IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

***REDACTED*,**
Petitioner

v.

THOMAS BROWN,
Sheriff, DeKalb County
Respondent

Civil Action

File No: _____

PETITION FOR A WRIT OF HABEAS CORPUS

A. JURISDICTION AND PARTIES

Petitioner, *REDACTED*., hereby brings this Petition for a Writ of Habeas Corpus and shows that he is being held in custody pursuant to an arrest in DeKalb County, Georgia, in violation of due process of law, contrary to O.C.G.A. § 17-4-26, Uniform Magistrate Court Rule 25.1 and Uniform Superior Court Rule 26.1.

1.

Petitioner was arrested pursuant to warrant number *REDACTED* on *DATE REDACTED* for the criminal offense of Failure to Register as a Sex Offender. Petitioner has been incarcerated at the common jail of DeKalb County, Georgia since her arrest, and has not been charged by indictment or presentment.

2.

The respondent, Thomas Brown, herein named is the Sheriff of DeKalb County, State of Georgia, and maintains his legal office at DeKalb County, Georgia, and is, therefore, subject to the jurisdiction of this Honorable Court.

3.

Petitioner relies on printouts from the DeKalb County Online Judicial System and Magistrate Court computer system, and other documents, records and transcripts which she may tender at the evidentiary hearing in this case, if the respondent does not tender them, or at such time as the Court directs.

B. GROUNDS FOR RELIEF

Petitioner's restraint of liberty is in violation of rights granted her by O.C.G.A. § 17-4-26, Uniform Magistrate Court Rule 25.1 and Uniform Superior Court Rule 26.1 by reason of the following:

1.

Petitioner was not brought before a committing judicial officer for a first appearance hearing within 72 hours of her arrest for this offense.

2.

Pursuant to OCGA § 17-4-26, "[e]very law enforcement officer arresting under a warrant" is required to "present the person arrested before a committing judicial officer within 72 hours after arrest" for a first appearance hearing.

3.

Pursuant to Uniform Magistrate Court Rule 25.1 and Uniform Superior Court Rule 26.1, "the arresting officer or the law officer having custody of the accused shall present the accused in person before a magistrate or other judicial officer for first appearance … [i]mmediately following any arrest but no later than … 72 hours following an arrest with a warrant."

4.

At the first appearance hearing, petitioner was to be given notice of the time and place of her commitment hearing. *Accord, Tarpkin v. State*, 236 Ga. 67 (1976). O.C.G.A. § 17-4-26 further mandates that "an arrested person who is not notified before the hearing of the time and place of the commitment hearing shall be released." *Accord, Chisholm v. State*, 231 Ga. App. 835 (1998; supporting release from custody as remedy).

5.

Since petitioner was not brought to a timely first appearance, she was not given proper notice of the time and place of her commitment hearing as required by O.C.G.A. § 17-4-26.

6.

Denial of a timely first appearance hearing under O.C.G.A. § 17-4-26 is grounds for pre-indictment habeas corpus. *McClure v. Hopper*, 234 Ga. 45, 48 (1975). *See also Tarpkin v. State*,

236 Ga. 67 (1976); *State v. Godfrey*, 204 Ga. App 58 (1992); *Taylor v. Chitwood*, 266 Ga. 793 (1996).

C. REQUEST FOR RELIEF

WHEREFORE, PETITIONER PRAYS:

(a) That the defendant be served according to law;

(b) That this case be set down for hearing;

(c) That an evidentiary hearing be held;

(d) That the Writ be granted and the Petitioner be released from custody;

(e) That the charges against the Petitioner be dismissed, or in the alternative that she be released on her own recognizance;

(f) For such other and further relief as justice may require.

Respectfully submitted this *REDACTED* day of *REDACTED*, 2006.

Adam Klein
Assistant Public Defender
Attorney for Defendant
Georgia Bar No. 425032

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

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File No: _____-

PAUPER'S AFFIDAVIT

I hereby certify that I am an Assistant Public Defender of the Stone Mountain Judicial Circuit, State of Georgia, and that I was appointed by the court to represent the defendant because of her indigency. Defendant remains indigent and unable to pay the costs of her defense.

"If a litigant is unable to pay any deposit or other court costs, under OCGA § 9-15-2, he has only to file a valid affidavit of indigency to be relieved from that expense (unless that claim of indigency is successfully contested by the other party)." *Whitehead v. Lavoie*, 176 Ga. App 666 (1985), certiorari denied.

So certified this *REDACTED* day of *REDACTED*, 2006.

Adam Klein
Assistant Public Defender
Attorney for Defendant
Georgia Bar No. 425032

Sworn to and subscribed before me
this *REDACTED* day of *REDACTED*,2006.

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

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Civil Action

File No: _____-8

WRIT OF HABEAS CORPUS

To Thomas Brown:

You are hereby commanded to produce the body of *REDACTED*, alleged to be illegally detained by you, together with the cause of the detention, before me on the _____ day of _____ at ___:___ , then and there to be disposed of as the law directs.

Given under my hand and official signature, this So certified this *REDACTED* day of *REDACTED*, 2006.

_____
Superior Court Judge, DeKalb County

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

Error! Reference source not found. Error! Reference source not found.**,**
Petitioner

v.

THOMAS BROWN,
Sheriff, DeKalb County
Respondent

Civil Action

File No: _____-8

ORDER TO PROCEED IN FORMA PAUPERIS

Defendant's request to proceed *in forma pauperis* in the matter of *REDACTED v. Thomas Brown* is hereby:

☐ GRANTED

☐ DENIED

SO ORDERED this *REDACTED* day of *REDACTED*, **Error! Reference source not found.**.

_____
REDACTED
Superior Court Judge, DeKalb County

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

***REDACTED*,** **Petitioner** **v.** **THOMAS BROWN,** **Sheriff, DeKalb County** **Respondent**	**Civil Action** **File No:_____**

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS

I. FIRST APPEARANCE HEARINGS GENERALLY

Georgia law[1] requires that, following any arrest, the person arrested has a right to be physically brought before a judicial officer (a "neutral and detached magistrate"[2]) for a first appearance hearing. According to Uniform Rules of Magistrate Courts, the purpose of a first appearance hearing is for the judicial officer to:

- Inform the accused of the charges
- Inform the accused of his rights: to counsel (appointed, if necessary), to remain silent, to indictment or accusation, to a commitment hearing
- Set bail (except for Superior-Court-only offenses)
- Schedule a commitment hearing if the defendant chooses not to waive his right to one
- Make a determination of probable cause, if a warrant has not already been issued[3]

The Uniform Rules require that the first appearance hearing be held "immediately following any arrest," and "not later than 72 hours following an arrest with a warrant." [4]

[1] The right to a First Appearance hearing is statutory, not constitutional; it is found in OCGA § 17-4-26, Uniform Magistrate Court Rule 25.1, and Uniform Superior Court Rule 26.1. Stephenson v. Gaskins, 539 F. 2d 1066 (5th Cir. 1976).
[2] Johnson v. United States, 333 U.S. 10, 13-14 (1948).
[3] Uniform Magistrate Court Rule 25.1.
[4] Id. Likewise, OCGA § 17-4-26 provides a flexible general rule with a bright-line outer boundary, requiring that an arresting officer "exercise reasonable diligence in bringing the person arrested before the judicial officer … and in any event to present the person arrested before a committing judicial officer within 72 hours after arrest."

Since they are often discussed together, a first appearance hearing must be distinguished from a commitment hearing (also sometimes referred to as a "preliminary hearing" or "probable cause hearing"). Although a commitment hearing may be held at the time of first appearance, generally they are two separate events.

At first appearance (held within 72 hours) the accused is informed of his rights and the charges against him, bail is set (if possible), and the commitment hearing is scheduled or waived. The accused is not entitled to representation by counsel at first appearance.

In contrast, a commitment hearing is a full-fledged adversarial proceeding in which a judge determines whether there is probable cause sufficient to bind the case over to a trial (State or Superior) court.[5] The latter need not be held within 72 hours—the law requires only that it be *scheduled* within the 72 hour period, and that, before the hearing, the defendant be notified of its time and place.[6]

II. PENNAMAN V. WALTON

The three sentences of OCGA § 17-4-26 deal with two separate rights—the right to a first appearance hearing within 72 hours, and the right to be notified as where and when the commitment hearing will be held.[7]

The first sentence deals with first appearance hearings, stating that an arresting officer "present the person arrested before a committing judicial officer within 72 hours after arrest." The first sentence of -26 does not, however, specify a remedy if the first appearance hearing is not held within the 72 hour window.

The second and third sentences require that "[t]he accused shall be notified as to when and where the commitment hearing is to be held" and mandating that "[a]n arrested person who is not notified before the hearing of the time and place of the commitment hearing shall be released." The statute provides a remedy (release) for a defendant is not informed of the time and place of

[5] Uniform Magistrate Court Rule 25.2.
[6] Dodson v. Grimes, 220 Ga. 269 (1964).
[7] An arresting officer shall, "[i]n any event to present the person arrested before a committing judicial officer within 72 hours after arrest."

the hearing, but is not specific as to when the defendant must be informed—it merely says "before the hearing."

Read separately, the two parts of -26 consist of a right without a remedy and a remedy without a right—and would have essentially no effect. A right to a hearing within 72 hours is meaningless without a penalty if that right is violated. The right to prior notice of a commitment hearing cannot be enforced unless the rule specifies when such notice must be given. In 1964, the Georgia Supreme Court came to just such a conclusion in *Pennaman v. Walton*.[8] Responding to a *habeas* petition from a defendant who had been held for eighteen days before his first appearance, the court held that, although he was entitled to a prompt hearing, the defendant had no recourse:

> The first sentence of § 1 of the 1956 Act (Code Ann. Supp. § 27-210) [9] imposes no penalty if the arresting officer fails to take the accused before a committing officer within 72 hours, nor is there any provision that the offender is to be released if no committal hearing was held within 72 hours.
>
> * * *
>
> The second and third sentences of § 1 of the 1956 Act are more vague, uncertain, and indefinite than the first … These sentences state that the officer shall notify the accused when and where the commitment hearing is to be held, and that an offender not so notified shall be released. When shall such notice be given? Would thirty minutes before the hearing suffice, or should the notice be given thirty hours before the hearing? [10]

The broad language of *Pennaman* renders OCGA § 17-4-26 toothless; under its logic, the statute has no meaning at all. However, since 1964, the law has evolved. Due to subsequent case law and the promulgation of the Uniform Rules for the Superior and Magistrate Courts, *Pennaman*'s narrow reading of the language of 17-4-26 is no longer good law.

[8] 220 Ga. 295 (1964).
[9] The Act of 1956 (Code Ann. Supp. § 27-210), the previous version of 17-4-26, had essentially the same requirements.
[10] *Pennaman*, supra note 8.

III. AFTER *PENNAMAN*: UNIFORM COURT RULES

At the time of *Pennaman*, Magistrate and Superior courts in Georgia were governed by local rules. In its Constitution of 1983, the State of Georgia gave the Georgia Supreme Court the authority to establish uniform rules for the operation of courts statewide.[11] The Supreme Court has done so, establishing rules for the magistrate and superior courts and abolishing the local rules that were formerly in effect.[12] The courts may not make local rules which are inconsistent with the Uniform Rules.[13]

The Uniform Rules for both Magistrate and Superior courts are quite clear in their requirements for first appearance hearings, requiring that they be held "[i]mmediately following any arrest but not later than 48 hours if the arrest was without a warrant, or 72 hours following an arrest with a warrant."[14]

The Uniform Rules serve both as an independent basis for a defendant's right to a prompt first appearance hearing and as a guide to the courts in the proper interpretation of § 17-4-26.

III. AFTER *PENNAMAN*: SUBSEQUENT CASE LAW

Pennaman was decided in 1964; it was last cited by the Georgia courts in 1967.[15] Since then, a number of Georgia Supreme Court and appellate cases have revisited § 17-4-26. This subsequent line of cases, starting with *McClure v. Hopper* in 1975, has consistently held that, before a defendant has been indicted, violation of his rights under § 17-4-26 is grounds for release a petition for *habeas corpus.*[16] These cases also support an integrated reading of the two parts of the statute, mandating that a defendant must "at least be brought within 72 hours of his arrest before a committing officer to schedule the time and place" for a commitment hearing.[17]

McClure v. Hopper (1975): "By basing this decision on mootness, this court does not intend to effect a repeal of Code Ann. §§ 27-210, 27-212 (Ga.L.1956, pp. 796, 797) which provide the

[11] Ga. Const. Art. 6, § 9, P I
[12] Uniform Magistrate Court Rule 1; Uniform Superior Court Rule 1.
[13] Uniform Magistrate Court Rule 1.2(B); Uniform Superior Court Rule 1.1.
[14] Uniform Magistrate Court Rule 25.1; Uniform Superior Court Rule 26.1.
[15] Whisman v. State, 223 Ga. 124, 126 (1967).
[16] The courts have held that, after indictment, the defendant is no longer being illegally detained, and a post-conviction *habeas* petition is therefore moot.
[17] Tarpkin v. State, 236 Ga. 67 (1976).

right to a speedy hearing. The General Assembly enacted those provisions and they are law … Code Ann. § 27-210 provides that a person arrested under a warrant shall be brought before a committing officer within 72 hours after arrest for commitment hearing, and that an offender not notified, before the hearing, of the time and place of such hearing, shall be released. An offender who is not afforded a commitment hearing receives no notice of the time and place thereof. Hence the provision requiring release applies equally to one who receives no commitment hearing as well as to one who receives no advance notice of the time and place thereof … Although not ground for post-conviction habeas corpus due to mootness (as seen above), denial of commitment hearing would be ground for pre-indictment habeas corpus. Pre-indictment habeas corpus for lack of commitment hearing can be handled expeditiously."[18]

Middlebrooks v. State (1975 decision by Georgia Court of Appeals, overturned by Georgia Supreme Court on grounds of mootness): "Release can have but one meaning, viz., that for noncompliance with the statute, where the defendant was arrested under a warrant, the warrant is dismissed; where the arrest was without a warrant, the defendant is simply discharged … Code Ann. §§ 27-210 and 27-212 are not ambiguous. There is no subtlety of expression which renders them capable of more than one interpretation … Yet, the effect of the trial court's action is to completely emasculate and disembowel statutes which are the front line of defense against illegal and arbitrary detention ... The consequences are frightening. If the trial court is correct, the state would be under no compulsion to ever give the accused a preliminary hearing. We believe this would be grievous error.[19]

Tarpkin v. State (1976): "Code Ann. § 27-210 grants the right to a preliminary hearing, and that the accused at least be brought within 72 hours of his arrest before a committing officer to schedule the time and place for the hearing."[20]

State v. Godfrey (1992): "If a defendant wishes to assert the right to a commitment hearing, he must do so promptly and before indictment by filing a habeas corpus petition". [21]

[18] 234 Ga. 45, 48.
[19] 135 Ga.App. 411. The Georgia Supreme Court overturned on the grounds that since defendant had been convicted, the denial of a commitment hearing constituted harmless error, but acknowledged that "while such [pre-conviction] detention lasts he may be entitled to habeas corpus relief" 236 Ga. 52 (1976).
[20] 236 Ga. 67.

Taylor v. Chitwood (1996, Sears, J. concurring): "I concur with the majority that in this particular case, because Taylor was indicted and had bail set shortly after having been extradited to Georgia, there was no prosecutorial oversight in the failure to hold a first appearance hearing within 72 hours of his arrest. However, the language of Rule 26.1 is mandatory, and this Court's ruling today should not be misconstrued to mean that under different circumstances, a failure to hold a first appearance hearing will always be harmless error so long as an accused is later indicted. In order to avoid the needless frustration of criminal prosecution, in addition to the possibility of subjecting itself to unnecessary civil litigation, the State will do well to adhere to the mandatory language of Rule 26.1."[22]

Since *Pennaman* was decided in 1964, the appellate courts have repeatedly and consistently adopted a more integrated reading of OCGA § 17-4-26, requiring a First Appearance within 72 hours, and providing release (i.e. preindictment *habeas*) as the remedy.

III. AFTER *PENNAMAN*: STATUTORY CONSTRUCTION

Additionally, the *Pennaman* court's narrow reading of the precursor to § 17-4-26 violates established rules of statutory construction and simple common sense. Its separate reading of the two sections would preclude each of them from having any legal effect at all.

The first sentence, said the Court, "imposes no penalty" for the violation of a clearly specified right (a hearing within 72 hours).[23] The second and third sentences specify a clear remedy (release), but the right to be protected (notification of the time and place of the hearing) is described as "vague, uncertain, and indefinite." [24]

To the *Pennaman* court, neither half is effective, and OCGA § 17-4-26 becomes a legal nullity.

The idea that a legislature would pass a law intending such a result is absurd, and in violation of long-established rules of statutory construction. Read separately, the two sections are meaningless; read together, they complement one another, connecting right to remedy. A

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[21] 204 Ga. App 58.
[22] 266 Ga. 793.
[23] Id.
[24] *Pennaman*, supra note 8.

defendant must be brought to a first appearance hearing within 72 hours. A commitment hearing must be scheduled and the defendant notified of its time and place *at the first appearance hearing*. A defendant who is denied a prompt first appearance hearing has not been properly notified of the time and place of her commitment hearing and, therefore, *must be released*.

Such a reading of 17-4-26 is wholly consistent with general principles of statutory construction and Georgia case law on the subject, which has held that:

- interpretation "must square with common sense and reasoning"[25]
- "a court may look beyond the plain language of a statute if applying the plain language would produce an absurd result"[26]
- "a construction that gives effect to statutes is preferred to one that invalidates them"[27]
- The "courts of this State are without power to make such an interpretation…" which "…would amount to a determination that the legislature acted superfluously and senselessly in enacting [the statute]."[28]
- "All the words of the legislature, however numerous, ought to be preserved, and effect given to the whole, if it can be done."[29]

An integrated reading of the two parts of 17-4-26 is more consistent with the principles of construction than the strained, narrow interpretation of the *Pennaman* court.

[25] Tuten v. City of Brunswick, 262 Ga. 399, 404, (1992); *See also* Kendall v. Griffin-Spalding County Hosp. Authority, 242 Ga.App. 821 (2000); World Trade Business, Inc. v. Amit, Inc., 239 Ga.App. 383 (1999); Apollo Travel Services v. Gwinnett County Bd. of Tax Assessors, 230 Ga.App. 790 (1998); Georgia Public Service Com'n v. ALLTEL Georgia Communications Corp. 270 Ga. 105 (1997).
[26] In re Lehman, 205 F.3d 1255 (11th Cir. 2000), *citing* Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1529 (11th Cir.1996); *see also* Latham v. State 225 Ga.App. 147 (1997), *citing* Proo v. State 192 Ga.App. 169 (1989), *citing* Barton v. Atkinson, 228 Ga. 733 (1972).
[27] East West Exp., Inc. v. Collins, 264 Ga. 774 (1994), *citing* Brown v. State Merit System of Personnel Administration 245 Ga. 239 (1980); *see also* Mathis v. Fulton Industrial Corp., 168 Ga. 719 (1929); Wellmaker v. Terrell, 3 Ga.App. 791, (1907).
[28] Caballero v. Pate, 171 Ga.App. 425 (1984), Mitchell v. City of Newnan, 125 Ga.App. 761 (1972); Strickland v. City of Winterville, 130 Ga.App. 425 (1973).
[29] Butterworth v. Butterworth, 227 Ga. 301, 304 (1971).

IV. CONCLUSION

Pennaman v. Walton, in as much as it holds that OCGA § 17-4-26 provides no remedy to a defendant abandoned in jail for days past the state's 72-hour deadline, is no longer good law. The law provides a rule and the law provides a remedy, and intervening cases, court rules, and long-established rules of construction connect the two.

A first appearance hearing held after the 72-hour mark, no matter the outcome, provides no remedy at all. To a defendant, the difference between three days in jail and five, or ten, or twenty, is enormous. Those days might represent a job kept or lost and a house payment made or missed. The state simply cannot simply the consequences its citizens suffer when it puts one of them in jail and then forgets its obligation to bring him to court. Once the 72-hour line has been crossed, the damage has been done. The only effective remedy is the one required by the statute itself: release.

O.C.G.A. § 17-4-21

The arresting officer shall take the arrested person before the most convenient and accessible judicial officer authorized to hear the case unless the arrested person requests otherwise, in which case, if there is no suspicion of improper motive, the arresting officer shall take him before some other judicial officer. An arrested person has no right to select the judicial officer before whom he shall be tried.

O.C.G.A. § 17-4-26

Every law enforcement officer arresting under a warrant shall exercise reasonable diligence in bringing the person arrested before the judicial officer authorized to examine, commit, or receive bail and in any event to present the person arrested before a committing judicial officer within 72 hours after arrest. The accused shall be notified as to when and where the commitment hearing is to be held. An arrested person who is not notified before the hearing of the time and place of the commitment hearing shall be released.

O.C.G.A. § 17-4-40

(a) Any judge of a superior, city, state, or magistrate court or any municipal officer clothed by law with the powers of a magistrate may issue a warrant for the arrest of any offender against the penal laws, based on probable cause either on the judge´s or officer´s own knowledge or on the information of others given to the judge or officer under oath. Any retired judge or judge emeritus of a state court may likewise issue arrest warrants if authorized in writing to do so by an active judge of the state court of the county wherein the warrants are to be issued.

O.C.G.A. § 17-4-62

In every case of an arrest without a warrant, the person arresting shall, without delay, convey the offender before the most convenient judicial officer authorized to receive an affidavit and issue a warrant as provided for in Code Section 17-4-40. No such imprisonment shall be legal beyond a reasonable time allowed for this purpose; and any person who is not brought before such judicial officer within 48 hours of arrest shall be released.

Prepared by:
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Stone Mountain Circuit Public Defender Office
120 West Trinity Place, Rm. 408
Decatur, GA 30030

Uniform Magistrate Court Rule 25.1

Immediately following any arrest but no later than 48 hours if the arrest was without a warrant, or 72 hours following an arrest with a warrant, unless the accused has made bond in the meantime, the arresting officer or the law officer having custody of the accused shall present the accused in person before a magistrate or other judicial officer for first appearance.

At the first appearance, the judicial officer shall:

(1) Inform the accused of the charges;

(2) Inform the accused of the right to the presence and advice of an attorney, either retained or appointed, of the right to remain silent, and that any statement made may be used against him or her;

(3) Determine whether or not the accused desires and is in need of an appointed attorney and, if appropriate, advise the accused of the necessity for filing a written application;

(4) Inform the accused of the right to a pre-indictment commitment hearing, that the hearing will be postponed if the accused requests additional time to prepare its case, and inform the accused that giving a bond returnable to arraignment or trial shall be a waiver of the right to a commitment hearing although a magistrate may in his or her discretion hold a commitment hearing pursuant to Rule 13.2(A);

(5) Schedule a commitment hearing if authorized and if requested by the defendant and so notify the prosecuting attorney and the law officer having custody of the accused;

(6) In cases of warrantless arrest, unless a subsequent determination of probable cause has been made, make a fair and independent determination of probable cause for the arrest;

(7) Inform the accused of the right to grand jury indictment in felony cases, to accusation in misdemeanor cases, to uniform traffic citation in traffic cases, and the right to trial by jury, and, in felony cases, when the next grand jury will convene; in felony cases subject to O.C.G.A. 17-7-70.1 (involving violations of O.C.G.A. 16-8-2, 16-8-14, 16-8-18, 16-9-1, 16-9-2, 16-9-20, 16-9-31, 16-9-33, 16-9-37, 16-10-52, or 40-5-58), inform the accused that if the commitment hearing is expressly waived or the accused is bound over after the commitment hearing, the district attorney may prepare an accusation or seek an indictment;

(8) Inform the accused that the accused or his or her attorney may waive the right to a commitment hearing; and

(9) Set the amount of bail if the offense is not one bailable only by a superior court judge, or so inform the accused if it is.

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Stone Mountain Circuit Public Defender Office
120 West Trinity Place, Rm. 408
Decatur, GA 30030

Uniform Superior Court Rule 26.1

Immediately following any arrest but not later than 48 hours if the arrest was without a warrant, or 72 hours following an arrest with a warrant, unless the accused has made bond in the meantime, the arresting officer or the law officer having custody of the accused shall present the accused in person before a magistrate or other judicial officer for first appearance.

At the first appearance, the judicial officer shall:

(A) Inform the accused of the charges;

(B) Inform the accused that he has a right to remain silent, that any statement made may be used against him, and that he has the right to the presence and advice of an attorney, either retained or appointed;

(C) Determine whether or not the accused desires and is in need of an appointed attorney and, if appropriate, advise the accused of the necessity for filing a written application;

(D) Inform the accused of his or her right to a later pre indictment commitment hearing, unless the first appearance covers the commitment hearing issues, and inform the accused that giving a bond shall be a waiver of the right to a commitment hearing;

(E) In the case of warrantless arrest, make a fair and reliable determination of the probable cause for the arrest unless a warrant has been issued before the first appearance;

(F) Inform the accused of the right to grand jury indictment in felony cases and the right to trial by jury, and when the next grand jury will convene; [In state court, see State Court Rule 26.1(F).]

(G) Inform the accused that if he or she desires to waive these rights and plead guilty, then the accused shall so notify the judge or the law officer having custody, who shall in turn notify the judge.

(H) Set the amount of bail if the offense is not one bailable only by a superior court judge, or so inform the accused if it is.

Prepared by:
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Stone Mountain Circuit Public Defender Office
120 West Trinity Place, Rm. 408
Decatur, GA 30030

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

HENRY DONALDSON, JR.,	)	
Petitioner	)	**CASE NO.: 06CV8787 — 8**
	)	
v.	)	**PETITION FOR WRIT OF**
	)	**HABEAS CORPUS**
THOMAS BROWN,	)	
Respondent	)	

MEMORANDUM

DeKalb County police arrested Petitioner pursuant to warrant 06W12760 [Failure to Register as a Sex Offender] on June 24, 2006. On July 24, 2006, Petitioner's counsel filed the above-referenced Petition for Habeas Corpus, alleging that Petitioner "was not brought before a committing judicial officer within 72 hours after arrest". The Court heard evidence from Petitioner's counsel and Assistant District Attorney Jerry Mason, representing Respondent. At that time, the Court requested additional information regarding the history of Petitioner's court appearances.

1. Petitioner was arrested on June 24, 2006.
2. Petitioner's first appearance before a magistrate, according to information available to the Office of the District Attorney, was on July 5, 2006 at 5:30 p.m.
3. At this appearance, Petitioner was afforded a preliminary hearing, at the conclusion of which Judge G. Galbaugh of the DeKalb County Magistrate Court set a bond in the amount of $10,000.00.

The State concedes, as the defense contends, that Petitioner had a right to be brought before a magistrate within seventy-two hours of his arrest. It appears that this did not happen, and that Petitioner was not brought before a magistrate until some eleven days had passed since his

arrest. Rights, however, can be waived; by exercising his right to a preliminary hearing and submitting to the judgement of the Magistrate Court on July 5, Petitioner impliedly waived his right to be brought before a magistrate within seventy-two hours after his arrest. A committal hearing may be a critical stage, but failure to hold such a hearing "does not constitution a deprivation of a defendant's constitutional rights ... if a defendant wishes to assert his right to a commitment hearing, he must do so promptly and before indictment by filing a habeas corpus petition ... once indictment takes place probable cause has been established and a preliminary hearing serves no purpose". *State v. Godfrey*, 204 Ga App 58 (1992).

Defendant has not been indicted, but it is undisputed that he had a preliminary hearing on July 5, 2006, some nineteen days prior to the filing of the habeas petition. Probable cause has been established. The habeas petition is moot.

This 2 day of August, 2006.

JERRY MASON
ASSISTANT DISTRICT ATTORNEY
STATE BAR NO.: 475648

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a copy of the within and foregoing MEMORANDUM to be served on defense counsel via internal mail:

Adam Klein, Esq.
Office of the Public Defender

This 2 day of August, 2006.

JERRY MASON
Ga. Bar No. 475648
Assistant District Attorney

700 DeKalb County Courthouse
556 N. McDonough Street
Decatur, Georgia 30030
(404) 371-2561

FILED
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CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

REDACTED,
Petitioner

v.

THOMAS BROWN,
Sheriff, DeKalb County
Respondent

Civil Action

File No: 06CV8787-8

PETITIONER'S BRIEF IN RESPONSE
TO REPONDENT'S MEMORANDUM DATED AUGUST 2, 2006

I. TWO SEPARATE RIGHTS

While they are often discussed together, the right to a prompt first appearance hearing and the right to a commitment hearing are fundamentally distinct and independent from one another. While a commitment hearing could be set for a date weeks after an arrest, the law requires that a first appearance hearing be held "immediately", and the accused, in any event, must be brought before a judge within 72 hours.[30]

Since the purpose of a commitment hearing is to determine whether probable cause exists, its timing is not central to its importance. A commitment hearing held a week or two after arrest serves the same purpose as one held immediately afterwards—putting the question of probable cause before a court of inquiry.

The purposes of a first appearance hearing are quite different—and far more urgent. A First Appearance hearing is the accused's first opportunity to be read the charges against him, to be informed of his rights, to request a lawyer, get a date for a later commitment hearing, and to receive bond. For these purposes, time is of the essence.

The damage done to a person sitting in jail for eleven days, without seeing a judge, without an opportunity to seek bond, not knowing his rights, not knowing what the charges are against

[30] Uniform Magistrate Court Rule 25.1; Uniform Superior Court Rule 26.1.

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him, is immeasurable. A hearing on Day Twelve does nothing to remedy the grievous harm caused by the State's dereliction of its legal duty.

The State concedes that "[p]etitioner had a right to be brought before a magistrate within seventy-two hours of his arrest."[31] It seems, however, to be the State's contention that this right is one it is entitled to ignore. If a hearing held after 227 hours of incarceration is good enough, then the "72 hour rule" has no meaning at all.

II. DEFENDANT'S RIGHT TO COUNSEL

The State contends ("Petitioner was afforded a preliminary hearing") that a commitment hearing was held at the same time as Petitioner's first appearance hearing on July 5, 2006, at 5:30 P.M.

Assuming, that the State is correct, defendant has a right to counsel on July 5. Although a first appearance hearing is not a "critical stage" for Sixth Amendment purposes[32], a commitment hearing (or preliminary hearing) is.[33] In order to hold a commitment hearing at the time of first appearance, without the benefit of an attorney, defendant must make a knowing and intelligent waiver of the right to counsel.[34] There is no evidence at bar that he did so.

III. "IMPLIED WAIVER?"

Even if Mr. *Redacted did* properly waive his right to counsel and conducted a preliminary hearing at the time of his tardy first appearance on July 5, his continued pre-indictment detention would still be unlawful.

The State contends that "by exercising his right to a preliminary hearing and submitting to the judgment of the Magistrate Court on July 5, Petitioner impliedly waived his right to be brought before a magistrate within seventy-two hours after his arrest."[35]

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[31] Respondent's memorandum of August 2, 2006
[32] State v. Simmons, 260 Ga. 92 (1990).
[33] State v. Godfrey, 204 Ga.App. 58 (1992); *See also* Coleman v. Alabama, 399 U.S. 1, 9-10 (1970).
[34] Faretta v. California, 422 U.S. 806 (1975).
[35] Respondent's memorandum, *supra* note 31.

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The State provides no authority for this implied waiver, and in fact, has provided no evidence that, on July 5, Petitioner even knew he had a right to a hearing within 72 hours which might be waived. Brought to court after eleven days in jail, Mr. Donaldson had no opportunity to refuse to participate and no opportunity to confer with counsel. Nothing in the facts or the law before this court suggest that Petitioner, by his actions, made a knowing waiver of the right to a prompt first appearance.

The State in its memorandum quotes *State v. Godfrey*, citing that failure to hold a hearing "does not constitution [sic] a deprivation of a defendant's constitutional rights."[36] This is correct, but only insofar as the rights granted by OCGA 17-4-26 and Uniform Rules are *statutory*, not constitutional. While the right to a prompt first appearance may not be written in the Georgia or U.S. Constitutions, it is, nevertheless, the law. Said Justice Sears, concurring in *Taylor v. Chitwood*:

> [T]he language of Rule 26.1 is mandatory, and this Court's ruling today should not be misconstrued to mean that under different circumstances, a failure to hold a first appearance hearing will always be harmless error so long as an accused is later indicted. In order to avoid the needless frustration of criminal prosecution, in addition to the possibility of subjecting itself to unnecessary civil litigation, the State will do well to adhere to the mandatory language of Rule 26.1.[37]

IV. "BEFORE INDICTMENT"

The rest of the quotation from *State v. Godfrey* in the State's memorandum supports Petitioner's position that the appropriate remedy for a violation of the rights protected by OCGA §17-4-26 and the Uniform Rules of Superior and Magistrate Courts is release—a "habeas corpus petition" filed "before indictment."

While *Godfrey* does state that, after indictment, the issues brought up by -26 are moot, State has provided no support for its position a pre-indictment *habeas* petition is not valid.

The law provides a clear right and a clear remedy in this case. *REDACTED* is entitled to be released.

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[36] Respondent's memorandum, *supra* note 31; *See also* State v. Godfrey, 204 Ga. App. 58 (1992).
[37] 266 Ga. 793

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IN THE SUPERIOR COURT OF DeKALB COUNTY
STATE OF GEORGIA

HENRY DONALDSON, JR.,	)	
Petitioner,	)	**CASE NO.: 06 CV 8787-8**
	)	
vs.	)	
	)	
THOMAS BROWN, Sheriff	)	
DeKalb County,	)	
Respondent.	)	
	)	

ORDER DISMISSING CRIMINAL WARRANT AND RELEASING PETITIONER HENRY DONALDSON, JR. FROM CUSTODY

On August 1, 2006 the Petition for Writ of Habeas Corpus filed by Henry Donaldson, Jr. came before the Court for a hearing. The State was represented by Jerry Mason of the District Attorney's Office. The Petitioner was represented by Adam Klein of the Public Defender's Office. The proceedings were recorded by Court Reporter Michelle Davis.

Neither party introduced any testimony. The parties stipulated the following facts:

1. A warrant was issued June 23, 2006 for the arrest of Henry Donaldson, Jr.;
2. Henry Donaldson, Jr. was arrested June 24, 2006;
3. On July 5, 2006 there was a hearing;
4. Donaldson did not have any hearings prior to July 5th;
5. It was more than 72 hours after arrest that Donaldson was provided with a hearing;
6. Bond has been set for the Donaldson in the amount of $10,000.00;
7. There has been no indictment of Donaldson as of August 2, 2006.

At the time of the hearing, the Court requested that the District Attorney provide the Court with more information about the July 5th hearing by 4:00 p.m. August 2, 2006.

The Court further directed the Public Defender to provide the Court with a memorandum in support of his legal arguments and allowed the District Attorney to also provide the Court with any additional law relevant to the matter.

The District Attorney, in his Memorandum submitted to the Court on August 2, 2006, stated that the hearing on July 5, 2006 was a preliminary hearing, but no transcript, tape or other evidence was submitted by the District Attorney. The Court takes judicial notice that the State has control over any recordings of the pre-indictment proceedings in criminal matters in DeKalb County.

The back of the original warrant 06W12760, provided to the Court at its request, provides a form for the Magistrate to complete at the time of a "Committal Hearing" or upon the waiver of the same by the Petitioner. The back of the warrant is blank.

The Court has no way of determining whether the requirements of Superior Court Rule 26.1 or Magistrate Court Rule 25.1 have been afforded the Petitioner since no evidence has been entered on this issue. Specifically, there is no evidence in the record that the Petitioner was provided notice of when and where the commitment hearing would be held and it is undisputed that the Petitioner was not afforded a "first appearance" hearing within seventy-two (72) hours of arrest.

As it has been alleged under oath that the Petitioner was never provided notice of the time and place of the commitment hearing and the State having offered no evidence to rebut the sworn statement, the Court hereby **GRANTS** Petitioner's requested relief.

DeKalb County Criminal Arrest Warrant Number **06W12760** is hereby and accordingly **DISMISSED** and the Sheriff is hereby directed to **RELEASE** the Petitioner **INSTANTER**.

SO ORDERED, this 3rd day of August, 2006.

Jack M. McLaughlin, Senior Judge
State of Georgia, By Designation

cc: Adam Klein, Esq., Counsel for Petitioner
Jerry Mason, Asst. District Attorney

Jack M. McLaughlin
Senior Judge
State of Georgia
By Designation

STONE MOUNTAIN JUDICIAL CIRCUIT SUPERIOR COURT DEKALB COUNTY GA

State of Georgia, DeKalb County
The undersigned officer of DeKalb Superior Court certifies that this is a true and correct copy of the original document which is recorded in the Office of the Clerk of Superior Court. Witness my hand and seal of the Superior Court of DeKalb County Georgia.
This 13 day of Feb 18
Signature
Deputy Clerk, DeKalb County Superior Court

FILED
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CLERK OF SUPERIOR COUR
DEKALB COUNTY GA