IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 82,927

STATE OF FLORIDA,

Petitioner,

vs.

GLEN GARY ROHM,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

GREG ROSS & ASSOCIATES
GREG ROSS, ESQ.
DVORA WEINREB, ESQ.
Counsel for Respondent
400 S.E. 8th Street
Ft. Lauderdale, FL 33316
Telephone: (305) 522-4506
Florida Bar No. 312185 (Ross)
Florida Bar No. 946273 (Weinreb)

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PRELIMINARY STATEMENT

The Respondent, GLEN GARY ROHM, was the Appellee in the Fourth District Court of Appeal and the Defendant in a criminal prosecution from the Seventeenth Judicial Circuit, in and for Broward County. The Petitioner, the State of Florida, was the prosecution and the Appellant, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbols "R" and "SR" will be used to denote the record and supplemental record on appeal, respectively, in this cause and the symbol "A" will be used to refer to Respondent's Appendix, which is a conformed copy of the District Court's opinion, attached hereto.

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

GLEN GARY ROHM, Respondent, agrees in a large part with the facts and statement of the case as set forth by Petitioner in its initial brief on the merits. However, for clarity purposes, Respondent augments those facts with the following to further emphasize the issue before this Honorable Court.

On May 8, 1992, mandate was issued by the Fourth District (R 9). The remand by the Fourth District was unspecific and did not specify that the trial was to occur, if at all, within any specific period (R 9). Consequently, the trial court concluded that Petitioner had to bring Respondent to trial within the 15 day window period (SR 5). As of May 8, 1992, Respondent had not yet been brought to trial due to Petitioner's inability to proceed as the victim was unavailable (R 4, 14-15), and due to Petitioner's failure to take a video taped deposition to perpetuate the victim's testimony (R 4-5, SR 6). On May 15, 1992, Respondent filed a demand for speedy trial, as counsel wished to preserve Respondent's right to a speedy trial (R 12). Additionally, on this same date, the State filed a Motion to Extend the Period of Time for Trial (R 14-15). The hearing for Respondent's Demand for Speedy Trial took place on May 18, 1992, wherein the Honorable Judge Carney told defense counsel that it was the court's view that Glen's original demand was still in effect and that the window period granted to the State by the Appellate Court was to be reopened only upon the filing of a written Motion for Discharge (SR 8). As the time for speedy trial had expired, defense counsel timely submitted to the

court his Motion for Discharge on May 18, 1992 and a hearing on said motion was heard at that time (R 7). The court then set the trial date for May 26, 1992 (SR 11). On May 28, 1992, ten days after the Motion for Discharge was heard, the trial court granted said Motion for Discharge because the 15 day window period had expired and Petitioner was still not ready to try Respondent (R 7).

Petitioner appealed and the Fourth District affirmed holding that the 90 day period as prescribed by Rule 3.191 (m) Fla. R. Crim. P. (1993)[1] was to be applied only where the appellate court action made possible a new trial for the defendant (A 4). Respondent was not to receive a new trial but an initial trial; therefore, Petitioner had not complied with the intent of the speedy trial rule prior to the appeal of the order erroneously granting the motion for discharge. As such, the Fourth District held that the 15 day window period and not the 90 day compliance with mandate period applied (A 1-5). As Petitioner did not bring Respondent to trial within that 15 day window period, the granting of the motion for discharge was affirmed by the Fourth District (A 5).

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[1] Formerly Rule 3.191(g) Fla. R. Crim. P. (1985).

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal correctly interpreted Rule 3.191(m) Fla. R. Crim. P., allowing the state a 90 day period in which to bring a defendant to trial only in the following four situations: 1) a mistrial, 2) an unappealed order granting a new trial, 3) an unappealed order granting a motion in arrest of judgment, and 4) a mandate from a higher court making a new trial possible. Unless one of the aforementioned situations applies, the State must try a defendant within the 15 day window period provided for in Rule 3.191(p)(2) and (3).

ARGUMENT

ON REMAND, AFTER AN APPELLATE COURT HAS REVERSED A TRIAL COURT'S ORDER ERRONEOUSLY GRANTING A DISCHARGE, THE 15 DAY WINDOW PERIOD PROVIDED FOR IN RULE 3.191(p)(3), FOR BRINGING A DEFENDANT TO ORIGINAL TRIAL SHOULD APPLY.

The decision of the Fourth District Court of Appeal was clearly appropriate under the plain language of Rule 3.191(m) and the purpose of the speedy trial rule. Petitioner's argument suggesting that it was entitled to an additional 90 days is misplaced and inherently unfair.

In disagreeing with the Fourth District Court of Appeal's interpretation of Rule 3.191(m), Petitioner alleges that said court "gave meaning to only a portion of the language, ignoring the remaining language of the rule. . ." (Petitioner's Brief on the Merits, 6). As such, the **entire** text of Rule 3.191(m) shall be repeated with an emphasis on how said Rule should be interpreted:

> (m) Effect of Mistrial; Appeal; Order of New Trial.
> A person who is to be tried again or whose trial has been delayed by an appeal by the state or the defendant shall be brought to trial within 90 days from
> - the date of declaration of a **mistrial** by the trial court,
> - the date of an order by the trial court granting a **new trial**,
> - the date of an order by the trial court granting a **motion in arrest of judgment**, or
> - the date of receipt by the trial court of the **mandate**, order, or notice of whatever form from an appellate or other reviewing court that makes possible a new trial for the defendant,
> whichever is last in time. If a defendant is not brought to trial within the prescribed time periods, the defendant shall be entitled

> to the appropriate remedy as set forth in subdivision (p). (Emphasis added).

According to the plain language of Rule 3.191(m) and its headings, four possible events trigger the 90 day period. The first is a mistrial wherein the 90 day period begins to run from the date on which the trial court declared the mistrial. The second is an unappealed order granting a new trial wherein the 90 day period begins to run on the date of the trial court's order granting the new trial. The third in an unappealed order granting a motion in arrest of judgment, wherein the 90 day period begins to run on the date of entry of the trial court's order. The fourth and final event which triggers said 90 day period is a mandate from a higher court that makes possible a new trial for the defendant. Where this occurs, the 90 day period begins to run from the date on which the trial court receives the mandate. Hence, the language "[a] person who is to be tried again" refers to the first three events, and the language "whose trial has been delayed by an appeal by the state or the defendant" refers to the fourth triggering event, an event which is limited in scope. Finally, the headings of Rule 3.191(m), i.e., "Effect of Mistrial", "Appeal", "Order of New Trial", provide the reader of the rule with an outline of these triggering events.

The four events which trigger the 90 day period have one item in common: they all occur after the defendant has already been tried and the state has complied with the speedy trial rule. Clearly, it was the intent of the drafters of Rule 3.191(m) to give

the state a uniform 90 day period in which to retry the defendant, as the defendant's right to a speedy trial has already been satisfied. However, where the defendant has not yet been afforded the right of a "original" trial and thus the speedy rule has not been complied with by the state, the drafters intended to punish the state for the delay by providing it with the 15 day window period in which to try the defendant. This intent mirrors the purpose of the speedy trial rule which is to insure that "persons charged with crimes are not allowed to languish in jail or otherwise suffer the indignities of a pending prosecution for an **unreasonable length of time.**" State v. Smail, 346 So.2d 641, 644 (Fla. 2d DCA 1977).

In the case sub judice, Petitioner never complied with the speedy trial rule and consequently, Respondent never received an original trial. Although Petitioner's key witness was out of the country, Petitioner made no effort to videotape a deposition to perpetuate testimony so that Respondent could be tried in a speedy manner. As such, Petitioner was correctly penalized by being required to try Respondent within the 15 day window period following the issuance of the mandate, as per Rule 3.191(m) and Rule 3.191(p)(3).

This Court, in State v. Jenkins, 389 So.2d 971 (Fla. 1980), made the distinction between mandates resulting in retrials as opposed to original trials:

> When a defendant takes an interlocutory appeal, a remand for trial requires only that the state try the defendant within a reason-

> able time in accordance with constitutional standards.
>
> The situation changes, however, when a defendant is to be retried as a result of a mistrial or the granting of a new trial by either trial court or appellate court action. In these instances, the provisions of the existing Rule of Criminal Procedure 3.191(g) are applicable and require the state to try the defendant within ninety days from the date of the appropriate court order. This is consistent with the new rule 3.191 effective January 1, 1981. Id. at 975 (emphasis added).

Hence, this Court, following the plain language of Rule 3.191(m), formerly Rule 3.191(g), noted that the 90 day period **only applies** in the situation of retrials and not original trials. As the case sub judice concerns an original trial, the 90 day period should not apply and the 15 day window period governs. In Lowe v. Price, 437 So.2d 142 (Fla. 1983), this Court did not address this important distinction as it had previously ruled on this issue in Jenkins. Here, contrary to the factual scenario in Lowe, a trial judge granted a timely filed motion for discharge after first affording the state the window period to bring defendant to original trial. The trial court received the mandate on May 8th, Respondent filed a motion for discharge on May 18th, and on May 28th, the trial court granted said motion. Hence, Petitioner had more than the 15 day window period in which to bring Respondent to original trial but made no attempt to do so. In fact, at the May 28th hearing, Petitioner requested a continuance until at least August, once again infringing on Respondent's right to a speedy trial.

Petitioner states that "[t]o require a trial court to clear

its docket and schedule a trial, or require the state or a defendant to be prepared for trial within 15 days of issuance of mandate would be onerous if not impossible." (Petitioner's Brief on the Merits, 10). Respondent submits that requiring the parties to be prepared for an original trial within 15 days of issuance of the mandate allows for the efficient operation of the criminal justice system while at the same time, affording the defendant the right to a speedy trial. As this Court has noted, the speedy trial rule was "adopted by the court in order to promote the efficient operation of the criminal justice system in this state as well as to minimize the hardships imposed on accused persons resulting from lengthy delays while awaiting trial." State v. Barnett, 366 So.2d 411, 415 (Fla. 1978). By affording the defendant an original trial within 15 days from issuance of the mandate, the "efficient operation of the criminal justice system" is promoted in that dockets are cleared in an expeditious fashion.

As the mandate issued on May 8th did not grant Respondent a new trial but an "original" trial and as the 90 day period in Rule 3.191(m) only applied to mandates granting a defendant a new trial, Petitioner had only the 15 day window period in which to try Respondent. As Petitioner failed to try Respondent within this 15 day window period, the trial court was correct in granting Respondent's motion for discharge and the Fourth District was correct in affirming the lower court's order and the lower court's order must be affirmed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this court AFFIRM the decision of the Fourth District Court below ~~and AFFIRM~~ the decision of the trial court.

Respectfully submitted,

GREG ROSS, ESQ.
Florida Bar. No. 312185
Counsel for Respondent
400 S.E. 8th Street
Fort Lauderdale, FL 33316
(305) 522-4506

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief on the Merits" was furnished to the Assistant Attorney General, Sarah B. Mayer, 111 Georgia Avenue, Suite 204, West Palm Beach, FL 33401 this 8th day of February, 1994.

BY: _____
GREG ROSS, ESQ.

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1993

STATE OF FLORIDA,

Appellant,

v.

GLEN GARY ROHM,

Appellee.

CASE NO. 92-1792
L.T. Case No. 90-19971CFB

Opinion filed December 8, 1993

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Broward County, Robert B. Carney, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellant.

Greg Ross and Dvora Weinreb of Law Offices of Greg Ross, P.A., Fort Lauderdale, for appellee.

FARMER, J.

When the speedy trial time provided in rule 3.191(a)[1] has fully run, and the trial court grants a timely motion for discharge during the unexpired 15-day window period[2] which is reversed on appeal, does the state on remand have the 15-day window

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[1] See Fla. R. Crim. P. 3.191(a) (1993) ("Except as otherwise provided by this rule, and subject to the limitations imposed under subdivisions (e) and (f), every person charged with a crime by indictment or information shall be brought to trial * * * within 175 days if the crime charged is a felony.").

[2] See Fla. R. Crim. P. 3.191(p)(3) (1993) ("Not later than 5 days from the date of the filing of a notice of expiration of speedy trial time, the court shall hold a hearing on the notice and, unless the court finds that one of the reasons set forth in subdivision (j) exists, shall order that the defendant be brought to trial within 10 days.").

period to bring the defendant to trial, or instead the 90-day appellate mandate period?[3] Under the facts of this case, we hold that the 15-day window period applies and affirm the court's discharge after remand.

In the first appeal in this case, State v. Rohm, 596 So. 2d 1271 (Fla. 4th DCA 1992), we reversed the speedy trial discharge because the court failed to give the state the 15-day window period in which to bring the defendant to trial. Our reversal was based on State v. Kruger, 539 So. 2d 565 (Fla. 4th DCA 1989), which was factually identical, i.e., a discharge within -- rather than after -- the 15-day window period. In both cases, however, our remand was unspecific; we simply ordered further proceedings consistent with the reversal. We did not specify that the trial was to occur, if at all, within any identified period. The trial court here concluded that further proceedings consistent with the reversal meant that the state had to bring defendant to trial within the 15-day period.

In arguing error, the state relies on the text of rule 3.191(m) and Lowe v. State, 437 So. 2d 142 (Fla. 1983), to stand for the universal proposition that all criminal trials after an appellate mandate are governed by the 90-day provision of rule 3.191(m). We do not read either rule 3.191(m) or Lowe as broadly

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[3] See Fla. R. Crim. P. 3.191(m) (1993) ("A person * * * whose trial has been delayed by an appeal by the state * * * shall be brought to trial within 90 days from * * * the date of receipt by the trial court of a mandate * * * from an appellate or other reviewing court that makes possible a new trial for the defendant * * *.").

as the state contends. We begin as we must with the precise text of the rule, which we repeat here:

> "(m) Effect of Mistrial; Appeal; Order of New Trial. A person who is to be tried again or whose trial has been delayed by an appeal by the state or the defendant shall be brought to trial within 90 days from the date of declaration of a mistrial by the trial court, the date of an order by the trial court granting a new trial, the date of an order by the trial court granting a motion in arrest of judgment, or the date of receipt by the trial court of the mandate, order, or notice of whatever form from an appellate or other reviewing court that makes possible a new trial for the defendant, whichever is last in time. If a defendant is not brought to trial within the prescribed time periods, the defendant shall be entitled to the appropriate remedy as set forth in subdivision (p)." [e.s.]

We read the above text -- especially the highlighted portion which is the portion urged by the state as controlling under the facts of this case -- to apply only to appellate mandates which "make possible a new trial for the defendant."

In other words, we construe the plain language of this rule to create four possible triggering events for the 90-day period. The first is a mistrial, in which event the period begins to run from the date on which the trial court declared the mistrial. The second is an unappealed order granting a new trial, in which event the period begins to run on the date of the trial court's order granting the new trial. The third is an unappealed order granting a motion in arrest of judgment, in which event the period begins to run on the date of entry of the trial court's order. The fourth (and last) is a mandate from a higher court making a new trial possible, in which event the period begins to run from the date on which the trial court receives the mandate.

We distinguish, as the drafters of this rule so obviously did by the text they chose, between trials, on the one hand, and new trials or retrials, on the other. In the case of a new trial, the state has met its initial burden to bring the defendant to trial within the initial speedy trial period. The result of that trial has been reversed at the instance of the defendant, and no double jeopardy consideration prevents a retrial (or new trial) from taking place. In that situation, the rule draws a speedy trial compromise between giving the state another 175 days to begin the new trial, on the one hand, and the defendant's legitimate interest in having some greatly reduced period, on the other.

No such analysis is justifiable when, as here, the state has already failed to bring the defendant to trial within the initial period. It cannot point to its full compliance with the rule's intent before the defendant invoked his speedy trial right. It cannot point to any presumption of correctness as to the resulting judgment and its reliance thereon in releasing its witnesses, as a prejudice arising from the reversal. On the other hand, subdivision (p)(3) of the rule still gives the state one last "window" period of 15 days to remedy its tardiness, which the trial judge is not free under the rule to take away.

When a trial court incorrectly denies even that period to the state, we are obliged under the rule to reverse, but not to start trial within 90 days as in the case of a new trial made possible by an appellate court's mandate, but only within the 15-day window period prescribed by rule 3.191(p)(3). Cf. State v.

Eubanks, 18 Fla. L. Weekly D2430 (Fla. 4th DCA Nov. 17, 1993) (trial court's discharge after expiration of appellate mandate period, but without according state 10-day portion of window period after hearing on motion for discharge, requires reversal with instructions to bring to trial within 10-day period).

As for Lowe, also relied upon by the state, it plainly did not address the situation we face here, where a trial judge granted a timely filed motion for discharge after first affording the state the window period to bring defendant to trial. In this case, the mandate was received by the trial court on May 8th, defendant filed a motion for discharge on May 18th, and on May 28th the trial court granted the motion. Hence the state had more than the 15-day window period to bring defendant to trial but made no attempt to do so. In fact at the May 28th hearing the state sought a continuance until at least August. We simply find no error in the trial court's decision. If we are wrong, we have the luxury of certifying the issue stated in the first paragraph of this opinion to the supreme court as one of great public importance.

AFFIRMED; QUESTION CERTIFIED.

DELL, C.J., and GUNTHER, J. concur.