

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Thomas Parker,
Petitioner,

vs.

Case No. SC01-1013

State of Florida,
Respondent.

_____)

PETITIONER'S REPLY BRIEF ON THE MERITS

Alan H. Schreiber
Public Defender
17th Judicial Circuit

Diane M. Cuddihy
Chief Assistant Public Defender
Florida Bar No. 434760
201 S.E. 6th Street
North Wing - Third Floor
Ft. Lauderdale, Fl. 33301

Attorney for Petitioner

Table of Contents

Page(s)	
Table of Citations and Other Authorities	iii
Summary of Argument	2
Argument	3
ARTICLE I SECTION 14 OF THE FLORIDA CONSTITUTION REQUIRES SPECIFIC FINDINGS BEFORE BOND CAN BE DENIED	4
THE PROBABLE CAUSE BURDEN OF PROOF IS INSUFFICIENT TO DENY THE CONSTITUTIONAL RIGHT TO BOND	7
FLORIDA STATUTE 903.0471 VIOLATES PROCEDURAL DUE PROCESS BY PERMITTING BOND REVOCATION AND PRETRIAL DETENTION WITHOUT HEARING OR NOTICE	8
Conclusion	11
Certificate of Service	13
Certificate of Type Size and Style	13

Table of Citations and Other Authorities

	Page(s)
<u>Department of Law Enforcement v. Real Property</u> , 588 So. 2d 957 (Fla. 1991)	7
<u>Gerstein v. Pugh</u> , 420 U.S. 103 (1975)	9,10
<u>Hauser v. Manning</u> , 719 So. 2d 307 (Fla. 3d DCA 1998)	9
<u>Matthews v. Eldridge</u> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)	7
<u>Russell v. State</u> , 71 So. 27 (Fla. 1916)	4
<u>State v. Arthur</u> , 390 So. 2d 717 (Fla. 1980)	4,7
<u>State v. Paul</u> , 783 So. 2d 1042 (Fla. 2001)	5,7,9
<u>State v. Stalder</u> , 630 So. 2d 1072 (Fla. 1994)	6
<u>Fla.Stat. §903.0471</u> , (2001)	<u>passim</u>
<u>Fla.Stat. §907.041</u> , (2001)	<u>passim</u>
<u>Fla. Stat. §907.041(4)(c)</u> , (2001)	<u>passim</u>
Article I, section 14 <u>Fla.Const.</u> (1968)	5
Article 1, section 14 <u>Fla.Const.</u> (1983)	<u>passim</u>

Statement of the Facts

Petitioner, Thomas Parker, relies on the facts set forth in his Initial Brief on the Merits.

SUMMARY OF ARGUMENT

The district court erred in denying habeas relief and finding constitutional Florida Statute 903.0471. Section 903.0471 is unconstitutional because it authorizes pretrial detention without the findings required by Article I, section 14 of the Florida Constitution. The statute narrows an individual's substantive right to pretrial release. The statute does not require an arrest, the filing of charges, or prosecution for an offense committed while on bond. More importantly, it does not require a finding that no condition of bond can protect the community from the risk of physical harm, assure the attendance of the defendant, or assure the integrity of the judicial process.

Additionally, the statute's probable cause standard violates substantive due process. Probable cause is too low a standard by which to deny a constitutional liberty interest. The risk of error inherent in the use of a probable cause standard is not justified by any countervailing government interest. Finally, section 903.0471 violates procedural due process by authorizing pretrial detention without hearing.

ARGUMENT

Respondent argues in its answer brief that Florida Statute 903.0471 is constitutional and therefore the district court's opinion should be affirmed. First, respondent states that Article I, section 14 of the Florida Constitution does not require any specific findings before pretrial detention can be ordered. (AB at page 6). Second, respondent argues that section 903.0471 affords substantive due process because the probable cause standard utilized is sufficient to revoke pretrial release. (AB at page 10). Third, respondent argues that section 903.0471 comports with procedural due process. Respondent claims that there is no need for an adversarial hearing; a simple finding by a magistrate is all that is constitutionally required to revoke pretrial release. (AB at page 12).

Respondent's last two arguments are founded on its classification of section 903.0471 as a revocation of pretrial release statute, rather than as a pretrial detention statute. Respondent's classification of section 903.0471 as solely a bond revocation statute is incorrect. The language of the statute directs that a court may revoke pretrial release "and order pretrial detention." Accordingly, the specific language of section 903.0471 authorizes pretrial detention. However, the statute creates an exception to the constitutional right to pretrial release without regard to Article I, section 14 of the Florida Constitution. There is no constitutional exception to the right to pretrial release founded on probable cause that a defendant

committed a crime while on pretrial release from a prior arrest.

ARTICLE I, SECTION 14 REQUIRES SPECIFIC FINDINGS BEFORE BOND CAN BE DENIED

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.

Contrary to respondent's claim, Article I, section 14 of the Florida Constitution **does** require particular findings before the right to pretrial release can be denied. If a person is charged with a capital offense or one punishable by life imprisonment, a court must specifically find that the proof of guilt is evident or the presumption of guilt is great before ordering pretrial detention. Russell v. State, 71 So. 27 (Fla. 1916); State v. Arthur, 390 So. 2d 717, 710 (Fla. 1980). In any other circumstance, bond can be denied only if the court specifically finds that no condition of release can protect the community from risk of physical harm, assure the presence of the accused at trial or assure the integrity of the judicial process. Section 903.0471 provides for pretrial detention without the constitutionally mandated findings.

Petitioner agrees that the constitution is the "supreme law of the land." (AB

at page 5). Petitioner also agrees that the people of Florida amended Article I, section 14 in 1983.¹ Finally, petitioner agrees that the will of the people is unmistakable when effected by constitutional initiative in which citizens vote directly. The will of the people is less evident in the legislative process wherein citizens participate indirectly through their representatives. (AB at page 5). In 1983, the people of the State of Florida, through individual vote, amended Article I, section 14 and limited the right to pretrial release in specific instances. By enacting section 903.0471, the Florida Legislature ignored the constitutional right to pretrial release enacted by the people.

As this Court noted in State v. Paul, 783 So. 2d 1042, 1045 (Fla. 2001), the right to bail provided by the Florida Constitution is “more explicit” than that established by the United States Constitution. This Court held that the right to deny bond is not discretionary, but is circumscribed by the constitution and statutes enacted in accordance with the constitution. “The Florida Constitution guarantees the right to bail with limited exceptions, and in accordance with this

¹ Article I, Section 14 of the Florida Constitution was amended effective January 1, 1983. Prior to that amendment, the section read:

Until adjudicated guilty, every person charged with a crime or violation of municipal or county ordinance shall be entitled to release on reasonable bail with sufficient surety 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.

Article I, section 14 Fla.Const. (1968).

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.” Id. at 1051.

Florida Statute 903.0471 overlooks the explicit, limited exceptions to pretrial release set forth in Article I, section 14 of the Florida Constitution and is therefore unconstitutional.

Respondent suggests that the trial court’s order of pretrial detention is constitutional based on the “third” requirement for pretrial detention relating to the integrity of the judicial process. (AB at page 8). However, both the trial court’s order and the record are devoid of any finding that pretrial detention was necessary to assure the integrity of the judicial process. By justifying the trial court’s order as necessary to assure the integrity of the judicial process, the respondent is implicitly conceding that such a finding is required to deny bond. This argument exposes the constitutional infirmity of the statute. Section 903.0471 does not require a finding that the integrity of the judicial process be impugned before bail can be denied. Neither the district court nor the respondent can interpret section 903.0471 consistent with Article I, section 14, in light of the express wording of the statute and the Legislature’s intentional omission of language consonant with the Article I, section 14. See State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994).

THE PROBABLE CAUSE STANDARD IS INSUFFICIENT TO DENY THE CONSTITUTIONAL RIGHT TO BOND

Respondent next argues that probable cause is sufficient to justify pretrial detention because a defendant on pretrial release, accused of violating a condition of release, is similar to a probationer violator. (AB at page 10). Respondent ignores the fact that a defendant on pretrial release is presumed innocent and has a constitutional right to bond. The right to pretrial release “embodies that principle that the presumption of innocence abides in the accused for all purposes while awaiting trial.” Paul, 783 So. 2d at 1045, (citing Arthur, 390 So. 2d at 719).

Section 903.0471, Florida Statutes, authorizes a court to revoke bond and order pretrial detention upon finding probable cause that a defendant committed a new offense while on bond. The probable cause standard violates substantive due process because it risks error and denies a constitutional right without justification.

In Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991), this Court recognized that the standard of proof in a criminal case is subject to substantive due process protections under the Florida Constitution. In Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976), the United States Supreme Court held that when determining the constitutionality of a standard of proof, a court must 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. 424 U.S. at 335.

Section 903.0471 fails the Eldridge test. The right to pretrial release is a constitutional liberty interest. Section 903.0471 violates due process by only requiring a finding of probable cause before denying pretrial release. The risk of error in a hearing utilizing a probable cause standard is high because pretrial detention can be ordered even if a defendant is not arrested or prosecuted for the crime allegedly committed while on bond. 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 the defendant's presence. Lastly, the state's interest in using a probable cause standard is not related to the protection of the community. Under the statute, probable cause that a defendant committed any minor offense while on pretrial release justifies pretrial detention. The state's interest in using the probable cause standard is equally unrelated to concern over the defendant's future appearance or the integrity of the judicial process; those concerns are conspicuously absent from the statute.

The respondent fails to address Matthews v. Eldridge in its answer brief.

**FLORIDA STATUTE 903.0471 VIOLATES PROCEDURAL
DUE PROCESS BY PROVIDING FOR PRETRIAL
DETENTION WITHOUT HEARING OR NOTICE**

The respondent argues that section 903.0471 need not afford the same

procedural due process as section 907.041. Respondent claims that because section 903.0471 is only used when a defendant has violated a condition of bond, bond is discretionary. (AB at page 11) The respondent relies on Hauser v. Manning, 719 So. 2d 307 (Fla. 3d DCA 1998), for the proposition that a trial court has the inherent authority to deny bond if a condition of bond has been previously violated. (AB at page 11) The respondent fails to point out that Hauser was disapproved by this Court in Paul. Paul, 783 So. 2d at 1052.

In addition, Florida Statutes section 907.041, which applies to pretrial detention determinations, affords the same procedural due process regardless of whether the hearing is held immediately after arrest or after a defendant has violated a condition of bond:

Not only has the Legislature provided comprehensive guidelines for when an original application for bail may be denied, but in doing so, it has also addressed the question of when a defendant violates the conditions of bond, which is the precise issue now before us. Section 907.041(4)(b)(1) specifically applies to a defendant who has “previously violated conditions of release.”

Paul, 783 So. 2d at 1047. Procedural due process does not depend on whether pretrial detention is ordered initially or after bond has been revoked.

Finally, respondent argues that adversary safeguards are not necessary for a pretrial detention determination. (AB at page 12). Respondent relies on the United States Supreme Court’s holding in Gerstein v. Pugh, 420 U.S. 103 (1975), wherein

the Court held that an informal procedure is justified by the “lesser consequences of a probable cause determination.” Pretrial detention without bond was not at issue in Gerstein. Moreover, pretrial detention without bond is not a “lesser consequence” as contemplated by the Gerstein decision.

In Gerstein, the court held that a neutral and detached magistrate must make a probable cause determination before detaining a defendant upon the filing of an information by the state, but that adversary safeguards were not necessary. It is important to note that the court acknowledged that probable cause procedures would vary among the states and that probable cause determinations “may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release.” Gerstein, 420 U.S. at 124. This language confirms that the court was not addressing bond issues and understood that bond issues were distinct. The court recognized that state courts may both determine probable cause and bond at one hearing, but that they were separate issues.

Gerstein was decided based on the requirements of the Fourth Amendment to the United States Constitution. Gerstein, 420 U.S. at 120. Gerstein did not address the standard of proof needed for the denial of bond, nor the procedural due process required before bond can be denied. Gerstein was not decided based on the Eighth Amendment’s prohibition against excessive bail. More importantly, Gerstein does not address Article I, section 14 of the Florida Constitution, which

provides more protection than the federal constitution.

Section 903.0471 violates procedural due process. Florida Statutes section 907.041, provides procedural safeguards to insure due process of law before holding a defendant without bond. Section 907.041 also provides strict time constraints for filing a motion for pretrial detention, holding a hearing, and rendering a ruling. 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 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. Accordingly, section 903.0471 violates procedural due process because it does not provide for adequate and meaningful notice to a defendant, nor does it provide for a full and fair opportunity to be heard.

CONCLUSION

The district court erred in denying habeas relief and finding constitutional Florida Statute 903.0471. Section 903.0471 is unconstitutional because it authorizes pretrial detention without the findings required by Article 1, section 14. In addition, the statute's probable cause standard violates substantive due process.

Probable cause is too low a standard by which to deny a constitutional liberty interest. The risk of error inherent in such a low standard is not justified by any countervailing government interest. Finally, section 903.0471 violates procedural due process by authorizing pretrial detention without hearing.

Respectfully submitted,

Alan H. Schreiber
Public Defender
17th Judicial Circuit

Diane M. Cuddihy
Chief Assistant Public Defender
Florida Bar No. 434760
201 S.E. 6th Street
North Wing- Third Floor
Ft. Lauderdale, Fl. 33301
(954) 831-8814
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was delivered by U.S. Mail to Celia Terenzio, Bureau Chief, and Joseph Tringali, Assistant Attorney General, Department of Legal Affairs, 1515 N. Flagler Dr., West palm Beach, Fl. 33401, this 6th day of March, 2002.

Diane M. Cuddihy

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Rule 9.100(1) Fla.R.App.P., counsel for the Petitioner hereby certifies that the instant brief has been prepared with 14 point in Times New Roman font.

Diane M. Cuddihy