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IN THE SUPREME COURT OF FLORIDA



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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# BRIEF OF THE RESPONDENT ON JURISDICTION

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## INTRODUCTION

This case involves the applicability of section (o) of the Speedy Trial Rule, concerning the use of a nol pros, to a case that was nol prossed in 1981, before the effective date of the "window period" rule.

The Respondent, the State of Florida, prosecuted this case in the trial court and was the Appellant and Cross-Appellee in the Third District Court of Appeal, after the trial court discharged the Petitioner for a violation of the speedy trial rule. The Petitioner, Todd Dorian, was the defendant and Appellee/Cross-Appellant before the Third District. The parties shall be referred to as they appeared below, the State and the defendant.

## STATEMENT OF THE CASE AND FACTS

The State accepts the statement as presented in the defendant's brief with the following additional sentence. The trial judge found that the State's dismissal of the charges in 1981 and the 1990 refile were not done in bad faith. State v. Dorian, 18 Fla. L. Weekly D856, 857 (Fla. 3rd DCA March 30, 1993).

## SUMMARY OF ARGUMENT

The en banc decision of the Third District Court of appeal in State v. Dorian[1] is in conflict with this Court's opinion in State v. Agee[2] and therefore this Court should accept jurisdiction. However, an exception to this Court's rule, as announced in Agee, should be carved out for cases, like that at bar, in which the State entered a nol pros prior to the 1985 amendment to the speedy trial rule that instituted the "window period." In those few cases, capital or life felonies in which there is no statute of limitations, the rule of law announced in Agee should not apply because the nol pros was presumptively entered in good faith, since it occurred prior to 1985 and thus the nol pros was used by the State to terminate the prosecution with no intent of ever refiling the case. For these reasons, the Court should accept briefs on the merits that address why Dorian should not have come within the ambit of the Agee opinion.

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[1] 18 Fla. L. Weekly D856 (Fla. 3d DCA March 30, 1993).

[2] 18 Fla. L. Weekly S391 (Fla. July 1, 1993).

## ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN STATE V. DORIAN, 18 FLA. L. WEEKLY D856 (FLA. 3D DCA MARCH 30, 1993), IS IN CONFLICT WITH THIS COURT'S OPINION IN STATE V. AGEE, 18 FLA. L. WEEKLY S391 (FLA. JULY 1, 1993), AND THUS, THIS COURT SHOULD ACCEPT JURISDICTION AND BRIEFS ON THE MERITS.

The State agrees that a conflict exists between the en banc opinion of the Third District Court of Appeal in State v. Dorian, 16 Fla. L. Weekly D2370 (Fla. 3d DCA September 10, 1991), vacated superseded on rehearing, 18 Fla. L. Weekly D856 (Fla. 3d DCA March 30, 1993), and this Court's opinion in State v. Agee, 18 Fla. L. Weekly S391 (Fla. July 1, 1993). However, contrary to the relief sought by the defendant in his jurisdictional brief to this Court, the State requests that this Court accept jurisdiction and briefs on the merits, rather than summarily quashing the opinion of the Third District in Dorian. The State takes this position because it firmly believes that despite the rationale of the Agee decision, this Court's disapproval of Dorian was not warranted. In Agee, the State nol prossed its charges in 1988, three years after the amendment to the speedy trial rule that instituted the fifteen-day "window period."[3] However, the reach of this Court's Agee opinion is far broader and effects cases in which the nol pros was entered

[3] The subsection that provides the remedy of discharge, the so-called "window period" was formerly denoted with the letter (i), and is currently lettered (p).

prior to January 1, 1985. For the reasons advanced infra, the State submits that this distinction is critical and the opinion of the Court in Agee, insofar as it is applied to pre-1985 cases and does not recognize this distinction, reaches too far.

In Agee, this Court expressed the concern that "[t]o allow the State to unilaterally toll the running of the speedy trial period by entering a nol pros would eviscerate the rule...." 18 Fla. L. Weekly S391-392. The Court's opinion then raised the spectre of a prosecutor with a weak case entering a nol pros, continuing to develop his or her case, and then later refiling charges months or years later, "thus effectively denying an accused the right to a speedy trial while the State strengthens its case." Id. The Court's concern, as expressed in its opinion, and hence the rationale for the Court's opinion, do not apply to cases that were nol prossed prior to January 1, 1985, the effective date of the "window period" rule. For this reason, the Court's disapproval of the Third District en banc decision in State v. Dorian, 18 Fla. L. Weekly D856 (Fla. 3d DCA March 30, 1993), is unwarranted.

In Dorian, as in all such cases in which the nol pros was entered prior to the advent of the "window period," there was never any intent or even any hope of later refiling charges. There is no question as to the motives of a prosecutor who entered a nol pros prior to January 1, 1985. There can be no dispute that when a prosecutor, such as the one in Dorian, nol prossed the charges, he or she did so to end the prosecution,

not to toll the time period while the case developed and possibly strengthened. Because when charges were dismissed prior to 1985, by entry of a nol pros, there was no vehicle to ever refile after 180 days had elapsed. The State cannot lay claim to such prescience that when it nol prossed the instant case in 1981, they knew that the rule would change in 1985, thereby allowing them an additional fifteen days if they ever refiled charges.[4] It is clear therefore, that the fear that a prosecutor will utilize the nol pros to manipulate the speedy trial period and thereby deny a defendant his remedy under the rule is unsubstantiated in cases such as Dorian, in which the State nol prossed prior to January 1, 1985. In fact, the trial court in Dorian specifically found that the State's actions in this regard were not in bad faith. Dorian, 18 Fla. L. Weekly at D857.

Since a nol pros entered prior to January 1, 1985 must be seen presumptively as done in good faith, the constraints of Section (o) of the speedy trial rule do not apply.

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[4] In Dorian, the State ultimately refiled charges in 1990, after the defendant, in the belief that he could not be prosecuted, boasted to the police about the murder he committed. 18 Fla. L. Weekly D857 (Fla. 3d DCA March 30, 1993). Thus, in Dorian, the State would have had to be doubly clairvoyant when it nol prossed in 1980: 1) to predict the rule change in 1985, and 2) to predict that Dorian would someday confess and supply the necessary additional information needed to bring charges for the murder.

Section (o)[5] addresses only the use of a nol pros by the State to deliberately avoid the intent and effect of the rule. The clear import and thrust of this section is to prohibit the State from nol prossing charges when the intent of the prosecutor is to circumvent the speedy trial rule. When the prosecutor has no such intent, as is ultimately exemplified in the situation of a pre-1985 nol pros, Section (o) does not apply. Where, as in the case at bar, the nol pros was entered, not to circumvent the rule or deny the defendant any remedy thereunder, but rather to end the case and permanently remove the threat of prosecution, Section (o) was never intended to apply. Since the strictures of (o) do not apply to a pre-1985 nol pros, and since the concerns of this Court as expressed in its opinion concerning potential abuse of a nol pros are not implicated in pre-1985 cases, disapproval of the Dorian decision is neither mandated by the speedy trial rule nor justified.

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[5] This section is currently lettered (o); however, at the time of the nol pros and at the time of the motion for discharge, it was denoted with the letter (h)(2). The text of the rule has remained unchanged and reads:

> Nolle Prosequi: Effect. The intent and effect of this rule shall not be avoided by the state by entering a nolle prosequi to a crime charged and by prosecuting a new crime grounded on the same conduct or criminal episode or otherwise by prosecuting new and different charges based on the same conduct or criminal episode whether or not the pending charge is suspended, continued, or is the subject of entry of a nolle prosequi.

## CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully requests that this Court accept jurisdiction and request briefs on the merits from the parties.

Respectfully submitted,

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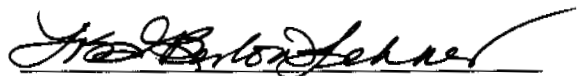
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above and foregoing was forwarded to Bruce A. Rosenthal, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125, on this the 29th day of July, 1993.



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