

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 67,740

(5th DCA Case No. 84-695)

GEORGE GARCIA,

Defendant/Petitioner,

vs.

STATE OF FLORIDA,

Plaintiff/Respondent.

FILED
OCT 15 1985
CLERK, SUPREME COURT
By: _____
Chief Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

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Chief Deputy Clerk *pl*

JOHN W. TANNER, P.A.
Tanner and Lambert
630 N. Wild Olive Avenue
Suite A
Daytona Beach, Florida 32018
(904) 255-0464

Attorney for Defendant/Petitioner

I N D E X

	<u>Pages</u>
CITATION OF AUTHORITY.....	ii
SUMMARY OF ARGUMENT.....	1 - 3
JURISDICTION.....	3
JURISDICTIONAL ARGUMENT.....	3 - 8
CONCLUSION.....	8
CERTIFICATE OF SERVICE.....	9

CITATION OF AUTHORITY

(CASES CITED)	<u>Pages</u>
<u>Bustos v. Fleet,</u> 461 So.2d 1039 (4th DCA, 1985).....	2, 6
<u>Darby v. State,</u> 463 So.2d 496 (1st DCA, 1985).....	2, 5
<u>Machado v. State,</u> 431 So.2d 337 (2nd DCA, 1983).....	2, 5
<u>Rico v. State,</u> 463 So.2d 1172 (2nd DCA, 1984).....	2, 4
<u>State v. Barriero,</u> 460 So.2d 945 (3rd DCA, 1984).....	7, 8
<u>State v. Dante,</u> (3rd DCA, Case#83-2626, 4/2/85).....	7, 8
<u>State v. Littlefield,</u> 457 So.2d 558 (4th DCA, 1984).....	2, 5
<u>Westlake v. Miner,</u> 460 So.2d 430 (1st DCA, 1984).....	6

(OTHER AUTHORITIES)

<u>Florida Rules of Appellate Procedure,</u>	
Rule 3.191.....	6
Rule 3.152.....	6
Rule 9.030.....	3

(NOTE: THROUGHOUT THIS BRIEF, PETITIONER SHALL BE REFERRED TO AS "GARCIA"; APPELLANT'S TRIAL COUNSEL AS "ATTORNEY TANNER"; THE PROSECUTOR AS "THE STATE"; AND THE TRIAL JUDGE AS "JUDGE MILLER")

(REFERENCE TO THE APPENDIX SHALL BE BY THE SYMBOL A-Item letter)

SUMMARY OF ARGUMENT

Petitioner, GEORGE GARCIA, remained three hundred and sixty three (363) days in jail before he was brought to trial. Two hundred ninety three (293) days elapsed between GARCIA'S first Demand For Speedy Trial and the date he was finally brought to trial; in the intervening period, the Trial Court twice extended the speedy trial time and denied three (3) Motions For Discharge on speedy trial grounds.

Petitioner seeks discretionary review because the Fifth District Court of Appeal in its decision held that:

* * * "where defendants are joined on conspiracy charges, and the State timely moves for an extension of the speedy trial time period, showing that the extension is necessary to accommodate the co-defendants, the State's interest in a joint trial prevails over the defendant's speedy trial right," * * * (A-A, pg. 4 & 5)

That decision expressly and directly conflicts with decisions of other District Courts of Appeal on the same question of law, holding:

That the convenience of the State in trying co-defendants together is not sufficient reason to extend an objecting defendant's speedy trial and deny a defendant's Motion To Sever, even when a delay is necessary to accommodate a co-defendant.

Rico v. State, 463 So.2d 1172 (Fla.App. 2nd DCA, 1984)
Machado v. State, 431 So.2d 337 (Fla.App. 2nd DCA, 1983)
Darby v. State, 463 So.2d 496 (Fla. App. 1st DCA, 1985)
Bustos v. Fleet, 461 So.2d 1039 (Fla.App. 4th DCA, 1985)
State v. Littlefield, 457 So.2d 558 (Fla.App. 4th DCA, 1984)

The decision of the Fifth District Court of Appeal also expressly and directly conflicts with decisions of the Third District Court of Appeal in the cases of State v. Dante, (3rd DCA, case #83-2626, April 2, 1985); and, State v. Barriero, 460 So.2d 945 (Fla.App. 3rd DCA, 1984)

The Fifth District held that Florida Rule of Criminal Procedure 3.191(g) permits a defendant to be brought to trial within 90 days after final resolution of a co-defendant's Petition For Writ Of Prohibition, without regard for cumulative, elapsed time prior to the filing of the co-defendant's Petition. (A-A)

The Third District Court of Appeal, in Dante, (supra), and Barriero, (supra), specifically held that Florida Rule of Criminal Procedure 3.191(g) is not applicable to a Petition For Writ Of Prohibition or other original Writ proceedings, as such proceedings are not "appeals", and are, therefore, not covered by the Rule.

The Fifth District Court of Appeal overlooked or misapprehended several pertinent facts, to-wit:

(1) At the hearing on the State's Motion to extend the speedy trial time, GARCIA specifically argued his right to be tried within sixty (60) days of his Demand For Speedy Trial.

(A-D, E & F)

(2) GARCIA'S Motion For Stay Of Trial only requested that the Court stay the joint trial of the Defendants and

specifically declined to waive his right to a separate speedy trial in the cause. (A-G)

(3) The Order of the Trial Court staying the trial proceedings and granting a second extension of the speedy trial time specifically found that GARCIA did not waive his right to speedy trial as previously demanded. (A-H, ¶6)

JURISDICTION

Petitioner, GEORGE GARCIA, has respectfully invoked the discretionary jurisdiction of this Court for review of a decision from the Fifth District Court of Appeal, which expressly and directly conflicts with decisions of other District Courts of Appeal on the same question of law and prays this Court will accept jurisdiction under Rule 9.030(a)(2)(A)(iv).

Petitioner further prays that this Court will accept jurisdiction because the decision of the Fifth District passes upon a question which has been certified by other District Courts of Appeal of this state to be of great public importance; although, the Fifth District Court of Appeal did not so certify the question. Nonetheless, this Court should, in its discretion, accept jurisdiction pursuant to Rule 9.030(a)(2)(A)(v).

JURISDICTIONAL ARGUMENT

Petitioner, GEORGE GARCIA, was arrested on February 10, 1983, and despite continued Motions For Severance and Demands For Speedy Trial, it was three hundred and sixty three (363) days before he was brought to trial, February 8, 1984. Two hundred and ninety three (293) days elapsed between the time GARCIA first demanded speedy trial on April 21, 1983, and the February 8, 1984, trial date. The Trial Judge's granting of the State's Motion To

Extend The Time For Trial, over GARCIA'S objection and his Demand For Speedy Trial, was based upon a new premise of law forged by the Fifth District Court of Appeal, to-wit: (THE STATE'S INTEREST IN A JOINT TRIAL, WHERE CONSPIRACY IS CHARGED, PREVAILS OVER A DEFENDANT'S SPEEDY TRIAL RIGHT.)

The Fifth District Court of Appeal said:

"In summary, where defendants are joined on conspiracy charges, and the state timely moves for an extension of the speedy trial time period, showing that the extension is necessary to accommodate the co-defendants, the state's interest in a joint trial prevails over the defendant's speedy trial right, provided the extension is not to an unreasonably distant date."
* * * (A-A, pg. 4 & 5)

The above-quoted decision expressly and directly conflicts with decisions of other District Courts of Appeal on the same question of law, to-wit:

(1) In Rico v. State, 463 So.2d 1172 (Fla., 2nd DCA, 1984), defendant was convicted of Trafficking In Cocaine and Conspiracy To Traffic In Cocaine. The trial court refused defendant's Motion For Severance and granted a continuance to the State to accommodate co-defendants. The Second District Court of Appeal discharged defendant because the prosecutor failed to assert any reason or argument for the defendants' joint trial; however, it must be presumed that both the trial and appellate courts were aware that the defendants were to be tried as co-conspirators jointly. The trial judge had already accommodated the co-defendants by granting their Motions For Continuance. (This case is virtually indistinguishable from Petitioner's case.)

(2) In Machado v. State, 431 So.2d 337 (Fla.App. 2nd DCA, 1983), defendant was convicted of Burglary and Grand Theft. The trial court refused defendant's Motion For Severance, granted co-defendants a continuance and the prosecutor's Motion to extend the time for trial because of an asserted need for an interpreter at trial. The Second District Court of Appeal reversed the conviction, holding that "a defendant's right to a speedy trial takes precedence over the mere convenience to the state of trying him and his co-defendants together." Machado v. State, (@339)

(3) In State v. Littlefield, 457 So.2d 558 (Fla.App. 4th DCA, 1984), defendant was charged with Possession Of Marijuana along with nine other co-defendants. The co-defendants obtained continuances and Littlefield's case was also continued over his objection. The state took no action to obtain an extension of trial time and defendant's Motion For Discharge was granted by the trial court and affirmed by the Fourth District Court of Appeal.

The question of law dealt with by the Fifth District Court of Appeal in the instant case has been certified by both the First and Fourth District Courts of Appeal to this Court as being a question of great public importance, to-wit:

(1) In Darby v. State, 463 So.2d 496 (Fla.App. 1st DCA, 1985), defendant was convicted of Grand Theft. The state moved for an extension of speedy trial time to allow the co-defendant's new attorney to prepare for trial and for the convenience of not calling a witness who would have to travel from Miami to Tallahassee for two separate trials. The First District Court of Appeal noted the inconsistency in applying simultaneously Rule

3.191(f)(5) and Rule 3.152(b)(1)(i), RCrP. The former Rule allowing an extension of speedy trial time to accommodate a co-defendant "where there is reason not to sever the cases in order to proceed promptly with trial of the defendant"; and, the latter mandating a severance of a defendant to protect his right to a speedy trial.

The First District Court of Appeal opted for the mandatory protection of defendant's speedy trial right over the discretionary rule permitting an extension on the state's Motion. That case is presently on certification to this Court.

(2) In Bustos v. Fleet, 461 So.2d 1039 (Fla.App. 4th DCA, 1985), question certified:

"IS THE CONVENIENCE TO THE STATE OF TRYING CO-DEFENDANTS TOGETHER A SUFFICIENT REASON IN AND OF ITSELF TO EXTEND AN OBJECTING DEFENDANT'S SPEEDY TRIAL TIME AND DENY A MOTION TO SEVER WHEN A DELAY IS NECESSARY TO ACCOMMODATE A CO-DEFENDANT?"

(3) In Westlake v. Miner, 460 So.2d 430 (Fla.App. 1st DCA, 1984), the defendant was charged with Grand Theft and obtained a Writ Of Prohibition from the First District Court of Appeal because, in the opinion of the Appellate Court, the time limits for speedy trial had expired. The trial judge had extended the time for trial on the state's Motion because a delay was necessary to accommodate the co-defendant who had sought a continuance and "there is ample reason not to sever the trials of Bevan and Westlake in that all testimony, witnesses and evidence is identical for the proof of each defendant's case."

The First District Court of Appeal certified to this Court the question:

"IS THE CONVENIENCE TO THE STATE OF TRYING CO-DEFENDANTS TOGETHER A SUFFICIENT REASON IN AND OF ITSELF TO EXTEND AN OBJECTING DEFENDANT'S SPEEDY TRIAL TIME AND DENY A MOTION TO SEVER WHEN A DELAY IS NECESSARY TO ACCOMMODATE A CO-DEFENDANT?"

The Fifth District Court of Appeal is well aware that the question of priorities in the application of the two pertinent Rules of Criminal Procedure has been certified to this Court to be "a question of great public importance"; nonetheless, the Fifth District Court of Appeal has promulgated its own interpretation of the Rule against GARCIA'S speedy trial right simply because he was charged with Conspiracy.

The decision of the Fifth District Court of Appeal also expressly and directly conflicts with the decision of the Third District Court of Appeal in State v. Dante, (3rd DCA, Case #83-2626, filed April 2, 1985).

In the Dante case, (supra), the Third District Court held that Florida Rules of Criminal Procedure 3.191(g) is inapplicable to a Petition For Writ Of Prohibition because such a proceeding is not, in the language of the Rule, an "appeal", citing State v. Barrierro, 460 So.2d 945 (Fla., 3rd DCA, 1984)

Fifty five days elapsed from the time GARCIA first filed his Demand For Speedy Trial and the time the Trial Court first extended the time of trial. When the time for trial resumed, after the conclusion of the Co-Defendants' efforts to obtain a Writ Of Prohibition, there remained only five (5) days on the

original sixty (60) days within which the State could have brought GARCIA to trial under the Dante decision, (supra), and Barriero, (supra).

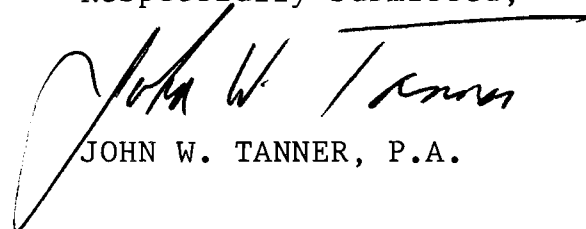
GARCIA timely and appropriately argued that issue before the Fifth District Court of Appeal and again called it to the Appellate Court's attention in his Motion For Rehearing. (A-#B) Nonetheless, the Fifth District Court of Appeal ruled that:

* * * "he was brought to trial well within ninety days after the disposition of the Co-Defendants' Petition For Writ Of Prohibition as Florida Rule of Criminal Procedure 3.191(g) requires. Accordingly, he is not entitled to discharge. AFFIRMED."

CONCLUSION

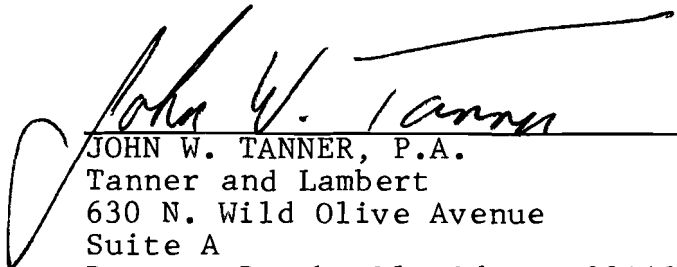
WHEREFORE, Petitioner, GEORGE GARCIA, respectfully prays this Honorable Court will exercise its discretion in this matter and grant him review of these issues, wherein the Fifth District Court of Appeal has totally disregarding precedence of its sister courts and set about forging its own set of rules without regard to the obvious and direct conflicts in its decisions with that of other Benches.

Respectfully submitted,


JOHN W. TANNER, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the HONORABLE JIM SMITH, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida; and to the HONORABLE FRANK J. HABERSHAW, Clerk, Fifth District Court of Appeal, Post Office Box CA, Daytona Beach, Florida, this 17th day of October, A. D., 1985.



JOHN W. TANNER, P.A.
Tanner and Lambert
630 N. Wild Olive Avenue
Suite A
Daytona Beach, Florida 32018
(904) 255-0464

Attorney for Defendant/Petitioner