In the Supreme Court of Florida

CASE NO. SC19-1182

BRANDON THOURTMAN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF APPELLANT

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INTRODUCTORY NOTE

In this brief, as in the initial 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.

SUMMARY OF THE ARGUMENT

Rather than address the plain text of the constitution, the state suggests that it must be balanced against other concerns. That is inappropriate; courts follow the plain text. The plain text of Article I, Section 14, says that the state must have met its "proof is evident or the presumption is great" burden in order for a person to lose the right to reasonable pretrial release conditions.

The state's and the district court's concerns stem from forty years ago when that exception to the right to reasonable conditions of pretrial release stood alone and served as a sort of crude pretrial detention scheme. With the 1983 amendment providing a second exception where no conditions of release can protect the community, assure the presence of the accused, or assure the integrity of the judicial process, Florida created a more intelligent and precise pretrial detention scheme that solves any practical concerns about releasing someone who may be dangerous or who might flee.

The state's "burden of pleading" (which really means "burden of incarceration waiting for an *Arthur* hearing") is a throwback to when courts were operating under a presumption of guilt and defendants were incarcerated until they met their burden of proving their innocence. Under modern law, defendants are presumed innocent and have a right to reasonable conditions of release unless and until the state meets its burden of "proof of guilt is evident or the presumption is great." The burden, the presumption, and the custody status are not independent

variables—they are all part of the same equation. *Arthur* was based on that same logic, and nothing has undermined the presumption of innocence in the intervening years.

ARGUMENT

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

The central fact of this case is that Mr. Thourtman was held without bond for a month based on nothing more than a showing of probable cause. The plain language of Article I, Section 14 dictates that a person has a right to reasonable conditions of pretrial release "unless . . . the proof of guilt is evident or the presumption great." Tellingly, the state's brief has almost nothing to say about the plain language of the constitution. The state accuses Mr. Thourtman of a "strict reading of the constitutional provision text," and then disputes it by claiming a competing interest. (Response at 28). The state more fully explains that: "The [district court's] majority understood the competing interests at issue and the necessity to balance them." (Response at 33). In other words, the district court balanced the constitutional text against what it thought was right and decided that the constitutional text loses.

That just can't be. "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*, 288 So. 3d 1070, 1078 (Fla. 2020) (internal quotation from *Graham v. Haridopolos*, 108 So. 3d 597, 603 (Fla. 2013)

omitted). 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*.

Contrary to the state's representations (Response at 28), *United States v. Salerno*, 481 U.S. 739 (1987), did not balance concerns for public safety against the constitutional text. *Salerno* specifically held that there is no comparable federal constitutional text giving a right to pretrial release. *Id*. at 752-55. The Florida Constitution does. Art. I, § 14, Fla. Const.

The word "unless" creates a condition precedent: "Unless . . . the proof of guilt is evident or the presumption is great." Art. I, § 14, Fla. Const. The state does not dispute that "proof" and "evident" require the state to present evidence to reverse the normal presumption of innocence. That language belies the state's claim that nothing dictates when the state must present its evidence. (Response at 6, 19, 23, 27). In the constitutional text, the answer to "when" is: before a citizen loses the right to reasonable conditions for pretrial release.

The state argues that this is a new claim. (Response at 7-8). The very first paragraph of the petition for habeas corpus set out the issue in this case:

> The issue in this original proceeding is whether a criminal defendant can be detained before trial without bond—solely on the "non-bondable" nature of the alleged offense—where the trial court has not made a finding that the "proof of guilt is evident or the presumption is great,"

> an evidentiary burden of proof more stringent than even the beyond-a-reasonable-doubt standard applicable at trial."

(R. 3). That issue has never changed.[1] Discussions of first appearances in the petition and reply are a result of the facts of this case: Mr. Thourtman was illegally detained without bond from his first appearance hearing onward. Contrary to the state's assertions, defense counsel did not "vigorously" argue (Response at 12) that *Arthur* hearings should occur at first appearance. The District Court's opinion reveals that counsel stated quite the opposite. (R. 332, 344).

Mr. Thourtman's argument has always been that detention without bond is unconstitutional "unless [the state has met its burden such that] proof of guilt is evident or the presumption is great," just as the constitutional text reads.

[1] The state also accuses counsel of relying on a slightly different quote from *Arthur*, both of which say the same thing: the state must meet its burden before a person loses the right to reasonable conditions of pretrial release. (Response at 23). Undersigned counsel knows of no requirement to file identical briefs in this Court as in the District Court.

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

The angst that drives the state's (and the District Court's) rush to discard the constitutional text is the idea that if that text means what it says, and if the state cannot meet its proof evident or presumption great burden at a first appearance hearing, someone will be released who is dangerous or likely to flee. Hence, an oft-repeated idea in the state's brief is that the state cannot be expected to meet its constitutional burden under Article I, Section 14 at a first appearance hearing. (Response at 15-19, 34-35, 38-39).

This argument is a throwback to almost forty years ago when the "proof is evident or the presumption is great" exception in the first sentence of Article I, Section 14, stood alone and was used as a sort of crude, inexact, pretrial detention scheme. It did not apply to all persons who might be dangerous or likely to flee if the charges were not punishable by life or death. And it always applied to persons with such charges even if they were unlikely to be a danger or to flee.[2]

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[2] One could question whether this pre-*Arthur* detention scheme would have survived the constitutional analysis in *Salerno*, which found the federal Bail Reform Act constitutional only because "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *United States v. Salerno*, 481 U.S. 739, 750 (1987); *see also id*. at 751 ("When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an

Those concerns have not been valid since 1983 when Article I, Section 14, was amended with a second sentence providing for a pretrial detention scheme: "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. Based on that second sentence, Florida now has a much more intelligent and precise pretrial detention scheme.

Specifically, in section 907.041, Florida Statutes, the legislature created specific criteria for pretrial detention of persons who are likely to not appear (subsection (c)1&3), to obstruct the judicial process (subsection (c)2.), or are threats to public safety. On that last point, the legislature specified pretrial detention for those accused or on probation for dangerous crimes (subsections (c)5&6), those who have previously violated conditions of release (subsection (c)7), those facing enhanced sentencing (subsection (c)8.).

In its brief, the state's only complaint about that statute is that to take away a citizen's liberty it still bears the burden of proof. (Response at 31-32). The state never disputes that under the pretrial detention rule, a defendant can be detained for one-to-two full work weeks pending the state meeting its burden of proof. Fla.

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individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.").

R. Crim. P. 3.132(a), (c). That rule is constitutionally permissible because of the difference in the constitutional text of the second sentence, which has nothing comparable to the precondition "unless" language in the first sentence.

The state claims that pretrial detention is not the issue in this case. (Response at 37). Quite right, and for the same reason that the state's discussion of first appearance hearings is irrelevant. Both of those topics only became relevant because of the district court's and the state's concerns about the inability of the state to muster its evidence to meet the constitutional standard by the time of a first appearance. That is only a problem if there is nothing else the state could do at first appearance to prevent the release of someone dangerous or likely to flee. And the pretrial detention scheme solves that problem with far more precision than the crude pretrial detention scheme that existed pre-*Arthur*.

This Court has turned back a previous attempt by the Third District to circumvent the pretrial detention scheme in *State v. Paul*, 783 So. 2d 1042 (Fla. 2001), where that court declared that any violation of the conditions of pretrial release could result in loss of the constitutional right. *Id*. at 1049-51. In doing so this Court held that the "Legislature by statute has constructed a comprehensive and specific framework setting forth the multiple circumstances under which trial courts may act to deny bail and order pretrial detention." *Id*. at 1052. This Court should similarly reject this attempt to circumvent the pretrial detention statute.

The state's nostalgia for the inexact pre-*Arthur* pretrial detention system extends to its claim that defendants bear the burden "to file a bond application and set the issue for an *Arthur* hearing." (Response at 22; *see also* Response at 13, 19, 22). The state and the district court derive this burden from the pre-*Arthur* case law. (Response at 13-14), (R. 336-37).[3] As one would expect, when the defendant bore the burden of proof, the defendant bore the burden of pleading. Pre-*Arthur*, defendants essentially had to prove their innocence, and therefore had to wait for an opportunity to do so.

Note that the state's claim is not that the defendant now bears the burden of persuasion, nor even the burden of production. *Arthur* made it clear the state bears those burdens. *State v. Arthur*, 390 So. 2d 717, 719-20 (Fla. 1980). Instead, the state's claim is that the defendant bears the burden of a negative pleading. After all, an "application for release" (as the state puts it) is just a defendant pleading that the state cannot meet its burden of proof.

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[3] The state's long discussion of the rules of procedure, both antiquated and modern, is more mysterious. (Response at 15-19). The ancient Rule 3.131 that the state discusses is the forebearer of the modern Rule 3.133(b) governing adversarial probable cause hearings. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 84-85 (Fla. 1972). Probable cause is the wrong issue. There has never been any rule of procedure governing hearings under the first sentence of Article I, Section 14, either before or after *Arthur*. What this lack of a rule proves is difficult to discern. The state's "burden of pleading" is certainly not to be found there.

Of course, the issue is not who has to file the pleading. Whether styled an "application for release" or an "application for detention," the pleading can be easily done orally or produced in a one-page boilerplate document.

The issue is what happens to the defendant in the interim before the parties can assemble their evidence and the court can hold an *Arthur* hearing. This interim can be quite lengthy—Mr. Thourtman was held without bond for a month. As this country discovered through weeks of staying at home (in far more comfortable circumstances than any jail cell), such confinement is maddening.

The state argues that *Arthur* does not inform this discussion because the certified questions it answered do not cover when the state must meet its burden of proof. (Response at 23-25). The second certified question in *Arthur* asked which party bore the burden of proof. 390 So. 2d at 717. Burdens of proofs, presumptions, and custody status are not independent variables in this context; they are all part of the same equation. A burden of proof is the evidence required to change a presumption. A presumption determines custody status unless and until a burden of proof is met.

Pre-*Arthur*, the presumption was one of guilt and defendants were incarcerated based on that presumption unless and until they could prove otherwise. *Arthur*, 390 So. 2d at 719 ("Based on this reasoning [of the pre-*Arthur* case law] 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.").

In placing the burden on the state based on the presumption of innocence, *Arthur* held that this burden had to be met before a person could be held without bond. 390 So. 2d at 719-20 ("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.") (footnote omitted). This holding (and the state does not dispute that it is part of the logical syllogism of *Arthur*) is squarely within the second certified question of *Arthur*.

Once divorced from concerns about dangerousness or fleeing (which are covered by the pretrial detention scheme), the answer to what should happen to the defendant in the interim depends on whether there is a presumption of innocence or guilt. The pre-*Arthur* case law, of which the state is so fond, was based on a presumption of guilt. *Rigdon v. State*, 26 So. 711, 712 (Fla. 1899) ("after an indictment for a capital offense the accused was presumed guilty for all purposes, except that of a trial before a petit jury.").

Arthur, and all modern case law, is based on a presumption of innocence. Nothing has undermined that case law—indeed it is stronger than ever. "The presumption of innocence is a basic tenet of our criminal justice system and attaches to each person charged with a crime. Article I, section 14, Florida

Constitution, gives effect to this presumption." *Parker v. State*, 843 So. 2d 871, 874 (Fla. 2003) (footnote omitted); *see Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016) ("Prior to conviction, the accused is shielded by the presumption of innocence, the 'bedrock[,] axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.'"). The state's brief omits any discussion of the presumption of innocence in describing the holding in *Arthur*. (Response at 24-25).

CONCLUSION

For forty pages, the state discusses antiquated case law and what it considers practicalities. It does not address the plain text of the Article I, Section 14, which embodies the constitutional presumption of innocence. Mr. Thourtman lost his liberty for a month based on only a showing of probable cause. Article I, Section 14, prohibits that result "unless . . . proof of guilt is evident or the presumption great." The state had not met its burden of proof, and therefore his detention was illegal.

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 ninth day of June 2020.

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

/s/ *John Eddy Morrison*
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