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**FILED**

SID J. WHITE 8/16

JUL 21 1993

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

CASE NO. 82,060

**TODD DORIAN,**

Petitioner,

-vs-

**THE STATE OF FLORIDA,**

Respondent.

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**ON PETITION FOR DISCRETIONARY REVIEW**

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**AMENDED BRIEF OF PETITIONER ON JURISDICTION**

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## INTRODUCTION

The Petitioner, TODD DORIAN, was the defendant in the trial court and the Appellee and Cross-Appellant in the Third District Court of Appeal. The Respondent, the State, was the prosecution in the trial court and the Appellant and Cross-Appellee in the District Court of Appeal. The parties will be referred to as they stood before the lower court.

## STATEMENT OF THE CASE AND FACTS

The defendant was arrested on murder charges on May 20, 1981, commencing the then-applicable 180-day time for trial under Fla.R.Crim.P. 3.191. State v. Dorian, 16 Fla. L. Weekly D2370 (Fla. 3d DCA Sept. 10, 1991), superseded on rehearing, 18 Fla. L. Weekly D856 (Fla. 3d DCA March 30, 1993) (en banc). The last day for trial under the speedy trial rule would have been November 17, 1981. A little over a week before expiration of the speedy trial period, the State nolle prossed the charges because of inability to locate its witnesses. Id. Six years later, in an unrelated arrest, the defendant confessed to the earlier charges. Id. Three years after that event, i.e., at the end of 1990, the defendant was rearrested on the original 1981 charges. Id. The trial court granted the defendant's motion for speedy trial discharge based on the rule as comprised in 1981. Id.

On the basis of the rule revision creating a window period which first became effective on January 1, 1985, the Third District Court of Appeal in a seven-to-four en banc decision<sup>1</sup> reversed the trial court's order of speedy trial discharge and resurrected the prosecution. 18 Fla. L. Weekly at D856.

In State v. Agee, 588 So. 2d 600 (Fla. 1st DCA 1991) (on

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A three-judge panel of the lower court initially heard the appeal, and reversed the order of discharge. State v. Dorian, 16 Fla. L. Weekly D2370 (Fla. 3d DCA Sept. 10, 1991). The Appellee filed a motion for rehearing, which the lower court treated as a motion for rehearing en banc, and which led to the superseding en banc decision. State v. Dorian, 18 Fla. L. Weekly D856 (Fla. 3d DCA March 30, 1993) ("On motion for rehearing en banc"). The Appellee's motions for rehearing and for certification of the en banc decision were denied on June 15, 1993.

motion for rehearing), the First District, in a decision issued after the panel decision in this case, had certified conflict with that panel decision. Agee, 588 So. 2d at 604. In its superseding en banc decision, the Third District rejected both the Appellee's reliance on and the reasoning of State v. Agee. 18 Fla. L. Weekly at D857.

The en banc decision became final on June 15, 1993, and on June 30, 1993, notice invoking this Court's discretionary review jurisdiction was filed. On the following day, this Court issued its decision in State v. Agee, Case No. 78,950, 18 Fla. L. Weekly S391 (Fla. July 1, 1993), which expressly disapproved of the Third District's decision in this case and approved the First District's decision in Agee. 18 Fla. L. Weekly at S392.

### SUMMARY OF ARGUMENT

The decision below, State v. Dorian, 16 Fla. L. Weekly D2370 (Fla. 3d DCA Sept. 10, 1991), superseded on rehearing, 18 Fla. L. Weekly D856 (Fla. 3d DCA March 30, 1993)(en banc), has been expressly disapproved by this Court in State v. Agee, Case No. 78,950, 18 Fla. L. Weekly S391 (Fla. July 1, 1993). Because the speedy trial period in this case would have run in 1981 but for the state's nolle prosequi eight days before the end of that period, the window period which first became effective January 1, 1985 had no application whatsoever in the case, and the trial court properly granted speedy trial discharge after a 1990 refiling of the same charges. The Third District's opinion should be quashed under authority, inter alia, of State v. Agee, and the cause remanded with directions to reinstate the trial court's order of discharge.

## ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL BELOW, STATE V. DORIAN, 18 FLA. L. WEEKLY D856 (FLA. 3D DCA MARCH 30, 1993) (ON REHEARING EN BANC), HAS ALREADY BEEN DISAPPROVED BY THIS COURT IN STATE V. AGEE, 18 FLA. L. WEEKLY S391 (FLA. JULY 1, 1993), AND ACCORDINGLY THIS COURT SHOULD QUASH THE DECISION BELOW AND REMAND WITH DIRECTIONS TO REINSTATE THE TRIAL COURT'S ORDER OF SPEEDY TRIAL DISCHARGE.

In rejecting the defendant's entitlement to discharge in 1991 from re prosecution of the same charges which had been nolle prossed shortly before the end of the speedy trial period in 1981, the majority of the Third District en banc rejected the defendant's argument that the 1985 speedy trial rule amendment creating a window period was not intended to nor could it apply to revivify a speedy trial time lapsed in 1981, and proceeded to apply the window period both to nullify the effect of the 1981 nolle proesse and retrospectively expand the time for trial from 180 days to nearly ten years. The lower court held that "the speedy trial rule accords no substantive rights subject to vesting." 18 Fla. L. Weekly at D857.

In so ruling, the Third District utterly ignored this Court's decision in State ex rel. Gutierrez v. Baker, 276 So. 2d 470, 471 (Fla. 1973), which recognized that "[t]he accused has a vested interest in being brought to trial within the limitations set by Rule 3.191(.)" See also State v. Williams, 287 So. 2d 415, 419 (Fla. 2d DCA 1973) (Under the rule, "a speedy trial is a substantive right to which one shall not lightly be deprived."). This Court's opinion adopting the window-period specified that the amendment "shall govern all proceedings within [its] scope after



12:01 a.m. January 1, 1985." The Florida Bar Re: Amendment to Rules -- Criminal Procedure, 462 So. 2d 386 (Fla. 1984). The instant case was never intended to be within, and could not constitutionally be within, the scope of the window period amendment in the first instance. See also Rule 3.191, 1984 Committee Note ("[The window period] gives the system a chance to remedy a mistake; it does not permit the system to forget about the time constraints.").

Moreover, even assuming that the window period could apply retrospectively to a case where the speedy trial time period ran several years earlier, the application of it to obviate the specific rule-provided effect of a nolle prosequi under Fla.R.Crim.P. 3.191(h)(2) (i.e., that a nolle prosequi cannot avoid or toll the running of the speedy trial time) has now been unequivocally rejected by this Court.

In State v. Agee, 588 So. 2d 600 (Fla. 1st DCA 1991), the First District held that the speedy time rule could not be unilaterally extended by the State nolle prosequi; that the motivation behind a conscious decision to nolle prosequi is irrelevant because "[t]he speedy trial rule contains no "good faith" exception; and that "where the requisite speedy trial period has passed and the defendant could have secured a discharge, had a nolle prosequi not been entered, the 15-day recapture period provided by Rule 3.191(i)(3) is inapplicable." Id. at 603-04.

In State v. Agee, Case No. 78,950, 18 Fla. L. Weekly S391 (Fla. July 1, 1993), this Court has now held: "We approve the decision of the [first] district court [in State v. Agee, 588 So.

2d 600] below, disapprove Dorian, and recede from Zabrani v. Cowart, 506 So. 2d 1035 (Fla. 1987) and Bloom v. McKnight, 502 So. 2d 422 (Fla. 1987), to the extent they suggest the fifteen-day window of recapture applies in such cases."<sup>2</sup> Id. at S392. As further stated, "we hold that when the State enters a nol pros, the speedy trial period continues to run and the State may not refile charges based on the same conduct after the period has expired." Id. Agee controls and requires reversal.

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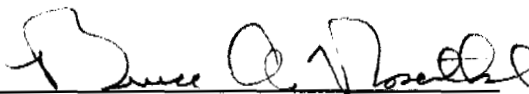
Discharge would be required under the dissent to this Court's State v. Agee decision as well. In Agee, which was a post-window period commenced prosecution, the State filed a nolle prosee thirty-three days before expiration of the speedy trial period. State v. Agee, 18 Fla. L. Weekly at S391. In the instant case, the nolle prosee was filed only eight days before the running of the speedy trial rule in 1981. See the dissenting opinion of Justice Overton, 18 Fla. L. Weekly at S392, reasoning that filing of a nolle prosee should establish a presumption of intent to avoid the effect of the speedy trial rule, which presumption can be rebutted only if the defendant is unable to show actual prejudice "and is tried within the time remaining between the filing of the *nol pros* and the last day of the speedy trial time period." (emphasis supplied). Here eight days impermissibly became nearly ten years.

**CONCLUSION**

Based on the foregoing argument and authorities cited, inasmuch as the defendant has remained in custody for an extended period of time based on a re-arrest and prosecution in egregious violation of his speedy trial rights, this Court should summarily quash the decision below, approve the dissent below, and remand with instructions to reinstate the trial court's order of discharge and immediately release the Petitioner.

Respectfully submitted,

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By:   
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Lisa Berlow-Lehner, Assistant State Attorney, Office of the State Attorney, E.R. Graham Building, 1350 Northwest 12th Avenue, Miami, Florida 33136-2111 and a copy mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 20<sup>th</sup> day of July, 1993.



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