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IN THE SUPREME COURT OF FLORIDA  
CASE NO. 79, 506

**DAVID DELL'ORFANO,**  
Petitioner,  
vs.  
STATE OF FLORIDA  
Respondent.

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ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida; Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the symbol "R" will be used to denote the record on appeal.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and **facts** for purposes of **this** appeal, subject to the following additions, corrections, and/or clarifications:

The State asserted that it **was** unable, and Petitioner did not dispute this fact, to narrow the time frame more specifically; the trial court accepted this representation and **that a good faith** effort was **made to** by the State to narrow the time frame (R 5, **7-8, 10, 34, 38**). State v. Dell'Orfano, 592 So.2d **338, 339** (Fla. 4th DCA 1992).

On appeal, the Fourth District reversed the trial court's dismissal of charges against Petitioner, **holding** that the length of the time frame was not the sole **criteria** on which a dismissal of the information might be based. Dell'Orfano at 340. The Court noted that application of a **per se** rule would mandate dismissal even in cases where proof of **the** occurrence of the crime was evident, and **held** that where the **State** had in **good** faith framed the time as narrowly as possible, the trial court **should** not dismiss unless the defendant demonstrates to the trial court's satisfaction that he is specifically prejudiced in the preparation of his defense. Id. at 341. As there had been no showing of prejudice in this case, the **Fourth** District remanded for further proceedings.

### SUMMARY OF THE ARGUMENT

The Fourth District correctly reversed the trial court's dismissal of charges against Petitioner where the State, despite the exercise of good faith, was unable to further narrow the time frame during which the offenses were alleged to have been committed, to less than a two and one-half year period, where there was no showing that the defendant would be prejudiced in the preparation of his defense. The Court's opinion that a per se rule of dismissal could result in injustice comports with established precedent of the State of Florida and must be approved.

## ARGUMENT

THE DISTRICT COURT CORRECTLY DETERMINED THAT A DEFENDANT MUST ESTABLISH ACTUAL PREJUDICE IN THE PREPARATION OF HIS DEFENSE **BEFORE A TRIAL COURT MAY DISMISS THE CHARGES AGAINST HIM WHERE THE STATE HAS EXERCISED GOOD FAITH IN TRYING, BUT BUT CAN NOT FURTHER NARROW THE TIME FRAME DURING WHICH THE CHARGED OFFENSE IS ALLEGED TO HAVE BEEN COMMITTED** (Restated).

Petitioner urges this Court to reverse the decision of the Fourth District below, and adhere to a per se rule of dismissal in circumstances where the State can not narrow the time during which the charged crime is alleged to have been committed to a period of time less than two **and** one-half years. Petitioner also argues that the State should have the burden of showing that a defendant is not prejudiced in the preparation of his defense by the State's inability to narrow the time frames. Respondent submits that the decision of the Fourth District in this case is correctly holds that use of a per se rule of dismissal could result in injustice, particularly where proof of a defendant's guilt is evident; further, Petitioner's suggestion that the State establish that a defendant is not prejudiced by the State's inability to narrow the time frames, is not workable, as only the defendant is in a position to know exactly what his defense will entail and how the span of time will hamper his defense.

In this case, the Petitioner was charged with one count of sexual battery on a child and three counts of indecent assault on a child (R 49). Initially the information charged that these offenses had occurred between the dates of August 1, 1985 and June

30, 1988, however, the State ultimately narrowed the time frame to a period of time between January 1986 and June 30, 1988 (R 37). The trial court found that it was undisputed that the State could not further narrow the time periods, but held that the time periods were too broad and dismissed the charges, without any consideration of how or whether Petitioner would be prejudiced in the preparation of his defense due to the State's inability to narrow the time (R 38-41). The Fourth District reversed, finding that a per se dismissal rule was not warranted, either by case law or the facts of this case. State v. Dell'Orfano, 592 So.2d 338 (Fla. 4th DCA 1992). Although Petitioner does not **ask** this Court to set a specific time which is presumptively broad enough to warrant dismissal of charges, his argument that the trial court make such a determination on a case by case basis, without consideration of the issue of prejudice to the defendant, is tantamount to suggesting that this Court approve application of a per se rule in this case: that is, that two and one-half years is too broad. Clearly such a position is contrary to established precedent.

As noted by the Fourth District in this case, exclusive of dicta in Knight v. State, 506 So.2d 1182 (Fla. 5th DCA 1987), relied on in Gable v. State, 535 So.2d 706 (Fla. 5th DCA 1988), there are **no** cases in Florida which approve dismissal of charges against a defendant where the State has made a good faith effort to narrow the time frame, unless the trial court has also made a determination that the defendant would be prejudiced in the preparation of his defense. Beginning with State v. Bandi, 338

So.2d 75 (Fla. 4th DCA 1976), cert. denied, 344 So.2d 323 (Fla. 1977), the Fourth District reversed a trial court's order dismissing indecent assault charges against the defendant where the State had fulfilled the requirements of the rules of criminal procedure by narrowing the time span as much as possible. The Court noted that where the exact time was not an element of the offense', the defendant could not make it so by claiming a possible alibi defense. Similarly, in State v. McGregor, 409 So.2d 504 (Fla 4th DCA 1982), the defendant was charged with accepting pecuniary benefit not authorized by law in connection with his duties as a building inspector during an eight month period between January 1, 1980 and September 1, 1980. When the State was unable to further narrow the time span, the defendant requested and was granted **the** sanction of dismissal of the charges. The Fourth District again reversed finding the sanction of dismissal to be too severe; the Court noted that the State had complied with the trial court's

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<sup>1</sup> This Court has long recognized that, except where time is a substantive element of an offense, it is not necessary for the State to set forth the exact time the crime was committed if that time is unknown, so long as the State alleges the time frame with as much specificity as possible and so as long the defendant is afforded a full range of discovery and is not prejudiced in the preparation of his defense. Sparks v. State, 273 So.2d 74 (Fla. 1973); Tingley v. State, 549 So.2d 649 (Fla. 1989) (recognizing that time was not a substantive element of the offense of sexual battery of a minor); Lightbourne v. State, 438 So.2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984). See also: State v. Barnett, 344 So.2d 863 (Fla. 2nd DCA 1977), where time was a substantive element of the offense of bookmaking as the State was required to prove that the defendant **accepted more than five bets in any one day.**

order to furnish as narrow a **time as possible**<sup>2</sup> **and that the** defendant was not really prejudiced as he had filed a demand for speedy trial indicating that he had investigated his case and **was** prepared to go to trial.

Subsequently, in State v. Belton, 468 So.2d 495 (Fla. 5th DCA 1985), the Fifth District also reversed an order dismissing the charges against the defendant where the State was unable to narrow the time frame during which a boat motor was stolen to a period of time less than 6 days. The Court noted that established case law provided that it is proper for an information to allege that the crime occurred between two dates if the exact date of the offense is not known, except in those rare instances where the exact time is part of the nature of the offense. There, the Court held that the defendant was not prejudiced in the preparation of his defense, even though he had prepared an alibi defense, because the State had filed the amended information (broadening the time span) prior to the case being set for trial and he did not assert he had insufficient time to prepare a defense. Because the amended information contained the time frame of the original information, the defendant's alibi for that time frame was **still** of value. The Fifth District revisited the issue in Knight v. State, 506 So.2d 1182 (Fla. 5th DCA 1987), wherein the defendant was charged and convicted of two counts of sexual battery **on a child and one** count of sexual activity while in a position of familial authority.

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<sup>2</sup> The Court held that the State did **not have the** burden of showing what it had done toward narrowing the time frame.

The information charged that the first sexual battery occurred between January 1, 1977 and December 31, 1980; that the second sexual battery occurred between January 1, 1981 and February 11, 1984; and that the third offense occurred between February 12, 1984 and December 31, 1984, although this time was later **narrowed** to between October 1, 1984 and December 31, 1984; the trial court denied the defendant's requests that **the State narrow the time frames** for the first and second counts. **The Court reversed the convictions for the first and second counts, noting that the victim, prior to trial, was able to recall the incidents in relation to her grade in school, yet the State made no effort to correlate either of the counts to her testimony, and found that the state's failure to narrow the time span, when it had the ability to do so distinguished the case from Belton, supra. While the Court noted in dicta that no reported Florida case had ever upheld such an indefinite time span and that to do so would "eviscerate" Rule 3.140(d) (3) Fla.R.Crim.P., it is clear from a reading of the entire opinion that the Court was concerned that the State had failed to comply with the rule requiring that the time of the commission of the offense be stated as definitely as possible, when the State had the ability to do so.**

Likewise in State v. Garcia, 511 So.2d 714 (Fla. 2nd DCA 1987), the Second District upheld the dismissal of three counts of sexual battery against the defendant where it appeared the State had the ability to allege the offenses with more specificity. There, the Court distinguished the holdings of Belton, supra, and

Bandi, supra, because in those cases the State had met its burden of stating the date of the offense as definitely **as** possible, while here the State did not. The Court did, however note that affirmance of the dismissal was without prejudice to the State to refile the charges alleging a more specific time span. The next reported case construing this issue is Goble v. State, 535 So.2d 706 (Fla. 5th DCA 1988), in which the Court reversed the trial court's denial of the defendant's motion to dismiss the sexual battery cases alleged to have occurred during a two and one-half year time span, relying on the dicta in Knight that no such indefinite time span had ever been upheld. Unfortunately, as noted by the Court in the instant case, the Goble opinion fails to reveal whether the State had the ability to narrow the time frame but failed to do so. Thus **the** State submits that either we must presume that the State did have the ability to narrow the time frame, or that Goble was wrongly decided, as it does not conform to the prior decisions of the courts of Florida.

After the decision in Gobel, the Fourth District affirmed the dismissal of sexual battery charges against a defendant, but without prejudice to the State to refile the charges based upon more certain time periods for the commission of the offenses in State v. DeBianchi, 538 So.2d 984 (Fla. 4th DCA 1989). Again, the opinion did not reveal whether the State had the ability to narrow the time frames, but in deciding this case, the Fourth District reviewed its files concerning the DeBianchi case and determined that the dismissal was based on the trial court's finding that the

State had the ability to narrow the time frames, **due** to the victims' ability to recall the acts in relation to other events in their lives, but elected not to do so. Dell'Orfano at 339-340.

Subsequently the Third District reversed the trial court's dismissal of sexual battery charges against the defendant despite the lower court's finding that the State had acted in good faith and had alleged the dates of the offenses with as much particularity as possible. State v. Jones, 539 So.2d 535 (Fla. 3rd DCA 1989). The Court held that in these circumstances a two-fold inquiry is required; first, the trial court must determine whether the State has the ability to further narrow the time frame and second, if does not, then the lower court must determine whether, under the time frame alleged, the defendant is prejudiced in the preparation of his defense. The Court found that while it is proper to dismiss charges on the basis of time frame specificity where the State has the ability to be more specific but fails to do so, it was error to dismiss the charges in the face of a finding that the State in good faith could not have further narrowed the time frame. In reviewing the defendant's claims that he was **prejudiced** in the preparation of his defense, the Court found that they were without merit, as they were "**in** actuality ... an argument concerning the credibility of the state's witnesses and the sufficiency of the state's case in chief." Id. at 538. Regarding the defendant's double jeopardy claim, the Court found that as a matter of **law** the defendant was protected from prosecution for **the** same offense for the same time period alleged in the information.

There, the Third District squarely held that charges against a defendant should not be dismissed where the State can not narrow the time frame, absent a finding that the defendant is prejudiced in the preparation of his defense.

Still more recently, the Second District in State v. Yzaquirre, 569 So.2d 492 (Fla. 2nd DCA 1990), reversed the dismissal of sexual battery charges, holding that dismissal could "rest only on a finding that the state, contrary to its representations, failed to exhaust avenues of inquiry which may have produced more precise dates identifying the periods Yzaquirre's alleged criminal conduct" and remanded for determination of that issue. Id. at 492. Finally, the Fifth District again revisited the issue in State v. Theriault, 590 So.2d 993 (Fla. 5th DCA 1991), although in that decision the Court noted that the trial court's dismissal was not based on **the** State's failure to narrow the time frames during which the sexual batteries were alleged to have been committed, but **was** based on the prosecutor's willful violation of the rules of discovery by filing false statements of particulars when the prosecutor knew the time frames were narrower. There, the Court reversed **the** dismissal, finding that the sanction of dismissal **was** too severe and that he defendant had failed **to** establish that **he** suffered actual prejudice a result of the State's misconduct.

Additionally, review of another area of the law in which the passage of time could impair a defendant's ability to prepare for trial, i.e. preaccusatorial delay, also reveals that in those

circumstances as well, not only is the State's conduct examined to determine good faith, but the prejudice which might have inured to the defendant due to the State's actions must also be established before the radical sanction of dismissal is imposed. In such, courts examine both the State's reasons for delay in bringing the charges and the prejudice to the accused in the preparation of **his** defense due to the delay; in the absence of intentional conduct by the prosecution, prejudice to the accused is the most important factor and the defendant bears the burden of proving actual prejudice resulting from the delay. State v. Hills, 467 So.2d 845 (Fla. 4th DCA 1985); State v. Borges, 467 So.2d 375 (Fla. 2nd DCA 1985), petition for review denied 476 So.2d 672 (Fla. 1985); Marrero v. State, 428 So.2d 304 (Fla. 2nd DCA 1983); Howell v. State, 418 So.2d 1164 (Fla. 1st DCA 1982).

Where the State causes charges to be brought against a defendant as soon as probable cause exists to link the defendant with the alleged offense, that is where **the** State has exercised good faith in charging the defendant as soon as possible, the defendant is required to demonstrate actual and material prejudice and general allegations of prejudice are insufficient. Borges, supra; Hills, supra. The Court in Hills, held that a defendant's general allegation that evidence had been lost was insufficient; rather, the Court stated that a defendant must also offer some explanation as to how the lost evidence would have been favorable and material. Id. at 848. Similarly in Marrero, supra, the Court held that the defendant's complaints that due to the long delay,

several persons who participated in a drug conspiracy meeting were absent from trial, that he could no longer recall the identities of several of participants in the transactions so as to call them as defense witnesses, and that he could no longer recall the exact nature of any particular telephone call or to whom he spoke in response to the evidence that numerous calls had been made from his residence and business to other conspirators, while causing him some prejudice, were insufficient to warrant dismissal of the charges; the Court further noted that the defendant had failed to demonstrate how the "lost" evidence would have been material and favorable. The First District in Howell, supra, held that the defendant had failed to meet his burden of demonstrating prejudice where he claimed that his faded memory and the faded memories of his friends impaired his ability to prepare a defense. The Court held that as Howell had failed to show in what material way these faded memories caused him actual prejudice, speculative allegations as to faded memories simply did not suffice to prove actual prejudice. Id. at 1170. The Court also noted that the fading of witnesses' memories with time may disadvantage the State far more than the accused because the State carries the burden of proof. Id. at 1168.

The State submits that if a defendant whose arrest has been delayed must show actual and material prejudice before he is entitled to dismissal of the charges, so too must a defendant who is charged with a crime encompassing a broad period of time. Here, the Petitioner not only failed to show actual and material

prejudice, he offered no evidence of how was prejudiced in the preparation of his defense, but simply asserted that the two **and** one-half year time period **was** too long (R 4-41, 41), and by failing to make even a colorable showing of prejudice, he should not be entitled to dismissal of these charges.

Petitioner argues that the Fifth District's decision in Therriault and the First District's decision in Lavigne v. State, 349 So.2d 178 (Fla. 1st DCA 1977), allow the trial court to presume prejudice, unless the State establishes otherwise. Initially, it must be noted that each of those cases involve the issue of the propriety of the sanction of dismissal where the State has violated the discovery rules by failing to provide a defendant with material to which he is entitled; that is, where the State, by some willful conduct of its own, has deprived the defendant access to information, which the State has in its possession, which might have prejudiced the defendant in the preparation of his defense. Clearly those are different circumstances from here, where the State has not engaged in willful misconduct, but has made a good faith effort to comply with the rules of criminal procedure. Nonetheless, neither of those cases require dismissal of charges where there has been no showing of prejudice to the defendant, as transpired below. Further, the issue of prejudice is a different consideration in broad time span cases than it is in discovery violation cases. In discovery violation cases, where the State can show that a defendant had knowledge of the withheld information from other sources, or that he could prepare his case having

received he withheld information by being granted a continuance without violating his speedy trial rights, or that the defendant failed to timely bring the State's noncompliance with discovery to the trial court's attention, or that the State could not have **provided** the information at an earlier date, the State has met its burden of showing that **its** misconduct **has not** prejudiced the defendant. Leeman v. State, 357 So.2d 703 (Fla. 1978); Richardson v. State, 246 So.2d 771 (Fla. 1971); Therriault, supra; State v. Del Gaudio, 445 So.2d 605 (Fla. 3rd DCA 1984). However, in broad time frame cases, requiring the State to show **that the** defendant's defense will not be impaired **even though evidence has been lost or** destroyed, or that a defendant's memory of events is not sufficiently specific to cover the time span, or that witnesses are no longer available, or that the defendant can not present an alibi for the time frame, is unreasonable, if **not impossible, as the** State has no right to question the defendant about his defense **unless he elects to testify at trial.** Clearly the State can not be required to prove prejudice in these circumstances, particularly after the State has shown that it has, in good faith, narrowed the time span as much as it could.

Thus the State submits that, with the exception of Goble, the decision of the Fourth District in this case clearly comports with established decisional law of this State and must be affirmed. Obviously, particularly in cases involving sexual abuse on small children, it is difficult, if not impossible, for the State to allege the dates of the offense with the same specificity as in

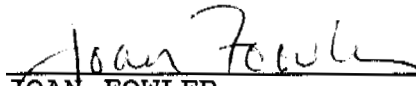
cases of murder, robbery or assault of adult victims. Yet to suggest that such crimes should go unprosecuted simply because the time period is too broad, notwithstanding a finding that the State has exercised good faith in narrowing the time frame as much as possible, is to deny those victims due process of law. This Court has long recognized that the rules of criminal procedure are not designed to furnish a defendant with a procedural device to **escape** justice. Richardson, supra at 774; Leeman, supra at **705**. Clearly the remedy of dismissal punishes the public, not the prosecutor, and should not be used, as here to result in a windfall to the defendant. Therriault, supra at 996; Del Gaudio, supra at **608**. The decision of the Fourth District provides protection to the defendant as well as serving justice, thus Court must approve the instant decision and overrule the holding of Goble to the extent it conflicts with this decision.

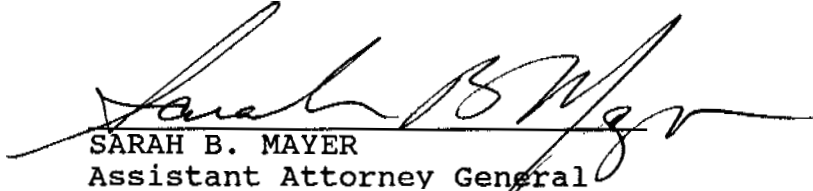
CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court APPROVE the decision of the Fourth District below, and remand this cause to the trial court for proceedings consistent therewith.

Respectfully submitted,

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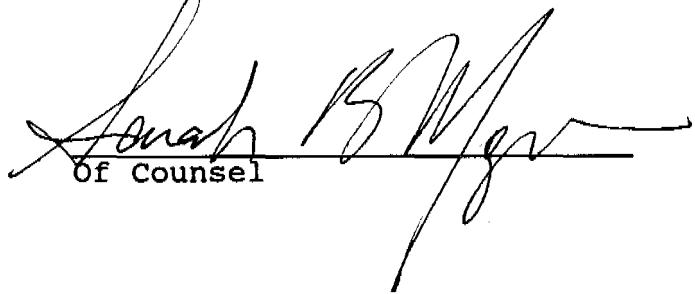
  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing  
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JOSEPH DeGANCE, Esquire, 1995 East Oakland Park Boulevard, Suite  
101, Ft. Lauderdale, FL 33306, this 28<sup>th</sup> day of April, 1992.

  
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