IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	CASE NO. SC02-2583
vs.	)	DCA CASE NO. 5D02-261
	)	
JASON RAY ROBBINS,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

AMENDED MERIT BRIEF OF RESPONDENT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

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_____	)	

STATEMENT OF THE CASE AND FACTS

The Respondent accepts Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The trial court was correct in its dismissal of the Count Two Driving Under the Influence charge herein because the charge had not been consolidated with a felony at the time its misdemeanor speedy trial period ran, and caselaw and the rules committee notes support the court's ruling. This Court should halt further erosion of our citizens' rights ro speedy trial, answer the certified question in the affirmative, and affirm the decision below.

ARGUMENT

THE TRIAL COURT AND THE FIFTH DISTRICT COURT OF APPEAL WERE CORRECT IN DISCHARGING RESPONDENT AS TO THE MISDEMEANOR DUI WHERE THE STATE DID NOT FILE THE INFORMATION CHARGING RESPONDENT WITH BOTH MISDEMEANOR AND FELONY CHARGES UNTIL AFTER THE EXPIRATION OF THE SPEEDY TRIAL PERIOD FOR THE MISDEMEANOR.

In affirming the trial court's dismissal of respondent's misdemeanor count, the Fifth District relied on Livingston v. State, 564 So.2d 612 (1st DCA 1990), and Alvarez v. State, 791 So.2d 574 (Fla. 4th DCA 2001). Based on these precedents, the Fifth District issued a *per curium* affirmance of the trial court's action.

The state is correct in its analysis of the existing case law. This Court is squarely presented the issue decided adversely to the state in Alvarez v. State, 791 So.2d 574 (Fla. 4th DCA 2001). State's brief, p.8. The state contends that Livingston and Alvarez were both wrongly decided and should not be upheld by this Court. The state contends that the "fatal flaw" found in these cases is Livingston's reliance on the committee note accompanying Rule 3.191(b)(2)[now 3.191(f)] which states, "To claim benefit under this provision, the crimes must be consolidated before the normal time period applicable to misdemeanors has

expired." Although the Livingston court found the committee note "highly persuasive", the Office of the Attorney General points out that unadopted committee notes are not binding, although they may be persuasive if they have not been disavowed. State's brief, p.9. The state contends that resort to the committee note was inappropriate, because the rule is clear and unambiguous. Respondent begs to differ. If the rule were unambiguous, the litigation on this issue would not exist. Clearly there is ambiguity and reliance on the committee note is helpful.

Petitioner also relies on State v. Jackson, 784 So.2d 1229 (Fla. 1st DCA 2001) claiming that any precedential value of Livingston has been called into question by this more recent holding in the First District. Jackson was arrested and charged in county court with DUI in late October, 1999. On January 10, 2000, the state entered a *nolo prosequi* in county court for all charges. On January 25, 2000, 96 days after his arrest, Jackson gave notice in county court of the expiration of the speedy trial period and moved for discharge. Prior to the county court's order of discharge, the state filed a felony information in circuit court charging defendant with his fourth misdemeanor DUI offense and also charged Jackson with a felony DUI as a result of that magic number. Subsequently, the county court granted Jackson's motion for discharge on the misdemeanor DUI. Following that,

Jackson was successful in convincing the circuit judge that the state could not now prove four misdemeanor DUI convictions.

On appeal, the First District made no reference to Livingston v. State, 564 So.2d 612 (Fla. 1st DCA 1990) or Alvarez v. State, 791 So.2d 574 (Fla. 4th DCA). The court did not cite either case because Jackson is clearly distinguishable. The First District pointed out that the information was filed in circuit court well before the speedy trial deadline for the felony charge. Additionally, once the state filed the *nolo prosequi* in county court, the circuit court obtained exclusive jurisdiction. The First District pointed out that everything which occurs in a proceeding subsequent to the filing of a *nolo prosequi* is a nullity. The First District concluded that there was no estoppel to the misdemeanor DUI charge brought in circuit court as a felony. The court distinguished Reed v. State, 649 So.2d 227 (Fla. 1995), cited by the defendant. Reed is easily distinguished from the instant case because in Reed the information charging the defendant with felonies was not filed until after the speedy trial had run. Moreover, in Reed, there was not a loss in jurisdiction. Furthermore, there was nothing to indicate that the state was attempting to improperly avoid the effects of the speedy trial rule. As such, it is abundantly clear that Jackson is completely and utterly distinguishable from the facts presented to this Court in this case.

The Facts Before the Trial Court.

The prosecutor below chose to wait on lab results before filing the felony charge herein, despite a presumptive positive field test result. (R 55; 3) While that intake decision in itself was perhaps one of commendable caution, the next decision to wait more than three months for a lab test result (which was actually available before the 90 days ran) while Mr. Robbins was repeatedly brought to court for arraignments that were continued by the state, was not commendable. (R 32) Mr. Robbins was under a $3,000.00 bond originally and was kept under bond or pretrial release while the state's delays prevented any progress in the case month after month. (R 8, 10, 11, 14, 15)

A trial court's fact findings and conclusions of law are presumed correct and will not be reversed unless the court's decision is manifestly against the weight of the evidence, contrary to the legal effect of the evidence, or unsupported by competent substantial evidence. City of Cocoa v. Leffler, 803 So.2d 869, 872 (Fla. 5th DCA 2002).

The state argued at the trial level that Alvarez was not on point because in this cause a citation was filed--however one could not ascertain from these tickets

whether Mr. Robbins was charged with a felony or misdemeanor and the citations did not tell Mr. Robbins where to appear for court-- the trial judge pointed out that citations were only sufficient to charge a traffic offense in county court, not in circuit court.[1] (R 6-7; 53; 57-58; 61)

The state conceded at the trial level that the DUI was charged as a misdemeanor initially, independent of the felony possession charge:

> The reason that we didn't file an Information until November is because we were waiting for the lab report to come back on the GHP, *(sic)* but we had a citation out there charging a misdemeanor anyway. So once we filed the Information, we then had the misdemeanor DUI citation just continually running into the Information. That's why the *Alvarez* case is not on point.

(R 55)

Of course, the state did not explain what it would have done, had the GHB results come back *negative*. Then there would have been no felony charge and no felony speedy trial net to fall back into-- the state would have let their delay in obtaining a lab report dictate the outcome of the DUI as well. It is arguable that

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[1] F.R.Cr.P. 3.140(a)(2) states: "In circuit courts and county courts, prosecution shall be solely by indictment or information, except that prosecution in *county courts* for violations of municipal ordinances and metropolitan county ordinances may be by affidavit or docket entries and prosecutions for *misdemeanors*, municipal ordinances, and county ordinances may be by notice to appear issued and served..." (*emphasis added)*

this was an acceptable fate, in that the DUI here did not have a presumptive blood alcohol of more than .08% to begin with, and without the GHB positive lab results, the state might not have been willing to proceed with the DUI.

However, if this was the prosecution's plan, to wait to see what the lab test revealed, the state waited too long to learn if its DUI had merit: there was no felony charge filed or pending by October 30, and the DUI was just a misdemeanor DUI whose speedy trial had expired.

This is not a case in which evidence establishing the commission of a felony arises after the 90 day speedy trial period has elapsed. Here, the arrest was on July 25, 2001. The lab report with the necessary results was dated October 11, 2001--less than 80 days later, and before speedy trial ran. (R 32) The lab results were ready nearly three weeks before the Notice of Expiration of Speedy Trial was filed. (R 26) The prosecution below simply failed to monitor his case progress, or lack thereof. Bad facts should not produce bad law here.

The prosecution below quickly filed a felony information once the defense forced his attention to a situation where a lab report was apparently simply overlooked or misplaced. There is already an 'escape' or 'recapture' window to assist the state. If the state believes it cannot process these cases quickly enough

to meet speedy trial requirements, then officers can be instructed to file non-arrest complaints so that speedy trial (and bond restrictions) are not initiated so early, thus giving the lab and the state more than three months in which to prepare a possession case.

It is not unusual or bad practice for a felony prosecutor to reason that misdemeanor charges will be sufficient punishment out of a group of related misdemeanors and felonies. Police officers sometimes overcharge. There is no suggestion of bad faith exercised below but to accept the state's interpretation of Rule 3.191 would mean that theoretically, the state could resurrect any misdemeanor whose time had run by filing on a felony that was originally charged by police but not deemed necessary by prosecutors at first. The temptation to do this rather than admit the prosecutor's 'unpardonable sin' of letting speedy trial run on a viable charge could color many judgment calls..

Respondent would also argue that by failing to join the DUI with the new felony possession Information charge in a timely manner (during the DUI's speedy trial period) this constituted a waiver of the right to consolidation under Fla. R. Crim. P 3.151. Fla. R. Crim. P. 3.191 (f) states that "(w)hen a felony and a misdemeanor are consolidated for disposition in circuit court, the misdemeanor

shall be governed by the same time period applicable to the felony." There was no consolidation in the instant case because there was no felony charge pending in circuit court until the defense notice prompted a quick state Information filing two days later--the misdemeanor DUI was no longer a viable charge at that point.

History of the Rule and Committee's Intentions

The 1980 committee note to Rule 3.191(f) explained the rules committee's intent and thought process when it stated that "(t)o claim benefit under this provision, the crimes must be consolidated before the normal time period applicable to misdemeanors has expired." The state is correct in arguing that the plain language of the rule should be given paramount consideration and rules committee notes are not controlling but are 'helpful hints' and 'may be persuasive.' (State's brief, p. 9)

In this particular case, the rule was prepared or presented by, among others, the Fifth District's Judge James C. Dauksch, Jr. (ret.) and the late University of Florida Professor Gerald Bennett, of the Criminal Procedure Rules Committee. The Florida Bar In Re Rules of Criminal Procedure, 389 So.2d 610 (Fla. 1980) Respondent would suggest the committee notes, a product of decades of

combined criminal law experience, should certainly provide guidance in this case, especially since the note supports the plain language of the rule and has not been disavowed. The state's suggestion that there is something significant in the fact that the particular committee note it finds disagreeable was not adopted by the Supreme Court overlooks a factor present in most rule adoptions: the court did not adopt other committee notes involving other topics in that same opinion, and does not adopt notes in many, if not most, instances. *See* The *Flordia (sic)* Bar, 343 So.2d 1247 (Fla. 1977); In re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972);In re Amendments to Florida Rules of Traffic Court, 2002 WL 1209421 (Fla. June 6, 2002); In re Amendments to the Florida Probate Rules 2002 WL 825699 (Fla. May 2, 2002). Regarding the particular note involved in this appeal, however, at least one other district has cited the committee note for its value in explaining the rule further. Sharif v. State, 436 So.2d 420 (Fla. 4th DCA 1983)[2] .

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[2]This case is also helpful in explaining the original (and clearly more sympathetic) hardship that this rule change sought to alleviate: "Prior to the adoption of Rule 3.191(b)(2), informations or indictments charging a felony and a misdemeanor were subject to two different speedy trial time frames: ninety days for the misdemanor and one hundred and eighty days for the felony. In practical terms, however, the state had to sacrifice the last ninety days of the one hundred and eighty day felony period in order to try the offenses together. This required the state to prepare serious and often complex cases for trial in compressed time frames. It also required the court to shoulder the management problem of monitoring this special category of cases which differed from all other cases in the circuit court.Rule 3.191(b)(2), Fla.R.Crim.P., resolved these problems by providing for a uniform speedy trial time frame for all offenses consolidated for

Sharif extended Rule 3.191 to include not just *consolidated* misdemeanors, but also misdemeanors combined by *joinder*. The facts in Sharif were better for the state than the present appeal, because there, the prosecution filed an information joining the misdemeanor and felony within the first 90 days, but it was argued that this was an act of *joinder*, not *consolidation* of charges. Even there, the court suggested it might have entertained this notion further but for an obstacle which is not present in the instant appeal:

> Turning to the case at bar, we note that the defendant failed to challenge the state's decision to join the misdemeanor offense of battery with the felony offense of false imprisonment. Therefore, he waived his right to attack the validity of joinder on appeal. In accord with our construction of Rule 3.191(b)(2), Fla.R.Crim.P., we hold that the speedy trial time frame for disposition of both offenses in the case at bar was one hundred and eighty days.

Id. at 422.

The original speedy trial rule was even more clear on the position taken with regard to misdemeanor offenses--there was **no** special provision for 'consolidation' of misdemeanors with felonies, as Sharif, *supra*, discussed:

> RULE 1.191--SPEEDY TRIAL
> (a)(1). Speedy Trial Without Demand.--
> Except as otherwise provided by this Rule, every person charged with a crime, by indictment or information or trial affidavit, shall without demand be brought to trial within 90 days if the crime charged be a

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disposition." Sharif at 422.

misdemeanor, or within 180 days if the crime charged be a felony, capital or non-capital...

In re Florida Rules of Criminal Procedure, 245 So.2d 33 (Fla. 1971)

Respondent submits that not only is the committee note invaluable in guiding rule followers, but the history of the rule's transformation over the years is also helpful. The present rule wording came about as the result of a truly rough situation for prosecutors, where, as in Pouncy v. State, 296 So.2d 625 (Fla. 3d DCA 1974), the state lost misdemeanor cases to speedy trial *even where* the state properly charged them together with related felonies from the outset. That severe result was the result of the original rule wording above and *that* is the unsupportive springboard from which the state now seeks to launch a new attack on the speedy trial rule, while ignoring the committee's intentions.

Rule 3.191(j) hearing not held

Although counsel below filed his Notice of Expiration on October 31, 2001, the hearing pursuant to Fla. R. Crim. P. 3.191(p) (3) was apparently not held. There is only a court file entry that a 'calendar call' was held November 5, 2001 with defense counsel below on the telephone. (R 19) The remarks simply noted: "State advised the court that an information has been filed." (R 19) No inquiry was found to have been conducted by the trial court here, to comply with Fla. R. Crim. P. 3.191 (j):

> If trial of the accused does not commence within the periods of time established by this rule, a pending motion for discharge shall be granted by the court unless it is shown that:
>
> (1) a time extension has been ordered under subdivision (i) and that extension has not expired;
>
> (2) the failure to hold trial is attributable to the accused, a codefendant in the same trial, or their counsel;
>
> (3) the accused was unavailable for trial under subdivision (k); or
>
> (4) the demand referred to in subdivision (g) is invalid.

Instead, when the prosecution continued onward, defense counsel next filed a Motion for Discharge on the misdemeanor charge and the motion was not heard until November 13, 2001. (R 20; 50) Understandably, trial counsel was perplexed after the trial court also refused to follow *Alvarez* until it could be shown to be final. The trial court responded by apparently hinting that the state should move to strike one or more of the defense motions:

> DEFENSE: I am confused--I am honestly confused on the court's ruling regarding my notice of expiration of speedy where the tenth day after the hearing has run as far as the window goes on Count II.
>
> COURT: I'm sorry that you are confused, but no one has filed a motion for me to strike their pleadings. So since no one has done that, I can't strike it. So until somebody does that, I am ignoring it. If that clears it up for you because I believe it is an improper based on my ruling today. It wasn't an improper pleading when you filed it. I am not accusing you of anything. Today, it is an improper pleading because of that rule that Mr. Schneider (prosecution) found. He is Johnny-on-the-spot today.

(R 63)

Later, after *Alvarez* became final, the prosecutor below misstated Fla. R. Crim. P. 3.191(f) to argue that where a misdemeanor and felony merely "arise out of the same circumstances, the felony speedy trial rule applies."[3] By extension of this state argument, the felony charge would not *ever* need to be filed--the misdemeanor DUI would be blessed with 180 days speedy trial simply because the police initially arrested a suspect for a felony as well. That is not what the rule states.

Where there is a doubt about the meaning of a criminal statute, at least, the legislature has decreed that the Rule of Lenity applies, and Respondent submits no less should be applied to the criminal rules:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

§ 775.021 (1) (Fla. Stat.)

Summary

The speedy trial rule has steadily been watered down in the decades since this Honorable Court first enacted a rule to expand upon the brief constitutional and legislative clauses. It has seen the addition of the consolidation language

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[3] The rule reads: "When a felony and a misdemeanor are consolidated for disposition in circuit court, the misdemeanor shall be governed by the same time period applicable to the felony."

discussed above, the inclusion of 'joinders', and the 'escape' windows and notice provisions which replaced the formerly severe but clear and straightforward dismissal sanctions. Now the state asks this Court to split from clear precedent because a prosecutor permitted intake to go uncharged for an unnecessarily long period of time. Respondent respectfully asks this Court to refrain from leading the way in the further erosion of Florida citizens' right to speedy trial.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court to answer the certified question in the affirmative and hold that when the state fails to timely file a felony information before the expiration of the speedy trial period for misdemeanors, the misdemeanor counts should be dismissed upon proper motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Charlie Crist, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Jason Ray Robbins, 9434 Torrington Avenue, Orlando, Florida 32817, on this 4th day of February 2003.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

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APPENDIX