IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 82,927

STATE OF FLORIDA,

Petitioner,

vs.

GLEN GARY ROHM,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

JOAN FOWLER
Senior Assistant Attorney General

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (407) 688-7759

Counsel for Petitioner

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PRELIMINARY STATEMENT

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

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

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner adopts and realleges the statement of the case and facts as set forth in its initial brief in this cause.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal incorrectly interpreted Rule 3.191(m) Fla. R. Crim. P. to allow the state a 90 day period in which to bring a defendant to trial, **only** in instances where an appellate court or the trial court has granted a new trial. The plain meaning of the rule, and this Court's prior interpretation of the rule, is that a uniform 90 day period after the issuance of mandate is provided in which a defendant shall be brought to trial after an appeal by the state, regardless of the nature of the state's appeal.

ARGUMENT

ON REMAND, AFTER AN APPELLATE COURT HAS REVERSED A TRIAL COURT'S ORDER ERRONEOUSLY GRANTING DISCHARGE, THE 90 DAY TIME PERIOD PROVIDED FOR IN RULE 3.191(m), FOR BRINGING A DEFENDANT TO TRIAL SHOULD APPLY.

Respondent asserts the 90 day time period provided for in Rule 3.191(m) Fla. R. Crim. P. apply **only** where a defendant is being **retried** and not, where as here, the cause has been remanded to provide a defendant with his first or original trial. The State submits that such an interpretation of the rule does not comport with the plain language of the rule or with this Court's prior interpretations of the rule.

Respondent, while noting that a triggering event under the language of the rule is where a person "whose trial has been delayed by an appeal by the state or the defendant" (Respondent's Answer Brief, p. 6) asserts that all of the events which trigger the 90 day period occur **after** the defendant has been tried. This contention is simply incorrect. What about appellate reversals of orders granting motions to dismiss (i.e. for overbreadth of the information or bill of particulars, or for entrapment, or for double jeopardy, etc.) or orders granting suppression, or pretrial appeals by the defendant? Appellate reversals such as these make possible initial, as opposed to new or re- trials, yet under the Fourth District's interpretation of the rule in this case, Rule 3.191(m) has no applicability to those situations; if Rule 3.191(m) does not apply, what does? Clearly the "whose trial has been delayed by an appeal" language of Rule 3.191(m) expressly

encompasses circumstances in which a defendant has not yet had a trial.

Obviously there instances where pretrial appeals occur; equally obviously, Rule 3.191(m) was adopted to provide a uniform period after issuance of mandate from those appeals in which a defendant shall be brought to trial or retried. Particularly where a defendant takes a pretrial appeal, it cannot be said that the intent of Rule 3.191(m) is to punish the state for failing to bring a defendant to trial within the speedy trial time, as the state is not at fault in failing to do so in these situations. For that matter, how can the state ever be said to be at fault when the trial court issues an erroneous ruling? Further, the suggestion that Petitioner was dilatory here is not borne out by the record. Here, prior to the initial appeal, Petitioner was ready and willing to bring Respondent to trial within the appropriate speedy trial time. Indeed, when the initial motion for discharge was granted, jury selection was in progress, and **but for** the erroneous ruling (which was reversed on appeal), Respondent's trial would have occurred. Thus, it cannot be said that Petitioner was at fault for the delay of trial in this case. See: State v.Barnett, 366 So. 2d 411 (Fla. 1978).

Finally, Respondent's interpretation of this Court's holding in State v. Jenkins, 389 So. 2d 971 (Fla. 1980), is incorrect. Respondent asserts Jenkins holds that the 90 day period only applies to retrials and not to original trials (Respondent's Answer Brief p. 8). Initially, the language quoted by Respondent, as

noted by this Court, refers to the **then existing** Rule 3.191(g), which this Court noted had been changed. Id. at 973, 975. Further, in Jenkins, this Court expressly held that the provisions of the new Rule 3.191(g) [now Rule 3.191(m)], would be applicable to state appeals. Id. at 975. In summarizing its interpretation of the rule, this Court stated:

> We emphasize that the new rule effective January 1, 1981, modifies and amends rule 3.191(g) and provides an express, uniform ninety day period within which a defendant must be brought to trial after various appellate proceeding by either the state or defendant, or to retrial because of a mistrial or an order granting a new trial.

Id. at 976.

Petitioner submits that, contrary to the Fourth District's opinion below, the plain language of Rule 3.191(m) provides that a uniform 90 day period in which a defendant must be brought to trial is applicable to pretrial as well as post-trial appeals, regardless of whether the appeals are brought by the state or the defendant. Clearly, the caption of the rule, "Effect of ... Appeal", as well as the express language of the rule "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 of mandate" establishes that a uniform 90 day period is provided for bringing a defendant to trial after an appeal by the state. This is the precise interpretation given Rule 3.191(m) by this Court in Lowe v. State, 437 So. 2d 142 (Fla. 1983). See also: Jenkins, supra at 976. If not, then the language "whose trial has been delayed by an appeal by the state or a defendant" has no meaning. Indeed, in

Lowe, this Court expressly noted that while the former provisions of Rule 3.191(g), now (m), did not apply to cases where the defendant had never been brought to trial, under the new provisions of the rule, the 90 day provision was applicable to all state appeals. Id. at 975. Thus the Fourth District's interpretation of the rule is incorrect and must be quashed. Here, as in Lowe v. State, supra, Respondent's motion for discharge was untimely, as it was filed prior to expiration of the 90 day speedy trial time which began to run anew on the date of issuance of mandate in this case, i.e. May 8, 1992 (R 9). Lowe at 144. As such, the trial court erred in granting Respondent's motion for discharge, the Fourth District's erred in affirming the trial court's order and the trial court's order must be reversed.

APPENDIX

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court QUASH the decision of the Fourth District Court below and REVERSE the decision of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Senior Assistant Attorney General
Florida Bar No. 339067

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401
(407) 688-7759

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Reply Brief of Petitioner" has been furnished by U.S. Mail to: GREG ROSS, Esquire, and DVORA WEINTREB, Esquire, 400 S.E. Eighth Street, Ft. Lauderdale, FL 33316, this 3rd day of March, 1994.

Of Counsel

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.").

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.

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 * * *.").

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.