IN THE SUPREME COURT OF THE STATE OF FLORIDA

SC CASE NO. SC09-2335

DCA CASE NO.4D09-2335

**STATE OF FLORIDA,**

Petitioner,

vs.

**ARTHUR BLAIR,**

Respondent.

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Petitioner, THE STATE OF FLORIDA, was the prosecution and Respondent, ARTHUR BLAIR, was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State. In this brief, the symbol "A" will be used to denote the bond hearing transcript, and “B” will denote the Fourth District’s opinion below.

## STATEMENT OF THE CASE AND FACTS

Respondent was arrested for misdemeanor DUI and released on his own recognizance. The State entered a nolle prosse on the misdemeanor case. The State then filed a felony information. The court clerk mailed Respondent a notice indicating that Respondent was required to appear in court for the felony case on March 10, 2008. However, the notice sent to Respondent the week before was returned to the clerk as being undeliverable. Respondent later appeared at the courthouse on Gun Club Road. Apparently, it was at this time that the Respondent was told that the court date had been cancelled and that the misdemeanor

case had been nolle prossed. Respondent alleged that he was not told that his misdemeanor case was re-filed as a felony.

The court clerk mailed Respondent a notice that a "status-check" hearing on Respondent's felony case was scheduled for September 16, 2008. That notice was returned to the court clerk as being undeliverable. On September 16, 2008, the felony status-check hearing was held, and Respondent failed to appear. On April 13, 2009, Respondent was arrested on a capias warrant. On June 10, 2009, Respondent appeared before the Honorable John J. Hoy. Counsel moved for bond or for the release of Respondent on his own recognizance.

During the bond hearing, Respondent testified that: he did not know the nolle-prossed misdemeanor case had been re-filed as a felony; because of the itinerant nature of his life, he did not have a regular mailing address; the address Respondent gave to the police upon his arrest was his ex-wife's home address; Respondent later learned that his ex-wife had directed the Post Office to return mail sent to Respondent at her address from the courts; Respondent believed the case against him had been nolle prossed; Respondent had appeared in court, as instructed on February 28, 2008, and was told that the hearing had been cancelled; and at some point, Respondent had a police officer check for open warrants and was told there were none outstanding.

Ultimately, the trial court denied Respondent bond. The trial court endorsed the State's argument that the notice was sufficient because the notices of hearing were mailed to the address Respondent had provided to the police upon arrest.

On July 15, 2009, the Fourth District Court of Appeal issued an opinion in this matter. The Court discussed the decision in Ricks v. State, 961 So. 2d 1093, 1093-94 (Fla. 5th DCA 2007), indicating:

> The court in Ricks v. State, 961 So.2d 1093, 1093-94 (Fla. 5th DCA 2007), appears to have relied on pre-Paul cases to reach the same conclusion as Bradshaw, that a court may order pretrial detention based solely on a finding of a willful failure to appear 'without determining whether conditions of release are appropriate.' Id. (citing Wilson v. State, 669 So. 2d 312, 313 (Fla. 5th DCA 1996)). We certify conflict with this aspect of Ricks.

Blair v. State, 15 So. 3d 758 (Fla. 4th DCA 2009). The Fourth District Court of Appeal specifically certified conflict with another district court of appeal. Accordingly, jurisdiction is invoked under Art. V, § 3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(iv).

Petitioner sought this Court's discretionary jurisdiction to review the lower court's decision in this case. On October 16, 2009, this Court accepted jurisdiction to review this case.

## SUMMARY OF THE ARGUMENT

Petitioner maintains that the trial court in this case could properly impose pretrial detention based solely on a

finding of a willful failure to appear without explicitly determining whether conditions of release were appropriate. Respondent's due process rights were not violated, since Respondent knew what the hearing was about, Respondent testified that his failure to appear was not willful, and defense counsel argued that Respondent's failure to appear was not willful. To find that the trial court did not abide by the pretrial detention statute and the Florida Constitution simply because the trial court did not state the "magic words" (i.e., "assure the presence of the accused at trial") places form over substance in this particular instance. Contrary to what the Fourth District Court of Appeal held, the proceedings in this case fulfilled the spirit of both Art. I, section 14 of the Florida Constitution and section 907.041, Florida Statutes.

## ARGUMENT

**WHETHER THE TRIAL COURT MAY ORDER PRETRIAL DETENTION BASED SOLELY ON A FINDING OF A WILLFUL FAILURE TO APPEAR WITHOUT EXPLICITLY DETERMINING WHETHER CONDITIONS OF RELEASE ARE APPROPRIATE.**

### I. Standard of review

The standard of review of a case dealing with certified conflict is de novo. Nelson v. State, 875 So. 2d 579, 581 (Fla. 2004).

### II. Discussion on the merits

Respondent was initially arrested for a misdemeanor DUI and then was released on his own recognizance. Petitioner entered a nolle prosse on the misdemeanor case. Petitioner then filed a felony information on the DUI. The trial court clerk mailed Respondent a notice indicating that Respondent was required to appear in court for the felony case on March 10, 2008. However, the notice that had been sent to Respondent the week before was returned as being undeliverable. Later, Respondent appeared at the courthouse for the misdemeanor case. It was at this point in time that the Respondent was told that the court date had been cancelled and that the misdemeanor case had been nolle prossed.

The court clerk later mailed Respondent a notice that a “status-check” hearing on Respondent’s felony case was scheduled for September 16, 2008. That notice was also returned to the

court clerk as being undeliverable. On September 16, 2008, the felony status-check hearing was held, and Respondent failed to appear. On April 13, 2009, Respondent was arrested on a capias warrant. On June 10, 2009, Respondent appeared in court. At that point in time, defense counsel moved for bond or for the release of Respondent on his own recognizance.

Respondent alleged that he did not receive notice that his misdemeanor case had been re-filed as a felony, nor did he receive notice of a court date for the felony DUI. Ultimately, the trial court denied Respondent bond. The trial court endorsed the State's argument that the notice was sufficient because the notices of hearing were mailed to the address Respondent had provided to the police upon arrest.

Respondent filed a petition for writ of habeas corpus in the Fourth District Court of Appeal. He alleged that his failure to appear was not willful and that he never received notice of the changed court date. The Fourth District held that the trial court did not find the failure to appear willful. Further, the appellate court held that the trial court improperly ordered pretrial detention without making a finding that "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 Fourth District certified conflict with the Fifth District Court of Appeal in Ricks v. State, 961 So.2d 1093 (Fla. 5th DCA 2007). The Fourth District's focus in this case deals with the application of section 907.041(4)(c)7. This subsection states that the trial court may impose pretrial detention if:

> 7. The defendant has violated one or more conditions of pretrial release or bond for the offense currently before the court and the violation, in the discretion of the court, supports a finding that no conditions of release can reasonably protect the community from risk of physical harm to persons or assure the presence of the accused at trial.

Section 907.041(4)(c)7, Fla. Stat. (2008). The Fourth District also considered Article 1, § 14 of the Florida Constitution:

> 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 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.

West's F.S.A. Const. Art. 1 § 14. Further, Rule 3.131(a), Florida Rules of Criminal Procedure, states:

> (a) Right to Pretrial Release. 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 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.

Section I, Art. 14 of the Florida Constitution, section 907.041(4)(c)7, Florida Statutes (2008), and Rule 3.131, Florida Rules of Criminal Procedure, all list the conditions that a trial judge may utilize in order to impose pretrial detention. Petitioner contends that the condition that applies in this particular case is "assure the presence of the accused at trial."

The Fourth District below found that the trial court in this case failed to make any findings in order to substantiate the imposition of pretrial detention, in violation of the Florida Constitution and Florida Statutes. According to the Fourth District, the trial court should have made explicit findings in the record that pretrial detention was necessary in this case where 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.

In relation to the application of the three possible reasons for ordering pretrial detention, the appellate court relied upon this Honorable Court's decision in State v. Paul, 783 So. 2d 1042 (Fla. 2001). The Fourth District held that State

v. Paul "makes clear that these requirements apply even where a defendant has violated pretrial release conditions, such as through a failure to appear." Blair v. State, 15 So. 3d 758 (Fla. 4th DCA 2009).

In State v. Paul, this Court held that a trial court's discretion to impose pretrial detention is limited by the pretrial detention statute, section 907.041(4)(c)7, Florida Statutes. This Court stated:

> We agree with the reasoning of Paul. The Florida Constitution guarantees the right to bail with limited exceptions, and in accordance with this guaranty, the Legislature has created a comprehensive and carefully crafted scheme for setting forth the circumstances under which a defendant may be held in pretrial detention (footnote omitted). Accordingly, although the breach of a bond condition provides the basis for revocation of the original bond, the trial court's discretion to deny a subsequent application for a new bond is limited by the terms of the statute. Further, there is nothing that prevents the State from seeking pretrial detention for the newly charged offense if the State can establish the necessary criteria pursuant to section 907.041(4)(b).

State v. Paul, 783 So. 2d at 1051. This Court adopted the Fourth District's reasoning in Paul v. Jenne, 728 So. 2d 1167 (Fla. 4th DCA 1999):

> [T]he court's authority to deny bond pending trial is circumscribed by the provisions of Florida Statute section 907.041. The legislature has specifically delineated and narrowly limited those circumstances under which bond may be denied. We have no difficulty divining the legislative intent to curtail the court's power to deny bail except in certain instances, in light of the constitutionally guaranteed right to bail. To effectuate its express

> policy of assuring the detention of 'those persons posing a threat to the safety of the community or the integrity of the judicial process,' the legislature enacted a pretrial detention statute, which sets forth a comprehensive list of conditions that will qualify a defendant for detention without bail. By providing clear and reasonable guidelines for courts to follow in considering denial of this basic and fundamental right, the legislature may very well have been motivated by a desire to achieve uniformity and fairness in judicial determinations of bail entitlement, as well as to provide trial courts with a means of identifying persons whose criminal histories and patterns of behavior signal a danger to society.

State v. Paul, 783 So. 2d at 1051, quoting Paul v. Jenne, 728 So. 2d at 1171-1172.

In Ricks v. State, 961 So.2d 1093 (Fla. 5th DCA 2007), the defendant alleged that his failure to appear in court for pretrial proceedings was the product of oversight and poor communication with the Public Defender's Office. The Fifth District held that this was insufficient grounds to warrant a hearing on the motion to set bond forfeiture or to set new bond. Id. at 1093-1094. Further, the Fifth District held that "[g]enerally, if there is a failure to appear, the court may simply commit a defendant to custody without determining whether conditions of release are appropriate." Thus, the Fifth District determined that the trial court did not need to make specific findings to support the imposition of pretrial detention.

The Ricks court relied upon Wilson v. State, 669 So. 2d 312 (Fla. 5th DCA 1996). In Wilson, the defendant was committed to

custody without an opportunity of addressing the reasons for why she failed to appear in court. In that particular case, the Fifth District held that there was an abuse of discretion in committing the defendant to custody without addressing the issue of whether her failure to appear was knowing and willful. Id. at 313. The appellate court relied upon Rule 3.131(g), Florida Rules of Criminal Procedure, since the trial court committed the defendant to custody prior to trial. The Fifth District held that "[g]enerally, if there is a failure to appear, the court may simply commit a defendant to custody without determining whether conditions of release are appropriate. However, implicit in the rule is that the failure to appear occurred after reasonable notice, and was willful." Id. at 313.

While Petitioner is not challenging the legitimacy of this Court's holding in State v. Paul, Petitioner contends that there are certain situations where ruling that the trial court must make specific findings of fact as to the application of pretrial detention leads to the application of the principle "form over substance." Petitioner contends that the instant case is one of those situations.

In Nelson v. State, 875 So. 2d 579 (Fla. 2004)(Lewis J., dissenting), this Court held that a facially sufficient postconviction motion alleging the ineffectiveness of counsel for failing to call certain witnesses must include an assertion

that those witnesses would in fact have been available to testify at trial. However, in a dissenting opinion, Justice Lewis wrote that the requirement that the "magic words" "was available for trial" be included in the motion created an additional pleading element, not required by the applicable rule. Justice Lewis continued:

> The addition of a fourth element, requiring a party to specifically allege the 'magic words' that a party 'was available for trial,' elevates form over substance, as the underlying component is, of necessity, the premise already included within these three elements. A valid claim of ineffective assistance of counsel requires (1) a demonstration of counsel's deficiency and (2) proof of prejudice to the movant. Failure to include the four 'magic words' should not defeat an otherwise valid claim.

Id. at 585-586. Justice Anstead agreed with Justice Lewis's dissenting opinion, stating "that the addition of this fourth element elevates form over substance because the witness's availability at trial is presumed when an allegation of counsel's failure to present a witness at trial is made." Id. at 584.

In Department of Highway Safety and Motor Vehicles v. Dehart, 799 So. 2d 1079 (Fla. 5th DCA 2001), the Fifth District held that a breath test result affidavit, when combined with an agency inspection report, showed that the State Department of Highway Safety and Motor Vehicles and the agency substantially complied with the applicable statutes and rules relating to the

inspection and maintenance of the intoxilyzer used for a motorist's breath test, thus supporting administrative suspension of the motorist's license, even though the statute required that the date of the performance of the last required maintenance be included in the affidavit, and the affidavit provided the date of the last agency inspection instead. See Dep't of Highway Safety and Motor Vehicles v. Nikollaj, 780 So. 2d 943 (Fla. 5th DCA 2001)(holding that where driver received adequate notice of the reason for his license suspension, the circuit court misapplied the law by elevating form over substance in quashing the license suspension); and In re Report of Supreme Court Workgroup on Public Records, 825 So. 2d 889 (Fla. 2002)(the requirement that all requests for access to judicial records be in writing is not intended to be a procedural obstacle, drowning the requestor in excessive formalities and deterring individuals from seeking access to judicial records; records custodians must not place form over substance, and as long as the custodian can identify the record requested, the custodian must produce the record.).

In the case at bar, the transcript of the June 10th, 2009 bond hearing clearly establishes that the Respondent was well aware of why the trial court ordered pretrial detention. The focus of the entire bond hearing was Respondent's arrest and no bond for failure to appear in court. (Exh. A). Respondent

testified at the hearing that he had not received notice of the court appearance, and that was why he did not show up. (Exh. A, pp. 3-10). Defense counsel argued that Respondent was not provided with notice of the court appearance, and that was why he did not appear as required. Defense counsel also argued that the failure to appear was not willful. (Exh. A, pp. 10-14).

In contrast, Petitioner argued that Respondent did not get notice of the hearing because he provided the court with a false address. According to the Petitioner, had Respondent provided the court with a valid address, Respondent would have received notice. (Exh. A, p. 14). Instead, Respondent gave an address that he had not lived at for at least eight years. (Exh. A, p. 14). The Petitioner also argued that Respondent was not entitled to an OR release because the case dealt with a felony. (Exh. A, p. 14).

Ultimately, the trial court stated: “Address on the PC is 129 Swain Boulevard. The address on the booking sheet is 129 Swain Boulevard. Be held without bond. That’s where the notices were sent…” (Exh. A, p. 14). Granted, the trial court did not make specific findings that Respondent would be held without bond in order to “assure the presence of the accused at trial.” However, virtually the entire transcript (fifteen pages) deals with whether or not Respondent’s failure to appear in court was willful.

Since the entire bond hearing dealt with whether or not Respondent's failure to appear in court was willful, it is obvious that Respondent was informed of the reason for the hearing, and as a consequence, the reason for the trial court ruling the way that it did. To now require the trial court to say the "magic words" (i.e., "assure the presence of the accused at trial"), would place form over substance.

Further, Respondent's due process rights were not violated. A lower tribunal provides due process if the complaining party was given notice and an opportunity to be heard. State Farm Fire and Cas. Co. v. Lezcano, --- So.3d ----, 2009 WL 3271705 (Fla. 3d DCA 2009). Here, Respondent was given notice of the bond hearing as well as an opportunity to present a defense against pretrial detention.

Respondent's constitutional rights were not violated, since Respondent knew what the hearing was about, Respondent testified that his failure to appear was not willful, and defense counsel argued strenuously that Respondent's failure to appear was not willful. Further, Respondent knew that he had been charged with felony DUI and that the State objected to bond in this case. Respondent's due process rights were properly fulfilled by the trial court proceedings. To find that a trial court did not abide by the pretrial detention statute and the Florida Constitution places form over substance in this particular

instance. The proceedings in this case fulfilled the spirit of Art. I, section 14 of the Florida Constitution, as well as of section 907.041, Florida Statutes.

## CONCLUSION

Wherefore, Petitioner respectfully requests that this Honorable Court reverse the Fourth District's ruling in this matter and hold that, on the facts of this particular case, the trial court did not need to explicitly determine whether conditions of release were appropriate.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Merits Brief" has been furnished by U.S. Mail to: DANIEL COHEN, Assistant Public Defender, counsel for Respondent, 15th Judicial Trial, 421 Third Street, West Palm Beach, FL 33401, on November _____, 2009.

_____
Of Counsel

## CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced, on November ___, 2009.

_____
MYRA J. FRIED