, the McDaniel court ruled that while the defendant's conduct may have been

grounds for contempt, there was no effort to evade the court process so as to forfeit his constitutional right to bail.

The legislature has specifically stated under what circumstances bond may be denied. Presumably, the legislature balanced the right of a citizen to bail against the public's safety and the integrity of the judicial process. The Houser court's opinion attempts to create a third exception to Florida's Constitution out of the dicta of two prior court rulings. The problem with Houser is a problem that has been addressed by the criteria of Florida Statute 907.041. While the Statute requires a hearing, the right to confront and cross-examine witnesses, the right to present witnesses, and the right to a speedier trial; Houser contains none of those procedural protections. Houser only requires that a defendant commit a new crime.

In the case at bar, the State filed no motion alleging a violation of the pre-trial detention statute, Respondent did not qualify for pre-trial detention, the trial court only examined the probable cause affidavit, and then ruled without following the criteria set forth in Florida Statute 907.041. Under Houser, merely being arrested would have been sufficient to revoke Respondent's bond, thereby denying Respondent's Due Process and Equal Protection rights. In order to balance a defendant's right to bail as guaranteed by the Florida Constitution and Florida Rules of Criminal Procedure.

Respondent urges this Court to follow the reasoning of the Fourth District Court of Appeal in the line of cases beginning with Merdian v. Cochran, *supra*, and enunciated most recently in Paul v. Jenne, 728 So.2d 1167 (Fla. 4th DCA 1999), wherein the court stated that a trial court's authority to deny bond pending trial is circumscribed by the provisions of Florida Statute 907.041.

## CONCLUSION

The argument presented by Respondent supports the Fourth District Court of Appeal's decision, therefore, Respondent respectfully requests this Honorable Court 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 Respondent's Answer Brief on the Merits was delivered to Leslie T. Campbell, Assistant Attorney General, and Celia Terenzio, Assistant Attorney General, Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401, this 24th day of June, 1999.

\_\_\_\_\_  
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