In the Supreme Court of Florida

CASE NO. SC19-1182

BRANDON THOURTMAN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

The District Court, on a petition for habeas corpus, held that it was legal to hold Brandon Thourtman without bond even though the state had never presented evidence sufficient to prove that his guilt was evident, or the presumption was great, under the first sentence of Article I, Section 14 of the Florida Constitution. The District Court certified conflict with other District Court decisions holding that the state must meet this burden of proof before holding a defendant without bond.

In this brief, the letter "R." followed by a numeral will indicate the page number in the record on appeal. All emphasis in quotations is supplied unless the contrary is indicated.

STATEMENT OF FACTS AND CASE

On November 9, 2018, police arrested Brandon Thourtman for one count of armed robbery with a firearm. (R. 24-25). That crime, if proven, is punishable by life in prison. § 812.13(2)(a), Fla. Stat. (2019).

The next day, the first appearance judge ordered that Mr. Thourtman be held without bond.[1] The first appearance judge observed that the standard bond amount for the offense of armed robbery is "no bond," but made no finding that "the proof of guilt is evident or the presumption is great." Art. I, § 14, Fla. Const.

At arraignment on November 30, 2018, the state filed an information with the same charges (R. 28). Defense counsel attempted to address Mr. Thourtman's detention, only to be shut down by the trial court:

> [DEFENSE COUNSEL]: Was there a finding of proof evidence presumption great in F18-22561?
>
> THE COURT: There doesn't have to be a proof [evident] presumption [great] finding, we've already gone through this, counsel. Hold no bond on the issue.

[1] Court reporters are not present at first appearances in Miami-Dade, which are instead video-recorded. A copy of that video was submitted to the District Court and should be in the record before this Court. The relevant segment of the video begins at 1:18:35.

(R. 30).

The trial court was referring to a recent case, *State v. Albert Moore*, in an identical procedural posture, involving the same judge and defense counsel, where the trial court had likewise refused to set conditions for pretrial release despite there being no finding that proof of guilt was evident nor that the presumption was great. (R. 63-66). In that case, Mr. Moore had his first appearance on August 3, 2018. (R. 39). A petition for habeas corpus was taken from that case, which the Third District denied as moot (R. 83) because an *Arthur*[2] hearing was conducted on November 19, 2018. (R. 69-72). In that case, defense counsel had provided the trial judge with what are now the conflicting opinions, *Ysaza v. State*, 222 So. 3d 3 (Fla. 4th DCA 2017), and *Gray v. State*, 257 So. 3d 477 (Fla. 4th DCA 2018). (R. 65).

In Mr. Thourtman's case, defense counsel returned to the issue to get a clear ruling for another habeas corpus petition:

> [DEFENSE COUNSEL]: I apologize, if we could go back to Mr. Thourtman.
>
> THE COURT: No, I've moved on.
>
> [DEFENSE COUNSEL]: Did Your Honor just say that no proof evident presumption great finding needs to be made before he's held no bond.

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[2] Named after *State v. Arthur*, 390 So. 2d 717, 719 (Fla. 1980).

> THE COURT: Rafael Sanchez Montoya, I'm keeping it no bond based on the bond Judge's ruling.
>
> [DEFENSE COUNSEL]: But Your Honor, the bond Judge did not find proof evident presumption great,—
>
> THE COURT: Counsel—
>
> [DEFENSE COUNSEL]: — it is illegal to hold him no bond.
>
> THE COURT: Bond Judge left no bond, I'm not changing it at this time. You can put in the appropriate motion if you believe there is one to be put in. I'm moving on now.

(R. 30-31).

Another habeas corpus petition was taken to the District Court. (R. 3-17). The state again relied on mootness (R. 69-70), when an *Arthur* hearing was held on December 6, 2018, almost a month after Mr. Thourtman's arrest. (R. 225-325). The judge presiding over the *Arthur* hearing found:

> I find there, certainly, may be proof evident presumption great for the fact that this defendant committed the robbery that day.
>
> I do not find, however, that the proof is evident or presumption great that that robbery was committed with a firearm. So, therefore, I do not find that the State has met their burden for the crime as charged.

(R. 321). Robbery without a firearm is not a crime punishable by life in prison. § 812.13(2)(b)&(c), Fla. Stat. (2019). The judge therefore ordered Mr. Thourtman placed on house arrest with "total lockdown." (R. 322).

The District Court ordered the state to respond to the merits of the petition. (R. 93). The state responded that *State v. Arthur* did not require it to prove that guilt was evident or the presumption is great before a defendant was held without bond and that *Ysaza* and *Grey* were wrongly decided. (R. 95-113).

This time the District Court acknowledged that the issue was capable of repetition yet evading review. (R. 333). By a 2-1 vote, the District Court denied habeas corpus, issuing a 25-page opinion. (R. 327-52). The District Court's arguments will be discussed in the argument section of this brief. For present purpose, suffice it to say that it opined that a defendant can be held without any conditions for pretrial release pending an *Arthur* hearing without the state proving that proof of guilt is evident or the presumption is great. (R. 352). Judge Emas dissented, noting that the holding of *Arthur* was otherwise. (R. 353-63).

SUMMARY OF THE ARGUMENT

Mr. Thourtman lost his liberty for a month based on nothing more than probable cause. Once his case was brought to an *Arthur* hearing, the state could not meet its burden of proof. In the opinion below, the District Court ratified such procedures for every defendant in a similar situation.

The constitutional text should decide this issue: every person has a right to reasonable conditions for pretrial release unless the "proof of guilt is evident or the presumption is great." Proof means proof. Evident means evidence. The District Court's appeal to "reasonableness" is an excuse to abandon that constitutional text and replace it with something a judge considers reasonable. Such judicial activism allows a court to invert constitutional language, as occurred in this case when Mr. Thourtman was held without the constitutionally required proof.

The District Court's thinking got tangled in the idea of two *Arthur* hearings, one at first appearance and one later. Mr. Thourtman's claim is not that there has to be an *Arthur* hearing at first appearance. His claim is that the state has to meet its burden of proof before he could be held without bond. The District Court confused the facts of this case—that here he was held without bond at first appearance—with the constitutional claim.

Having confused the issue, the District Court then amplifies that error by overstating what it considers to be the impracticality of the constitutional text. Initially, the difficulty of having an *Arthur* hearing at first appearance does not

mean anyone will necessarily be released. The second sentence of Article I, Section 14, implemented by the pretrial detention statute and rule, provides a specific tool to allow a court to hold a defendant without an *Arthur* hearing if the defendant presents a danger to public safety, to witnesses, or of flight. Moreover, such a motion for pretrial detention allows the state time to marshal its evidence for an *Arthur* hearing. Additionally, the constitutional text does not bar the state from presenting its evidence at a hearing after first appearance. The state now being ready to present its evidence at such a later hearing is the good cause/change in circumstances necessary for the state to move for a modification of bond. Finally, should the state surprise the defense and present evidence sufficient to meet its burden at first appearance hearing, the need for a second hearing is caused by basic due process right to notice and an opportunity to prepare, not the constitutional text of Article I, Section 14.

This discussion is largely redundant with *State v. Arthur*, 390 So. 2d 717, 719 (Fla. 1980), which relied on the constitutional text. What the District Court labeled "dicta" is part of *Arthur*'s logical syllogism: the right to pretrial release is based on the presumption of innocence, that presumption attaches at the beginning of a criminal case, therefore, the state must meet its burden of proof before a defendant loses that constitutional right.

The District Court approved Mr. Thourtman losing his liberty based on mere probable cause. The constitutional text says differently.

ARGUMENT

I.
THE PLAIN LANGUAGE OF ARTICLE I, SECTION 14, REQUIRES PROOF OF GUILT BEFORE ONE CAN BE HELD WITHOUT BOND.

The facts of this case show the problem. The state presented only a triple-hearsay probable cause affidavit. (R. 24-25). The state filed no pretrial detention motion claiming that Mr. Thourtman was a danger to society, or was likely to flee or harass any witnesses. Based solely on that affidavit, the trial court ruled that Mr. Thoutman had lost his constitutional right to reasonable conditions of pretrial release and ordered him held without bond. A month later, when the trial court eventually held an *Arthur* hearing, the state was unable to meet its burden of proof. The net result of this process, which the District Court approved as the standard procedure for all defendants going forward, was that Mr. Thourtman was illegally held without bond for about a month.

The District Court misunderstood Mr. Thourtman's claim, which was driven by the facts of his case. Mr. Thourtman does not claim that the state must always conduct an *Arthur* hearing at first appearance. He does not claim there must always be two *Arthur* hearings. And he does not claim a defendant cannot be held under the separate pretrial detention scheme.

Mr. Thourtman's claim is simple: that for a court to hold someone under the exception in the first sentence of Article I, section 14, the state must have already

met its burden of showing that "proof of guilt is evident or the presumption is great." That was not done in his case, and his detention was therefore illegal.

The plain language of the Florida Constitution, Article I, Section 14, resolves this issue and shows the error in the District Court's result. The language of the first sentence of that section contains two conditions precedent on holding a person without bond—(1) a crime for which, if convicted, the person could be punished by a life or death sentence, and (2) proof of guilt:

> 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.

Art. I, § 14, Fla. Const.[3] "Proof of guilt" requires proof—competent evidence or testimony. Proof is defined in terms of evidence:

> **1.** The establishment or refutation of an alleged fact by evidence; the persuasive effect of evidence in the mind of a fact-finder.
> **2.** Evidence that determines the judgment of a court.
> **3.** An attested document that constitutes legal evidence.

PROOF, Black's Law Dictionary (11th ed. 2019). "This Court in construing constitutional language approved by the voters often "looks to dictionary definitions of the terms because we recognize that, 'in general, a dictionary may provide the popular and common-sense meaning of terms presented to the voters.'"

[3] The last sentence of this constitutional provision is omitted here because it will be quoted and discussed *infra*, at pages 13-14.

Advisory Opinion to Governor re Implementation of Amendment 4, 45 Fla. L. Weekly S10, S13 (Fla. Jan. 16, 2020) (quoting indirectly *Advisory Op. to Governor—1996 Amendment 5*, 706 So. 2d 278, 282 (Fla. 1997)).

The next part of the phrase confirms that requirement. For "proof of guilt" to be "evident" requires evidence. The Latin roots of "evident" and "evidence" are identical.[4] Likewise, there is no presumption of guilt in the criminal justice system. Quite the opposite. *See, e.g., Broadnax v. State*, 57 So. 2d 651, 652 (Fla. 1952) ("in all criminal prosecutions the person charged with crime, under our judicial system, is entitled to the presumption of innocence."). Therefore, for the presumption of guilt to be great, the state must have presented sufficient evidence to reverse this default presumption. *Id*. ("the presumption of innocence accompanies a defendant through each step of the trial until same is overcome by testimony establishing the guilt of the accused beyond a reasonable doubt.").

Arthur held that the state could meet this burden "by presenting the evidence relied upon by the grand jury or the state attorney in charging the crime. This evidence may be presented in the form of transcripts or affidavits." *State v. Arthur*, 390 So. 2d 717, 720 (Fla. 1980). This Court has never decided whether an arrest affidavit would be sufficient, and this case does not present that question. The triple-hearsay arrest affidavit in this case is clearly inadequate. (R. 24-25).

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[4] *Compare* https://www.merriam-webster.com/dictionary/evidence *with* *https://www.merriam-webster.com/dictionary/evident*.

Instead, the District Court held that Mr. Thourtman could be detained without bond even though the state had not met its burden of proof.

the text of Article I, Section 14, however, requires both proof and evidence before a person loses the constitutional right to reasonable conditions for pretrial release. "First and foremost, this Court must examine the actual language used in the Constitution. If that language is clear, unambiguous, and addresses the matter in issue, then our task is at an end." *Advisory Opinion to Governor re Implementation of Amendment 4*, 45 Fla. L. Weekly at S13 (quoting *Graham v. Haridopolos*, 108 So. 3d 597, 603 (Fla. 2013)). This Court follows "the 'supremacy-of-text principle': 'The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.' Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012)." *Id*. at S13.

The District Court purported to examine the plain text of the amendment, but asked the wrong question, focusing on whether there must be one or two *Arthur* hearings:

> Article I, section 14's requirement that the State show "proof evident, presumption great" obviously presupposes a hearing on that issue. But there is nothing in the text that requires both a preliminary Arthur hearing at first appearance and a subsequent full Arthur hearing, as held by Ysaza and Gray.

Thourtman, 275 So. 3d at 733. (R. 338).

True enough, the text does not say how many *Arthur* hearings can occur. It simply says that a defendant has the right to pretrial release "unless" the state has made its proof. If the state can present that proof at a first appearance hearing, then at that point the defendant loses the right to pretrial release. If not, the defendant retains that right. If the state can make that proof later, then the defendant loses the right at that time.[5] The number of *Arthur* hearings is the wrong question. The answer to how many *Arthur* hearings could occur is: as many as new evidence justifies. *Bent v. State*, 271 So. 3d 1212, 1213 (Fla. 5th DCA 2019) (granting new *Arthur* hearing when the evidence evolved).

The right question is: what must the state show as a precondition for the loss of the constitutional right to reasonable conditions of pretrial release? The constitutional text's use of the word "unless" means that the state meeting its burden is the precondition, irrespective of how many hearings it takes. This conclusion follows directly from the plain language of the constitutional text and this Court's acknowledgment in *Arthur* that the constitutional "unless" creates a condition precedent or an "if/then" requirement: "Under this provision [Art. I, § 14], <u>if</u> the proof is evident or the presumption great that a person accused of a capital offense or an offense punishable by life imprisonment is guilty of the offense charged, <u>then</u>

[5] For why the state will be able to move for modification of bond and secure an *Arthur* hearing after first appearance, contrary to the District Court's misperception to the contrary, see section II.B., *infra*, at pages 21-23.

the accused is not entitled to release on reasonable bail as a matter of right." *Id*. at 718.

Asking the wrong question, and therefore receiving no textual answer, gave the District Court license to bend the constitutional text through a "reasonable accommodations" rationale, allowing the District Court's own ideas of what is reasonable to trump the plain language:

> One such reasonable accommodation is to recognize that a trial judge has the discretion to detain a defendant accused of a crime punishable by capital punishment or life imprisonment for a reasonable time in order to conduct the hearing necessary to determine whether the defendant is entitled to be released under the "capital or life offense" exception. Certainly, nothing in the text supports Gray and Ysaza's holdings to the contrary.

Thourtman, 275 So. 3d at 734. (R. 340). That last sentence is dead wrong. The constitutional text specifies that a person cannot be held without conditions for pretrial release "unless" the state has submitted its "proof of guilt." Art. I, § 14, Fla. Const.

The District Court excuses its judicial activism by pointing to this Court promulgating Rule 3.132, which allows defendants to be held without pretrial release conditions pending a hearing on a state motion for pretrial detention. *Thourtman*, 275 So. 3d at 734. (R. 340-41). There are two exceptions to the right to pretrial release. The first is the exception in the first sentence of Article I, Section 14, discussed in *Arthur* and quoted above. The second is in the second

sentence, added in 1982:

> 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.

Art. I, § 14, Fla. Const.

Note the difference in language. This second exception has no language requiring "proof of guilt," or proof of anything, as a precondition for detention. That difference in language highlights the District Court's error. It read the two sentences of Article I, Section 14 to function the same, despite different language. Different language must be read differently. *State v. Mark Marks, P.A.*, 698 So. 2d 533, 541 (Fla. 1997) ("The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended.") (quoting *Department of Professional Regulation v. Durrani,* 455 So. 2d 515, 518 (Fla. 1st DCA 1984)); *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) ("When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded."). The District Court ignored the plain text of the constitution when it read the first sentence, which requires "proof," to function the same as the second sentence, which does not.

The constitutional text unambiguously requires "proof of guilt" before a person loses the right to pretrial release under the first sentence of Article I,

Section 14. That ends the inquiry. "Reasonableness" can be subjective, usually dependent on whose ox is being gored. In this case, it led the District Court to contort and invert the plain constitutional text by authorizing deprivation of liberty without bond and without any proof by the state beyond mere probable cause. That holding removes the "proof of guilt" phrase from the constitutional text. *But see Edwards v. Thomas*, 229 So. 3d 277, 284 (Fla. 2017) (holding that constitutional and statutory interpretation use the same rules of construction and "[w]e are required to give effect to "every word, phrase, sentence, and part of the statute, if possible, and words in a statute should not be construed as mere surplusage." Moreover, "a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.") (quoting *Goode v. State*, 30 So. 461, 463 (Fla. 1905)).

At one point in its opinion, the District Court worries that Mr. Thourtman's habeas petition would have the "unintended consequence of causing the existing high standard required for 'proof evident, presumption great," to lapse into simple probable cause." 275 So. 3d at 736. (R. 345). That is exactly what the District Court's opinion does by allowing Mr. Thourtman and similarly situated defendants to be held without bond for extended periods of time based on nothing more than probable cause. The constitutional text says otherwise.

II.
THE DISTRICT COURT'S CONCERN WITH PRACTICALITIES DOES NOT JUSTIFY OVERRIDING THE PLAIN CONSTITUTIONAL TEXT.

The District Court justifies its decision in part based on what it perceives as "impractical," as opposed to what the constitutional text says:

> Given the high level of evidence needed to establish "proof evident, presumption great," and the summary nature and early timing of first appearances, it is simply impractical to hold even a preliminary Arthur hearing at first appearance. Within 24 hours of arrest, the State normally has not had time to marshal, document, and organize its evidence. Most often, the assistant State attorney who will prosecute has not been assigned. The information has not been drafted. Like the inchoate information itself, the "transcripts and affidavits" upon which the information will be based do not yet exist. The victim has not given a formal statement. Much of the physical evidence has not been collected, much less analyzed or tested. And the defendant, who was arrested only 24 hours before first appearance, has not had the time to prepare to allow him to meaningfully exercise his constitutional right to present evidence.

Thourtman, 275 So. 3d at 735. (R. 343).

One implicit value judgment behind the District Court's argument is that it is somehow improper for a defendant to be released pretrial if the state might eventually meet its burden of proof. The same could be said for any crime, whether punishable by life or not. There are many cases where the state will meet its burden of proof at a trial in which the defendant had been released pending the trial. The constitution does not allow deprivation of liberty on an assumption that

the state will meet its burden. The constitution places a higher value on liberty unless and until the state meets its burden of proof. The District Court is not free to reweigh that constitutional decision.

The District Court's practical concerns are amplified by three misperceptions. First, the District Court does not understand how the two clauses of Article I, Section 14, work together. Second, the District Court does not take into account the law governing state motions for modification of pretrial release conditions. Finally, the District Court assumes that two *Arthur* hearings would be required in every case. Each misperception will be considered in turn.

A. THE TWO CONSTITUTIONAL EXCEPTIONS TO THE RIGHT TO PRETRIAL RELEASE WORK TOGETHER.

The District Court's impracticality argument assumes that if the court does not find the state has met its burden of "proof evident or its presumption is great" at first appearance, the defendant will automatically be released into the community. Nothing could be further from the truth.

Initially, a first appearance judge may set a high monetary bond based on the seriousness of charges that are punishable by life in prison or death. *See* § 903.046(2), (Fla. Stat. 2019) (listing factors "the court shall consider," including: "The nature and circumstances of the offense charged" and "The nature and

probability of danger which the defendant's release poses to the community."); Fla. R. Crim. P. 3.131(b)(3) (same language except with a "may" rather than "shall").

Second, the District Court does not consider the interplay between the first and second exceptions in Article I, Section 14. The second exception, quoted above,[6] is the basis for the pretrial detention statute, which allows for pretrial detention without bond if any of the following criteria are met:

> 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 condition of release will reasonably prevent the obstruction of the judicial process;
> . . . .
>
> 5. 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;

§ 907.041(4)(c), Fla. Stat. (2019).

Thus, the second exception and the pretrial detention statute cover the three reasons for concern about a defendant being released on pretrial detention.

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6 *See* Section I, *infra* at page 14.

Conversely, this Court has already held that such concerns are not part of the constitutional text of the first sentence:

> The state, however, urges us to hold that the denial of bail is mandatory because of the high risk that one accused of an offense punishable by death or life imprisonment will flee the court's jurisdiction. What the state presents us with are arguments on the wisdom of a construction which we find the plain language of section 14 simply will not support.

State v. Arthur, 390 So. 2d 717, 719 (Fla. 1980).

The District Court's impracticality argument ignores that the state has this second tool specifically designed to address concerns such as public safety. As a practical matter, the question whether the state can be reasonably expected to meet its *Arthur* hearing burden at first appearance is academic. In any case where there is legitimate concern about release pending an *Arthur* hearing, the state can file a motion for pretrial detention. Just the filing of the motion gives the state a full work week (extendable for a second full work week for "good cause") to prove the need for pretrial detention. Fla. R. Crim. P. 3.132(a) (five days); Fla. R. Jud. Admin. 2.514(a)(3) (excluding weekends and holidays for time periods stated as less than seven days). Moreover, the state need not even file a motion at first appearance. Under the rules, the state can receive an additional three working days by announcing that it plans to file a motion. *See* Fla. R. Crim. P. 3.132(a).

The most comprehensive explanation of the difference between the two exceptions in Article I, Section 14, is found in *Preston v. Gee*, 133 So. 3d 1218

(Fla. 2d DCA 2014). *Preston* differentiates the two exceptions to the right to pretrial release contained in the first and second sentences respectively:

> *Arthur* thus established the proper construct for applying the constitution's first exception to the right of pretrial release, applicable only when the accused is charged with a capital offense or an offense punishable by life imprisonment. On the other hand, the pertinent statute [§ 907.041] and rules of procedure [Fla. R. Crim. P. 3.132] appear to be directed to the second, more general, exception to the right of pretrial release, which may be applied regardless of the charge.

Id. at 1222.

After a scholarly discussion of the differences between the two exceptions, the *Preston* opinion discusses how the state may use the two exceptions in combination:

> [W]hen seeking to have the accused detained pretrial, the State may proceed under either of the exceptions to the constitutional right of pretrial release. It may attempt to show that under *Arthur* its case is sufficient to shift the burden on the appropriateness of pretrial release to the accused, or it may file a motion for pretrial detention under rule 3.132 and undertake the showings required by that rule.

Id. at 1225.[7]

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[7] Although unnecessary for this Court's jurisdiction, *Preston* is a third case conflicting with the decision below. In *Preston*, a first appearance judge found that proof was evident or the presumption was great based on the arrest affidavit. 133 So. 3d at 1225. The Second District held the affidavit in that case was insufficient. *Id*. at 1227. The Second District therefore granted its habeas petition, instructing the trial court to set conditions for pretrial release unless the state moved for pretrial release or met its burden at an *Arthur* hearing. Under the Third District's

And at any time during the time allocated to hold a pretrial detention hearing, the state may switch exceptions and calendar an *Arthur* hearing to meet its burden of proof. That fact leads directly to the District Court's second misconception.

B. FOLLOWING THE CONSTITUTIONAL TEXT DOES NOT LIMIT THE STATE TO AN *ARTHUR* HEARING AT FIRST APPEARANCE OR NEVER.

According to the District Court:

> But it gets more Kafkaesque. The defendant is therefore entitled to release pending the *Arthur* hearing. But once the defendant is granted pretrial release, the State can only seek to modify the terms of release by showing changed circumstances. *Saravia v. Miami-Dade Cty*., 129 So. 3d 1163, 1165 (Fla. 3d DCA 2014). Thus, under the defendant's interpretation, the defendant must be released pending an *Arthur* hearing, but once the defendant is released, an Arthur hearing cannot normally be held. As Yosarian says in the novel, "[t]hat's some catch, that Catch-22." Joseph Heller, Catch-22 56-57 (Alfred A. Knopf, Inc. 1995).

275 So. 3d at 736. (R. 345).

As much as undersigned counsel appreciates the literary references to works by Joseph Heller and Franz Kafka, the constitutional text does not create any such "Catch-22" or living nightmare. The error is the District Court's assumption that if

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analysis in this case, habeas would have been denied and Mr. Preston held without bond until whenever the state gets around to scheduling an *Arthur* hearing.

the state does not meet its *Arthur* burden at first appearance it is foreclosed from doing so in the future. The law in Florida is to the contrary.

The state can move for modification of pretrial release conditions at any time after first appearance with as little as three hours' notice. Fla. R. Crim. P. 3.131(d)(2). All that is required is "good cause," which has been interpreted to mean that "the state must present evidence of a change in circumstances or information not made known to the first appearance judge." *Keane v. Cochran*, 614 So. 2d 1186, 1187 (Fla. 4th DCA 1993).

The very language of the District Court's own prior opinion, which it cites, does not support its proposition:

> To satisfy the "good cause" requirement in this rule, the State must present evidence of a change in circumstances or new information not made known to the first appearance judge that warrants the increase or revocation of bond. . . . Evidence that was available to the State at the time of first appearance does not qualify as "new" information and therefore does not justify the subsequent revocation of bond and imposition of pretrial detention.

Saravia, 129 So. 3d at 1165. It takes very little for information to be considered new. *See Calixtro v. McCray*, 858 So. 2d 1079 (Fla. 3d DCA 2003) (state filing notice that defendant qualified as a habitual offender was a change in circumstances, even though defendant's prior convictions, which resulted in that status, were known by the first appearance judge).

The basis of the District Court's impracticalities argument is that the state will not have its evidence available in time for a first appearance hearing:

> The facts of this case are typical in showing the difference between the evidence available at first appearance (conclusory hearsay within hearsay within hearsay) and the evidence available at the full *Arthur* hearing (testimony, sworn statements of victims and witnesses, the confession of the defendant, photographs, videos, GPS records, and other physical evidence).

Thourtman, 275 So. 3d at 735. (R. 343-44).

By the District Court's own argument, the lack of available evidence at first appearance is good cause for the state to later move for an *Arthur* hearing when that evidence becomes available.

The genius of both Heller's and Kafka's work is their illustration of how modern society can be dehumanizing. Neither author would find anything worth writing about in Florida's system of allowing the state to move for modification of pretrial release conditions whenever the evidence becomes available that will allow it to attempt to meet its burden of proof. Conversely, both authors might have a great deal to say about Mr. Thourtman's situation: the state presents no proof but nevertheless a presumptively innocent man is held without bond on the ground that proof of his guilt is evident or the presumption is great.

C. FOLLOWING THE CONSTITUTIONAL TEXT WILL NOT USUALLY RESULT IN TWO *ARTHUR* HEARINGS.

The District Court claims that the conflict cases "interpretation of Article I, section 14, as requiring two bond hearings including a preliminary finding at first appearance of 'proof evidence, presumption great' reflects a significant innovation in the understanding of Article I, section 14." *Thourtman*, 275 So. 3d at 731-32 (R. 336) (citing *Gray v. State*, 257 So. 3d 477 (Fla. 4th DCA 2018), and *Ysaza v. State*, 222 So. 3d 3 (Fla. 4th DCA 2017)).

The actual decision in *Ysaza* just reiterates the constitutional text that a person cannot be held without bond until the state meets its burden of proof.

> What makes the instant case unique is that the first appearance judge ruled it did not have to make any finding whether the probable cause affidavit established that proof of guilt was evident or the presumption was great. The first appearance judge erred in this regard. To allow the State to hold the defendant without bond pending an *Arthur* hearing with the judge to whom the case would be assigned, the first appearance judge was required to find that the probable cause affidavit (or other materials before the court) established that proof of guilt was evident or the presumption was great.

222 So. 3d at 6. *Gray* is just a reiteration of *Ysaza*. *See* 257 So. 3d at 478-79.

The *Ysaza* court went on to hold that error harmless because the first appearance judge should have made that finding based on the probable cause arrest affidavit. *Id*. *Gray* is similar in that the Fourth District held that, in four separate cases, the probable cause arrest affidavits were sufficient evidence to meet the

"proof of guilt is evident, or the presumption is great" standard at the first appearance hearings. 257 So. 3d at 479.

The *Ysaza* and *Gray* opinions do not give any details of the arrest affidavits in those cases, but we have to assume that those arrest affidavits were direct evidence of guilt and not the triple hearsay in this case. In that context, the Fourth District realized its decision created a fundamental unfairness: at first appearance hearing the defendant would have no opportunity to contest the arrest affidavit. Therefore, due process would require that a defendant have the ability to request a full hearing at a later time. *See, e.g., Valle v. State*, 394 So. 2d 1004, 1007 (Fla. 1981) ("basic due process right . . . that defense counsel in a criminal case be afforded a reasonable opportunity to prepare his case."); *Peevey v. State*, 820 So. 2d 422, 423 (Fla. 4th DCA 2002) ("Adequate time to prepare a defense is inherent to due process and the right to counsel.").

The District Court below is not wrong that at first appearance the state is unlikely to be able to present evidence sufficient to satisfy the "proof of guilt is evident or the presumption is great" standard. 275 So. 3d at 734-35. (R. 341-44). Counsel for Mr. Thourtman said as much to the District Court below. 275 So. 3d at 730, 735. (R. 332, 344). Therefore, the double *Arthur* hearing scenario, rejection of which animates the District Court's entire opinion, is an aberration, not the usual. And in those rare cases where the state surprises a defendant with such evidence at a first appearance hearing, it is due process, not Article I, Section 14,

that requires a second hearing in which the defendant would have adequate notice and an opportunity to prepare.

The District Court took counsel's statements as a concession of impracticality, 275 So. 3d at 730, 735, (R. 332, 344), but that is true only if either the state would have no later opportunity to meet its burden, or if there is no pretrial detention statute and rule that gives a court the ability to hold without bond those who are dangerous, would flee, or would intimidate/threaten witnesses. As noted in the previous two subsections, neither of those suppositions is true.

III.
ARTHUR FOLLOWED THE CONSTITUTIONAL TEXT, AND THAT HOLDING WAS NOT DICTA.

To reach its conclusion, the District Court had to label the holding of *Arthur* as dicta. In addition to the clear "if/then" language from *Arthur* quoted above,[8] that seminal opinion also contains two other clear statements about when a person can lose the right to pretrial release. As Judge Emas points out in dissent, 275 So. 3d at 740 (R. 355), the *Arthur* opinion itself labeled these holdings as such:

> We answer the questions by holding . . . (2) that before the court can deny bail the state must have carried the burden of establishing that the proof of guilt is evident or the presumption great.

State v. Arthur, 390 So. 2d 717, 717 (Fla. 1980).

[8] Section I, *supra*, pages 12-13.

> "We hold, therefore, that before release on bail pending trial can ever be denied, the state must come forward with a showing that the proof of guilt is evident or the presumption is great."

Id. at 720.

The District Court also claims Mr. Thourtman takes the second quotation "out of context" and makes it "orbiter dicta." *Id*. Neither of those accusations are valid, although the first requires this brief to commit the sin of overly-long block-quotes from *Arthur.*

The issue in *Arthur* of which party bore the burden of proof is the issue of what the state had to do before a person loses the constitutional right to pretrial release. The state argued that merely filing an indictment or information was sufficient:

> There is a question, however, as to whether the indictment or information should be deemed to raise a prima facie showing, shifting to the defendant the burden of proving that the proof of guilt is not evident and the presumption not great. The district court followed precedent and held that the indictment shifts the burden to the defendant.
>
> There is a long line of cases which support the state's argument that the accused has the burden of establishing that the proof is not evident and the presumption not great before being entitled to release on bail. This rule originated in *Rigdon v. State*, 26 So. 711 (Fla. 1899), where this Court stated that "(a)t common law ... after an indictment for a capital offense the accused was presumed guilty for all purposes, except that of a trial before a petit jury, and this presumption was so strong as to preclude the party from bail, unless in very exceptional cases." *Id*. at 712. Based on this reasoning the Court held that the indictment was a

> strong prima facie showing that the defendant was not entitled to release on bail. To overcome this showing it was the defendant's burden to present the evidence on which the state intended to rely and rebut it.

State v. Arthur, 390 So. 2d 717, 719 (Fla. 1980) (footnotes omitted).

Arthur rejected that rationale based on a more modern understanding of the presumption of innocence:

> We can no longer ascribe to this procedure. Section 14 of our Declaration of Rights embodies the principle that the presumption of innocence abides in the accused for all purposes while awaiting trial. It should be the state's burden to prove facts which take away the entitlement to bail provided for by article 1, section 14.
>
> Furthermore, as a matter of convenience, fairness, and practicality, it is preferable that the state have the burden of coming forward when the accused seeks release on bail. Presumably the state is in better position to present to the court the evidence upon which it intends to rely.
>
> We hold, therefore, that before release on bail pending trial can ever be denied, the state must come forward with a showing that the proof of guilt is evident or the presumption is great.

Id. at 719-20 (footnote omitted).

That last paragraph is all a part of one holding: the state must not merely file formal charges, but must meet its burden of proof before the constitutional right to release is lost. Far from being out of context, when given the complete quotation above it becomes clear that the last paragraph is the conclusion of a logical syllogism:

> The constitutional right in Article I, Section 14 is based on the presumption of innocence.
>
> The presumption of innocence abides in the accused for all purposes pending trial.
>
> ∴ The state must overcome that presumption by proof before the constitutional right in Article I, Section 14, is removed.

Obitur dicta is defined as "a purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination." *Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975). Far from being dicta, the last paragraph is the logical conclusion of the *Arthur* court's reasoning. Such a logical conclusion is the very opposite of dicta, which is why the *Arthur* opinion itself labels it as a holding.

The District Court again gets tangled because it is asking the wrong question, demanding that *Arthur* answer the question of whether "the defendant is entitled to both 'preliminary' and 'full' *Arthur* hearing." 275 So. 3d at 737 (R. 348). As with the constitutional text itself, the question in *Arthur* is not the number of hearings, but what is the necessary precondition for loss of the constitutional right to pretrial release. And *Arthur* held that the state must meet its burden before that right is removed.

CONCLUSION

The constitutional text says what it says: The only exception to the right to reasonable conditions of pretrial release in the first sentence of Article I, Section 14, is if the state has already met its burden of showing the "proof of guilt is evident or the presumption is great." The District Court's "practical" reasons for not following this constitutional text are misunderstandings of the state's options. The District Court does not recognize that under the second exception to Article I, Section 14, the state has a tool specifically designed to address concerns that some defendants should have no conditions for release. The District Court does not understand that the state will have good cause to move for an *Arthur* hearing after first appearance when it marshals its evidence; the good cause being that it did not present that evidence at first appearance. Most importantly, the District Court does not understand how those two exceptions work together—the motion for pretrial detention giving the state time to marshal its evidence for an *Arthur* hearing.

What the state cannot do under the constitutional text, however, is exactly what the trial court did in this case: hold a defendant without bond on a bare probable cause affidavit and nothing more. And that is the unconstitutional procedure the District Court's opinion allows for every defendant in the Third District. This Court should quash that opinion because it is contrary to the plain constitutional text.

Respectfully submitted,
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CERTIFICATES

I hereby certify that a copy of the above brief was sent by electronic service through the electronic filing portal to counsel for the State of Florida, Magaly Rodriguez, Assistant Attorney General, 1 S.E. 3rd Avenue, 9th Floor, Miami, Florida 33131, at CrimAppMia@myfloridalegal.com and Magaly.Rodriguez@myfloridalegal.com, this twenty-fourth day of February 2020.

I hereby certify that this petition was created in 14-point Times New Roman.

/s/ *John Eddy Morrison*
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