SUPREME COURT OF FLORIDA

CASE NO. SC19-1182
LT. NO. 3D18-2433

BRANDON THOURTMAN,

Petitioner,

vs.

DANIEL JUNIOR, et al.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

On November 9, 2018, Petitioner was arrested for armed robbery with a firearm. (A. 4-5). The following day, at the first appearance hearing, the trial court reviewed the arrest affidavit. (A. 4-5). The affidavit stated that Petitioner approached a security guard, placed a firearm to the guard's head, and demanded the guard get on the ground. (A. 5). Petitioner then stole the guard's bus pass and purse and fled on foot. (A. 5). The guard identified Petitioner from a photographic array as the armed robber. (A. 5).

After reviewing the arrest affidavit and recognizing that the charge was a felony punishable by life, the first appearance judge announced, "no bond," and deferred the bond decision until a hearing was held pursuant to *State v. Arthur*, 390 So. 2d 717 (Fla. 1980). (A. 5). This complied with the standard practice taught to trial judges in Florida. (A. 5-6). The hearing lasted two minutes. (A. 6). Neither Petitioner nor his attorney spoke. (A. 6).

On November 30, 2018, Petitioner was arraigned. (A. 6). The State filed an information charging him with robbery using a firearm or deadly weapon. (A. 6). Petitioner requested an *Arthur* hearing. (A. 6). Petitioner also objected to his detention after the first appearance hearing without a preliminary finding that proof of his guilt was evident, and presumption was great. (A. 6). The trial court overruled

the objection. (A. 6). The parties and the trial court agreed to set an *Arthur* hearing. (A. 6).

On December 6, 2018, the trial court held the *Arthur* hearing. The investigating detective testified. (A. 6). A statement by the victim, surveillance video, a GPS record of the victim's mobile telephone, Petitioner's confession, and the photographic lineup were admitted into evidence. (A. 6). The court found that proof of guilt was evident, and the presumption was great that Petitioner robbed the victim. (A. 7). But proof was not evident, and the presumption was not great that Petitioner used a firearm. (A. 7). Since unarmed robbery is not a felony punishable by life, the trial court ordered pretrial release with house arrest and a $25,000 bond. (A. 7).

Three days earlier, on December 3, 2018, Petitioner filed a petition for writ of habeas corpus challenging his detention. (A. 6). At oral argument, Petitioner's counsel conceded that: (1) most often, the State will be unable to offer evidence to show that proof is evident and the presumption is great at the first appearance proceeding; (2) almost always, a defendant will be unable to exercise his constitutional right to present evidence; and (3) under existing law, a full *Arthur* hearing must be held within a reasonable time – not at the first appearance hearing. (A. 7).

The Third District denied the petition for several reasons. (A. 27). The text of Article I, section 14 of the Florida Constitution does not require a trial court to hold a bond hearing at the first appearance proceeding and a second bond hearing at an *Arthur* hearing for a defendant charged with a felony punishable by life. (A. 13-16). A trial court should have the discretion to detain an accused for a reasonable time before holding an *Arthur* hearing. (A. 14-15). Because first appearance proceedings are brief in nature and held right after arrest, it would be impractical to hold an *Arthur* hearing so early in the case. (A. 18). Finally, the Court found that *Arthur* does not require a finding at the first appearance proceeding. (A. 26). One judge dissented. (A. 28-38).

Petitioner filed a notice to invoke discretionary review jurisdiction. He argues that this Court should exercise its discretionary jurisdiction, because the Third District's opinion: (1) expressly construes the state constitution; (2) expressly and directly conflicts with Fourth District decisions; and (3) expressly and directly conflicts with *Arthur*. Finally, Petitioner asserts that this Court should resolve what a "reasonable time" means in the context of the scheduling of an *Arthur* hearing. (Pet. 6-9).

SUMMARY OF ARGUMENT

This Court should decline jurisdiction. First, the Third District's decision does not expressly construe any provision of the state constitution. Although the Third

District quoted Article I, section 14 of the Florida Constitution, it did not explain, define, or eliminate any existing doubts of any constitutional provision. At most, it concluded that section 14 does not prohibit a trial court from holding an *Arthur* hearing within a reasonable time. It did so by recognizing that *Arthur* construed section 14 as requiring an adversarial, evidentiary bond hearing to prove that proof of guilt is evident and the presumption is great.

Second, this Court can decline jurisdiction despite the lower court's certification of conflict, because the decision does not, in fact, expressly and directly conflict with *Ysaza* and *Gray*. While the decisions appear to have the same controlling facts and address the same issue of law, each reaches the same outcome, the denial of habeas relief.

Third, the Third District's decision does not expressly and directly conflict with *Arthur*, which addressed different questions of law and arose from different controlling facts. Lastly, the Court cannot exercise discretionary jurisdiction to resolve an issue not addressed in the opinion or to clarify a procedural ambiguity. What constitutes a "reasonable time" is an issue that was not addressed in the Third District's decision. Further, discretionary jurisdiction is governed by the state constitution; and, no provision of the Constitution allows the Court to accept jurisdiction to exercise its authority to promulgate rules or to resolve a procedural ambiguity.

I. THE THIRD DISTRICT'S DECISION DOES NOT EXPRESSLY CONSTRUE A PROVISION OF THE STATE CONSTITUTION.

Petitioner first asks that jurisdiction be granted because the Third District's decision expressly construes Article I, section 14 of the Florida Constitution. (Pet. 6-7). To trigger this Court's discretionary jurisdiction, the district court must have explained, defined, or otherwise eliminated existing doubts arising from language or terms of a constitutional provision. Fla. Const., art. 5, §3(b)(3); *Ogle v. Pepin*, 273 So. 2d 391, 392-93 (Fla. 1973). The Third District did not do so.

The Third District did quote Article I, section 14 of the Florida Constitution. (A. 8). It also recognized that *Arthur* construed section 14 as requiring an adversarial, evidentiary bond hearing to prove that proof of guilt is evident and the presumption is great. (A. 2). *Arthur* construed section 14 to require a hearing, but not when the hearing should be held. However, when the Third District addressed when that adversarial hearing must be held, it did not explain, define, or eliminate any existing doubts of a provision to come to this conclusion.

At most, the Third District concluded that section 14 does not prohibit allowing a trial court to hold an *Arthur* hearing within a reasonable time. (A. 12-15). In doing so, the Third District does refer to other provisions in section 14 or to this Court's interpretation of those provisions. (A. 14-15). This is far different from explaining, defining, or eliminating doubts from specific language, terms, or words

in section 14 to conclude that an *Arthur* hearing may be held within a reasonable time.

II. THE THIRD DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *YSAZA* AND *GRAY*.

Petitioner next asks that jurisdiction be granted to resolve the certified conflict with *Ysaza v. State*, 222 So. 3d 3 (Fla. 4th DCA 2017), and *Gray v. State*, 257 So. 3d 477 (Fla. 4th DCA 2018). (Pet. 7). This Court can decline jurisdiction even if a district court certifies conflict. Fla. Const., art. V, §3(b)(4) ("The supreme court **may** review . . ." (emphasis added)); *State v. Barnum*, 921 So. 2d 513, 528 (Fla. 2005).

Despite the lower court's certification of conflict, the Third District's decision does not expressly and directly conflict with *Ysaza* and *Gray*. Express and direct conflict arises when two decisions reach opposite results on controlling facts, which if not virtually identical, more strongly dictate the result reached by the conflicting case. *Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166-67 (Fla. 2006). Conflict must arise from the same issue of law. Fla. Const., art. V, §3(b)(3), (4).

While the decisions appear to have the same controlling facts and address the same issue of law, all three decisions reached the same outcome, *i.e.*, denial of habeas relief. (A. 26); *Gray*, 257 So. 3d at 479; *Ysaza*, 222 So. 3d at 7. *Gray* and *Ysaza* denied the petitions on harmless error grounds, while the Third District's

decision denied the petition on the merits. Because the decisions did not reach different outcomes, they do not conflict.

III. THE THIRD DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *ARTHUR*.

Petitioner next asks that jurisdiction be granted because the Third District's decision conflicts with *Arthur*. While the Third District's decision distinguished *Arthur*, (A. 19-25), there is no express and direct conflict. *Arthur* addressed different questions of law arising from different controlling facts. The issue in this case is outside the scope of the certified questions in *Arthur*. (A. 21-22). *Arthur* arose after a full bond hearing on the merits. (A. 23). *Arthur* did not involve a first appearance hearing. (A. 23-24). Release of the defendant in *Arthur* pending a bond hearing was not at issue. (A. 23).

IV. THE COURT CANNOT EXERCISE DISCRETIONARY JURISDICTION TO RESOLVE AN ISSUE NOT ADDRESSED IN THE OPINION OR A PROCEDURAL AMBIGUITY.

Finally, Petitioner asks this Court to exercise its authority to promulgate rules of procedure under Article V, section 2(a) of the Florida Constitution in order to clarify the pretrial bond procedures. (Pet. 9). Petitioner asserts that the Third District's decision "improperly created a reasonable time rule of procedure," which he asserts is ambiguous and in conflict with the Fourth District's holdings. *Id*.

The question of what constitutes a "reasonable time" was not addressed in the Third District's decision. The Third District observed that "[t]he issue of what

constitutes a reasonable time within which to conduct an *Arthur* hearing is therefore not before us." (A. 1, n.1.). The ultimate decision of the Third District was that the trial court, at a first appearance, when finding probable cause for the charged offense, retains the discretion to defer ruling on bail and to detain a defendant for a reasonable time for a full *Arthur* bond hearing. (A. 10).

The Third District's decision did not create a rule of procedure[1] because it did not specify the number of days for holding an *Arthur* hearing. It implicitly recognized that the adoption of any bright-line rule, defining the outer limits of the time for such a hearing, was a matter that is beyond its scope, or any district court of appeal's jurisdiction. Such power only belongs to this Court. *See In re Armistead's Estate*, 240 So. 2d 830, 831 (Fla. 1st DCA 1970) ("Such power is the exclusive prerogative of the Supreme Court of this State conferred upon it by the provisions of Article V, Florida Constitution, 1968. . . .").

"Reasonable time" references in the appellate arena demonstrate uncertainty in the case law suggesting that a rule of procedure might be appropriate. *See Shipley v. Belleair Group, Inc.,* 759 So.2d 28 (Fla. 2d DCA 2000) (contrasting seemingly inconsistent decisions regarding the reasonable time standard and opining that the

[1] A rule of procedure prescribes the method or order by which a party enforces substantive rights or obtains redress for their invasion." *Massey v. David*, 979 So. 2d 931, 935 (Fla. 2008) (citing *Military Park Fire Control Tax Dist. No. 4 v. DeMarois*, 407 So. 2d 1020, 1021 (Fla. 4th DCA 1981)).

"uncertainty created by this case law suggests that a rule of procedure concerning such motions might be appropriate"). The phrase also reflects an appellate court's authority to determine reasonableness on a case-by-case basis, which calls for an evaluation of all the facts and circumstance of a particular case. *See Shipley*, 759 So. 2d at 30 ("Accordingly, we can only evaluate the unreasonableness of a motion under all the facts and circumstances of a particular case.").

Lastly, discretionary jurisdiction is governed by the state constitution. Fla. Const., art. V, §3. No provision of the constitution allows the Court to accept jurisdiction to exercise its authority to promulgate rules. The rules of procedure explain how the Court can exercise that authority by proposal. Fla. R. Jud. Admin. 2.140. The Court might refer the matter to the Court's Criminal Rules Committee, where the issue would receive extensive consideration from prosecutors, defense attorneys, trial and appellate court judges, and law school professors. Ultimately, that would be the appropriate forum for such a significant issue. *See Shipley*, 759 So. 2d at 30 (stating that "the uncertainty created by case law concerning reasonable time suggests that a rule of procedure concerning such motions might be appropriate"). Thus, the constitution does not have provide the Court with discretionary jurisdiction to promulgate new rules.

CONCLUSION

WHEREFORE, the State respectfully requests this Court decline to exercise its discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CERTIFICATE OF FONT

I CERTIFY that the foregoing document has been delivered to counsel for Petitioner by **e-mail** at Mlauredo@pdmiami.com and appellatedefender@pdmiami.com on August 27, 2019, and that the type used in this brief is 14-point proportionately spaced Times New Roman.

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