FILED
SID J. WHITE
SEP 28 1990
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STEVEN VALDEZ,
Petitioner,

-v- CASE NO. 76,260

STATE OF FLORIDA,
Respondent,

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KEVIN J. ORY,
Petitioner,

-v- CASE NO. 76,311

STATE OF FLORIDA,
Respondent,

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LAWRENCE A. DEMERS,
Petitioner,

-v- CASE NO. 76,310

STATE OF FLORIDA,
Respondent.

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REPLY BRIEF OF PETITIONER STEVEN VALDEZ

C. DENNIS ROBERTS
PUBLIC DEFENDER
3RD JUDICIAL CIRCUIT

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I. ARGUMENT

The Respondent's reading of Rule 3.133(b)(6) does not follow the plain language and meaning of the rule. The Respondent argues that the Petitioner's analysis of the rule creates new substantive rights which the Supreme Court of Florida is unable to promulgate. The Supreme Court, in In re Rules of Criminal Procedure, 545 So. 2d 266 (Fla. 1989), refused the petition of the State Attorneys of Florida to vacate Rule 3.133(b)(6) because to do so would create the possibility of prisoners being confined indefinitely, with charges never being filed. The plain language of the rule sets forth a specific time period -forty days- within which the state must file an indictment or information, or a defendant must be released. The Petitioner asks that this court follow the plain language of the rule. The Petitioner does not ask for, as the Respondent alleges, creation of new rights.

The Respondent argues that Rule 3.133(b)(6) was created with the idea that a Defendant incarcerated for 21 (twenty-one) days would file for an adversary preliminary hearing. The language of the rule contradicts this position. The last sentence of Rule 3.133(b)(6) states that:

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

Neither in this sentence, nor anywhere in Rule 3.133 appears the language requiring a defendant to move for an adversary preliminary hearing prior to moving for release after the

expiration of forty days from arrest.

Respondent characterizes the various opinions of the District Courts of Appeal of this state as "differing and conflicting". A careful analysis of the facts of these different cases bears out that they all follow the plain language of the rule.

In Bowens v. Tyson, 543 So. 2d 851 (Fla. 4th DCA 1989), the court stated:

> 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 defendant's motion for release. Id.

Thus, Bowens follows the plain language of the rule in that if the State can show good cause why charges have not been filed, they have until the end of the fortieth day to file charges, or a defendant must be released. In the instant case no cause was ever advanced by the State Attorney or the Attorney General for the tardy filing of charges. To obtain extra time after the thirty-day period, the state must show good cause for the delay. If they fail to do so, a defendant must be released. Lott v. Lawrence, 15 F.L.W. 1758 (Fla. 3d DCA July 13, 1990). Lott goes on to say that if good cause is not established, and if the state then waits more then forty days to file charges, a defendant must be released. Id.

Petitioner asserts that Lott is also consistent with the plain language of the rule. There are two factual differences between Lott and the instant case: (1) the state in the instant case has never attempted to show good cause for failing to file charges; and (2) more than forty days passed before an information was filed

in the instant case. Under the facts of the instant case, the Lott court probably would have granted relief.

In Thomas v. Dyess, 557 So. 2d 196 (Fla 2d DCA 1990), the District court granted a writ of habeas corpus for a defendant and reversed the finding of the trial court. Id. As in the instant case, the State waited until after forty days had passed to file charges. Id. The court remarked that Rule 3.133(b)(6)'s purpose was to require the state to timely file charges, or lose the right to insist upon continued detention. Id.

As in Bowens and Lott, the Thomas court used the plain language of the rule in reaching their decision. The Petitioner merely asks this court to do the same. The Respondent states that the rule does not operate in a "vacuum", and uses a variety of cases and authorities to make their point. The cases and authorities are distinguishable.

In Payret v. Adams, 471 So. 2d 218 (Fla. 4th DCA 1985) the court struck down a local order granting automatic release to a defendant if after 21 days of incarceration no indictment or information was filed. The Payret court held that automatic release after 21 days, without inquiry as to the probable cause underlying a defendant's arrest, would be inconsistent with the language of Rule 3.133(b)(6). Id. The court stated that to allow such a release would also "skirt the requirements of duly promulgated rules." Id. at 220, Berkheimer v. Berkheimer, 466 So. 2d 1219, 1221 (Fla. 4th DCA 1985). Rule 3.133(b)(1) states that a defendant has a right to ask for an adversary preliminary hearing

if he or she is held for 21 days without an information being filed. The local order in Payret was an unallowable expansion of the plain language of Rule 3.133(b)(1). 471 So. 2d at 220. The relief sought by the Petitioner, an the other hand, is the plainly stated purpose of Rule 3.133(b)(6). To do anything other than to grant release to a defendant after forty days of incarceration with no formal charges would skirt the requirements of duly promulgated rules. Berkheimer, 466 So. 2d at 1221.

In Kennedy v. Crawford, 479 So. 2d 758 (Fla. 3d DCA 1985), the court held that a defendant is not entitled to release if the state fails to give him or her an adversary preliminary hearing within 21 days of incarceration. The court in Kennedy does not state or infer in any way that such a hearing is mandatory before a defendant is entitled to release. Id. In U.S. v. Montalvo-Murillo, 4 F.L.W. Fed. S473 (June 1, 1990) the United States Supreme Court held that a defendant in federal court is not entitled to immediate release because the prompt hearing provision of the Bail Reform Act of 1984 is not followed. The Court stated that "neither the timing requirements nor any other part of the Act can be read to require, or even suggest, that a timing error must result in the release of a person who should otherwise be detained." Id. at 475. The same is not true of the language of Rule 3.133(b)(6), which states that the defendant "in no event" will be detained after forty days with no charges being filed.

The Montalvo-Murillo court also said that the Bail Reform Act of 1984 is "silent on the issue of a remedy for violations of it's

time limits" by the prosecutor. Id. at 475. The Plain language of Rule 3.133(b)(6) sets out the remedy which the First District Court of Appeal has utilized before. In Beicke v. Boone, 527 So. 2d 273 (Fla. 1st DCA 1988), the court interpreted Rule 3.133 and stated that the purpose of the rule was:

> to protest persons held in custody from remaining there indefinitely on account of the state's failure to file formal charges against them. Id.

This is virtually the same rationale the Thomas court found to underlie the rule. Thomas, 557 So. 2d 196. Curiously enough, the First District denied relief in the instant case.

The Petitioner asks only that the plain language of the rule be followed as it currently reads. This is not a "gotcha" technique, as the Respondent would characterize it. Furthermore, the State was aware of Petitioner's bail situation when bail reduction proceedings were initiated after 21 days. The Respondent cites Florida Statutes chapters 903 and 907 and Florida Rule of Criminal Procedure 3.312 to say that since the State may have had a motion for pretrial detention, there is no right for Petitioner to be released. This is internally inconsistent.

Whatever arguments may exist for keeping or doing away with this rule are not the issue in this case. In any event, these arguments have already been addressed by the Florida Supreme Court in In re Rules of Criminal Procedure, 545 So. 2d 266 (Fla. 1989). The Florida Supreme Court in that case refused to vacate the rule because it's purpose serves to keep defendants from being indefinitely incarcerated. Id. This appears to be the purpose

also set forth expressly in Thomas and Beicke, and implicitly in the other cases interpreting the rule.

In conclusion, it is essential to note that the Respondent fails to address the principle expressed in the Petitioner's initial brief that since this is a rule of criminal procedure, it is to be strictly construed in favor of a defendant. Ex Parte Bailey, 39 Fla. 734, 23 So. 552 (1897). Rules of construction applicable to criminal statutes should be applied to Rule 3.133(b)(6). Any doubts regarding the construction of this rule should be resolved in favor of Petitioner.

II. CONCLUSION

For all these reason, the Petitioner humbly asks this honorable court to grant the relief requested.

III. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petitioner Valdez' Reply brief has been furnished by U.S. Mail to Edward C. Hill, Jr. Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050 this 26TH day of September, 1990.

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