ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA, et al.,

Petitioner,

v.

Case No. 96,490
5 DCA Case No. 99-1629

JAMES A. WILLIAMS,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE FIFTH JUDICIAL CIRCUIT IN AND FOR
HERNANDO COUNTY, FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

Robert A. Butterworth
Attorney General

Belle B. Schumann
Assistant Attorney General
FL Bar # 397024
444 Seabreeze Blvd. 5th Floor
Daytona Beach, FL 32118
(904) 238-4990

Counsel for State of Florida

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CERTIFICATE OF FONT

The undersigned hereby certifies that this brief is submitted in Courier New, 12 point font, a font that is not proportionally spaced.

STATEMENT OF THE CASE AND FACTS

Petitioner adds two facts in support of its reply brief.

First, there is no indication in the transcripts of the first appearance hearings that Judge Hyslop reviewed or had a copy of the arrest warrant and supporting affidavits. In Mr. Norris' case, the arrest warrant was served five months after it was issued. The first appearance judge does not always have this information.

Second, the record in this case was not fully developed due to the procedural posture of the case. These cases were before the district court on an extraordinary writ and the only record consisted of the appendix. The parties ordered to respond to the petition were the Honorable Peyton Hyslop and the Honorable William Swigert; the State of Florida was not ordered to respond. Fla.R.App.P. 9.100(h),(j). Petitioner relies upon Judge Goshorn's dissenting opinion for the fact that the judge issuing the arrest warrant is in a superior position than the first appearance judge to be informed of the facts of the crime and the defendant. "In my experience[1], the reason the judge issuing an arrest warrant may want to restrict the authority of the first appearance judge to modify a bond amount is because the issuing judge has a unique knowledge of the defendant or of the facts of the case." Norris v. State, 737 So.2d 1240, 1242 (Fla. 5th DCA 1999).

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[1]Judge Goshorn was a Circuit Court Judge in the Eighteenth Judicial Circuit for ten years, and a judge on the District Court of Appeal, Fifth District, for an additional ten years.

SUMMARY OF ARGUMENT

At issue in this case is whether the rules of criminal procedure permit the first appearance judge to modify a bail bond when a person is arrested pursuant to an arrest warrant and the issuing magistrate has set a firm bond. The judge issuing the arrest warrant has found probable cause for the arrest, has been fully informed of the circumstances of the crime, and indicated on the face of the arrest warrant that a bail amount should not be modified. This act is the original setting of the bail bond. Therefore, under these circumstances, consideration of the bond at the first appearance is a subsequent modification. Florida Rule of Criminal Procedure 3.131(d)(1)(D) states that no judge may modify or set a condition of release unless the judge "is the first appearance judge *and has been authorized by the judge initially setting or denying bail to modify or set conditions of release.*" (emphasis added) In those instances when the judge issuing an arrest warrant indicates that bail cannot be modified, the first appearance judge is without authority to do so under the plain meaning of the rule.

The purpose of a nonadversarial first appearance hearing is to determine whether there is probable cause to support the arrest, advise the defendant of certain rights, and to set a bond. When a judge issues an arrest warrant, he or she has determined that probable cause exists. Once the person is arrested pursuant to the

warrant, the first appearance judge does not make an independent determination of whether there was probable cause for the arrest. Nevertheless, the defendant retains the right to have another determination of probable cause at an adversarial preliminary hearing under certain circumstances. Likewise, where the judge issuing the arrest warrant, who is most familiar with the crime and the facts of the case, sets a firm amount of bail bond, the first appearance judge cannot modify that bail bond in a first appearance hearing. The defendant retains the right to have a prompt review of the amount of bail bond at an adversarial hearing. There is no deprivation of the right to pretrial release. Petitioner agrees that all defendants are entitled to a prompt hearing to modify bail; our position is simply that he is not entitled to that adversarial hearing at first appearance without any notice to the State and other interested parties. There is no way to determine when an arrest warrant will be served, or where the defendant will be arrested. It is impractical to require the State to be prepared immediately for an adversarial bond hearing where ever and when ever the arrest may take place. This interpretation advances the clear meaning of the rules of procedure. It correctly balances the rights of the individual to a prompt review of the amount of bail fixed by the judge when the arrest warrant is issued with the need to present evidence relevant to the defendant's history and the circumstances of the crime at an adversarial hearing.

ARGUMENT

WHEN A JUDGE ISSUING AN ARREST WARRANT SETS A BAIL AMOUNT AND INDICATES THAT IT CANNOT BE MODIFIED, THE FIRST APPEARANCE JUDGE CANNOT MODIFY THAT FIRM BAIL BOND

Respondents in this case contend that they have an absolute right to an adversarial bond hearing within 24 hours of arrest at their first appearance hearing. Petitioner responds that this position is not only unsupported by the law, it is illogical and impractical. We agree that all defendants, whether arrested with or without a warrant, are entitled to a prompt review of the amount of bail bond. We disagree that such a review must be held immediately at first appearance under the particular circumstances presented in this case, namely, when a judge has by prior order set a bail bond in an arrest warrant and further indicated that it cannot be modified at first appearance.

"The standards and procedures for arrest *and pretrial detention* are derived from the fourth amendment." Gerstein v. Pugh, 420 U.S. 103, 111 (1975). (emphasis added) There is no due process right involved.

> Gerstein held that the Fourth Amendment, rather than the Due Process Clause, determines the requisite post-arrest proceedings when individuals are detained on criminal charges. Exclusive reliance on the Fourth Amendment is appropriate in the arrest context, we explained, because the Amendment was "tailored explicitly for the

> criminal justice system," and its "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases." 420 U.S., at 125, n. 27. Furthermore, we noted that the protections afforded during an arrest and initial detention are "only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." Ibid.

U.S. v. James Daniel Good Real Property, 510 U.S. 43, 47 (1993). In Gerstein, the Court specifically held that a first appearance probable cause hearing was not required in cases where the defendant is arrested on a warrant. This is so because there has already been a judicial determination that probable cause exists for the arrest. There has always been different treatment of persons arrested pursuant to arrest warrants.

The right against unreasonable seizures of the person by arrest and pretrial detention, derived from the fourth amendment, is the same as the right under the Florida Constitution. Art. I, §12, Fla. Const. The right granted by our state constitution "...shall be construed in conformity with the 4th Amendment to the United States Constitution..." Id.

There are several purposes of a first appearance in Florida other than to determine probable cause for the arrest. One such use is for bond to be fixed if it has not already been set. There exists no constitutional right to an adversary bond hearing at

first appearance. Since there is no fourth amendment right to a Gerstein hearing for arrest warrant cases, there is no constitutional right to an immediate hearing for the other functions of first appearance. See, United States v. Montalvo-Murillo, 495 U.S. 711 (1990)(No constitutional violation to delay first appearance bond hearing for several days, no right to release for violation of time limits of 18 U.S.C. §3141-3150.)

In Stack v. Boyle, 342 U.S. 1 (1951), the Court held that the proper procedure to deal with bail issues was to file a bail reduction motion and to appeal the denial of such motion. "It is highly important that such preliminary matters as bail be disposed of with as much finality as possible in the District Court where the case is to be tried...(because) it is...best informed..." Id. Part of the reasoning behind this lies in the very nature of bail. A decision on bail is not a one time, fixed ruling. The issue of pretrial release is an ongoing process. It is a process where each party may invoke the detailed criminal procedures and have the conditions of release modified.

To the extent that a defendant could claim a due process right to be considered for bail, there exists no requirement that this consideration be at first appearance when a bond amount has been set by a magistrate and can be promptly modified upon the filing of a motion. Procedural rules providing for expedited hearings and review complies with any and all due process requirements.

An initial setting of bond at first appearance is independent from the procedural mechanism provided to review or modify the bail bond at a subsequent adversarial proceeding. There is no requirement to determine probable cause at first appearance when the defendant is arrested on an arrest warrant, and yet a defendant retains the ability to challenge probable cause at a subsequent adversarial hearing if he is not charged within 21 days. Fla.R.Crim.P. 3.133(b) This is mirrored in the determination of bail. A defendant has the right to have a judge set bail bond at a nonadversarial hearing, whether that is when the warrant is issued or at first appearance. After that initial setting of conditions of release, the defendant may have a prompt review of the bail bond amount at an adversarial bond hearing. He is not entitled to an adversarial bond hearing at the first appearance hearing immediately upon arrest.

This reflects the practical considerations inherent in the situation as well. Once an arrest warrant is issued, there is no way to determine when or where it will be served. In Mr. Norris' case, the warrant was issued on October 7, 1998, but not served until March 28, 1999. In many instances, defendants are arrested great distances away from the places where the crimes were committed, within Florida, out of state, or even out of the country. Unlike the defendant, the State has no ability to control where the defendant is located upon arrest. The State is entitled

to reasonable notice prior to a hearing to determine whether a bail bond will be modified. Defendants are entitled to at least three hours' notice before bond can be increased, and the State is entitled to the same notice before a hearing to reduce a bail. See, Fleming v. Cochran, 694 So.2d 131 (Fla. 4th DCA 1997); Meridian v. Cochran, 654 So.2d 573 (Fla. 4th DCA 1995).

Even in this age of computers and fax machines, it is not uncommon for the actual arrest warrant and supporting affidavits to be unavailable in the few hours between an arrest and first appearance. Nothing in the transcripts of the first appearance hearings in these related cases indicates that the trial judge had a copy of or reviewed these documents. The witnesses to the crime may not be transported to this proceeding depending on when and where the defendant is arrested. Victims, law enforcement personnel and other interested parties have a right to be heard. If an adversarial bond hearing must be held at first appearance despite a magistrate's order that bail bond be set at a firm amount, they will not get that opportunity. A hearing to reduce an established bail bond is clearly adversarial, and all parties deserve notice of such a hearing. See, Stansel v. State, 297 So.2d 63 (Fla. 2d DCA 1974).

Petitioner is not suggesting that the bail bond set by the judge issuing the arrest warrant is permanently fixed. We are simply arguing that in those few instances where a defendant is

arrested pursuant to an arrest warrant, and the judge has set an amount of bond, and further indicated by his judicial order that the bond should not be modified by the first appearance judge, the defendant does not have a right to have that amount modified immediately upon arrest. Instead, he must request a prompt hearing to modify bail after all interested parties have been notified. This approach strikes the appropriate balance between the competing interests at stake.

Petitioner reiterates its position that the rule of procedure is clear. Florida Rule of Criminal Procedure 3.191(d), states: "(1)...No judge or a court of equal or inferior jurisdiction may modify or set a condition of release, unless the judge:...(D) is the first appearance judge *and was authorized* by the judge initially setting or denying bail to modify or set conditions of release. (emphasis added) The obvious corollary of this rule is that where the first appearance judge is *not* authorized by the judge initially setting bail to modify the terms of release, he or she cannot do so.

The title of the rule quoted above is "Subsequent Application for Setting or Modification of Bail". In this instance, the subsequent judicial review of bail <u>is</u> the first appearance, for the judge issuing the warrant has already made a prior judicial determination as to the appropriate amount of bond. The trial judge of equal or lesser jurisdiction had no authority under the

rule to modify the bond amount.

There are good reasons for this rule. "The purpose of the rule [3.131(d)] is to prevent forum shopping and to keep bail hearings before the judge with the most knowledge of the case whenever practical. To that end, the rule specifically delineates which judges have authority to set or modify bail after a prior decision on the matter. It is quite clear that an alternate judge...is not permitted by the rule to alter the bail status concerning a defendant." State v. Paterno, 478 So.2d 420 (Fla. 3 DCA 1985) This Court has long established that the proper procedure for reducing bail is to return to the same judge that set the bail in the first instance, and argue relevant factors to that judge. State ex rel Scaldeferri v. Sandstrom, 285 So.2d 409 (Fla. 1973). The rule contemplates that this application for modification of bail can be had with as little as three hours' notice. Fla.R.Crim.P. 3.131(d)(2). As Judge Goshorn found based upon his twenty years' experience on the bench, "...the reason the judge issuing an arrest warrant may want to restrict the authority of the first appearance judge to modify a bond amount is because the issuing judge has a unique knowledge of the defendant or of the facts of the case." Norris v. State,737 So.2d 1240, 1242 (Fla. 5th DCA 1999). There is no basis to suggest that the Circuit Judges of the Fifth Circuit set the amounts of their bail bonds on arrest warrants capriciously or without due consideration

of relevant criteria as counsel for Respondent claims.[2]

In no other instance would this Court permit such second guessing of the judge's rulings. It is axiomatic that a trial court's determination is entitled to a presumption of correctness. An accused seeking a reduction of bail must adduce sufficient evidence to overcome the presumption of correctness. Rawls v. State, 540 So.2d 946 (Fla. 5th DCA 1989). The amount of bail or conditions of release may not be modified without a showing of good cause, which usually means additional facts. Kelsey v. McMillan, 560 So.2d 1343 (Fla. 1st DCA 1990); Keene v. Cochran, 654 So.2d 573 (Fla. 4th DCA 1995). The judge issuing an arrest warrant is entitled to the same deference.

Respondents place great emphasis on semantic arguments that make no difference, or that weave whole cloth from a single button. Whether an arrest is pursuant to a "capias" or an "arrest warrant" does not alter the plain meaning of the rule. Like the words "bail" and "bond", these words are interchangeable in common usage. There is no difference in the two for the purposes of this argument. Likewise, the fact that rule 3.121(a)(7) requires that an arrest warrant be "endorsed with the amount of bail" does not mean that this determination is a mere suggestion. From this

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[2]The chart provided from another case not before this Court comparing the arrest warrant bail amounts with ultimate conviction rates may speak more to the difference in the burdens of proof of probable cause and beyond a reasonable doubt than to lend credence to Respondent's conclusions.

single word "endorse", Respondent argues that this means something less than "set", and then makes the leap that there is no authority for a judge issuing an arrest warrant to set an amount of bail as a firmly fixed amount. If that were true, there would be no need for the rule to indicate that the first appearance judge has to be "authorized by the judge initially setting or denying bail to modify or set conditions of release" in order to be able to modify the amount of bail. Although the word "endorse" has several meanings, including to recommend, as in to endorse a candidate, the more apt meaning here is "to place one's signature on a contract or other instrument to indicate approval with its contents or terms." American Heritage Dictionary (1981). When a judge issues an arrest warrant, and endorses the amount of bail as firm, it is not a suggestion, but a judicial order. Petitioner contends that in this instance, the issuing magistrate has initially set the bond, which cannot be modified unless the first appearance judge is authorized by the issuing judge to modify conditions of release. That is what the rule provides.

Finally, Petitioner maintains its position that the validity of the administrative order is essentially a red herring. Florida Rule of Judicial Administration 2.020(c) defines an administrative order as "a directive necessary to administer properly court affairs but not inconsistent with the constitution or with court rules and administrative orders entered by the

supreme court." See e.g., Administrator, Retreat Hosp. v. Johnson, 660 So.2d 333, 339 (Fla. 4th DCA 1995); State v. ex rel Department of Health v. Upchurch, 394 So.2d 577, 579 (Fla. 5th DCA 1981). Florida Rule of Judicial Administration 2.050(b)(2), provides that: "The chief judge shall exercise administrative supervision over all courts within the judicial circuit in the exercise of judicial powers and over the judges and officers of the courts. . . . The chief judge may enter and sign administrative orders, except as otherwise provided by this rule." See also, State v. Soud, 685 So. 2d 1376, 1378 (Fla. 1st DCA 1997). Therefore, whether this administrative order is a valid exercise of the chief judge's authority in turn depends upon whether it correctly interprets the rules and statutes it relies upon. Petitioner contends that since the administrative order conforms with the constitution and court rules, it is valid. Compare, Payret v. Adams, 471 So.2d 218 (Fla. 4th DCA 1985)(Where administrative order inconsistent with Rule 3.131, that portion of order that is inconsistent is struck.) Respondent claims that the administrative order "effectively eliminates bond determinations at first appearance", but the language of the order does not support that claim. In full compliance with the rules of procedure, the administrative order merely states that when a judge issues an arrest warrant or capias, that judge must establish an amount of bond, which cannot be changed by any other

judge except the issuing magistrate, "or with the consent of same". This provision does not conflict with rule 3.131(d), which states that no judge of equal or inferior jurisdiction may modify or set a condition of release unless the judge imposed the conditions of bail, is the chief judge of the circuit, is the trial judge, or is the first appearance judge and was authorized by the judge initially setting or denying bail to modify conditions of release. Like any other judicial order, this order is presumed correct and must be interpreted in a manner conducive to upholding its validity. The order specifically refers to the rule, and merely reiterates that the first appearance judge cannot modify a bail bond set by another judge without that judge's authorization. Since there is no conflict, the order is valid.

The judge issuing the arrest warrant has found probable cause for the arrest, has been fully informed of the circumstances of the crime, set a bail amount and indicated on the face of the arrest warrant that the bail amount should not be modified. This act is the original setting of the bail bond. In those few instances when the judge issuing an arrest warrant indicates that bail cannot be modified, the first appearance judge is without authority to do so under the plain meaning of rule 3.131(d)(1)(D). To obtain further judicial review of the amount of bail, defendants are entitled to a prompt adversarial bond hearing after notice to all parties.

CONCLUSION

Based upon the foregoing argument and authority, Petitioner respectfully requests this Honorable Court to reverse the district court's decision in this case.

Kellie ~~A. Nielan~~
Assistant Attorney General
FL Bar #618550

Belle B. Schumann
Assistant Attorney General
FL. Bar # 397024
444 Seabreeze Blvd. 5th Floor
Daytona Beach, FL 32118
(904) 238-4990

Counsel for State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief has been furnished by U.S. Mail to the Hon. William T. Swigert, Sr., at 110 N.W. 1st Avenue, Ocala, FL 34475, to Hon. Peyton Hyslop, at 20 N. Main Street, Room 340, Brooksville, FL 34601, to Assistant Public Defender Elizabeth Osmond, at 20 N. Main Street, Brooksville, FL 34601, and to A.R. Mander, III, Greenfield, Mander, Hanson, Murphy and Dwyer, at 14217 Third Street, Dade City, FL 33523, this 2nd day of March, 2000.

Belle B. Schumann
Belle B. Schumann
Assistant Attorney General