Florida Criminal Practice and Procedure

CHAPTER 3 DETENTION AND RELEASE FROM DETENTION
B. PRE-TRIAL RELEASE

1-3 Florida Criminal Practice and Procedure § 3.5

§ 3.5 Capital and Life Offenses.

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A limitation upon the right to pre-trial bail has been applied to cases involving capital or life offenses. A person accused of a capital offense or an offense punishable by life imprisonment for which the proof of guilt is evident or the presumption great is not entitled to bail as a matter of right.n33 In these cases, however, an accused does not lose access to bail - only the right to it. Although a court may deny bail upon a finding that the applicable evidentiary standard has been met, it still has the discretion to release the accused on bail.n34 Where the evidentiary standard concerning proof of guilt is not met, however, an accused is entitled to bail as a matter of right in the same manner as in other cases.n35 Thus, in these cases, the following determinations must be made: whether the offense is one which will invoke the limitation upon pre-trial release; if so, whether the standard concerning proof of guilt has been properly met; and if not, whether pre-trial bail should be granted in the discretion of the court.

The limitation upon the right to pre-trial bail is applicable only to cases involving capital or life offenses. First degree murder, which is punishable by death, is of course a capital case within this definition.n36 Death is not a permitted sentence for any other offense, despite a designation by the legislature of other offenses as capital offenses.n37 Nonetheless, these other capital offenses are still subject to the limitation upon the right to bail. Decisions that other "capital offenses" are not "capital" for some purposes have not been persuasive in regard to the purposes of bail, and it has been held that an accused has no right to bail for these offenses.n38 Second, even if death is not an authorized sentence, the alternative sentence for these capital offenses is life in prison.n39 Thus, like other life offenses, such as armed robbery, kidnapping, armed burglary of a dwelling with an assault, and armed sexual battery, or any enhanced sentence, bail would not be authorized as a matter of right.

The limitation upon bail as a right is applied only in cases in which the proof of guilt is evident or the presumption is great.n40 This standard had previously been interpreted as meaning that the proof of an accused's guilt must be stronger than that applied at trial, which would mean that it must be stronger than beyond a reasonable doubt.n41 This interpretation was put in doubt in *State v. Arthur*, where the Supreme Court spoke in terms of evidence "legally sufficient to sustain a jury verdict of guilty."n42 That doubt seems to have been eliminated.

That doubt was eliminated by a series of cases clearly setting a greater-than-reasonable-doubt standard. In *State v. Perry*

, the Third District Court found that *Arthur* did not overrule "the long line of Florida Supreme Court decisions" that defined the standard as "actually a greater degree of proof than that which is required to establish guilt merely to the exclusion of a reasonable doubt."n43

According to this court, this greater-than-a-reasonable-doubt standard is applied as follows:

> [W]hen the State's evidence, although not insufficient to convict for a capital or life offense, is arguably impeached in substantial respects by other evidence or is rendered doubtful by substantial contradictions and discrepancies in the State's case, the proof is not stronger than beyond a reasonable doubt and, accordingly, the accused is entitled to pretrial bail as a matter of right.

The standard and application set in *Perry* were confirmed by the Fourth District Court in *Elderbroom v. Knowles*, which used the greater-than-reasonable-doubt standard and held that bail should have been granted because the State's case, although sufficient to convict, was contradicted in material respects so that substantial questions of fact were raised.n44 Last, the First District Court agreed with *Perry* in *Kirkland v. Fortune*, finding that the Supreme Court did not intend in *Perry* to change the traditional standard and that the defendant's guilt must be "evident," that is, "[m]anifest, plain, clear, obvious, conclusive" and "beyond a question of doubt."n45 Obviously, then, bail should be granted if the evidence establishes no more than a probability of guilt.n46 This standard, then, applies to each element of the charged offense.n47

This means that the proof must specifically satisfy the premeditation element of first degree murder.n48 This may not be possible in certain types of cases. It is not unusual in murder cases for the victim and the accused to be the only persons present at the time of the homicide. Further, although it may be inferred from those circumstances alone, or frequently from an accused's statement, that he actually committed the homicide, that inference may not be sufficient to prove how the homicide was committed, particularly that it was not caused by an accident or in self- defense. Obviously, an accused would be the only person available to testify on these latter issues. At least one case has held that an accused's version of the manner by which a homicide occurred, be it accident or self-defense, cannot be ignored and must be accepted for the purpose of determining whether the proof of his guilt was evident or the presumption great.n49 This would, of course, mean that the requisite standard authorizing a denial of bail would not be met, so that bail must be granted.

The burden of proving that guilt is evident or the presumption is great is upon the prosecution. This principle was established by the Florida Supreme Court in its opinion in *Arthur*. In placing the burden upon the State, the court departed from a long line of cases that placed the burden upon an accused.n50 This departure was apparently dictated by the following reasoning:

> 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 by Article 1, Section 14.

The court also pointed out that "as a matter of convenience, fairness, and practicality, it is preferable that the State have the burden" as it is "in better position to present to the court the evidence upon which it intends to rely." This rule has some consequences; in *Gomez v. Campbell*, the prosecutor did not subpoena witnesses and took the position that it was the defendant's motion; thus, the State failed to carry its burden so that the defendant should have been released.n51 Despite this contemporary rule, a defendant does have some evidentiary obligations, as the burden does shift to him upon a finding that the proof of guilt is evident, so that discretionary release must then be considered.

A court has the discretion to grant release even when the proof of guilt is evident or the presumption is great. This is the second significant holding in *Arthur*. According to the court, the plain language of the constitutional provision does not deny bail totally in these cases; further, the State's interest in securing an accused's presence at trial in these serious

cases is outweighed by a "defendant's interest in retaining his liberty" where the circumstances justify it. Thus, an accused should be allowed to come forward and demonstrate to the court that circumstances other than the nature of the offense negate a finding that he will flee regardless of the sureties required. The circumstances to be considered on this issue of discretionary release are those prescribed by the rule for right to bail cases. Further, if an accused is successful in demonstrating that the circumstances justify bail, it must then be a reasonable bail.n52

FOOTNOTES:

Footnote 33. *Fla. Const. art. I, § 14.*

Footnote 34. *State v. Arthur, 390 So. 2d 717 (Fla. 1980)* .

Footnote 35. *Mathis v. Starr, 152 So. 2d 161 (Fla. 1963)* .

Footnote 36. *Rowe v. State, 417 So. 2d 981 (Fla. 1982)* .

Footnote 37. *Rowe v. State, 417 So. 2d 981 (Fla. 1982)* .

Footnote 38. *Batie v. State, 534 So. 2d 694 (Fla. 1988)* ; *Buford v. State, 403 So. 2d 943 (Fla. 1981) , cert. denied, 454 U.S. 1163, 102 S. Ct. 1037, 71 L. Ed. 2d 319 (1982)* .

Footnote 39. *Smith v. State, 357 So. 2d 427 (Fla. 1st DCA 1978)* .

Footnote 40. *Fla. Const. art. I, § 14.*

Footnote 41. *State v. Thursby, 184 So. 2d 505 (Fla. 1st DCA 1966)* ; State *ex rel. Van Eeghen v. Williams, 87 So. 2d 45 (Fla. 1956)* .

Footnote 42. *390 So. 2d 717 (Fla. 1980)* .

Footnote 43. *605 So. 2d 94 (Fla. 3d DCA 1992)* .

Footnote 44. *621 So. 2d 518 (Fla. 1st DCA 1993)* .

Footnote 45. *661 So. 2d 395 (Fla. 1st DCA 1995)* ; *see also Whitehead v. McCampbell, 700 So. 2d 135 (Fla. 4th DCA 1997)* , which followed *Perry* and *Elderbroom*; *see infra Section 3.7[d]* for a discussion of the hearing on a motion for bail and the kind of evidence that may be used by the State to carry its burden.

Footnote 46. *Smith v. State, 357 So. 2d 427 (Fla. 1st DCA 1978)* .

Footnote 47. *State v. Thursby, 184 So. 2d 505 (Fla. 1st DCA 1966)* .

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Footnote 49. *State v. Kelly, 86 So. 2d 166 (Fla. 1956)* .

Footnote 50. *Sirianni v. Coleman, 379 So. 2d 176 (Fla. 5th DCA 1980)* ; State *ex rel. Loper v. Stack, 291 So. 2d 207 (Fla. 4th DCA 1974) , cert. denied, 303 So. 2d 25 (Fla. 1974)* ; *Larkin v. State, 51 So. 2d 185 (Fla. 1951)* .

Footnote 51. *701 So. 2d 412 (Fla. 4th DCA 1997)* .

Footnote 52. *Driggers v. Carson, 486 So. 2d 25 (Fla. 1st DCA 1986)* ; State *ex rel. Bardina v. Sandstrom, 321 So. 2d 630 (Fla. 3d DCA 1975)* .