IN THE SUPREME COURT OF FLORIDA

BOBBY LEE BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 90,891

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Bobby Lee Brown, will be referred to by his last name and respondent as "State." The first two volumes of the record on appeal numbered 1 through 212 will be referred to by the symbol "R"; the five volumes of trial transcript numbered 1 through 731 will be referred to by the symbol "T." The supplemental record, consisting of the clerk's docketing statement, will be referred to by the symbol "SR."

STATEMENT OF THE CASE AND FACTS

The State accepts Brown's statement of the case and facts with the following additions.

On June 7, 1995, Jeffries Duvall, Assistant Public Defender, moved to dismiss the information on the ground that the speedy trial period had expired. (R. 113)

One week later (June 15, 1995), Elaine Ashley, assistant state attorney, filed a motion for the court to advise Brown of his right to a speedy trial and right to participate in discovery. (R. 114) The motion alleged in relevant part:

> 2. At case management on May 31, the defense attorney, Jeffries Duvall, did not recognize the defendant's cases as being assigned to him, nor did he physically recognize the defendant. He believed the cases were assigned to another Asst. Public Defender, Mr. Lucky Osho.
>
> 3. May 31 was more than 175 days since the arrest of the defendant.
>
> 4. On June 8, defense counsel filed a Motion to Dismiss, actually a motion for discharge under Rule 3.191 on the basis that defendant had not been brought to trial within 175 days of his arrest.

5. On June 13, the Court set the cases for trial the week of June 19. The court, because of time constraints, did not entertain argument on the motion for discharge at that time.

6. The defendant is charged with very serious crimes, which, if convicted, will result in a guidelines sentence somewhere in the range of 20 to 33 years, at a minimum,

7. The defense has done absolutely no discovery on these cases, not even filing a demand for discovery. There has not been a single deposition taken. Even though the state gratuitously provided police reports to the defense on May 18, they are not inclusive of all the law enforcement reports that have been done in this case, nor do they include all the witnesses, the names of persons to whom the defendant admitted his crimes, or all the physical evidence and other evidence in these cases against the defendant.

8. The court needs to make a record inquiry that the defendant understands both his rights to speedy trial and right to discovery, and that his choice to exercise his right to a speedy trial has been made freely, knowingly, and voluntarily by a fully informed defendant, who recognizes that full discovery has not been conducted on his case by defense counsel.

9. If the inquiry is not done and the defendant is convicted, the case will in all likelihood be subject to an ineffective assistance of counsel claim under Rule 3.850. (R. 114-116)

The next day (June 16, 1995), Bradford Thomas, Assistant State Attorney, filed a motion for an "extension of time pursuant to exceptional circumstances," in which he alleged that "the assigned prosecutor is not available due to medical condition requiring said prosecutor to remain home for two weeks due to physical illness." (R. 117-118)

The trial court heard the extension motion the same day as it was filed (June 16, 1995). Brad Thomas represented to the court:

> Ms. Ashley is unexpectedly unavailable or incapacitated for trial. Now I tried to assume the duties of

> conducting this trial today. I spent two hours almost with Ms. Ashley at home reviewing the evidence, the witnesses, everything we were going to be doing, and I stand in for counsel all the time and do trials, but I felt in this case due to the severity of the charges: attempted murder, kidnaping, and several other serious felonies, and the complexity of the case -- The State has actually subpoenaed approximately fifteen officers, several victims, FDLE analysts, and other witnesses in the case, and I felt based on my professional judgment that it would be a disservice and an injustice to the State to go forward at this time with one weekend's preparation. I did not think it would be a professional performance or a service to this Court. (R. 202-203)

Elaine Ashley testified at the hearing.[1] On Tuesday morning, June 13, 1995, at approximately 8:00 a.m., she experienced profuse vaginal bleeding, which required immediate surgery. (R. 204) Mr. Duvall (defense counsel) stipulated that Ms. Ashley was legitimately ill, and the trial court so found. (R. 294) Ms. Ashley's doctor ordered her to remain at home for at least two weeks from Thursday (June 15, 1995). (R. 204-205) At this point, Brad Thomas stated:

> Judge, I might add that in one week's time I can be prepared to try this case. so -- . . . [T]his is not a shell game to say Ms. Ashley is sick and then I'm going to come a week later and say, "Ill try it." But it is unusually complex, which I just might note for the Court is also one of the exceptional circumstances, that if a case is so unusual and, under these circumstances, combined with the illness of Ms. Ashley and the fairly complex nature of this case, that's why we are seeking the extension. But I will be available to try it within seven days. (R. 205-206)

The trial court granted the State's motion:

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[1]The trial court informed Elaine Ashley that since she was an officer of the court, she did not have to be sworn in to testify. (R. 203)

> In this case where Mr. Robinson [a/k/a Brown] is charged with three possible life felonies, a case that is obviously a very important case to the Defense and to the State, and one where Ms. Ashley has been involved since the beginning, and in fact as late as Tuesday when you brought this matter and set it for trial Ms. Ashley was still the attorney and was in court to set it; the fact that Ms. Ashley, an Officer of the Court, has now advised that she is medically incapacitated to me is sufficient to find exceptional circumstances exist such that it would be in the interest of justice that I grant a continuance in this case.(R. 209-210)

Trial was reset for July 18th to 20th, with jury selection on July 17th. (R. 210)

The trial started on July 19, 1995 and lasted three days, during which 22 witnesses, 19 for the State, testified. The trial transcript is 730 pages in length.

SUMMARY OF ARGUMENT

The answer to the certified question is a resounding "Yes." Florida Rule of Criminal Procedure 3.191(i) provides that "[t]he periods of time established by this rule may be extended provided the period of time sought to be extended has not expired at the time the extension was procured." The rule further provides that "[s]uch an extension may be procured ... in exceptional circumstances." All time periods are plainly covered by this language. It does not read, as Brown would have it read, that all time periods are covered except for the window of recapture.

Sound public policy supports the First District's interpretation of the rule. At stake are three competing interests--the accused's interest in his freedom, the court's interest in clearing its docket, and society's interest in protecting itself from criminals, particularly violent ones. While the first two interests are important, they are not so important as to be protected at any cost.

The issue here is the extension of a time period due to the unexpected illness of the prosecutor, a circumstance obviously not created by the prosecution and one which, but for its fortuitous timing, clearly would have justified either postponing the trial or granting a mistrial. The nature of the relief sought, coupled with the strong interest of society in protecting itself, outweigh the need of a'prepared defendant to be tried a few weeks earlier and the court's need to clear its docket.

ARGUMENT

CERTIFIED QUESTION

> IS AN EXCEPTIONAL CIRCUMSTANCE EXTENSION UNDER RULE 3.191(1) VALID, WHEN MADE AND OBTAINED DURING THE 5/10-DAY RECAPTURE WINDOW PROVIDED FOR IN RULE 3.191(p)(3), OR IS IT LIMITED ONLY TO AN EXTENSION MADE AND OBTAINED BEFORE EXPIRATION OF THE BASIC 175-DAY PERIOD PROVIDED IN RULE 3.191(a)?

Preservation of Issue, To preserve an issue fox appeal, it must'be the precise ground raised at trial. Harmon v. State, 527 so. 2d 182, 185 (Fla. 1988) (objection that testimony was beyond the scope of cross examination did not preserve for review issue that the testimony constituted improper collateral crime evidence); Bradley v. State, 581 So. 2d 245, 246 (Fla. 1st DCA 1991) (court refused to address for first time on appeal defendant's argument that speedy trial extension motion improperly granted because prosecutor failed to diligently search for victim and child).

At trial, Brown filed a motion to dismiss the information on the ground of expiration of the speedy trial period. (R. 113) The State responded by filing a motion "for an extension of time to try the . . . case." (R. 117) At the hearing on the State's motion, defense counsel argued:

> In this particular case you are dealing with the illness of the prosecutor, and I don't think that applies in this here. I think it's instructive to look at the history in this case. (R. 206)

Defense counsel then identified the dates on which specific events occurred (the crime; a lineup; identification by and a confession to a third party; arrest; and information filed). (R.

206-207) He pointed out that nothing else was done until they arrived at the point of the discharge motion. (R. 207) He argued further:

> I don't believe the rules provide for an extension of time based on the circumstances that are involved here. It does provide in Section (1):
>
> > "As permitted by Subsection (i) of this rule, the Court may order an extension of the time periods provided in this rule when exceptional circumstances are shown to exist. Exceptional circumstances shall not include," among other things, "lack of diligent preparation."
>
> And I think that's what we have here. (R. 208-209)

Defense counsel indicated he understood that Ms. Ashley was incapacitated medically, but he did not "think that the rules provide for an extension based on that, on that predicate." (R. 208)

Brown advances three arguments in his merits brief:

A. First, he argues, at least by implication, that unexpected illness is not an exceptional circumstance when the prosecutor has not been diligently preparing her case for trial. (M.B., 7, paragraph 1, 11). This is the argument that was made in the trial court. The First District noted in its opinion that "Brown's only argument in the trial court was that the State had not been diligent in bringing the case to trial." Brown v. State, 22 Fla. L. Weekly D1564 (Fla. 1st DCA June 23, 1997). This argument does not relate to the certified question.

B. Second, Brown argues that the recapture period can be longer than 15 days by excluding weekends and holidays from the calculation; that it was longer than 15 days in this case; that a

substitute prosecutor could have tried the case within the expanded 15-day window; and that the prosecutor's unexpected illness was not an exceptional circumstance when another prosecutor could have tried the case within the expanded 15-day window. (M.B., 7-8, paragraphs 2-3)

This issue clearly is not before the Court because it was not raised in the trial court, and it is not part of the certified question. It is the quintessential example of why we have a contemporaneous objection rule, the many policy reasons for which are set out in U.S. v. Vontsteen, 950 F.2d 1086, 1089-1090 (5th Cir. 1992) (en banc):

> "There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of an appeal."

The situation here is much worse, of course, because Brown seeks discharge, not a new trial, on an issue never presented to the trial court.

Counting weekends, the 15-day recapture period ended on June 22, 1995. Brad Thomas, Assistant State Attorney, informed the Court he could not be ready for trial as substitute counsel until Friday, June 23, 1995 (R. 202-203, 205-206), which took the case outside the recapture period. Not one word was heard from defense counsel that he considered the recapture period to be 17 days in length (one weekend excluded), which meant that Brad Thomas could have tried the case within the recapture period. This, of course, would have been an odd position for defense counsel to take (expanding recapture period), not to mention the fact that the law in the First District was to the contrary. Underwood v. Johnson, 651 So.2d 760, 761 (Fla. 1st DCA 1995) ("Thus, the trial must commence, at the most, by the fifteenth day after the motion is filed"). Nevertheless, the trial judge and the prosecutor were entitled to hear it. They might have relied on it and tried Brown within the recapture period as defined by his lawyer. If SO" Brown could not have complained on appeal that he was not tried within the 15-day window.

C. Third, Brown argues that an exceptional-circumstance extension is not authorized during the recapture period under any circumstances. (M.B. 8-11) The trial court implicitly ruled to the contrary, and it is this ruling which formed the basis for the certified question.

Standards of Review. Construction of a rule of criminal procedure, such as the speedy trial rule, is a pure question of law requiring de *novo* review on appeal. Application of the

speedy trial rule, such as subparagraph (1), to the facts in the case is reviewed under an abuse of discretion standard. Routly v. State, 440 So. 2d 1257, 1261 (Fla. 1983) ("trial court's determination of exceptional circumstances is a matter of discretion based on the facts presented below"). But see, Miner v. Westlake, 478 So. 2d 1066, 1067 (Fla. 1985). The discretionary standard of review is explained in Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). The trial court's factual findings (who, what, where, when, and how), either express or implied, are subject to competent substantial evidence review. State v. Daniel, 665 So. 2d 1040 (Fla. 1995) ("Turning to the facts at hand, we are constrained to review the record on appeal under the competent substantial'evidence standard"), *overruled on other grounds,* Holland v. State, 22 Fla.L.Weekly 387 (Fla. July 3, 1997).

Burden of Persuasion. Since judgments are presumed correct, Brown bears the burden of persuasion in this Court. Grant v. State, 374 So.2d 630, 632-633 (Fla. 3rd DCA 1979) ("Perhaps the most famous and most widely applied of all the appellate maxims so familiar to all of us in the trade are that judgments are presumed correct and that it is the obligation of the appellant clearly to demonstrate the existence of harmful error").

It is the lower court's decision, not its reasoning, that is presumed correct, and on appeal, the decision will be affirmed, even though based on faulty reasoning. Caso v. State, 524 So.2d 422, 424 (Fla. 1988) ("A conclusion or decision of a trial court

will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"). "The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." Securities and Exchange Corn. v. Chenery Corp., 318 U.S. 80, 88 (1943).[2]

Merits. The facts in a nutshell are: (1) the 175-day speedy trial period expired; (2) Brown moved for discharge; (3) the trial court set a trial date within the 15-day window of recapture; (4) the prosecutor had emergency surgery during the window of recapture; (5) as a result of her emergency surgery, the prosecutor could not try the case within the window of recapture; (6) no other prosecutor could be prepared to try the case within the window of recapture; (7) and the trial court set a new trial date outside the window of recapture. To elaborate:

05-24-95	Speedy trial period expired (175th day from 12/1/94).
06-07-95	Brown filed a motion to dismiss information on the ground of expiration of speedy trial period.

[2]The appellant and the appellee are not similarly situated on appeal. The contemporaneous objection rule limits the arguments that the appellant can advance on appeal, whereas the right-for-the-wrong-reason principle, discussed above, allows the appellee to advance new arguments on appeal, provided they are supported by the record.

06-13-95 Trial court set the trial for 6-19-95 (jury selection).[3]

06-13-95 Elaine Ashley, Assistant State Attorney, had emergency surgery. (R. 204)

06-16-95 Brad Thomas, Assistant State Attorney, filed a motion to extend the trial date due to Elaine Ashley's illness. (R. 117-118)

At the hearing, Elaine Ashley informed the judge that she was told by her doctor to stay home at least until June 29, 1995. (R. 204-205) Brad Thomas informed the judge that he could not be prepared to try the case by Monday (6-19-95), but, if necessary, he could be prepared to try it in one week. (R. 202-203, 205-206) The judge granted the continuance and reset the trial for July 17th (jury selection). (R. 209-210)

06-22-95 Window of recapture expired (15 days from date dismissal motion filed)

Had the prosecutor's life-saving emergency surgery been performed on May 24, 1995 (last day of speedy trial period) or on June 19, 1995 (after venire sworn), there would have been no question as to the propriety of postponing the trial. See Fla.R.Crm.P. 3.191(l) (speedy trial period may be extended for exceptional circumstances, such as " unexpected illness ... of a person whose presence . . . is uniquely necessary for a full and adequate trial"); Routly v. State, 440 So.2d at 1261 (eyewitness' inability to travel due to problems with her pregnancy justified extending speedy trial period due to exceptional circumstances);

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[3]Brad Thomas stated, "I felt . . . that it would be a disservice and an injustice to the State to go forward at this time with one weekend's preparation." (R. 201-203) The trial court stated, "[I]n fact as late as Tuesday when you brought this matter and set it for trial Ms. Ashley was still the attorney." (R. 210) The docketing statement shows that jury selection was set for 6-19-95 (SR.).

Wriaht v. State, 486 So. 2d 651 (Fla. 3rd DCA 1986) (victim's labor pains, hospitalization, and doctor's orders to remain in bed constituted exceptional/unforeseeable circumstances to extend speedy trial period); Brvant v. Stickley, 215 So. 2d 786, 788 (Fla. 2d DCA 1968) (illness of prosecutor "might be a legally sufficient reason to declare a mistrial and discharge a jury");. U.S. ex rel. Gibson v. Zieuele, 479 F. 2d 773 (3rd Cir. 1973) (illness of key prosecution witness justified mistrial).[4] As it were, however, the prosecutor became ill between these two dates, more specifically six days into the recapture period. Brown's position is that he is entitled to discharge from custody because of the fortuitous timing of the prosecutor's illness. The State respectfully disagrees.

Florida Rule of Criminal Procedure 3.191 is a creation of the judiciary, for no specific time limitation on prosecutions is found in either the state or federal constitution. Fla. Const. art. I, § 16(a) ("In all criminal prosecutions the accused . . . shall have the right . . . to have a speedy trial"); U.S. Const. art. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"); Barker v. Winuo, 407 U.S. 514, 530-533 (1972) (balancing test to be applied on case-

[4]Mistrial is a remedy of last resort, and evidence justifying this remedy must come from a source other than the subjective impressions of the trial judge, Thomason v. State, 620 So. 2d 1234, 1240 (Fla. 1993) (mistrial improperly granted where "disabled" attorney was in courtroom proclaiming her readiness to proceed, and no alternatives to mistrial were considered).

by-case basis); 18 U.S.C. §§ 3162(a)(1)-(2) (speedy trial act) (balancing test to be applied to determine whether charges should be dismissed with OK without prejudice).

Rule 3.191(i) states that "[t]he periods of time established by this rule may be extended provided the period of time sought to be extended has not expired at the time the extension was procured." (e.s.) There are three time periods (175 days, 60 days, and 15 days) established by the rule. The provision by its plain language covers the window of recapture, as the First District in this case so held: "We conclude that the rule authorizes as 'exceptional circumstances' extension in either time period." Brown v. State, 22 Fla.L.Weekly at D1564. The First District further concluded that "[a]ny interpretation other than that based on the plain language of the rule would reach an absurd result." Brown, at D1564. It explained:

> In the instant case, according to Brown's position, an emergency surgery arising in the basic 175-day period would be granted an exceptional-circumstance extension, but an emergency surgery arising during the recapture window would not qualify for an exceptional-circumstance extension. There is no logical reason to restrict emergencies to the basic 175-day period. Neither is there anything sacred about requiring a defendant to be brought to trial before expiration of the recapture period or its equivalent. Indeed, when an exceptional-circumstance extension is granted during the basic 175-day period, it is contemplated by the rule, which contains no arbitrary time limitation, that it may well extend beyond a time equivalent to the recapture period. *Id.,* at D1564.

To read into the rule an exemption for the recapture period gives the accused too much at the expense of the public's safety. It would mean an automatic discharge for the accused in the event

of the destruction of the courthouse due to fire or a hurricane, or the untimely death of major participants in the proceeding (judge, lawyer, witness). It also would mean an automatic discharge for the accused who obviously never wanted a speedy trial, or he would have asked for a trial date. Finally, it would mean an automatic discharge for the accused, even though he, just as well as the prosecutor, could have avoided the unforeseen circumstance merely by asking for an earlier trial date.

The efforts of criminal defendants to obtain speedy discharges, instead of speedy trials, is not lost on the appellate courts. See e.g., State v. Guzman, Fla.L.Weekly ___, ___ (Fla. 3rd DCA July 30, 1997) ("That option was offered by the court but, in its single-minded quest for a speedy dismissal, rather than the speedy trial it disingenuously stated it wanted, was, quite unsurprisingly, rejected by the defense"); Moore v. State, Fla.L.Weekly ___, ___ (Fla. 3rd DCA July 30, 1997) ("If the defendant believed that the rule's stated time provisions were inadequate to quench his burning desire for a speedy trial, he should have moved under Rule 3.220(k) for an abbreviation of the time period"). The First District in this case was also well aware of the efforts of criminal defendants to obtain speedy dismissals instead of speedy trials. It stated that prohibiting extensions due to exceptional circumstances occurring during the recapture period would "perpetuate the

unintended strategy of dismissal and discharge." Brown, 22 Fla.L.Weekly at D1565.[5]

Brown is asking this Court to construe the judicially-created rule in a manner that maximizes the opportunities for violent persons, like himself, to go free. To do as he asks, this Court would have to turn a blind eye and a deaf ear to the plight of the innocent and defenseless public, as is represented by the three victims in the case at bar.

Brown robbed a Burger King on West Tennessee Street at 5:00 in the morning. Three defenseless employees came to work long before daybreak to prepare breakfast for the working class. Brown shot one of the employees in the chest at point-blank range, took another hostage for the duration of a high-speed chase, during which he repeatedly put a gun to the hostage's head, and pointed a gun at a pursuing police officer. Brown v. State, 22 Fla. L. Weekly at D1564.

Judge Webster in his dissent would discharge Brown and put the blame on the prosecution for the miscarriage of justice. He stated, "In this case, the state has only itself to blame for its predicament." Brown v. State, 22 Fla.L.Weekly at 1567. This approach overlooks the role of the judiciary in this matter. At

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[5]The State would add that if the allegations in the prosecutor's motion are to be believed (R. 114-116), Brown was not even prepared for trial when the speedy trial period expired. An unprepared defendant seeks only a speedy dismissal. Assuming that his lawyer had temporarily forgotten about him, it was not without Brown's tacit approval, given his extensive experience with the criminal justice system. He was a drug dealer, for which he had been imprisoned three times. (R. 178)

issue is a judicially created rule of procedure, the promulgation of which obviously required consideration of several competing interests (the accused's interest in his liberty, society's interest in protecting itself from criminals, and the judiciary's interest in the orderly, expeditious operation of its courts).

The speedy trial rule establishes a time limit for trying criminal defendants. The First District construed the rule to authorize an extension of the deadline due to exceptional circumstances occurring during the recapture period. This was a reasonable and fair interpretation, considering what was at issue (a brief extension of a time period due to exceptional circumstances) and the public's strong interest in protecting itself. The competing interests of the accused and the judiciary, of course, are important interests, but they should not be protected at any cost.

Brown cites cases from the First, Third, and Fourth District Courts of Appeal for the proposition that the recapture period cannot be extended for exceptional circumstances. The case from the First District, State ex rel. Smith v. Rudd, 347 So. 2d 813 (Fla. 1st DCA 1977) is irrelevant because it was decided before the window of recapture was added to the speedy trial rule. The cases from the Third and Fourth Districts do, however, support Brown's position, See J.T. v. State, 601 So.2d 283 (Fla. 3rd DCA 1992); Heller v. State, 601 So.2d 642 (Fla. 3rd DCA 1992); Tascarella v. Seav, 564 So.2d 205 (Fla. 4th DCA 1990); Vallieres v. Grossman, 573 So.2d 196 (Fla. 4th DCA 1991).

The Third and Fourth Districts compartmentalized the time periods in the rule, viewing one period as the speedy trial period (175 days) and the other as the remedy period (15-day window of recapture). They then construed Fla.R.Crim.P. 3.191(i) to apply only to the first time period. The First District, on the other hand, viewed the speedy trial rule as a whole unit. Rule 3.191(i), therefore, necessarily applied to all of the time periods established by the rule.

J.T. provides the only other explanation in support of the result reached by the Third and Fourth Districts. Citing The Florida Bar Re: Amendment to R.Crim. Procedure, 462 So.2d 386, 388 (Fla. 1984), the Third District stated: "The purpose of the window period in Rule 3.191 is to allow the State to remedy a clerical mistake by bringing the accused to trial; it was not intended to give the State an opportunity to revive its case after violating the rule." J.T., 601 So.2d at 284. (e.s.) The commentary to the rule amendment, which incidentally was not adopted by this Court, does not actually use the word "clerical." It does state, however, that the time period selected (15 days) "gives the system a chance to remedy a mistake; it does not permit the system to forget about the time constraints." The Florida Bar Re Amendment to Rules, 462 So.2d at 386, 388.

The First District agrees with the Third District that the amendment was designed to correct a mistake. It does not agree, however, that the amendment authorizes unjustified windfalls to criminal defendants who cannot be tried because of exceptional

circumstances. These circumstances are not created by the prosecution; they just happen. The First District stated:

> The Florida Supreme Court amended the rule in 1984 to provide for the current 5/10 day recapture window. The purpose of the speedy trial rule is self-evident. It was never intended as strategy for dismissal and discharge. This court [in State v. Auee, 588 So.2d 600, 604 (Fla. 1st DCA 1991), approved, 622 So.2d 473 (Fla. 1993)] has said, with respect to the purpose of the rule:
>
> > Before the provision [5/10 day recapture window] was added to the rule in 1984, *defendants with active* cases were sometimes able to secure discharges because prosecutors overlooked speedy trial deadlines. In order to avoid the automatic discharge provision provided for in the pre-1984 rule, the current rule provides a reminder to the prosecutor that speedy trial is about to run. Therefore, the present rule continues to insure that a diligent defendant will be brought to trial within the periods provided in the rule, but it avoids the sometimes draconian remedy of automatic discharge following mere prosecutorial oversight.[6]
>
> *** Any interpretation of the current language of the rule limiting an exceptional-circumstance extension to the basic 175-day period and excluding such an extension from the recapture window, serves only to exacerbate the draconian remedy described in *Agee* and to perpetuate the unintended strategy of dismissal and discharge.

Although beyond the scope of the certified question, the State, in an abundance of caution, will briefly address Brown's alternative argument that was preserved in the trial court. He contends that unexpected illness is not an exceptional circumstance unless the prosecutor has diligently prepared its case. He misreads Fla.R.Crm.P. 3.191(l). What is and what is

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[6] First brackets added by State; second brackets added by court.

not an exceptional circumstance is set out in the rule. Lack of diligent preparation is not an exceptional circumstance, whereas unexpected illness of a key participant in the proceeding is an exceptional circumstance. Some of the enumerated circumstances, either directly or implicitly, do require diligence of some degree, but unexpected illness is not included in that group. See generally Routly v. State, 440 So.2d at 1261 (court rejects defendant's argument that prosecutor should have set trial earlier to avoid unavailability of a State witness).

Perhaps a hypothetical will illustrate the fallacy in Brown's argument. Suppose in the case at bar, it was defense counsel, instead of the prosecutor, who became suddenly ill. Now, would the trial court be justified in denying Brown's request for a continuance on the ground that defense counsel had been dilatory in preparing the defense? The answer is obvious--of course not.

CONCLUSION

Based on the foregoing argument, the State respectfully submits that the certified question should be answered in the affirmative, the decision of the First District Court of Appeal should be approved, and Brown's judgments and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail this 12th day of August, 1997 to Steven Seliger, Attorney for Appellant, Garcia & Seliger, 16 North Adams Street, Quincy, Florida, 32351.

Carolyn J. Mosley
Attorney for the State of Florida

[C:\USERS\CRIMINAL\PLEADING\9710933 1\BROWNBA.WPD --- 8/10/97,5:50 pm]