12-5-93

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,060

TODD DORIAN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Petitioner, Todd Dorian, was the defendant in the trial court and the Appellee in the Third District Court of Appeal. The Respondent, the State, was the prosecution in the trial court and the Appellant in the District Court. The parties will be referred to herein as "the Petitioner," and "the State," respectively.

The designation "R." will refer to the record before the Third District Court of Appeal, and the designation "S.R." will refer to the Appellee's supplemental record therein. The designation "App." will refer to the Petitioner's Appendix accompanying this brief.

STATEMENT OF THE CASE AND FACTS

The defendant was arrested on the subject charge (first-degree murder) on May 20, 1981, commencing the then-applicable 180-day time for trial under Florida Rule of Criminal Procedure 3.191. State v. Dorian, 16 Fla. L. Weekly D2370 (Fla. 3d DCA Sept. 10, 1991), superseded on rehearing en banc, 619 So. 2d 311 (Fla. 3d DCA 1983); (R. 39; S.R. 1, 4). The last day for trial under the speedy trial rule would have been November 17, 1981. The defendant was continuously available for trial throughout the relevant time period, and there was no defense continuance or delay. (R. 39; S.R. 1, 4). Eight days before expiration of the speedy trial period, the State nolle prossed the charge. (R. 39; S.R. 1, 4; 619 So. 2d at 311). Six years later, in an unrelated arrest, the defendant made incriminating statements relating to the 1981 charge. 619 So. 2d at 310-11. Three years after that event, i.e., at the end of 1990, the defendant was reindicted and rearrested on the original 1981 charge. (R. 3, 39). The trial court granted the defendant's motion for speedy trial discharge based on the rule as comprised in 1981. (R. 39).

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[1] reversed the

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[1] 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 timely 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, 619 So. 2d 311 (Fla. 3d DCA 1993) ("On motion for rehearing en banc"). The Appellee's timely motions for rehearing and for certification of the en banc decision

trial court's order of speedy trial discharge and resurrected the prosecution. 619 So. 2d at 311.

In State v. Agee, 588 So. 2d 600 (Fla. 1st DCA 1991) (on 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. 619 So. 2d at 313.

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, 622 So. 2d 473 (Fla. 1993) which expressly disapproved of the Third District's decision in this case and approved the First District's decision in Agee. Id. at 476.

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were denied on June 15, 1993.

SUMMARY OF ARGUMENT

Where, in 1981, throughout the relevant time following arrest on the subject charge, the defendant was undisputedly available and caused no delay, the State's nol pros on the 172nd day of the running of the speedy trial period (Florida Rule of Criminal Procedure 3.191 (1981)) did not serve to prevent the lapse of the 180-day period eight days later entitling the defendant to discharge, and the prosecution could not be revived on the basis of a rule amendment creating a window period which was first enacted over three years later. The 1985 "window period" amendment was never intended by this Court to reach back and revive a long-since lapsed prosecution, nor could it so apply. The decision of the lower court, State v. Dorian, 619 So. 2d 311 (Fla. 3d DCA 1983), has been expressly disapproved by this Court in State v. Agee, 622 So. 2d 473 (Fla. 1993), and should be formally quashed.

ARGUMENT

WHERE THE DEFENDANT WAS ARRESTED FOR THE CHARGE IN QUESTION ON MAY 20, 1981, WAS AVAILABLE THROUGHOUT THE APPLICABLE 180-DAY SPEEDY TRIAL PERIOD AND CAUSED NO DELAY, AND WAS NOT BROUGHT TO TRIAL AS REQUIRED WITHIN 180 DAYS THROUGH NO FAULT OF HIS OWN BUT BECAUSE THE STATE NOLLE PROSSED THE CHARGES EIGHT DAYS BEFORE THE RULE PERIOD ELAPSED, THE FIFTEEN-DAY "WINDOW" PERIOD FIRST ESTABLISHED BY AMENDMENT OF THE SPEEDY TRIAL RULE OVER THREE YEARS LATER WAS NEITHER INTENDED TO APPLY, NOR DOES IT APPLY, TO REVIVE THE ELAPSED PERIOD, AND DISCHARGE UPON A 1990 RE-INSTITUTION OF PROSECUTION FOR THE SAME CHARGE WAS PROPERLY GRANTED. THE LOWER COURT'S OPINION TO THE CONTRARY HAS ALREADY BEEN DISAPPROVED BY THIS COURT IN STATE v. AGEE, 622 So. 2d 473 (Fla. 1993), AND ACCORDINGLY, SHOULD BE FORMALLY QUASHED.

The defendant was arrested on the charge on May 20, 1981 (R. 39; S.R. 1, 4). The last day for trial under the applicable 180 day period provided by Florida Rule of Criminal Procedure 3.191 (1981) would have been November 17, 1981. The defendant was continuously available throughout the speedy trial period, caused no delay, and was not brought to trial within the requisite period through no fault of his own; eight days prior to expiration of the speedy trial period, the State nolle prossed the charges (R. 39; S.R. 3, 4). Had the charges been refiled any time between November 18, 1981 and the end of 1984, discharge under the speedy trial rule would have been uncontestably, unconditionally mandated, and, of course, this remains so.

On the basis of a rule change which became effective over three years after the speedy trial period elapsed, the majority of the divided lower court accepted the State's argument that a re-prosecution on the same charge, re-instituted in 1990, was viable.

State v. Dorian, 619 So. 2d 311 (Fla. 3d DCA 1993) (en banc), relying on Bloom v. McKnight, 502 So. 2d 422 (Fla. 1987), and Zabrani v. Cowart, 506 So. 2d 1035 (Fla. 1987). The lower court's decision has since been expressly disapproved by this Court in State v. Agee, 622 So. 2d 473 (Fla. 1993), as have Bloom and Zabrani to the extent they suggest that the window period again applies where there has been a nol pros and the speedy trial time has elapsed. Agee, 622 So. 2d at 476.

In Agee, this Court held, for a 1988 (i.e., post-window period inception) offense, that when the State enters a nol pros, and the time for trial under Florida Rule of Criminal Procedure 3.191 [i.e., either the 50-day demand period of subdivision (b)(4) or the 175-day period of subdivision (a) of rule 3.191[2] plus the fifteen-day "window-period" provided under subdivision (p)] has elapsed, the prosecution is not entitled to a second or continuing window period under the rule upon refiling charges. As stated therein,

> Section (h)(2) makes clear that the State cannot circumvent the intent of the rule by suspending or continuing the charge or by entering a nol pros and later refiling charges:
>
> > [h](2) *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,

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2 The rule subdivisions are referenced by the letter designations effective January 1, 1993.

> continued, or is the subject of entry of a *nolle prosequi*.
>
> Fla.R.Crim.P. 3.191(h)(2). To allow the State to unilaterally toll the running of the speedy trial period by entering a nol pros would eviscerate the rule -- a prosecutor with a weak case could simply enter a nol pros while continuing to develop the case and then refile charges based on the same criminal episode months or even years later, thus effectively denying an accused the right to a speedy trial while the State strengthens its case.
>
> When faced with a missing witness or unconscious victim, as in the instant case, a prosecutor is not without options. The State may always seek a delay under subsection (f), which allows judicial extensions for good cause. . . . The State may either postpone arresting a suspect until it has an adequate case or, if charges have already been filed, seek an extension for good cause. We note that requiring the State to petition the court for an extension achieves the intended result of insuring judicial control over deviations from the rule.
>
> Based on the foregoing, 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.

622 So. 2d at 475 (emphasis the Court's).[3]

Agee a fortiori mandates discharge, and hence reinstatement of the trial court's order, in this case. As stated, Agee involved a case otherwise subject to the window period, i.e., a 1988 offense in which the question presented was the interrelationship between two potentially applicable provisions, the nolle prosequi provision (present subdivision (o)), and the window-period provision (present subdivision (p)). Agee also involved a factual claim of good faith

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[3] The nol pros provision is presently designated as subdivision (o) of the rule.

far more substantial (a victim in a coma) than any possible claim of good faith the State could present herein, but which was held by this Court to be ineffective to prevent the running, and expiration, of the speedy trial time period where no extension was obtained or sought.[4] "The speedy trial rule contains no 'good faith' exception." State v. Agee, 588 So. 2d 600, 604 (Fla. 1st DCA 1991), approved, 622 So. 2d at 473-74, 476.

In contrast, the time for trial in this case passed in November of 1981, more than three years before the window period was even created. The 1985 window-period amendment was never intended by this Court to "reach back" to resurrect a long-lapsed speedy trial period. This Court's adopting opinion 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). This proceeding was never within the rule amendment's scope; the State had made an intentional decision not to prosecute in 1981, the rule period had shortly thereafter run, and the prosecution had long

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[4] The lower court asserted in its opinion that the Petitioner (Appellee therein) did not challenge the trial court's ruling that "the 1981 dismissal [sic] and 1990 refiling was not in bad faith." 619 So. 2d at 312, 314. The trial court never made any such finding as to the 1990 refiling. (R. 39). Not only is the question of "good faith" in a nol pros legally irrelevant under Agee, but as a factual matter the Petitioner (Appellee) indeed challenged in the lower court the finding as to the nol pros, arguing that the finding was evidentially utterly unsupported and that the State would necessarily have been aware of the imminent passage of the speedy trial time at the time of the November 8, 1981 nol pros. (Brief of Appellee at 7 n.6, App. "G" herein). In its supplemental (en banc) brief, which was a permitted, not a required pleading (App. "C"), the Appellee incorporated that position (Supp. Brief at 1, App. "H") and further developed its argument in support of affirmance of discharge.

since been foreclosed by the rule period.[5]

See Rule 3.191, 1984 Amendment Committee Note: "The [fifteen-

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[5] The Agee core principle, that the State may not unilaterally exempt itself from the provisions of the speedy trial rule, is supported by a long line of antecedent decisions, many of which long predate the nol pros entered in this case. See, e.g., State ex rel. Green v. Patterson, 279 So. 2d 362, 363-64 (Fla. 2d DCA 1973) ("Under the Speedy Trial Rule the time within which a person must be tried cannot be extended by the State entering a nolle prosequi to a crime charged and then prosecuting new or different charges based on the same conduct or criminal episode(.)"); Richardson v. State, 340 So. 2d 1998 (Fla. 4th DCA 1976) (same); Fyman v. State, 450 So. 2d 1250 (Fla. 2d DCA 1984) (same); Thigpen v. State, 350 So. 2d 1078 (Fla. 4th DCA 1977) (reversal of second-degree murder conviction; where defendant was arrested for murder, grand jury initially returned a "no true bill" and defendant was released, indictment was subsequently returned within the speedy trial period but defendant was not arrested on it until after the speedy trial period ran, defendant entitled to discharge), cert. dismissed, 354 So. 2d 986 (Fla. 1978); State v. Thaddies, 364 So. 2d 819, 820 (Fla. 4th DCA 1978) ("[A]lthough earlier charges arising from the same incident are dropped, speedy trial time on charges later filed, but based on the same incident, is still measured from the date of arrest on the earlier charges."); Robinson v. Lasher, 368 So. 2d 83 (Fla. 4th DCA 1979) (state could not enlarge time for speedy trial by nolle prosse of charge and later, untimely filing of charges based on same incident); Jay v. State, 443 So. 2d 187 (Fla. 3d DCA 1983) ("[T]he State may not use its prosecuting procedure to unlawfully extend a speedy trial period."); State v. McDonald, 538 So. 2d 1352, 1353 (Fla. 2d DCA 1989) ("The State cannot avoid the intent and effect of [Fla.R.Crim.P. 3.191(h)(1)], and engineer its own extension of speedy trial time limits, by dropping one set of charges and later refiling different charges arising from the same criminal episode. . . . In the present case, revitalization of the misdemeanor resisting arrest charge is foreclosed notwithstanding the fact the state's election to file its so called "no bill" precluded the county court from entering a formal order of discharge.").

See also State ex rel. Bird v. Stedman, 223 So. 2d 85, 86 (Fla. 3d DCA 1969) (under statutory predecessor to speedy trial rule, the State could not avoid effect of speedy trial requirements by dismissing prosecution and then subsequently refiling; "A holding that the statute applies to the information filed and not the crime for which the accused is prosecuted would make possible the indefinite postponement of prosecution for a crime by the simple expedient of a continuous entry of nol prosequis and a continuous refiling of informations charging the same crime. This would violate the right of one accused of a crime to a speedy trial(.)").

day window] period was chosen carefully. . . . [I]t gives the system a chance to remedy a mistake; it does not permit the system to forget about the time constraints." As has been pertinently observed, "[t]he 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. v. State, 601 So. 2d 283 (Fla. 2d DCA 1992) (holding, under the juvenile speedy trial rule, that an extension to be valid must be entered prior to expiration of the underlying speedy trial time). See also Heller v. State, 601 So. 2d 642 (Fla. 3d DCA 1992) (holding same as to adult speedy trial rule).

Even Bloom v. McKnight, 502 So. 2d 422 (Fla. 1987) and Zabrani v. Cowart, 506 So. 2d 1035 (Fla. 1987), which took an expansive view of the window period and which, where a nol pros is involved, have themselves now been overruled by this Court in Agee, never suggested that the window period would apply in a case such as this one. As recognized in Zabrani, "the event which triggers the speedy trial time should be decisive in computing the length of that period(.)" Zabrani v. Cowart, 502 So. 2d at 1258 (en banc), approved, 506 So. 2d 1035 (Fla. 1987), disapproved in part, State v. Agee, 622 So. 2d at 476. Zabrani and Bloom, properly construed and before their overruling (where a nol pros is involved) by Agee, implicitly represented only the proposition that application of the window period effective January 1, 1985 to a not yet lapsed[6]

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[6] In none of the Zabrani-type cases of which the Petitioner is aware had the speedy trial period expired at the time the window

prosecution (modifying a still-running speedy trial period from 180 days to 190 [175 plus 15] days for trial), was permissible.[7]

The State's expected argument that at the time of the nol pros in 1981, it did not anticipate that the rule would be amended in 1985 to create a window-period (or that incriminating statements would be obtained in 1987), and that therefore it should not be "deprived" of the "benefit" of that window, is a logical absurdity. The State was required to try the defendant within 180 days of arrest in 1981, and, through no fault of the defendant, it did not. Its sought manipulation of the rule would impermissibly reach

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period amendment became effective on January 1, 1985.

In Zabrani the arrest occurred on July 11, 1984, 502 So. 2d 1257; and in Bloom, on August 24 and 29, 1984. 490 So. 2d at 93. Similarly, in Upshaw v. State, 505 So. 2d 455 (Fla. 2d DCA 1987) and Winfield v. State, 503 So. 2d 333 (Fla. 2d DCA 1987) (on motion for rehearing), both decided under this Court's decisions in Bloom and Zabrani, the arrests occurred within 180 days prior to the effective date of the rule change, i.e., the rule period had not yet lapsed. In Upshaw, the arrest was on November 11, 1984, 505 So. 2d at 455, and in Winfield, on October 24, 1984. 503 So. 2d at 333.

As stated, this is even before consideration of the significance of a nol pros, with respect to which application of Bloom and Zabrani has been foreclosed by Agee.

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Although such statutes involve rights of lesser importance than the speedy trial right, the principles applicable to statutes of limitation in criminal cases may be seen to be analogous.

Such statutes are considered as vesting substantive rights rather than being procedural in nature, State ex rel. Manucy v. Wadsworth, 293 So. 2d 345 (Fla. 1974); may be amended (extended) with such amendment to apply retrospectively if the time period has not yet run and sufficient intent is manifested in the amendment to so apply, Reino v. State, 352 So. 2d 853, 860-61 (Fla. 1977); Scharfschwerdt v. Kanarek, 553 So. 2d 218 (Fla. 4th DCA 1989); but may not be extended after the original time period has lapsed. Andrews v. State, 392 So. 2d 270 (Fla. 2d DCA 1980), rev. denied, 399 So. 2d 1145 (Fla. 1981).

backward to expand the allowed (and elapsed) time for trial from 180 days from arrest in 1981 to well over 1100 days as of the date the window period was implemented on January 1, 1985, and nearly 2200 additional days (a total of approximately 3300 days) as of the time prosecution was actually recommenced in this case. This would be a retrospective expansion by a factor of 18.

This Court never intended the 1985 amendment to reach such a result, and the State's argument is in essence an unconstitutional one. If the Legislature could not by retrospective legislation accomplish that which the State seeks in this case, and it cannot, see, e.g., Andrews v. State, supra at 11 n.7, then such a deprivation by court rule would be similarly prohibited. Rule 3.191 represents a substantial right and specific implementation, as authorized and directed by the Legislature, of a constitutionally sourced protection, and is a successor to the speedy trial statute repealed to make way for it. See ch. 71-1(B), § 7, Laws of Fla. (repealing the former speedy trial statutes); § 918.015(2), Fla. Stat. (1971) ("The Supreme Court shall, by rule of said court, provide procedures through which the right to a speedy trial as guaranteed by subsection (1) and by s. 16, Art. I of the State Constitution shall be realized.").

This Court has long recognized the important, substantive nature of the right protected by rule 3.191. See State ex rel. Gutierrez v. Baker, 276 So. 2d 470, 471 (Fla. 1973) ("[T]he accused has a vested interest in being brought to trial within the limitations set by Rule 3.191(.)"); State ex rel. Butler v. Cullen, 253 So. 2d 861, 863 (Fla. 1971) ("[T]he purpose of the Speedy Trial

rule is to implement the practice and procedure by which a defendant may seek and be guaranteed his speedy trial." (emphasis added)). See also State v. Williams, 287 So. 2d 415, 419 (Fla. 2d DCA 1973) (Under rule 3.191, "a speedy trial is a substantive right to which one shall not lightly be deprived."); State v. Williams, 230 So. 2d 185, 187 (Fla. 4th DCA 1970) ("The [predecessor speedy trial] statute is mandatory and does confer upon the accused an absolute right to be set at liberty unless tried within the time prescribed, except under the circumstances specified.").[8]

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[8] The Florida Constitution is violated by retrospective action which "in relation to the offense or its consequences alters the situation of a party to his disadvantage." Higginbotham v. State, 88 Fla. 26, 31, 101 So. 233, 235 (1924). See also Dugger v. Williams, 593 So. 2d 180, 181 (Fla. 1991): "In Florida, a law or its equivalent violates the prohibition against ex post facto laws if two conditions are met: (a) it is retrospective in effect; and (b) it diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense."

Neither the fact that the provision at hand is a rule of court rather than a statute, nor, for state law purposes, normally characterized as procedural, diminishes the application of the ex post facto prohibition. While the ex post facto prohibition is primarily seen as a limitation upon legislative, and not judicial powers, the principles upon which it is based provide protection against judicial action through due process:

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids . . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."

Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964), quoted in Marks v. United States, 430 U.S. 188, 192 (1977).

Similarly, labeling the rule provisions as "procedural" does

CONCLUSION

The State can offer no legitimate justification for viability of prosecution nearly 10 years after the speedy trial period in this cause elapsed. The lower's court's reversal of discharge was clearly incorrect and has been effectively disapproved by Agee. Its decision should be quashed, the dissenting opinion below approved, and the cause remanded with directions to reinstate the trial court's order of discharge.

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not immunize a substantially disadvantageous retrospective application from scrutiny under the ex post facto prohibition. "[I]t is the effect, not the form, of the law that determines whether it is *ex post facto*." Weaver v. Graham, 450 U.S. 24, 31 (1980). "The critical question is whether the law changes the legal consequences of acts completed before its effective date." Id. As this Court has stated with respect to the Florida Constitution, "it is too simplistic to say that an ex post facto violation can occur only with regard to substantive law, not procedural law. Clearly, some procedural matters have a substantive effect. Where this is so, an ex post facto violation also is possible, even though the general rule is that the ex post facto provision of the state Constitution does not apply to purely procedural matters." Dugger v. Williams, 593 So. 2d at 181.

See, e.g., Talavera v. Wainwright, 468 F.2d 1013 (5th Cir. 1972) (retrospective application of court severance rule, which supplanted severance statute in effect at time of offense and motion, to require grounds not required by statute, denied defendant due process of law); Irizarry v. State, 578 So. 2d 711, 714 (Fla. 3d DCA 1991) (on rehearing) (ex post facto violation to apply, on violation of probation, amended sentencing guidelines rule establishing permitted range to offense which pre-dated effective date of change), disapproved in part on other grounds, Williams v. State, 594 So. 2d 273 (Fla. 1992); Slappy v. State, 516 So. 2d 342 (Fla. 1st DCA 1987) (ex post facto violation to retrospectively apply sentencing guidelines rule committee note change).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered 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 Richard Polin, Assistant Attorney General, Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 10 day of November, 1993.

BRUCE A. ROSENTHAL
Assistant Public Defender

IN THE SUPEME COURT OF FLORIDA

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TODD DORIAN,

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APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

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