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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,217

DCA CASE NO. 92-1972

MARVIN REED,

Defendant/Petitioner,

-vs-

STATE OF FLORIDA,

Plaintiff/Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER MARVIN REED ON THE MERITS

Geoffrey C. Fleck, Esq.
Fla. Bar No. 199001
FRIEND & FLECK
Sunset Station Plaza
5975 Sunset Drive
Penthouse 802
South Miami, Florida 33143
(305) 667-5777

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STATEMENT OF THE CASE

The petitioner, MARVIN REED, was the defendant in the trial court and the appellant in the Third District Court of Appeal. The respondent, State of Florida, was the prosecution in the trial court and the appellee on direct appeal. The parties will be referred to as they appeared below. The symbol "R" will be used to designate documentary evidence and pleadings contained within the record on appeal. "TR" will represent the transcripts of trial proceedings. An appendix, described as "A", is attached hereto containing a conformed copy of the transcript of the hearing held on the defendant' motion for discharge.

Reed was arrested and taken into custody on January 4, 1991. An information was filed charging him only with two counts of leaving the scene of an accident. [R1-2] Exactly 174 days later, on June 27, [1991], the State announced a nol pros. [A 19] On July 15, 1992, 192 days after his arrest, Reed filed a motion for discharge pursuant to Fla.R.Crim.P. 3.191. [R 59] On September 6, 1991, 245 days after Reed's arrest, the State refiled charges against Reed resurrecting its abandoned prosecution and adding four additional life felony counts. [R 3-9] A hearing was held on December 13, 1991, whereafter the trial court ruled that Reed's motion for discharge was a nullity and ordered the motion stricken. [A 17-29]

Reed filed a suggestion for writ of prohibition generating case number 92-201 in the District Court of Appeal. The District Court entered an order of denial on March 19, 1992.

On May 6, 1992, Reed was charged in the last of a series of informations with two counts of aggravated battery [Counts I and II], two counts of armed robbery [Counts IV-VII], three counts of kidnapping [Counts XI-XI], and two counts of leaving the scene of an accident involving personal injury [Counts XII-XIII]. [R 18-30] A trial by jury commenced on May 11, 1992. The State ultimately nol prossed Counts I and VII. The jury found the defendant guilty of Counts IV, V, X, XI, XII, and XIII and not guilty of Counts II, III, VI, VIII, and IX. [R 94-104]

The trial court sentenced the defendant as an habitual violent felony offender to concurrent terms of life imprisonment on Counts IV, V, X, and XI and to concurrent five year terms of imprisonment on Counts XII and XIII. [R 106-109] In addition, the Court ordered a 15 year minimum mandatory term of imprisonment and restitution in the total amount of $296,000.00. [R 109-110]

The defendant prosecuted a timely appeal to the Third District Court of Appeal. He presented three issues including the denial of his motion for discharge and his right to a speedy trial.

On June 15, 1993, the Third District issued a per curiam affirmance relying on State v. Dorian, 619 So.2d 311 (Fla. 3d DCA 1993) (en banc) and two other cases not germane to Reed's speedy trial claim. Reed filed a timely motion for rehearing challenging the Court's reliance on Dorian. During the pendency of Reed's motion for rehearing, this Court promulgated State v. Agee, 18 Fla. L. Weekly S391 (Fla. July 1, 1993). Reed filed a notice of intent to rely on additional authority which crossed in the mail with the

District Court's order denying rehearing on July 13, 1993. In light of Agee, Reed filed a motion for reconsideration of order denying rehearing which the District Court of Appeal denied on August 10, 1993.

Reed timely filed a notice to invoke discretionary jurisdiction on August 12, 1993. This Court, by order dated November 23, 1993, accepted jurisdiction and dispensed with oral argument. This brief on the merits follows.

STATEMENT OF THE FACTS

At approximately 9:00 a.m. on January 4, 1991, the Circle K store at 278th Street and US-1 in Naranja, Florida was the target of an armed robbery. [TR 384-389] A gunman approached the counter and hit assistant manager Lorenzo Perez on the head. He told manager Eugenio Menendez to open the safe. [TR 389] After Menendez indicated the safe was on a timer and would take 10 minutes to open, he was beaten about the head with the gun. [TR 391] His wallet containing credit cards and approximately $12.00 was taken. [TR 400] $1,200.00 in cash was taken from the safe along with a book of 500 lottery tickets. [TR 411-412] Menendez identified the defendant Reed as the perpetrator who assaulted him with the gun. [TR 448-456]

Civilian witness Michael Ahrenn saw two suspicious black males he had seen in the area before. [TR 519-520] He recorded the license plate number and called 911. [TR 521] Ahrenn followed them in his vehicle and saw them run out of the Circle K and leave in their vehicle. [TR 529]

A BOLO was issued and a chase took place. The defendant crashed on the Florida Turnpike and when he tried to flee was apprehended. Ahrenn was brought to the scene where he identified the vehicle as that which he saw at the Circle K. [TR 528] Ahrenn also identified defendant Reed and his accomplice. [TR 529-530]

Thomas Holcombe testified that he went to the Circle K on the evening of January 4, 1991, to buy gas. [TR 568] When he

approached the clerk, the person behind the counter ordered him to the back room. [TR 569] A gunman kept him and another person in the room while he robbed them of their jewelry. [TR 570-571] Holcombe was brought to the accident scene where he identified the perpetrators. At trial he identified defendant Reed as the gunman who robbed him. [TR 575]

Gary Ellenburg, also a Circle K customer, was directed to the rear room when he arrived to buy a magazine. [TR 586] He, too, surrendered jewelry to the gunmen. [TR 589] Ellenburg identified both perpetrators at the scene of the accident. [TR 591-592]

Lieutenant Milton Brelsford saw the defendant driving a Lincoln Towncar northbound on the Florida Turnpike. [TR 636-637] Defendant Reed was holding currency in his outstretched left hand. [TR 638] Brelsford used his red and blue lights on his marked police car and tried to stop the vehicle at the toll booth. [TR 640] Instead, the vehicle fled and a chase ensued. [TR 641] The passenger threw a bag out the window. Defendant Reed exited at 216th Street and caused an injury accident involving two other vehicles. [TR 642] Defendant Reed dove out the window of his car and ran northbound. [TR 643] Brelsford gave chase and caught the defendant. [TR 644]

Police later recovered a white plastic bag containing two brushes and deodorant. [TR 676] The bag, with "Circle K" written on it was recovered and found to contain a quantity of currency inside plastic drop containers. [TR 873]

A .357 Magnum revolver and live Smith & Wesson rounds were

found near the Lincoln at the scene of the crash. [TR 686] Lottery tickets and Circle K money orders were found in the vehicle. [TR 693-694] A bag of currency was also recovered. [TR 695] Menendez identified defendant Reed in a photographic lineup. [TR 762-763] Two wedding bands and a watch were seized from defendant Reed's pocket. [TR 870]

After his arrest, upon being Mirandized, the defendant allegedly said, "You've got us cold. We did it and you know it, and I'm not going to say anything more." [TR 905-906]

Marvin Reed testified at trial that on the morning of January 4, 1992, he and his co-defendant, McMillian, picked a man up who was supposed to repair the brakes and cooling system on his 1978 Lincoln. [TR 968-977] They went to a shopping center where the defendant parked his car and entered a drug store to buy aspirin for his ill son. [TR 974-978] McMillian and the mechanic exited the car and walked in the other direction. McMillian said he was going to get a soda and if he did not return by the time Reed was done, to pick him up around the store. [TR 980] Reed returned to his car and drove to the Circle K where, upon entering, he saw two people injured, lying on the floor behind the counter. [TR 982] McMillian had a bag and was getting something out of the safe. Reed left the store, entered his car, and McMillian followed as the defendant backed out. McMillian told him to get on the expressway. He had a bag and a pistol. [TR 983-984] Reed and McMillian began arguing over the fact McMillian had robbed the store. [TR 985]

Reed explained that when confronted by Lieutenant Brelsford at

the toll plaza, McMillian pointed the gun at him and told him to "dip" or leave. [TR 985-986] According to Reed, McMillian threw the bag as well as his weapon out of the window of the car as they fled away. Reed told McMillian he was getting off the expressway and as he exited, McMillian grabbed the steering wheel and mashed the accelerator with his left foot, causing the accident. [TR 986-988] According to Reed, he crawled out of the car fearing it would explode. The police came, called him a name, and split his head with the butt of a gun. [TR 988] Reed denied fleeing the scene of the accident. [TR 989] He testified that the jewelry recovered was all found on McMillian, not him. [TR 990] Reed denied that he was ever read his rights and said he was beaten during interrogation. He testified that he told the police he had nothing to do with the robbery. [TR 994-1002]

Co-defendant Kevin McMillian, having pled no contest in return for a 20 year prison sentence, testified that he, alone, robbed the Circle K. [TR 1089-1095] When Reed arrived and saw what McMillian was doing, Reed was upset with him and argued with him about what he had done. [TR 1096-1098] McMillian explained that he caused the accident by mashing the gas pedal himself. [TR 1100-1101] McMillian, too, said he was threatened and slapped by the police. [TR 1105-1106]

SUMMARY OF THE ARGUMENT

The State initially charged Reed with the relatively minor offenses of two counts of leaving the scene of an injury accident. One hundred seventy-four (174) days after Reed's arrest, one day prior to the expiration of the speedy trial period of Rule 3.191, the State announced a nol pros. Approximately three months later, the State resurrected its prosecution of Reed, adding a number of much more serious life felonies, including several counts of aggravated battery, kidnapping, and armed robbery.

The defendant was denied his constitutional right to a speedy trial as well as his right to a speedy trial pursuant to Florida Rule of Criminal Procedure 3.191. The State subverted the purpose and intent of the speedy trial rule by filing a nol pros on the 174th day following the defendant's arrest and custody. The defendant, thereafter, filed a timely Motion for Discharge pursuant to the requirements of Rule 3.191(d)(1). The trial court erroneously deemed the defendant's motion a nullity. Instead, it should have found that the State's nol pros was a nullity. Accordingly, the trial court should have ordered the defendant's discharge and the District Court of Appeal should have reversed the defendant's convictions.

ARGUMENT

THE TRIAL COURT ERRED IN STRIKING AS A NULLITY, RATHER THAN GRANTING, THE DEFENDANT'S MOTION FOR DISCHARGE TIMELY FILED AFTER THE STATE'S TACTICALLY MOTIVATED NOLLE PROSEQUI ENTERED 174 DAYS AFTER ORIGINAL CHARGES WERE FILED, THEREBY DENYING HIS RIGHT TO A SPEEDY TRIAL GUARANTEED BY FLA. R. CRIM. P. 3.191, THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

The State resurrected its prosecution of Reed after having initially announced a nol pros on day 174 of the speedy trial period. By its nol pros, the State unilaterally tolled the running of the speedy trial period for a period of time during which it was able to conduct further investigation and ultimately add additional, more serious, charges against Reed. Reed's subsequent, timely filed, Motion for Discharge was improvidently stricken and the State's self-serving and belated nol pros was permitted by the trial court to operate to circumvent the defendant's right under Rule 3.191 to discharge. The State's improper manipulation of the Rule resulted in a denial of due process and vitiated the defendant's right to a speedy trial under the Florida Rule as well as the Florida and United States Constitution. State v. Agee, 18 Fla. L. Weekly S391 (Fla. July 1, 1993) controls here. The District Court's stubborn adherence to State v. Dorian, 619 So.2d 311 (Fla. 3d DCA 1993), like the trial court's denial of Reed's

motion for discharge, was error.

Reed was arrested and taken into custody on January 4, 1991. An information was filed charging him only with two counts of leaving the scene of an accident even though, at the time of his arrest, he had been positively identified as the perpetrator of all the other offenses with which he was ultimately charged (and from which he was fleeing when he committed the leaving the scene offenses). [R 1-2] Remarkably, exactly 174 days later [one day short of the 175 days giving effect to Rule 3.191(a)], when the case was called for trial, the State filed a nol pros. Only later, having enjoyed an additional two and a half months to investigate and prepare, did the State on September 6, 1991, file an information like the one upon which the defendant was ultimately convicted charging not only the original leaving the scene counts but an additional number of life felonies. [R 3-9] There can be no legitimate question that the State's nol pros was a tactical maneuver which accrued to the unfair benefit of the prosecution.

At the hearing held on December 13, 1991, on the defendant's Motion for Discharge filed on July 15, 1991, the State successfully argued that the defendant's Motion for Discharge was a nullity and the trial court ordered the motion stricken. [A 17-29] Under the circumstances, however, the trial court should have granted the defendant's motion and the State should have been precluded from its prosecution of the defendant.

The defendant's Motion for Discharge was timely filed. Fla.R.Crim.P. 3.191(h) expressly defines the requirements of

timeliness:

MOTION FOR DISCHARGE; TRIAL; WHEN TIMELY

> A Motion for Discharge shall be timely if filed and served on or after the expiration of the periods of time for trial provided for herein; however, a Motion for Discharge filed before expiration of the period of time for trial is invalid and shall be stricken upon motion of the prosecuting attorney.

The defendant's Motion for Discharge was served after the expiration of the 175 day period described by Rule 3.191(a)(1). It was not filed before the expiration of that period of time and was, therefore, not invalid or subject to being stricken. As the Third District Court had previously recognized in Wills v. Wilson, 586 So.2d 468 (Fla. 3d DCA 1991):

> In this case, the trial court struck the motion. The only provision in these rules which provide for the striking of a Motion for Discharge is where the motion is not timely. See Fla.R.Crim.P. 3.191(d)(1). The Motion for Discharge was timely and, therefore, incorrectly stricken.

By the same token, the tactic of the State misused here to gain a tactical advantage over the defendant and to vitiate his right to a speedy trial is expressly recognized and condemned by the Speedy Trial rule. Fla.R.Crim.P. 3.191(o) provides:

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.

As the Court held in State v. Rheismith, 362 So.2d 698 (Fla. 2d DCA 1978):

> The object of the speedy trial rule is to insure, absent certain specified circumstances, that defendants will be brought to trial within time periods prescribed by the rule. If prosecutors were permitted to unilaterally suspend the prescribed time periods simply by use of nolle prosequi, the rule would be meaningless.

The courts in Fyman v. State, 450 So.2d 1250 (Fla. 2d DCA 1984) and State v. McDonald, 538 So.2d 1352, 1353 (Fla. 2d DCA 1989) reaffirmed the tenet that the State cannot avoid the intent and effect of this rule, 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.

Similarly, the Court in State v. Agee, 588 So.2d 600 (Fla. 1st DCA 1991) reasoned:

> A prosecutor nearing the end of speedy trial period, but wishing to delay the trial, could enter nolle prosequi, take the additional months or years desired, and then file a new information. The prosecution would merely be required to commence the trial within 15 days following the refiling the charges. Id. at 603.
>
> * * *
>
> ...(h)(2) was adopted for the purpose of avoiding this result... . Id.
>
> * * *
>
> The case before us does not involve prosecutorial oversight in failing to timely bring an active case to trial. Rather, it involves a conscious decision by the prosecutor to enter a nolle prosequi, followed by the prosecutor's conscious decision, almost two years later, to reinstate the case. Rule

> 3.191(i)(3) was not adopted to aid such a prosecutor, and we decline to so apply it in this case. Id. at 604.

While the time period here is less than in Agee, the circumstances are the same and, ipso facto, so should be the resolution of the issue. The Agee Court correctly reasoned that the State's conduct effected an abandonment of the case:

> ...the State had only one option under the Rule to preserve its right to proceed against the appellee in the future. That was to secure an order extending speedy trial due to exceptional circumstances. When the State chose to enter a nolle prosequi, rather than move for an order extending the speedy trial, the State effectively abandoned the case. Id. at 604.

Dorian, upon which the District Court relied, involved the good faith exception to the speedy trial rule under circumstances where the State, unable to locate its witnesses, nol prossed a first degree murder indictment in good faith. No contrary claim was made by the defendant in Dorian. Here, to the contrary, the State had no intent to "drop the charges" as it did in Dorian. The State never complained, for any reason, that it was unable to proceed at the initial trial setting on June 27, 1991. What it clearly did do, however, was fail to file an information containing all the offenses it wanted to prosecute against the defendant.

This Court in Agee, supra, having granted conflict jurisdiction, resolved the conflict which had existed between the First District Agee, supra, which Reed consistently argued in support of his prayers for relief, and State v. Dorian, supra, upon which the Third District predicated its decision. This Court

approved Agee and disapproved Dorian. (Overton, J., dissented)

The circumstances of Agee are materially indistinguishable from those in the case at bar. There, the State argued that the speedy trial rule was inapplicable during the period after entry of a nol pros and before charges are refiled and that a nol pros removed a defendant from the "accused" category and placed him or her in the same position as any other suspect in a criminal investigation. It should be noted, that in Agee, unlike the case at bar, the State had a legitimate reason to nol pros in light of the fact that its attempted murder victim was comatose and there were no known eye witnesses.

This Court rejected the State's argument and held:

> 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. [Id. at S392]

This Court discussed both the purpose of the rule ("to promote the efficient operation of the court system and to act as a stimulus to prosecutors to bring defendants to trial as soon as practicable, thus minimizing the hardships placed upon accused persons awaiting trial") and the legitimate options available to the State (postponing arrest or seeking a speedy trial extension for good cause).

Here, there is no question that the subsequent robbery, aggravated battery, and kidnapping charges filed against Reed after

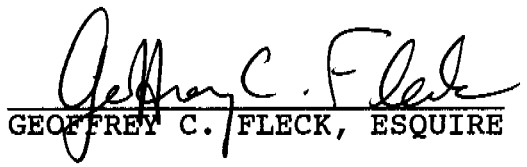
the State's nol pros were based on the same occurrence as the original charges of leaving the scene of an accident, just as the new and old charges, although different, were related in Agee. In short, Dorian which has been disapproved, should not have controlled the resolution of Reed's claim.

CONCLUSION

The defendant's right to a speedy trial was not honored in this case. In fact, it was deliberately abridged by the State by an expressly prohibited tactic designed by the State to garner an improper tactical advantage at the expense of the defendant's right to a speedy trial. By failing to recognize the unfairness of the State's manipulation of the Rule the trial court denied the defendant due process as well as his right to a speedy trial constitutionally and under the Rule. Those violations should be revisited, acknowledged, and remedied by this Honorable Court.

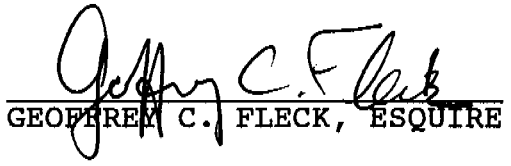
Respectfully submitted,

FRIEND & FLECK
Sunset Station Plaza
5975 Sunset Drive
Penthouse 802
South Miami, Florida 33143
(305) 667-5777

BY: 
GEOFFREY C. FLECK, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Charles M. Fahlbusch, Esquire, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128, this 7th day of December, 1993.

BY: 
GEOFFREY C. FLECK, ESQUIRE

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CASE NO. 82,217

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MARVIN REED,

Defendant/Petitioner,

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ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

APPENDIX

Geoffrey C. Fleck, Esq.
Fla. Bar No. 199001
FRIEND & FLECK
Sunset Station Plaza
5975 Sunset Drive
Penthouse 802
South Miami, Florida 33143
(305) 667-5777

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IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR DADE
COUNTY, FLORIDA

CRIMINAL DIVISON
(Rothenberg)

CASE NO. 91-536A

THE STATE OF FLORIDA,

Plaintiff,

vs.

MARVIN REED,

Defendant.
_____/

Miami, Florida

December 13, 1991

The above-entitled cause came on for hearing before the Honorable Arthur Rothenberg, Judge of the above-styled court, at the Metropolitan Justice Building, 1351 Northwest 12th Street, Miami, Florida, on December 13th, 1991, at or about 9:00 a.m.

APPEARANCES:

JANET RENO,
State Attorney,
By: BLAIR CARR,
Assistant State Attorney,
on behalf of the Plaintiff

SEYMOUR GAER, ESQUIRE,
1501 Northwest 14th Street,
Miami, Florida,
on behalf of the Defendant

- - -

(Thereupon, the following proceedings were had:)

THE COURT: Marvin Reed.

THE CLERK: Sy Gaer was here on that case, Judge. He'll be back.

THE COURT: Pass it.

(Thereupon, a short recess was taken during which time other proceedings were had, after which the following proceedings were had:)

THE COURT: Sy, are you ready?

MR. GAER: All we need is the date the State nol-prossed that case originally, because -- my social secretary can explain the dates. Originally, the case was filed in January, approximately -- a little less; and 180 days before the expiration of 180 days, the State nol-prossed the case. It's our contention Mr. Elso, on behalf of Mr. Reed, filed a demand for speedy trial and a motion for discharge prior to the State nol-prossing the case. So, the case that the State's submitted to Your

Honor doesn't apply. That case only applies to speedy trial demands made prior to the filing of an information or indictment.

THE COURT: Is there any doubt that the demand for discharge was filed prior to the nol-pros?

MS. CARR: Yes, Judge. It's not -- Judge, the court file reflects that June 27th, the A defendant, being Mr. Reed -- that case was closed by a nol-pros by the State, and -- I'll have the clerk hand up the motion to discharge -- it's filed July 15th. Judge, that's 18 days after the nol-pros. According to the case I cited you, it's a nullity.

THE COURT: Do you dispute that?

MR. GAER: Vehemently dispute that.

THE COURT: Please answer the question, because I've got to make the finding. Is there any dispute on your part that the nol-pros in 91-536A occurred on June 27th, 1991?

MS. CARR: Judge, ask your clerk.

MR. GAER: Obviously, the clerk's file will dominate.

THE COURT: Betty, can you tell me when the nol-pros was.

THE CLERK: June 27th, Judge, 1991.

THE COURT: Betty, what date was the motion for discharge filed by Mr. Elso?

THE CLERK: Okay. Judge. What I have attached to Mr. Gaer's motion are copies, which are not the original.

MR. GAER: The originals are in the file.

THE CLERK: It says "motion for discharge" -- is not clocked into the clerks office, but there's an original file stamped from the clerk's office stamped July 15th.

I'll go through and see if I can find the original.

MR. GAER: I would also like to cite from Florida Rules of Criminal Proceedure, 3.191 H-2, entitled -- excuse me one second, Judge, if I may just read this so -- or, the Court can read it for itself. It says, "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."

So, obviously, Judge, we are in a very good legal position because the State cannot avoid prosecution, or avoid the effect of a motion to discharge by nol-prossing the case once the charge has in fact been filed. That's what that rule stands for.

THE COURT: There's a 15-day window, is it not--

MS. CARR: Yes.

THE COURT: --from the date the motion for discharge has been filed?

MS. CARR: If the motion has any legal effect.

The case I cited you seems to suggest the facts we have today filed, and the 15th is a nullity. It's void after initium. It's void in effect as if it never occurred.

MR. GAER: If you read the rules, that case doesn't apply to this situation. In that case, he filed before any charges are filed. Here, charges had been filed and nol-prossed by the State. The State cannot avoid bringing a man to trial in 15 days by virtue of a nol-pros. That's what the rule stands for.

In the committee's notes, it states "the intent of I-4 is to provide the state attorney with 15 days within which to the bring the defendant to trial from the date of the filing of the motion for discharge. This time begins with the filing of the motion and continues regardless of whether the judge hears the motion."

So, Judge, we are in a very, very good position, as far as this rule is concerned.

MS. CARR: I would agree with everything Mr. Gaer says if in fact the motion does have legal effect.

Williams versus Shapiro went up for a writ of

prohibition. It clearly states if there is no pending action, a motion for discharge is -- never had any legal effect. Certainly, now that we have re-filed charges, if Mr. Gaer wants to institute a new motion to discharge -- but the one filed by Mr. Elso was filed when there was no pending charge.

MR. GAER: All you have to do is -- a cursory reading of the rule I cited to the Court would indicate the State cannot employ that type of conduct.

THE COURT: What's the rule?

MR. GAER: Betty, give the judge the book, and also the committee notes.

Judge, that really clarifies it.

MS. CARR: I agree with everything that's in the book, provided you have a motion to discharge that has legal effect.

THE COURT: Let me see it. Did you underline it in fuchsia?

MR. GAER: Is that yellow, Judge? We did it.

MS. CARR: Judge, even better, the clerk can't find the original motion in the file. All she has is a copy, which has an original file stamp on it.

THE CLERK: It says it was received by the clerk's office, but I do not find the original motion.

MR. GAER: Can you check the computer. I've had

things misfiled, but the computer enlightens us and tells us when and where it was filed.

THE CLERK: Sure.

THE COURT: I can't believe that when the case is nol-prossed and then it goes into limbo, that a motion filed has any legal effect.

MS. CARR: That's precisely what Williams versus Shapiro says, Judge.

MR. GAER: Then the State can take its sweet time in bringing somebody to trial; can take years, as a matter of fact. All they have to do is keep filing a -- nol-prossing cases.

THE COURT: This comes very close to the loophole, but the solution is to file that motion for discharge the same day it's re-filed.

MS. CARR: Precisely, Judge.

THE COURT: Then, you have 15 days.

MS. CARR: Precisely.

Judge, to cure one of the--

THE COURT: Then, if there's a nol-pros, I think that the rule applies; that, even if they nol-pros on the 14th day--

MR. GAER: How do you know when the State is going to nol-pros? In other words, what you're saying -- they walk into court -- the State nol-prossed the same day I file

a demand for speedy trial, and it's a nullity because the State sort of beat me to the clerk's office in taking some sort of action. It makes no sense, Judge. Once a case is filed, they're obligated to bring you to trial within 180 days.

THE CLERK: I show a motion of hearing was docketed in the clerk's office July 15th.

MS. CARR: To clerify one of the effects, if the State lingers on years and years, there's still the issue of constitutional speedies, but certainly this does not rise to a level of -- we are still looking at the statute provided by the Florida Rules of Criminal Procedure and Williams v. Shapiro.

He has an opportunity to file a new motion, Judge.

THE COURT: You've got to file a new motion to discharge.

MR. GAER: We are not filing a new motion to discharge. What we are saying is he should have been brought to trial 15 days after he filed that demand.

THE COURT: I disagree. Nothing was pending on his file.

MR. GAER: But, Judge, you're looking at a case that the State submitted to you. There's no other case, not even -- that case is not on point. In the case before Your Honor, it merely states that the man had not been

charged as of yet. You cannot demand -- file a demand for speedy trial unless the man has been charged.

THE COURT: Let's set it for trial. I want to set it for trial pronto.

MR. GAER: If you read the committee notes, that clarifies -- that would indicate that he should be discharged from prosecution in this case.

THE COURT: Your remedy would be--

MR. GAER: A writ of prohibition.

MS. CARR: Let me clarify your ruling; and the reason I say that is the notice of hearing that I have attached by Mr. Gaer says "motion to discharge," but the notice attached to his hearing is the one filed by Mr. Elso. For record-keeping purposes, you're saying that--

MR. GAER: I'm saying it. I'm harping back to Juan Elso's motion.

MS. CARR: Okay.

MR. GAER: You understand?

MS. CARR: --that the motion originally filed on July 15th by Mr. Elso, previous counsel for Mr. Reed, is a nullity, and that there is no new motion to discharge pending.

THE COURT: Right.

MS. CARR: Okay.

MR. GAER: I'm relying on Mr. Elso's motion, Judge.

THE COURT: I want to set it within 15 days. If Mr. Gaer files a motion for discharge--

MR. GAER: There is no motion for discharge pending. You denied the motion to discharge.

THE COURT: If you want to go to the district court--

MR. GAER: That's up to my esteemed colleague. She's new at the game and cannot believe, with the law being -- and the rules being clear as they are that this court has denied the motion to discharge. She's flabbergasted and unable to articulate at this moment, but if you can give her some time, she may be able to.

May the record reflect the shock on Miss Cuervo's face.

Be that as it may, Judge, they have some cases pending against poor Marvin. We may just forget about this, Judge, truly, because if they don't go on this one, they'll go on another one, and if they don't go on that one, they'll go on another one.

MS. CARR: To get down to housekeeping matters, as of 12/16 of this year, I'll be taking a three-month leave of absence. My suggestion is that we set it quickly, but in adequate time for the new prosecutor to prepare the trial. It's in a trial-ready posture. He just needs to review the file and--

THE COURT: Who is the new prosecutor?

MS. CARR: Dennis Casey.

A January trial date, sometime in the latter weeks of January--

THE CLERK: We've had two or three trial dates already.

THE COURT: On that case?

MS. CARR: That was when we went to backup and were not able to dispose of it at that time.

THE COURT: I want a late January date.

MS. CARR: Okay. One-21.

THE CLERK: 1/21, Judge?

THE COURT: That's fine. Do you have any motions?

MR. GAER: Judge, I think we heard -- they're not having any more hearings, right?

MS. CARR: No.

MR. GAER: January 21st?

THE COURT: To backup; 1/21 to backup.

THE CLERK: So, the motion to discharge filed July 15th is denied?

THE COURT: Right.

MS. CARR: Don't deny it. Are you striking it?

THE CLERK: The Court said denied.

MS. CARR: It can't be denied.

THE COURT: We're striking it.

MR. GAER: Then, it gives us a right to get a writ of

prohibition. You cannot set another trial date.

THE CLERK: Time out, Judge.

THE COURT: Strike it.

January 21st; January 21st for trial, 1992, it goes to backup. That will give your man enough time.

Thank you, Sy. That will give Mr. Casey -- what's his first name? Dennis. That will give Dennis Casey enough time.

MR. GAER: And a formidable opponent he is. You have no idea what a monstrous attack--

MS.CARR: May the record reflect the glee on Mr. Gaer's face.

(Thereupon, the hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)

SS.

COUNTY OF DADE)

I, PATRICIA A. BERNERO, Court Reporter, hereby certify that the foregoing transcript, numbered from page 1 to and including 12, is a true and correct transcription of my stenographic notes of the proceedings had and the testimony taken in the aforementioned cause before the Honorable Arthur Rothenberg, at the Metropolitan Justice Building, Miami, Florida, on the 13th day of December, 1991.

DATED at Miami, Dade County, Florida, this 22nd day of January, 1992.

Patricia A. Bernero

PATRICIA A. BERNERO
Court Reporter