IN THE SUPREME COURT OF FLORIDA

MICHAEL BOWENS,

Petitioner,

v. CASE NO. 74,370

HON. ROBERT W. TYSON, JR., ETC., ET AL.,

Respondents.

_____/

RESPONDENT'S ANSWER BRIEF

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SUMMARY OF ARGUMENT

Where an information has been filed subsequent to a motion for release pursuant to Rule 3.133(b)(6) but prior to the hearing on the motion, a defendant is no longer entitled to automatic release. The state should be allowed a reasonable amount of time or the time between the filing of the motion and the hearing in which to file the information. Defense attorneys should not be permitted to sandbag the state by waiting until the 40 day time period has passed and then move for release. Furthermore, as Rule 3.133(b)(6) is silent regarding restraint on a defendant's liberty once he has been released, upon the filing of an information the defendant may be re-arrested.

ARGUMENT

A DEFENDANT WHO IS HELD IN CUSTODY FOR THIRTY DAYS WITHOUT THE FILING OF AN INFORMATION OR INDICTMENT IS NOT ENTITLED TO AUTOMATIC PRETRIAL RELEASE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.133(b)(6), WHERE THE STATE FILED AN INFORMATION PRIOR TO THE HEARING ON DEFENDANT'S MOTION FOR RELEASE.

Prior to addressing the instant claim, respondents assert that this issue may very well be moot by the time this court renders its decision. This is because respondents claim concerns pretrial detention and release. Once petitioner has been acquitted or convicted, the issue of pretrial detention then becomes moot. This, therefore, is only a viable issue prior to the disposition of the case. Respondents, however, recognize that an exception to the mootness doctrine exists where an issue is capable of repetition which would evade judicial review.

Proceeding to the instant claim, Rule 3.133(b)(6) states:

> (6) *Pretrial Detention.* In the event that the defendant remains in custody and has not been charged in an information or indictment within 30 days from the date of his or her arrest or service of capias upon him or her, he or she shall be released from custody on their own recognizance on the 30th day unless the state can show good cause why the information or indictment has not been filed. If good cause is shown the state shall have 10 additional days to obtain an indictment or file an information. If the defendant has not been so charged within this time he or she shall be automatically released on his or her own recognizance. In no event shall any defendant remain in custody beyond 40 days unless he or

> she has been charged with a crime by information or indictment.

The new rule was adopted in In re Amendments to Florida Rules of Criminal Procedure, 536 So.2d 992 (Fla. 1988) and became effective on January 1, 1989. There are no accompanying committee notes. This was a matter of first impression with the district court, as it is with this court. The Fourth District Court of Appeal interpreted this new subsection to mean

> that if a defendant is held in pretrial custody for thirty days without the filing of an indictment or information, he or she has the right, on the 30th day, to move for immediate release by court order. The court then has the authority to either release the defendant, or, if the state can show good cause why the information has not been filed, the court may allow ten additional days for filing of an indictment or information. We do not interpret the rule to mandate automatic release if the state files an information or indictment after the thirty day period has expired, but before the court hears the defendant's motion for release.

Bowens v. Tyson, 543 So.2d 851 (Fla. 4th DCA 1989). Petitioner argues that the district court erred in denying the petition for writ of habeas corpus. Respondents assert that the district court properly denied the petition and the certified question should be answered in the negative. Respondents further assert that petitioner has suffered no prejudice to his case by his continued detention, nor will he suffer any prejudice.

Petitioner was arrested on January 17, 1989, for the offenses of attempted first degree murder, armed robbery and

possession of a short barrelled shot gun. On February 28, 1989, at 3:57 P.M., petitioner filed a motion for pretrial release. On the same day at 4:13 P.M., the state filed the information charging the petitioner with the above mentioned crimes. Although the information was filed 42 days after petitioner's arrest, it was filed only one day late, as the fortieth day was a Sunday. On March 3, 1989, the motion for release was denied. Petitioner then filed an emergency petition for writ of habeas corpus which was also denied.

Respondents assert that as the information was filed prior to the hearing on the motion for pretrial release petitioner was no longer entitled to be released on his own recognizance pursuant to Rule 3.133(b)(6).

Rule 3.133(b)(6) provides that a defendant who has not been charged by information or indictment within 30 days of arrest, 40 days if good cause shown, and remains in custody shall be released on his own recognizance. As the petitioner points out, the plain meaning of the rule is emphasized in the last sentence:

> "In no event shall a defendant remain in custody beyond 40 days unless he or she has been charged with a crime by information or indictment."

The key word is "unless": The defendant shall be released unless he has been charged.

It is clear that when interpreting court rules the principles of statutory construction apply and a rule should be interpreted according to the plain meaning of its language. Roe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981), affirmed, 417 So.2d

981 (Fla. 1982); Beckwith v. Board of Public Instruction, 261 So.2d 504 (Fla. 1972). Furthermore, it is a well settled rule of law that a statute or rule should be viewed as a whole. State v. Rodriquez, 365 So.2d 157 (Fla. 1978); Shuman v. State, 358 So.2d 1333 (Fla. 1978).

Rule 3.133(a)(4) and (b)(5), as well as (b)(6), contain the language that release shall be ordered "unless an information or indictment has been filed". When looking at the rule as a whole, release is no longer mandatory or automatic once an information or indictment has been filed. Thus, once petitioner was charged with the crimes of attempted first degree murder, armed robbery and possession of a short barrelled shot gun, he was no longer entitled to be released on his own recognizance pursuant to Rule 3.133(b)(6).

Under Rule 3.133(b)(1)-(5), when a defendant has not been charged by an information or indictment after 21 days from the date of his arrest he has the right to an adversary preliminary hearing. The defendant must demand the hearing. The filing of the information or indictment between the filing of the motion and the hearing does not eliminate the defendant's right to that hearing. Where the hearing is held and probable cause is found, the defendant is not entitled to be released. The fact that the 21 day time-period ran before the information or indictment was filed does not entitle the defendant to mandatory release.

Thus, under Rule 3.133(b)(1)-(5), the state is given the opportunity to correct its inadvertent failure to file the information within 21 days by showing at a hearing that probable

cause exists. If probable cause is shown, then the defendant is not entitled to release. The state should also be given an opportunity to correct the nonfiling of the information under 3.133(b)(6). A defendant should not be released due to the inadvertent nonfiling of an information within 30 days of arrest where the information was filed subsequent to the filing of the motion for release but prior to the hearing on the motion. The filing of the motion puts the state on notice that it must "put up or shut up". Once the motion has been filed the state is on notice that it must either file an information, show good cause why no information has yet been filed or agree that the defendant should be released on his own recognizance. Therefore, the state should have a reasonable amount of time after the filing of a defendant's motion for release in which to file the information.

A reasonable amount of time from the filing of a defendant's motion is necessary in order to ensure that defense attorneys do not "sandbag" the state by waiting for the 40 day period set out in the rule to run and then demand automatic release. The purpose of the rule was to light a fire under the state to ensure that a defendant was not held indefinitely and that an information or indictment was filed within a reasonable amount of time or the defendant is released. What petitioner has done by arguing that after 40 days a defendant is entitled to automatic release is exalted the form over the substance of the rule. An interpretation of a statute, or in this case a rule, which leads to an unreasonable or ridiculous conclusion will not

be adopted. Drury v. Harding, 461 So.2d 104 (Fla. 1984). Furthermore, statutes, or rules, should be construed in light of the manifest purpose to be achieved. Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc., 444 So.2d 926 (Fla. 1983).

Respondents further assert that by waiting until the 40 day time-limit provided for in Rule 3.133(b)(6) had expired before filing the motion for release, as was done in the instant cause, the state was deprived of the additional days which the rule allows if good cause is shown. If petitioner's defense counsel had filed his motion for release prior to the running of the fortieth day, then the state would have been put on notice that there was a problem, particularly that no information had been filed. The state then may have been able to show good cause why the information was not filed and would have then been granted the additional days in which to file the information. By waiting until the 40 days expired, defense counsel in effect deprived the state of their opportunity to show good cause and subsequently file a timely information. As previously stated, defense attorneys should not be permitted to sandbag the state by waiting until the 40 day time period has passed. The state should have a reasonable amount of time or the time between the filing of the motion and the hearing in which to file the information. If the state then fails to file an information or cannot show good cause, then the defendant should be released on his own recognizance.

Under petitioner's interpretation of this rule, once the 40 days has run and no information has been filed, a defendant should automatically be released. Respondents assert that the purpose of the rule was to keep defendants from being held in jail indefinitely without having been charged with a crime. The drafters of the rule did not provide for automatic release where a defendant was not charged by day 30. Rather, after 30 days has passed if the state can show good cause why no information was filed, they have 10 additional days in which to file the information. The 10 day time-period provided for in Rule 3.133(b)(6) is very similar to the 15 day time-period which is provided for in the speedy trial rule, Florida Rule of Criminal Procedure 3.191(i)(4).

Rule 3.191(i)(4) provides:

> (4) No later than 5 days from the date of the filing of a motion for discharge, the court shall hold a hearing on the motion, and unless the court finds that one of the reasons set forth in section (d)(3) exists, shall order that the defendant be brought to trial within 10 days. If the defendant is not brought to trial within the 10 day period through no fault of the defendant, the defendant shall be forever discharged from the crime.

The committee note further states:

> The intent of (i)(4) is to provide the state attorney with 15 days within which to bring a defendant to trial from the date of the filing of the motion for discharge. This time begins with the filing of the motion and continues regardless of whether the judge hears the motion.

Pursuant to Rule 3.191(i)(4), once a defendant files a motion for discharge the 15 day time period begins to run. If the state fails to bring the defendant to trial during those 15 days, the defendant is forever discharged from the crime.

While the remedy provided for defendants in rule 3.133(b)(6) is not as severe as that which is provided for in Rule 3.191(i)(4), respondents assert that the inaction by the state under Rule 3.133(b)(6) should be treated as it is in Rule 3.191(i)(4). The state should be given additional days from the date the motion for pretrial release is filed. If defense counsel does not file his motion for release until day 45 the state should not be penalized. Rather, the state should be given a reasonable amount of time in which to file the information, such as the time between the filing of the motion for release and the hearing on the motion. If the state fails to file the information within that time or fails to show good cause why no information was filed, then and only then should the defendant be released on his own recognizance.

If the petitioner's interpretation, on day 40 a defendant must be released no matter when the motion for release was filed, is accepted it could lead to disastrous consequences. For example, a defendant has been arrested on a charge of trafficking in cocaine and faces the mandatory minimum sentence of 15 years in prison. The state due to an unforeseen circumstance fails to file the information. On day 41, defense counsel files a motion for pretrial release because the state has failed to file the information. Because the 40 days have

passed the trial judge releases the defendant on his own recognizance and the defendant vanishes. Or a defendant is arrested for the attempted first degree murder of his ex-wife. The state through some inadvertence fails to file the information and after the expiration of the 40 days defense counsel moves for release or defense counsel moves for release on day 30, an information is filed on day 31 and a hearing is held on day 35. The trial judge releases the defendant on his own recognizance pursuant to Rule 3.133(b)(6) because the information was not filed within 30 days and the defendant finishes what he began, he kills his ex-wife. Respondents recognize that these are worst case scenarios, but under petitioner's interpretation of this rule that is exactly what could and in some instances has happened pursuant to Rule 3.133(b)(6).

While this rule was put into effect to protect the rights of defendants, we must not lose sight of the need to protect society. The criminal justice system is used not only to protect the rights of defendants, but to protect society. By allowing a defendant to be automatically released on his own recognizance when the state has failed to file an information within 30 days and the defense counsel waited until 40 or more days has passed before filing his motion for release, the needs of society are not protected.

Finally, respondents assert that a defendant who has not been charged by indictment or information after 40 days and who has been released pursuant to Rule 3.133(b)(6), can upon the filing of an indictment or information be re-arrested.

As previously stated, when interpreting court rules the principles of statutory construction apply and a rule should be interpreted according to the plain meaning of its language. Furthermore, a statute or rule should be viewed as a whole.

Rule 3.133(a) deals with nonadversary probable cause determinations. Section (a)(4) requires that a defendant be released from custody if no probable cause is found or the time periods are not complied with unless an information or indictment has been filed. Section (a)(4) also states that "a release required by this rule...does prohibit any restraint on liberty other than appearing for trial." Section (b) of Rule 3.133 concerns adversary preliminary hearings. Section (b)(5) requires that a defendant be released where there is no evidence of probable cause unless an information or indictment has been filed. Section (b)(5) also states that release pursuant to this rule prohibits any restraint on liberty other than appearing for trial. Section (b)(6) states that there shall be a release unless an information or indictment has been filed. However, section (b)(6) does not contain the language found in sections (a)(4) and (b)(5) prohibiting any restraint on liberty once there has been a release pursuant to those rules.

The rule "expressio unius est exclusio alterius," which means the express mention of one thing is the exclusion of another, is applicable in connection with statutory construction. PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952). Had this court intended that particular language be a part of the rule, it surely would have expressly included it in the rule.

As petitioner points out, this court was presumably aware of the contents of section (a)(4) and (b)(5) when it promulgated this new rule. Thus, had this court intended the language ("a release prohibits any restraint on liberty other than appearing for trial") to be a part of Rule 3.133(b)(6), it clearly would have included that language in the rule as it did in sections (a)(4) and (b)(5). The fact that this language is not found in section (b)(6) signifies that it is not applicable to that section. While a statute or rule should be read together as a whole, it is improper to add language to the statute or rule which has not been expressly included. Chafee v. Miami Transfer Co., Inc., 288 So.2d 209 (Fla. 1974); Atlantic Coast Line R. Co. v. Boyd, 102 So.2d 709 (Fla. 1958); Special Disability Trust Fund, Dept. of Labor and Employment Sec. v. Motor and Compressor Co., 446 So.2d 224 (Fla. 1st DCA 1984).

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the denial of the petition for writ of habeas corpus and answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Answer Brief has been furnished by U.S. Mail to Steven Michaelson, Chief Assistant Public Defender, 201 S.E. Sixth Street, Room 740 , Fort Lauderdale, FL 33301, this 13th day of October, 1989.

Bonnie Jean Parrish

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