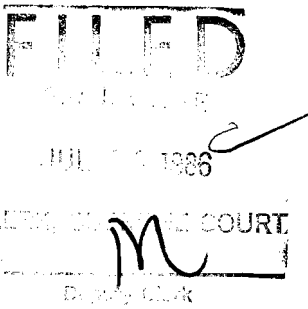
IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,849



THE STATE OF FLORIDA,

Petitioner,

vs.

ROBERT PARVIS,

Respondent.

* *

ON CERTIFIED QUESTION FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

* *

BRIEF OF PETITIONER ON THE MERITS

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OTHER AUTHORITIES

PREFACE

The Respondent, Robert Parvis, was the Appellee in the District Court of Appeal and the defendant in the trial court. The Petitioner, The State of Florida was the appellant in the District Court of Appeal and the prosecution, in the trial court. In this brief, the parties will be referred to as the Defendant and the State respectively. The opinion of the District Court of Appeal herein is reported at State v. Parvis, 487 So.2d 1181 (Fla. 3d DCA 1986) and is contained in the Petitioner's Appendix attached hereto at A1.

The following symbols are used in this brief:

(R) For the Record-on-Appeal transmitted by the Third District Court of Appeal consisting of pages R1-R15.

(T) For the transcript of proceedings consisting of pages T1-T10.

I

STATEMENT OF THE CASE

The Defendant was charged by information with one count of grand theft arising from the theft of cash between July 31, 1981 and August 4, 1981. See, R1. The Defendant was not arrested until August 27 or 28, 1984 in Daytona Beach, Florida. See, R8; R10. The Defendant filed a motion for discharge which was granted. See, R10.

At the first hearing on this matter, on August 23, 1985, the parties focused upon whether the Defendant was continuously available from August 31, 1984 to April 23, 1985. See, T5-T8. The Defendant's written motion repeats this analysis. See, R10. On April 25, 1985, the trial court granted the Defendant's written motion discussion. See, T2. In the trial court's written order however, the Court also recites and rejects the State's argument that the present cause is governed by Rule 3.191, Florida Rules of Criminal Procedure effective January 1, 1985. See, R11.

On appeal to the Third District Court of Appeals, the State contended that this cause was governed by the provisions of Rule 3.191(i)(4), Florida Rules of Criminal Procedure, enacted on January 1, 1985, which preclude automatic dismissal of this cause. The district court rejected

the State's position but certified the question explaining that:

> "The state appeals an order granting Parvis' motion to discharge on speedy trial grounds. We affirm based upon the controlling authority of McKnight v. Bloom, 11 FLW 468, ___ So.2d ___ (Fla. 3d DCA Feb. 18, 1986). We certify to the supreme court, as we did in McKnight, the following question: 'Whether Florida Rule of Criminal Procedure 3.191(i)(4) is applicable to a criminal case wherein the defendant is taken into custody prior to January 1, 1985, 12:01 A.M., the effective date of the above-stated rule.'"
>
> Id.

The present petition follows. The same issue herein is also pending in McKnight v. Bloom, Fla.S.Ct. Case No. 68,401.

II

QUESTION PRESENTED

WHETHER RULE 3.191(i)(4), FLORIDA RULES OF CRIMINAL PROCEDURE (1985), IS APPLICABLE TO PROHIBIT THE AUTOMATIC DISCHARGE OF A DEFENDANT, WHERE THE DEFENDANT WAS ARRESTED PRIOR TO THE EFFECTIVE DATE OF SAID RULE.

III

SUMMARY OF ARGUMENT

Rule 3.191(i)(4), Florida Rules of Criminal Procedure (1985), as a rule of procedure applies to all pending cases.

IV

ARGUMENT

RULE 3.191(i)(4), FLORIDA RULES OF CRIMINAL PROCEDURE (1985), IS APPLICABLE TO PROHIBIT ANY AUTOMATIC DISCHARGE OF THE DEFENDANT NOTWITHSTANDING THAT THE DEFENDANT WAS TAKEN INTO CUSTODY PRIOR TO THE EFFECTIVE DATE OF SAID RULE.

The only issue in the present petition is whether the ten-day "grace" period under Rule 3.191(i)(4), which became effective on January 1, 1985, applies to pending cases, such as that presently before the Court. It is, of course, well settled that substantive remedies apply prospectively only and procedural rules apply to all pending matters. See, e.g., Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); State v. Jackson, 478 So.2d 1054 (Fla. 1985); Rubin v. State, 390 So.2d 322 (Fla. 1980); Warwick v. State, 443 So.2d 188 (Fla. 3d DCA 1983); Batch v. State, 405 So.2d 302 (Fla. 4th DCA 1981); Johnson v. State, 371 So.2d 556 (Fla. 2d DCA 1979); see also Senfield v. Bank of Nova Scotia Trust Co., 450 So.2d 1157 (Fla. 3d DCA 1984).

A statutory speedy trial rule is solely a rule of procedure rather than a substantive constitutional right. See, Blackstock v. Newman, 461 So.2d 1061 (Fla. 3d DCA 1985); cf, State v. Jenkins, 389 So.2d 971 (Fla. 1980). Thus, in

Julian v. Lee, 473 So.2d 736 (Fla. 5th DCA 1985), cited with approval, O'Brien v. State, 478 So.2d 497 (5th DCA 1985)(en banc), the petitioner had claimed that the former juvenile speedy trial rule, Rule 8.180(a), Florida Rules of Juvenile Procedure (1984) required their discharge from dependency proceedings. The Julian court rejected the petitioners' claims upon an application of a new rule, Rule 8.720(f), effective January 1, 1985, which provides for a longer speedy trial period. The Court reasoned that since Rule 8.720(f) was a rule of procedure and it took effect before the motions for discharge were filed, it was applicable and controlled disposition of the causes:

> "Rules of court designed to implement constitutional or statutory speedy trial rights are rules of procedure which such rights are enforced in this state, and are a proper exercise of the Florida Supreme Court's constitutional power to promulgate rules of practice and procedure. State ex rel. Maines v. Baker, 254 So.2d 207 (Fla. 1971). See also Sherrod v. Franza, 427 So.2d 161 (Fla. 1983). In State v. Garcia, 229 So.2d 236 (Fla. 1969) the court distinguished between substantive and procedural rules in this manner:
>
> > 'The rules adopted by the Supreme Court are limited to matters of procedure, for a rule cannot abrogate or modify substantive law. In some instances it is difficult to determine whether a rule relates to a matter that is substantive or a matter is procedural....

* * *

> Procedural law is sometimes referred to as "adjective law" or "law of remedy" or "remedial law" and has been described as the legal machinery by which substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer.

* * *

> As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor, while procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished.' [Citation omitted].

* * *

The rules of procedure in effect at the time of trial or other proceedings control the conduct of those proceedings. Kocsis v. State, 467 So.2d 384 (Fla. 5th DCA 1983). Because the rules in effect when the motions for discharge were filed provided for a 180-day 'speedy trial' period in dependency proceedings, and because only 97 days and 96 days, respectively, had elapsed since D.L.J. and J.J. were taken into custody, the motions were properly denied."

473 So.2d at 738, 739.

Similarly, in Kanter v. State, 265 So.2d 742 (Fla. 3d DCA 1972), the court rejected a claim that the retrospective application of the 1971 amendment to the speedy trial rule violation ex post facto law prohibitions. Accord, Patterson v. State, 277 So.2d 587, at 592 (Fla. 4th DCA 1973)(citing Kanter). Under Julian and the foregoing authority, the trial court's application of former Rule 3.191(i)(4) to the instant motion for discharge, was therefore entirely correct.

In McKnight v. Bloom, 11 FLW 468 (Fla. 3d DCA February 18, 1986), relied upon by the district court for affirmance herein the Court relied upon State v. Green, 473 So.2d 823 (Fla. 2d DCA 1985) and the Respondent herein in his reply to this brief will rely upon various identical decisions in Jackson v. Green, 402 So.2d 553 (Fla. 1st DCA 1981); Arnold v. State, 429 So.2d 819 (Fla. 2d DCA 1983); Fulk v. State, 417 So.2d 1121 (Fla. 5th DCA 1982) and Holmes v. Leffler, 411 So.2d 889 (Fla. 5th DCA 1982). This reliance is misplaced. In Fulk, without any analysis, the Court cites Holmes for the proposition that procedural rules are only given prospective application unless otherwise specified. 417 So.2d at 1123, n1. Holmes in turn, without discussion or analysis, cites Jackson for the same proposition. 411 So.2d at 891-892. Green, Jackson and Arnold in turn, but

again without discussion or analysis, cite Poyntz v. Reynolds, 37 Fla. 533, 19 So. 649 (1896) for such a rule.

In Poyntz, supra, the appellee had filed motions to dismiss, contending that three new appellate rules, Rules 12, 13, and 20 Fla.R.App.P. (1895), requiring the preparation of certain appellate documents in order to perfect an appeal, were not prepared by the appellants. 19 So. at 650-651. The appellees reasoned therefore that the cases should be dismissed as a sanction for failing to comply with the rules. See, id. In construing the 1895 appellate rules enacted by the Supreme Court, the Poyntz court declined to apply two of its rules, Rules 12 and 13, to the pending case because the Court's enactment of Rules 12 and 13 did not say that it specifically applied to pending cases. On the other hand, the Poyntz court applied Rule 20 to the cause, because the Court's enactment of Rule 20 said that it would be applied to all pending cases. In applying the meaning of the rules, which it drafted, the Poyntz court noted in its syllabus that:

> "The rules of practice for the government of the supreme court adopted at its June term, 1895, did not go into effect or become operative until the 15th day of Octobe, 1895, and do not apply to or affect any cause brought to the supreme court prior to that date, except in those instances and in those respects wherein said rules themselves in express terms provide

> for their application to causes brought here prior to that date, except in those instances and in those respects wherein said rules themselves in express terms provide for their application to causes brought here prior to that date."
>
> Id. at 649.

From the foregoing specific statement, which undoubtedly was made only as it applied to the 1895 rules, the Green, Jackson and Arnold courts erroneously created a broad rule of statutory construction, blindly followed by the courts in Fulk, Holmes and the District Court opinion in McKnight. The "rule" thus created by Green, Arnold and Jackson flies into the face of sound constitutional and statutory construction as reflected in Julian above. If this "rule" is correct, then this Court's recent opinion in Jackson, applying the subsequent enactments in the sentencing guidelines approved by this Court to all pending cases, is incorrect. Similarly, the application of the death penalty rules of procedure in Dobbert v. Florida, is incorrect under state law as decided by Green, Arnold and Jackson. To the contrary, the settled notion that any statutory right to a speedy trial is only a rule of procedure, Julian v. Lee, and the well settled doctrine that rules of procedure will be applied to pending cases, State v. Jackson, absolutely precludes the result of the "rule" in Green, Jackson and Arnold. Furthermore, the Court in Poyntz also never

intended such a result. Even assuming the court in Poyntz intended such a rule in 1895, subsequent statutory and constitutional analysis has overruled it sub silentio. Therefore, the present decision relying upon the erroneous rule in McKnight must be reversed.

V

CONCLUSION

WHEREFORE, upon the foregoing, the Petitioner, THE STATE OF FLORIDA, prays that this Honorable Court will issue its judgement reversing the judgement of the Third District Court of Appeals.

RESPECTFULLY SUBMITTED, on this 11th day of July, 1986, at Miami, Florida

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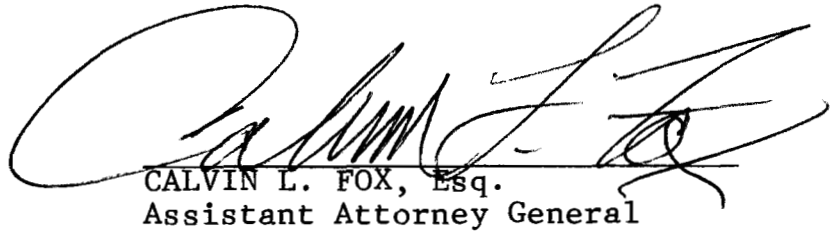
VI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was caused to be served by mail upon HOWARD BLUMBERG, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 11th day of July, 1986.



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