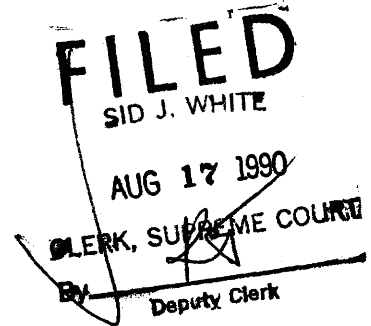

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

LAWRENCE A. DEMERS,

Petitioner,

-vs- Case No. 76-310

The Honorable TOM TRAMEL, as the Sheriff of Columbia County and ROBERT BUTTERWORTH, as the Attorney General of the State of Florida and the STATE OF FLORIDA,

1st District No. 90-1665

Respondent.

APPELLANT'S BRIEF

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Defendant

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______________________________________/

APPELLANT'S BRIEF

COMES NOW the Defendant/Petitioner, LAWRENCE A. DEMERS, by and through his undersigned Attorney and hereby files this Appeal from an adverse ruling from the First District Court of Appeals denying Defendant's Petition for Writ of Habeas Corpus.

(1)

That on the 21st day of May, A.D. 1990, the Defendant/Petitioner, LAWRENCE A. DEMERS was denied release in accordance with the release provisions under Florida Rules of Criminal Procedure 3.133 (b) (6), by the following Order:

ORDER DENYING DEFENDANT'S MOTION FOR IMMEDIATE RELEASE FROM INCARCERATION

This cause coming on to be heard before this Court on

May 14, 1990, on the written Motion for Immediate Release from Incarceration pursuant to F.R.Cr.P. 3.133(b)(6) and Demand for Adversary Preliminary Hearing on behalf of Valdez and pursuant to the ORE TENUS Motions on behalf of Demers and Ory, the Court having considered said Motions, F.R.Cr.P.(b)(6), other applicable Florida law, and the arguments of counsel, the Court makes the following findings;

(1) The three above-named defendants were arrested on March 30, 1990;

(2) The only written Motion on behalf of Valdez was filed on May 10, 1990 and was joined ORE TENUS by counsel for Ory and Demers on May 14, 1990;

(3) The State had not filed an information on any of the three defendants prior to May 11, 1990 when it filed informations on all three defendants;

(4) F.R.Cr.P. 3.133(b)(6) is a subsection of the Rule relating to the right of the Defendants to a Preliminary Adversary Probably Cause Hearing and must be read in Para Materia with the rest of the rule;

(5) In the cases before this Court, no demand for a Preliminary Adversary Hearing was made at the expiration of 21 days;

(6) Similarly, no demand for release was made at the expiration of thirty days when the State has an opportunity to show good cause why a ten day extension should be granted;

(7) The Court notes that the 40 day time limit appears to be reached by a combination of the 30 day rule plus the allowed extra 10 days and to be constructed to give them State ample notice to act in a timely fashion, if the procedure set forth in the Rule is followed which was not done in these cases;

(8) Since subsection (6) must be read in Para Materia with the rest of F.R.Cr.P. 3.133(b), the Preliminary Adversary Hearing may well be a condition precedent to release under subsection (b);

(9) Having considered THOMAS v. DYESS, 15 FLW D525 (2dDCA, 1990) cited by the defense and BOWEN v. TYSON, 543 So.2d 851 (4thDCA, 1989) cited by the State, this Court is persuaded by the logic in BOWENS;

(10) The purpose of F.R.Cr.P. 3.133(b) seems to be twofold: to insure that a defendant is not

incarcerated for a lengthy period of time without an adequate determination of probable cause and to insure that the State has to make the formal charges of record so that a defense may be prepared;

(11) To compel the State, if necessary, to show probable cause and to file formal charges, a sanction is provided in the form of the defendant's release, but here where formal charges have been filed, there is no need for the sanction;

(12) These charges were filed before the hearing on the defendant's Motion and as the last sentence of subsection (6) reads, "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" and does not specify that the information or indictment shall have been filed prior to the expiration of 40 days, there is no right to automatic release here;

(13) To hold otherwise would violate the clear language of the Rule, ignore all of the standard bond criteria, and in the cases at bar and others like them where the defendants face serious charges and have little, if any, ties to the community, possibly thwart the Court's later efforts to hold a trial on the merits of the case.

ACCORDINGLY it is hereby

ORDERED AND ADJUDGED these above-named defendant's Motions for Immediate Release are denied.

DONE AND ORDERED this 21 day of May, 1990, NUNC PRO TUNC to the 14th day of May, 1990, in Lake City, Columbia County, Florida.

The Defendant filed a Petition of Habeas Corpus in the First District Court of Appeal. This Petition was denied in an opinion rendered on June 21, 1990. It is from the First District Court's denial of the Petition that the Defendant take this Appeal. The First District certified this question to the Supreme Court as one of great public importance.

This Court has jurisdiction to review this case

pursuant to Rule 9.125 of the Florida Rules of Appellate Procedure.

Florida Rules of Criminal Procedure 3.133(b)(6), provides:

> (1) In the event that the Defendant remains in custody and has not been charged in an Information or an Indictment within thirty days from the date of his or her arrest or service of a capias upon him or her, he or she shall be released from custody on their on their own recognizance on the thirtieth 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 ten additional days to obtain an Indictment or file an Information. If the Defendant is 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 forty days unless he or she has been charged with a crime by Information or Indictment. (Emphasis added)

It is respectfully suggested that

(1) That since the State did not file charges within a period of forty days subsequent to the Defendant's arrest, the Defendant is entitled under Florida Rule of Criminal Procedure 3.133(b)(6), to be automatically released on his own recognizance.

WHEREFORE, the Defendant prays that this Court finds that the provisions of Florida Rule of Criminal Procedure 3.133(b)(6) should be applied and the Defendant be immediately ordered to be released from the custody of the Columbia County Jail, thus reversing the holding of the First District Court of Appeal.

SUMMARY OF ARGUMENT

The Rule of Criminal Procedure previously cited makes it abundantly clear that the Defendant should in fact be released subsequent to an incarceration if the State does not file an appropriate charging document within a forty day period of time. The Defendant's position is that, should the State be allowed to remedy noncompliance with the forty day rule by filing a subsequent information, the rule itself would simply act as a reminder to the State to file a charging document and would have no affect whatsoever.

STATEMENT OF THE FACTS

The Defendant, LAWRENCE A. DEMERS, was arrested on various charges on March 30, 1990. The State did not file an Information in the DEMERS case within a period of forty days and ultimately filed an Information on May 11, 1990. This filing of the Information was subsequent to the forty days allowed by the Rule of Criminal Procedure. The charges filed against the Defendant are not capital charges and under Florida law, the Defendant is entitled to be released on his own recognizance on each one of the charges currently filed. Those charges include, to-wit: Possession of a firearm by a convicted felon; armed robbery; aggravated battery; threat to throw a destructive device; throwing deadly missiles and resisting officer without violence. A copy of the Affidavit and Charging Document are included as attachments to this Motion (Items "A" and "B" respectively).

MEMORANDUM OF LAW

During the Motion for Immediate Release wherein Defense Counsel moved on behalf of the Defendant to release him from the custody of the Columbia County Sheriff's Office based on the noncompliance by the State in that they did not timely file an Information within the forty day period, the State has argued the case of Bowens v. Tyson, 543 So2d 851 (4th DCA, 1989). The Defense takes the position that the logic in Bowens should not apply and respectfully requests that this Court apply the logic set forth in Thomas v. Dyess, 15 FLW 525 (2nd DCA, 1990).

The Court in Dyess, stated:

> "We must disagree with this construction of the new subsection. Particularly when the Rule 3.133 is viewed as a whole, it instead appears to require the State to file within a certain time period or lose the right to insist upon the Defendant's continued detention. For example, Subsection (b)(1), which entitles an uncharged Defendant to an Adversary Preliminary Hearing after twenty-one days, cautions that "the subsequent filing of an Information or Indictment shall not eliminate a Defendant's entitlement to this hearing." Further incentive to bring charges is provided by Subsection (b)(6), a provision which may apply even where there has been a preliminary hearing in finding of probable cause and while a comparable caveat is not expressly included in that Subsection, we believe a similar intent is clearly implied. The end result of the contrary view expressed in Bowens would reduce the rule to little more than a reminder to the State to file charges in advance of any release hearing, however tardy."

The defense adopts the position taken by the Second District Court of Appeals. The Thomas court reasoned that construing Rule 3.133 as a whole mandates the State to file

charges within a certain time frame, or lose the right to be heard on pretrial detention of a Defendant. To fail to allow a Defendant release on his own recognizance after forty days would render the rule meaningless, as filing a motion for release would become a mere reminder to the State to do their job of filing charges. Thomas, Id. The Defendant also agrees and adopts the position suggested by Justice ERVIN in his dissent. The Defendant believes that this is the only reasonable result that can occur under the circumstances.

There is only one case out of the First District Court of Appeal that comes close to addressing this issue. In Beicke v. Boone, 527 So.2d 273 (Fla., 1st DCA 1988), this Court granted a writ of habeas corpus petition after the State failed to present evidence at an adversary preliminary hearing. The hearing was demanded under subsection (b)(1) of the rule. After the hearing, the Circuit Court refused to release the Defendant on his own recognizance. Id. at 274. In granting the petition and issuing the writ of habeas corpus, this Court states that:

> "the purpose of the rule, it seems to us, is to protect persons held in custody from remaining there indefinitely on account of the State's failure to file formal charges against them." Id.

In the instant case, Petitioner should be released because had Petitioner not filed a Motion for Immediate Release, charges would not have been yet filed. To fail to

grant the Petition would invite the problem the Thomas court warned against - reducing the rule to a mere reminder to the State to file charges. Thomas, 557 So.2d 196.

WHEREFORE, Petitioner moves this Honorable Court to enter an Order reversing the adverse ruling from the First District Court of Appeals denying the Defendant's Petition for Writ of Habeas Corpus.

DATED THIS 16th day of August, A.D. 1990.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to The Honorable THOMAS TRAMEL, Sheriff, Columbia County Courthouse, Lake City, Florida, 32055; The Honorable E. VERNON DOUGLAS, Circuit Judge, Columbia County Courthouse, Lake City, Florida, 32055; TOM COLEMAN, Assistant State Attorney, Post Office Box 551, Lake City, Florida, 32055, and to The Honorable ROBERT BUTTERWORTH, Attorney General, The Capitol, Tallahassee, Florida, 32301, all by regular United States mail this 16th day of August, A.D. 1990.

LAW OFFICE OF
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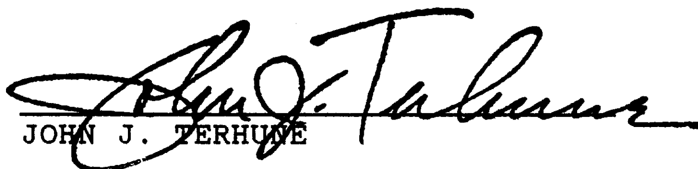
Attorney for Petitioner



JOHN J. TERHUNE