IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JUAN NAVEIRA,

Respondent.

CASE NO. SC02-633

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellant in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, JUAN NAVEIRA, the Appellee in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent.

The record on appeal consists of one volume, which will be referenced as "R," followed by any appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS[1]

Respondent was arrested for sexual battery and false imprisonment on February 25, 1999 (R 1-3, 25). On June 4, 1999, before an information was filed, Respondent filed a Notice of Appearance, Written Plea of Not Guilty, Demand for Discovery, and Demand for Jury Trial (R 10). On August 19, 1999, the State filed an information charging one count of sexual battery (R 11). Respondent received the information in the mail on August 24, 1999 (R 43, 44-45). On the same date, Respondent filed a

[1]Due to the importance of chronology in this speedy-trial case, the State has supplemented the Statement of the Case and Facts with a chronology at Appendix "A."

"Notice of Expiration of Time," alleging that more than 175 days had passed since his arrest (R 15). On August 26, 1999, the court held a hearing on the notice of expiration, in accordance with Florida Rules of Criminal Procedure 3.191(p)(3) (R 40-67). This rule requires the court, upon receipt of a notice of expiration of speedy trial time, to hold a hearing on the notice and, unless the court finds that certain conditions exist, to order that the defendant be brought to trial within 10 days.

At the hearing, the prosecutor noted that the information was timely filed, and that the State was ready for trial (R 44). The prosecutor observed that discovery responses are not due until after the information is filed, and that discovery responses here were submitted to Respondent along with the information. Id. Accordingly, the discovery responses were timely-filed.

Respondent replied that he did not have sufficient time to prepare for a trial within the recapture period (13 days), that he should not be forced to choose between his right to a speedy trial and his right to be ready for trial, and that any continuances should be "charged to the State" (R 45-47, 50-51). The prosecutor acknowledged that the delay in filing the information was not attributable to Respondent, and explained that the delay was due to the State's difficulty in finding and interviewing the juvenile victim (R 48). Nonetheless, the prosecutor asserted that he filed the information within 175 days of arrest and immediately complied with discovery rules,

all in good faith (R 49-50, 55). With regard to a possible continuance, the prosecutor stated that he would not necessarily object to a continuance, but asked that the court not make a determination at that time as to whom it would be attributed (R 63, 65-66).

The parties also argued over whether the information was filed on the 175th day after arrest, which would invoke the recapture provisions of Rule 3.191(p), or the 176th day after arrest, which would automatically entitle the defendant to a discharge (R 56-61).

The court did not immediately rule on this dispute. Instead, the court, in accordance with Rule 3.191(p), scheduled the trial for the following week, with jury selection to commence Monday August 30, 1999 (R 58, 62). The court then asked Respondent to file something in writing by the next day, and that if the "something" was a motion for continuance, then the defense could ask that the continuance be charged to the State (R 64-66). The prosecutor stated that he would not necessarily object to a continuance, but asked that the court not make a determination at that time as to whom it would be attributed (R 63, 65-66). The court kept the case on the trial docket for August 30, 1999, but assured Respondent that it would not require the attorney's presence the following week for trial and that it would decide 1) whom to attribute the continuance; and 2) the 175-day vs. 176-day dispute (R 66).

On August 27, 1999, Respondent filed a motion for continuance, arguing that the State failed to file an information within 175 days from arrest, that the defendant was unable to be ready for the trial date, and that due to the State's delay, the continuance should be charged to the State (R 16-18).

On September 9, 1999, Respondent filed a motion for discharge, arguing that he was entitled to discharge because 15 days had elapsed without a trial since the August 24th filing of the notice of expiration (R 19).

The judge granted the motion for continuance and ordered that it be "charged to the State" (R 23). This order was signed on October 21, 1999, nunc pro tunc to September 14, 1999. Id.

On December 8, 1999, the court held hearing on the motion for discharge (R 69-94). The parties discussed both issues raised at the earlier hearing: 1) whether the State filed the information subsequent to the expiration of the speedy trial period, which would entitle Respondent to an "automatic" discharge; and 2) whether the fact that the trial was not held during the 15-day "recapture" period was attributable to the State's delay or to Respondent's continuance.

With regard to the second issue, Respondent argued that the State had failed to try him within 175 days of his arrest, then failed to try him within the 15-day recapture period, that the continuance had been "charged to the State," and that he was, therefore, entitled to a discharge (R 71). The State responded

that it was ready for trial during the 15-day recapture period, and that Respondent, not the State, had requested a continuance (R 71-72). The prosecutor explained that he filed the information on the 175th day not to prejudice Respondent, but because of difficulty in contacting the victim (R 73). Furthermore, the prosecutor offered to have the victim available for deposition on short notice, which Respondent declined (R 87). And last, the prosecutor asserted that he could have tried the case with one witness, and that any other witnesses were under Respondent's control. Id. In sum, the prosecutor argued that Respondent had not established prejudice or bad faith. Id. The prosecutor again asserted that the State had committed no discovery violation, and that the trial had been scheduled at Respondent's request (R 92-93):

> [PROSECUTOR]: Well, that was because you filed your motion asking for a speedy trial. We gave it to you. And then you filed a motion to continue. The case was set for trial at your request and was continued at your request.

(R 93).

The court granted the motion for discharge (R 25-28). The court found that the 15-day recapture provision does not apply when the information is not filed within 175 days following arrest. The court ruled that, in calculating the time period, it was required to count the date of arrest, and that under such calculation, the information here was not filed until the 176th day following arrest. As such, the court held that Respondent was entitled to discharge irrespective of the 15-day recapture

period. Because it ruled that Respondent was entitled to discharge on this ground, the court did not address the other ground for discharge, i.e., the failure to try him within the 15-day recapture period.

The State appealed this ruling, and the First District Court of Appeal (DCA) reversed. State v. Naveira, 768 So.2d 1254 (Fla. 1st DCA 2000)("Naveira I"). The DCA found that the date of arrest is not counted when calculating time under the speedy-trial rule Id. at 1255. Accordingly, the information here was properly filed:

> The information against Naveira was therefore filed within the time allowed by the speedy-trial rule, because the day of arrest is excluded from the 175-day calculation of time by rule 3.040.

Id. at 1256. The DCA added a footnote to this ruling:

> The recapture provisions of Rule 3.191(p) are not implicated because these provisions presuppose that an information or indictment has been filed within the initial 175 day time period.

Id. The DCA concluded as follows:

> The court below as a matter of law incorrectly included the day of arrest in the calculation of time for purposes of the speedy-trial rule. We hence reverse and remand for consistent proceedings. In so doing, we do not address whether there may be other grounds for discharging Naveira. Although this collateral issue was briefly addressed below, the trial judge declined to rule after noting that her ruling with respect to calculation of the speedy-trial time was dispositive of the case. Moreover, the collateral issue was not addressed by either Naveira or the State on appeal.

Id. The mandate from the DCA was received by the clerk of the circuit court on November 3, 2000 (R 101).

On remand, Respondent again moved for discharge, alleging again that the State had failed to try him within the 15-day recapture period, and that the continuance had been "charged to the State" (R 97-100). This ground was the same ground raised in the earlier proceedings, but not addressed by the trial court in its order discharging Respondent or by the DCA in Naveira I. Respondent also argued that the DCA, in the footnote cited above, ruled that the State was not entitled to the 15-day recapture period because it had filed the information on the 175th day after arrest (R 98). At the hearing on this motion, Respondent suggested that the DCA had directed the trial court to reconsider the motion for discharge on the issue not raised in the first appeal, i.e., whether the failure to try him within the recapture entitled him to discharge, because this issue had not been "ripe" for review in Naveira I (R 126-128).

In response, the State argued that Naveira I was clear that it did not consider the recapture argument on appeal because Respondent had abandoned that issue on appeal (R 133-134). The appellate court ruling on discharge was final, and became "law of the case" (R 140). As such, the appropriate speedy-trial time on remand was the 90-day period provided in the rule, which had not expired (R 140). Further, the State argued, while the filing of the information on the last permissible day may not be the best practice, it was still permissible under the rules, and

did not, in itself, entitle Respondent to a discharge (R 139-140).

The trial court granted the motion for discharge (R 101-109). In the order, the trial court expressed puzzlement over the opinion in Naveira I, claiming that it failed to give the trial court proper direction on how to proceed. The trial court could not discern whether the DCA was requiring it to revisit the other grounds for discharge raised in the earlier motion, and finally concluded that it did:

> The defense has countered with its contention that the District Court's refusal to address whether there were other grounds for discharge, and a rather puzzling footnote indicated that "[t]he recapture provisions of Rule 3.191(p) are not implicated because these provisions presuppose that an information or indictment has been filed within the initial 175 day time period," permit this court to revisit all of the issues previously raised, argued, and mentioned in the trial court's order. Specifically, the pivotal issue is clearly whether the recapture that was already attempted, and the subsequent defense continuance granted by the trial court and charged to the State, now require discharge. Since the District Court concluded that this court discharged [Respondent] only on the ground that the information was filed on the 176th day following his arrest, it would appear that the more significant issue of the recapture and continuance must be addressed again.

(R 102-103). As such, the court ruled that the provisions of Rule 3.191(m), which require trial within 90 days following appeal, did not apply, and that it could discharge Respondent if it found that the continuance that extended the trial date past

the recapture period was attributable to the State (R 101, 103, 124).

Turning to the merits, the trial court found that Respondent's claim that he could not be ready for trial on short notice was "well-founded," and that his "reluctant" request for a continuance "was the only option available under the strict requirements of the rule" (R 104). The trial court then noted that "[t]here is long-standing precedent in the First District that a defendant should not have to choose between the right to a speedy trial and the right to be prepared to proceed with a defense" (R 105). The court found that the State "clearly" furnished discovery to Respondent late (R 107). Citing State ex rel. Wright v. Yawn, 320 So.2d 880 (Fla 1st DCA 1975), and Harley v. State, 407 So.2d 382 (Fla. 1st DCA 1981), the trial court concluded by holding that "even without a showing of misconduct on the State's part, discharge under the speedy trial rule is appropriate where a late-filed information implicates the ability to prepare a defense," and discharged Respondent (R 108).

The State appealed this ruling (R 110). The First District Court of Appeal affirmed. State v. Naveira, 807 So.2d 766 (Fla. 1st DCA 2002)(Naveira II). The DCA rejected the State's argument that Rule 3.191(m) controlled all post-appeal speedy-trial matters, regardless of the speedy-trial status of the case prior to the appeal:

> We are satisfied that the panel deciding the first appeal intended to permit the

> alternative ground for discharge to be considered on remand because the trial court had not previously addressed it. Therefore, appellee did not waive his right to raise that issue on remand, and the 90-day extension afforded by rule 3.191(m) would not come into play unless the trial court denied the motion for discharge.

Naveira II at 767.

Having rejecting this argument, the DCA addressed the issue that had not been addressed in Naveira I, the propriety of the orders charging Respondent's continuance to the State and subsequently discharging Respondent when he was not tried in the recapture period. The DCA affirmed these rulings on the authority of State ex rel. Wright v. Yawn, 320 So.2d 880 (Fla. 1st DCA 1975), and Mulryan v. Judge, Division "C" Circuit Court of Okaloosa County, 350 So.2d 784 (Fla. 1st DCA 1977). The DCA held that these cases stood for the proposition that a defendant is entitled to discharge when the state does not file a charging document until late in the speedy-trial period, and the defendant could not adequately prepare for trial in the time remaining under the speedy-trial rule, on the ground that a defendant may not be forced to choose between the right to a speedy trial and the right to conduct discovery. Naveira II at 767.

The DCA acknowledged that these cases were decided before major amendments to the speedy-trial rule, but that "the amendments do not appear to affect the applicability of the principle for which the cases stand." Naveira II at 767-768. The DCA also noted that its ruling here apparently conflicted

with State v. Fraser, 426 So. 46 (Fla. 5th DCA 1982). Id. In concurrence, Judge Wolf wrote that this Court should resolve the conflict between this case and Fraser by establishing a rule requiring the court to weigh the state's reason for a delay in filing charges against any prejudice to the defendant in determining whether to grant a motion to discharge. Id.

The State invoked this Court's discretionary jurisdiction to review Naveira II, and this Court accepted jurisdiction on September 30, 2002.

SUMMARY OF ARGUMENT

ISSUE I.

The cases of State ex rel. Wright v. Yawn, 320 So.2d 880 (Fla. 1st DCA 1975), and Mulryan v. Judge, Division 'C' Circuit Court of Okaloosa County, 350 So.2d 784 (Fla. 1st DCA 1977), represent an application of the speedy-trial rule that has been consistently rejected by courts in recent years. Unless the record discloses state misconduct, such as a material, prejudicial discovery violation, which results in the need for a defense continuance, any defense continuance constitutes a waiver of **some** provisions of Florida Rules of Criminal Procedure 3.191. This rule of law does not, as suggested by Wright and Mulryan, force a defendant to choose between the constitutional rights to a speedy trial and to adequate preparation for trial. A defendant requesting such a continuance still retains the ability to file a demand for speedy trial under Rule 3.191(b), and has not in fact waived his **constitutional** (as opposed to rule) speedy trial rights.

Under the current structure of the speedy trial rule, this rule of law applies with even greater force in cases like the one at bar. Under the current speedy trial rule, a criminal defendant no longer has a right to a trial within a certain number of days after arrest. Under the current rule, the only demand a defendant can make upon the State (other than to file a demand pursuant to Rule 3.191(b)), is to compel the State to bring him to trial within 15 days, in the event that 175 days

passes from the date of arrest. The right is not self-executing; a notice of expiration must be filed to invoke it. As long as 175 days has passed since arrest, a defendant may file such a notice **at any time**. These rules give the defendant control over the scheduling of the trial after 175 days expires. Accordingly, a defendant who exercises his right to compel the state to bring him to trial within 15 days of the filing of a notice of expiration must be presumed to be ready for trial. If such a defendant is not ready for trial, then it is clear that he is not seeking a speedy trial as provided by Rule 3.191, but is seeking a "speedy discharge."

Here, the State filed a timely information. While the State filed the information at the outside limit of the rule, it was still timely. In response, rather than taking the time to prepare for trial, Respondent immediately filed a notice of expiration to compel the State to try him in 15 days. When such a trial was scheduled, Respondent refused to go to trial, claiming that State "delay" required a continuance. Such a position cannot be maintained. The State complied with all speedy-trial rules and was willing to provide Respondent the speedy trial he was purportedly seeking. Respondent's request for a continuance was occasioned not by the State's "delay," but by his demand for a trial for 15 days for which he was unprepared. The court erred in discharging Respondent, and the district court erred in relying on cases that are no longer good law.

ISSUE II.

Alternatively, the State argues that the trial court could not have re-addressed the recapture issue following remand from the first appeal in this case, because the basic speedy-trial period is extinguished after an appeal, replaced with a 90-day period provided in Rule 3.191(m). This court in State v. Rohm, 645 So. 2d 968 (Fla. 1994) stated that the 90-day post-appeal rule applies to **whenever** a trial has been delayed by appeal, regardless of the speedy-trial status of the case prior to the appeal. The exceptions to this rule carved out by the district court are inconsistent with Rohm and incorrect.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY "CHARGING TO THE STATE" A CONTINUANCE REQUESTED BY RESPONDENT ON THE GROUND THAT THE STATE'S DELAY IN FILING THE INFORMATION PREVENTED HIM FROM ADEQUATELY PREPARING FOR TRIAL, AND THEN SUBSEQUENTLY DISCHARGING RESPONDENT WHEN THE STATE DID NOT TRY APPELLANT WITHIN THE TIME PERMITTED BY RULE 3.191 BECAUSE OF THE CONTINUANCE?

STANDARD OF REVIEW

Pure questions of law are reviewed *de novo*. Philip J. Padovano, Florida Appellate Practice §9.4, at 147 (2d ed. 1997); Rittman v. Allstate Insurance Company, 727 So. 2d 391 (Fla. 1st DCA 1999).

MERITS

The trial court order and district court decision below proceed on several legally-unsupportable premises. In addition to the error indicated in Issue II below, the errors can be distilled into two grounds: first, the contention that Respondent was entitled to a discharge because the State forced him to choose between the right to a speedy trial and the right to be prepared to proceed with a defense, has been squarely rejected by numerous district court decisions that are more recent than the cases on which the trial court and district court relied. Second, even if the principle enunciated in these earlier cases constituted a viable rule of law, major amendments to the speedy-trial rule since the 1970s have fundamentally altered the speedy trial rule, and these changes make this

principle inapplicable to the case at bar. The State will address these arguments in turn.

a. Where the State has committed no material, prejudicial discovery violation or engaged in other misconduct, a defense-requested continuance waives some rights under Rule 3.191, regardless of whether a defendant has sufficient time to prepare for trial

The trial court and district court in this case accepted Respondent's contention that he was forced "to choose between choose between the right to a speedy trial and the right to be prepared to proceed with a defense" (R 105), Naveira II at 767. This reasoning relies exclusively on cases such as State ex rel. Wright v. Yawn, 320 So.2d 880 (Fla. 1st DCA 1975), and Mulryan v. Judge, Division 'C' Circuit Court of Okaloosa County, 350 So.2d 784 (Fla. 1st DCA 1977), that have been rejected by more recent decisions of other district courts.

In State ex rel. Wright v. Yawn, the grand jury indicted the defendant 38 days prior to the expiration of the speedy trial period. Wright at 880. The case was scheduled for trial on a date outside the speedy-trial period, but on the State's motion, made 31 days prior to the expiration of the speedy-trial period, the case was scheduled for trial on a date within the speedy-trial period, only 19 days later. Id. at 881. The defendant attempted to engage in discovery, but when he filed his motion to discharge, it was denied because he was still engaging in discovery procedures and was not "continuously ready and available for trial." Id. at 882.

The Wright court held:

> The state, through its own inaction by failing for 142 days to return either an indictment or an information against a person, cannot force a defendant to choose between two coequal rights. While the Florida Rules of Criminal Procedure have in recent years been given great emphasis as to an accused's right to speedy trial and discovery, we cannot forget that these rights are ultimately protected by our State and Federal Constitutions.

Mulryan v. Judge, Division 'C' Circuit Court of Okaloosa County, 350 So.2d 784 (Fla. 1st DCA 1977), reached a similar conclusion relying on Wright, holding that a substantial amendment to the information 12 days prior to the expiration of the speedy-trial period did not afford the petitioner adequate time to prepare; his continuance should have been charged to the state; and he should have been discharged following the expiration of the speedy-trial period.

As a preliminary matter, at the time Wright was decided, the speedy trial rule required the defendant to be "continuously ready and available for trial." Such participation in discovery would not constitute a waiver of rights under the speedy-trial rule today. See State v. Fraser, 426 So.2d 46 (Fla. 5th DCA), rev. denied, 436 So.2d 98 (Fla. 1983); State v. Borges, 467 So.2d 375, 377 (Fla. 2d DCA 1985). The fact alone demonstrates why Wright cannot apply today. However, even without that distinction, Wright fundamentally proceeded on an erroneous ground that has been rejected by numerous cases, such as State v. Fraser.

In Fraser, the defendant moved for a continuance, to be "charged to the State," because he was not ready for trial and that "his lack of readiness was due to the unexplained delay of the State in charging him, leaving him with little time to prepare." Id. at 48. The trial court extended the trial date to a time after the expiration of the speedy-trial period, and later discharged defendant because the State did not try him within the time permitted by the speedy-trial rule. Id. The Fifth District reversed, ruling as follows:

> We hold that defendant's speedy trial rights under Rule 3.191 were not violated in this case when trial was scheduled within the time limitations of the rule and defendant advised the court he was not prepared for trial.

Id. at 49 (footnote omitted). In so ruling, the Fraser court rejected Wright and Mulryan (on which the DCA below exclusively relied) on the ground that "no sufficient explanation appears for the holding" in those cases. Id. at 48.

The Fraser holding above is directly contrary to the ruling below. In the case at bar, as in Fraser, the "trial was scheduled within the time limitations of the rule." In the case at bar, as in Fraser, the "defendant advised the court he was not prepared for trial" due to delays attributable to the state. Yet the court below ruled exactly the opposite of the Fraser ruling, on the ground that two First District cases from the mid-1970s (which were rejected by the Fraser court), mandated a different result.

The Fraser court rejected the Wright court's observation, repeated by the trial court below, that a defendant's rights under the speedy trial rule and his due process right to adequately prepare for trial are "coequal." In fact, courts have repeatedly stated that a defendant's rights under the speedy trial rule are not of constitutional dimension, see Fraser; Fonte v. State, 515 So.2d 1036 (Fla. 3d DCA 1987), rev. denied, 525 So.2d 878 (Fla. 1988); Taylor v. State, 557 So.2d 138 (Fla. 1st DCA 1990); Banks v. State, 691 So.2d 490 (Fla. 4th DCA 1997)(*en banc*), rev. denied 699 So.2d 1371 (Fla. 1997); so the suggestion that rights provided by the speedy-trial rule (as opposed to constitutional speedy-trial protections) are "coequal" with the right to due process is false.

The court in Blackstock v. Newman, 461 So.2d 1021, 1022 (Fla. 3d DCA), rev. denied, 467 So.2d 999 (Fla. 1985) discussed the distinction between the constitutional right to a speedy trial and the rights provided in Rule 3.191 in this context:

> By this decision, we do not force appellant to choose between two sixth amendment rights, the right to a speedy trial and the right to counsel, as she asserts. **The speedy trial rule is a procedural device only and not a constitutional right.** Once the speedy trial rule has been waived, it is supplanted by the constitutional speedy trial period which is measured by tests of reasonableness and prejudice, not specific numbers of days. Brownlee v. State, 427 So.2d 1106 (Fla. 3d DCA 1983); Gallego v. Purdy, 415 So.2d 166 (Fla. 4th DCA 1982).

See also Fonte v. State, 515 So.2d 1036 (Fla. 3d DCA 1987)("We reject Fonte's claim that he was placed in the untenable

position of choosing between his constitutional right to a speedy trial and his constitutional right to counsel").

In short, rights under Rule 3.191 are not of constitutional dimension and accordingly are not "coequal" with the constitutional right to counsel and adequate preparation.[2] Moreover, the extent of the speedy-trial right that is waived by a defense-requested continuance is overstated by the trial court below. As several courts, including this Court, have recognized, a defendant who has waived his right under Rule 3.191(a) retains the right to demand a speedy trial in accordance with Rule 3.191(b). See Butterworth v. Fluellen, 389 So.2d 968 (Fla. 1980); State ex rel. McCrimmon v. Lester, 354 So.2d 381 (Fla. 1977); State v. Gibson, 783 So.2d 1155 (Fla. 5th DCA 2001). The fact that a defendant who is obligated to request a continuance due to delay attributable to the State still retains the right to demand a trial with 50 days of such

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[2]Even if rights provided by Rule 3.191 were constitutional in nature, it has long been noted that criminal defendants are often forced to make difficult choices between exercising constitutional rights, but that requiring them to make such a choice is not always impermissible. See McGautha v. California, 402 U.S. 183, 213 (1971):

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. **Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose**. (citation omitted).

demand, pursuant to Rule 3.191(b), militates against the notion that such a defendant has lost some substantial right.

The rule that a defense-requested continuance waives Rule 3.191(a) rights is firm. However, the courts have created an exception to this rule when the delay resulting in the defense continuance is attributable to state misconduct, inexcusable delay in providing discovery, or other violation of defense discovery rights. In the event that a defendant requests a continuance due to these inexcusable delays by the state in providing discovery, or other bad faith, the continuance request may not constitute a waiver of rights under Rule 3.191, and the defendant may be entitled to discharge if the continuance extends the matter beyond the time limits in the rule. See State v. Del Gaudio, 445 So.2d 605 (Fla. 3d DCA), rev. denied 453 So.2d 45 (Fla. 1984). However, in order to benefit from the rule, the defendant must demonstrate that the State's discovery violation "impeded the defense preparations; that is, whether the defense was prejudiced by the discovery violation so that a continuance was in fact required in order for the defense to be prepared properly to defend against the charge before the expiration of the speedy trial time limits." Stridiron v. State, 672 So.2d 871, 872 (Fla. 3d DCA 1996); see also State v. Guzman, 697 So.2d 1263 (Fla. 3d DCA 1997).[3]

[3]Also note that the failure of a witness to appear for deposition "does not in any way violate the discovery rules or impeded the preparation of the defense" for the purposes of this rule. Colby v. McNeill, 595 So.2d 115 (Fla. 3d DCA 1992).

Turning to the case at bar, Respondent repeatedly claimed that the State had committed discovery violations, which the State denied. The trial court found that the State "clearly" furnished discovery to Respondent late (R 107). This ruling was erroneous and contrary to the record. Although Respondent filed a discovery demand long before the information was filed, the State was not obligated to provide any discovery to Respondent until the information was filed. Pura v. State, 789 So.2d 436 (Fla. 5th DCA 2001). The State filed the information on August 19, 1999, along with responses to Respondent's earlier-filed demand. At the hearing on Respondent's notice of expiration, held on August 26, 1999, Respondent indicated that he could not be prepared for trial within the recapture period. The next day, August 27, Appellant filed a motion for continuance. At that point it had been eight days since the information was filed. At that time, the State had committed absolutely no discovery violation, as the discovery rule allows 15 days to serve the defendant with discovery responses. Fla. R. Crim. P. 3.220(b)(1). Even if Respondent wished to quibble with the sufficiency of the response, Respondent cannot point to a single provision of the discovery rules that the State had violated as of August 27, 1999, the day he moved to continue the trial. Respondent's request for continuance was not necessitated by State discovery violations, and any suggestion to the contrary is false.

Even if Respondent could somehow demonstrate a discovery violation, he failed to demonstrate that such violation was material and prejudiced him in preparing his case. The State asserted that it was willing to try Respondent with only one witness if necessary, and could provide the witness for deposition on short notice (R 87). In short, Respondent's request for a continuance had nothing to do with any alleged State discovery violation. As the record shows no State discovery violation or other State misconduct, Respondent's continuance should have constituted a waiver of rights under Rule 3.191(a). The trial court and district court below erred in ruling otherwise.

The Fourth District's decision in Banks v. State, 691 So.2d 490 (Fla. 4th DCA)(*en banc*), rev. denied 699 So.2d 1371 (Fla. 1997), is instructive regarding each of these matters. In Banks, the State charged the defendant on April 24. Defendant filed a not-guilty plea and a demand for reciprocal on May 4. The trial was set for May 26. At calendar call on May 22, defense counsel indicated that he was not ready for trial and requested a continuance because he had not received the full discovery from the state until May 20. Banks at 491.

The defendant in Banks requested that any continuance be "charged to" the State, which the trial court denied. The court granted the continuance. The trial was subsequently continued again and trial commenced in November, 207 days after the

arrest, after the trial court denied defendant's motion for discharge pursuant to Rule 3.191. Id.

The Banks court began its analysis by stating the general principle:

> As a general rule, a defense request for continuance, absent state misconduct, inexcusable delay in providing discovery, or other violation of defense discovery rights, waives the 175 day "speedy trial" time and the defendant's right to discharge pursuant to criminal procedure rule 3.191(a).

Id. at 491-492 (citations omitted).

The court noted that the State committed no discovery violation, nor did the record show any misconduct or intentional delay by the State in furnishing discovery, nor any contention that the State was seeking some tactical advantage by the time taken in obtaining and furnishing the discovery material. Defendant simply argued that he was not prepared and did not have sufficient time to prepare for trial. Id.

The Banks court then rejected the notion that "charging" the continuance to the defendant would unreasonably force him to choose between two constitutional rights:

> The speedy trial right at issue here is not one of constitutional dimension and clearly may be waived. Fonte; Fraser. Nor is the defendant's lack of fault, or even possible defense prejudice, a determining factor in deciding whether speedy trial was waived by the defense being unavailable for trial. See State ex rel. Butler v. Cullen, 253 So.2d 861 (Fla. 1971); Fonte; Fraser; Blackstock. In any event, **Appellant is not prejudiced, as the defense at all times had available the 50 day speedy trial by demand remedy provided under rule 3.191, as well**

as speedy trial principles available under the state and U.S. constitutions.

Banks at 492.

The Banks court concluded that the state did not violate discovery requirements, nor engage in any bad faith. Accordingly, the defendant's continuance request constituted a waiver of speedy-trial rights under Rule 3.191(a), and he was not entitled to discharge after the speedy-trial period had run.

Banks amply demonstrates why the district court decision in this case is incorrect. A defendant who is "forced" to request a continuance due to inadequate preparation time does **not** waive his constitutional right to a speedy trial, which is different from the right derived by Rule 3.191. See Barker v. Wingo, 407 U.S. 514 (1972). In fact, the defendant has not even waived all of his rights under the rule: a defendant who waives his rights under Rule 3.191(a) may still demand a speedy trial within 50 days in accordance with Rule 3.191(b).

In short, the notion that a defendant who moves a continuance due to lack of preparation has forfeited a constitutional right in exchange for another is false. Respondent here, like the defendant in Banks, still retained his constitutional right to a speedy trial, as well as his right to demand a speedy trial under Rule 3.191(a). A criminal defendant is not guaranteed any particular amount of time to prepare a case without waiving some portions of the speedy-trial-rule rights. Unless the defendant can show that delays are due to material, prejudicial discovery violations or other state

misconduct, he or she may be required to give up some portion of his rights under the rule if he or she does not believe that an adequate defense can be prepared before trial. Numerous cases in this State have correctly made this point of law, and the district court below erred in relying on old, incorrect cases merely because they were decided in its district. The State respectfully requests this Court to resolve the conflict between this case and the numerous cases from other districts in the State's favor.

b. The correct rule of law stated above applies with even greater force today, due to major amendments to the speedy-trial rule since the 1970s have fundamentally altered the speedy trial rule procedures

The rule of law enunciated above applies with even greater force to the case at bar, due to the addition of the "period of recapture" to the speedy-trial rule and the particular facts of this case. A short historical review of the rule will place this issue in perspective.

Prior to 1984, under Rule 3.191, criminal defendants had an explicit right to be tried within a certain number of days (180 days for a felony), and "if not brought to trial within such time shall upon motion timely filed with the court having jurisdiction and served upon the prosecuting attorney be forever discharged from the crime." Rule 3.191(a)(1) (1983). Accordingly, prior to 1984, a defendant could truthfully assert that he or she had a "right" to be tried within a certain number of days from the date of arrest.

This right was significantly altered in 1984 when this Court added the recapture provision to the speedy-trial rule. The Florida Bar Re: Amendment to Rules-Criminal Procedure, 462 So.2d 386 (Fla. 1984). Pursuant to the 1984 amendment, a defendant could move for discharge when the basic speedy-trial period (now 175 days for felony charges) expired, but could not be discharged unless the State failed to try him within the 15-day recapture period.

This alteration was further clarified in 1992, when the speedy-trial rule was again amended to prohibit a defendant from even filing a motion for discharge until after he or she had filed a notice of expiration of the speedy-trial period and had not been tried within the recapture period. In re Amendments to Florida Rules of Criminal Procedure, 606 So.2d 227 (Fla. 1992).

The significance of the change in a defendant's right to a speedy-trial since 1984 cannot be overstated. Under the rule as it has read since at least 1992, a person charged with a felony **no longer has a free-standing right to a trial within a certain number of days after arrest**. The only right that a defendant charged with a felony possesses under the current, basic speedy-trial rule is to require the State to try him or her within 15 days, in the event that 175 days has passed since arrest. The speedy-trial rule is no longer self-executing: until a defendant takes the affirmative step of filing a notice of expiration, the State has no obligation under the rule to try the defendant within any particular time. State v. Gibson, 783 So.2d 1155,

1158 (Fla. 5th DCA 2001)("The provisions of rule 3.191 make it evident that the rule is not self executing: it requires the defendant to take certain steps to trigger application of rule 3.191(p)(3) which will either ensure a speedy trial or a discharge from the alleged crime); State v. Robinson, 744 So.2d 1151, 1153 (Fla. 1st DCA 1999):

> Florida Rule of Criminal Procedure 3.191 (the speedy trial rule) is not self-executing. The time limits set out in that rule are triggered either by a demand for speedy trial as contemplated by rule 3.191(b), or by a notice that the prescribed time periods have expired as contemplated by rule 3.191(p)(2).

Under the current rule, if the State fails to try a felony within 175 days of arrest, the defendant becomes entitled **not** to a discharge, or even to move for a discharge, but only to require the State to try him or her within 15 days of filing a notice that time has expired. Fla. R. Crim. P. 3.191(a) & (p) (2000). As long as the information is filed within the speedy trial time,[4] the **only** right a defendant has under the current rule, when the State does not try him within 175 days of arrest, is to **demand** a trial within fifteen days of such demand.

Respondent availed himself of his right under the rule by filing a notice of expiration immediately upon receiving the information, five days after 175 days had passed since arrest.

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[4]If the State fails to file the information until after the basic, 175-day period, the State is not entitled to the recapture period and the defendant is entitled to immediate discharge. Genden v. Fuller, 648 So.2d 1183 (Fla. 1994).

It is essential to recognize that **at that time, the case was not scheduled for trial.** By filing the notice, Respondent was invoking his right under Rule 3.191(p) to be tried within 15 days. The State responded by asserting that it was ready for trial within 15 days, and accordingly, the trial court scheduled the trial for a date within the recapture window. Even though this was exactly the remedy to which Respondent was entitled, he balked and refused to go to trial during that time, claiming that he was unprepared. Instead, Respondent asked for a continuance, and then blamed the State for necessitating the continuance by filing the information so "late." Respondent's actions raise two questions: first, if Respondent was not prepared to go to trial within 15 days, why did he invoke his right to require a trial within 15 days? And second, if the trial was scheduled **solely at his instance** (by filing the notice of expiration), but he nonetheless moved to continue the trial because he was unprepared, how can he claim that the State's actions forced him to request a continuance?

The answer to the first question cannot be, "because he had a right under the rule to a trial within 175 days, plus 15 days for recapture." Again, Respondent had no free-standing right under the rule to be tried within any number of days. His only right, if the 175-period had expired, was to demand trial within 15 days of such demand. The exercise of this right must require that the movant himself will be prepared for trial within 15

days. Any other result would allow unscrupulous abuse of the speedy-trial rule.

In fact, the answer to these questions is obvious: Respondent was not seeking a speedy trial, which the State was willing to give him; rather, he was seeking a speedy discharge. See State v. Thomas, 659 So.2d 1322, 1324 (Fla. 3d DCA 1995)(Cope, J., concurring)("The purpose of the speedy trial rule is to assure a speedy trial, not a speedy discharge"). While the State may have filed the information at the outside limit of the time permitted by the speedy-trial rule, it was still within the proper time. The State did not seek to set the case for trial immediately after the it filed the information; the case was set for trial only after Respondent invoked his right to demand trial within 15 days. Respondent was not compelled to take this action; Respondent could have taken the time to prepare his case to his satisfaction, and then could have filed his notice of expiration of the speedy-trial period to demand trial within 15 days. Fla. R. Crim. P. 3.191(p)(2) (1999)("The defendant may, **at any time after the expiration of the prescribed time period**, file a notice of expiration of speedy trial time").[5] The rule does not require, or even

[5]The language of this subdivision has been altered since 1999, when Respondent here filed his notice of expiration, to read: "At any time after the expiration of the prescribed time period, the defendant may file a separate pleading entitled 'Notice of Expiration of Speedy Trial Time,' and serve a copy on the prosecuting authority. This amendment does not alter the legal effect of a notice of expiration.

contemplate, a defendant to dash off a notice of expiration immediately upon discovering that the time period set forth in Rule 3.191(a) has expired (as Respondent did in this case). Filing such a notice, knowing that a trial will be scheduled as a direct result of the notice, but without being prepared for such a trial, makes it appear that Respondent never had any intention of receiving the speedy trial that he was offered.

The trial court accepted Respondent's contention that he was forced "to choose between the right to a speedy trial and the right to be prepared to proceed with a defense" (R 105). As stated above, this choice was illusory. However, this "choice" is even more fallacious when the recapture period is taken into account. Again, Respondent's argument is based in part on the incorrect notion that a defendant has an absolute right to be tried within 175 days of arrest, plus 15 days for recapture. Respondent had no such right: again, he had only the right to demand trial within 15 days if the State did not try him with 175 days of arrest.

Thus, with the advent of the recapture period, cases like Wright and Mulryan are not only inconsistent with cases out of other districts, but they are based on a premise that is no longer true. In 1975, if a case had not been scheduled for trial before the 180-day deadline, the defendant's remedy was discharge. Today, if a case had not been scheduled for trial

before the 175-day deadline, the remedy is to affirmatively demand a trial within 15 days. Since the trial has been scheduled at the instance of the defendant, the State and the court have a reasonable expectation that the request is made in good faith and that the defendant is ready to proceed to trial in 15 days.

In contrast, in Wright and the other old cases, the trial was not scheduled solely at the demand of the defendant. As such, if the State had committed discovery violations or engaged in other misconduct that caused the defendant to continue the case, the courts remedied this prejudice by refusing to apply the rule that a defense continuance waived rights under the speedy trial rule. Again, this is not the case today. Appellee's rights, as they are embodied in the current rule, are not violated solely because the State files the information on the last day permissible, because his only right is to demand trial within fifteen days from the demand. If this right is invoked, it should be expected that it is done in good faith that the movant is prepared for trial during that time.

The simple fact ignored by the trial court is that Respondent requested a continuance not because the State delay forced him to be unprepared for trial; but because he himself had demanded a trial in 15 days (which the State was willing to conduct), even though he was unprepared for it. The trial court's finding that Respondent filed a "reluctant request for a continuance" that "was the only option available under the

strict requirements of the rule" (R 104), completely overlooks the fact that no trial was scheduled until Respondent himself had demanded that it be scheduled.

In summary, the trial court erred in finding that Respondent filed a "reluctant request for a continuance" that "was the only option available under the strict requirements of the rule." This request for continuance would have been wholly unnecessary if Respondent had not filed his notice of expiration at the first instance that it was available. The court further erred in relying on old cases that construed superseded law in finding that the filing of the information on the 175th day after arrest improperly forced Respondent to choose between "coequal rights." For these reasons, the trial court erred in discharging Respondent, and the district court erred in affirming the discharge. This Court should reverse and remand for trial.

ISSUE II

DID THE TRIAL COURT ERR IN RULING THAT, AFTER A SUCCESSFUL STATE APPEAL, IT COULD STILL DECIDE WHETHER THE STATE HAD FAILED TO TRY RESPONDENT WITHIN THE RECAPTURE PERIOD OF RULE 3.191(P), WHEN THE STATE ARGUED THAT THE RECAPTURE PERIOD NO LONGER APPLIED AFTER AN APPEAL AND THAT 3.191(M) PROVIDED THE CORRECT POST-APPEAL SPEEDY-TRIAL PERIOD?

STANDARD OF REVIEW

Pure questions of law are reviewed *de novo*. Philip J. Padovano, Florida Appellate Practice §9.4, at 147 (2d ed. 1997); Rittman v. Allstate Insurance Company, 727 So. 2d 391 (Fla. 1st DCA 1999).

MERITS

Even if the State had improperly failed to try Respondent during the recapture period because the Respondent's continuance was properly "charged to the State," the State alternatively asserts that the trial court did not have the authority to discharge Respondent following the appeal in Naveira I, as the basic speedy-trial period set forth in Rule 3.191(a) is extinguished when the case is remanded to the trial court following an appeal, and is replaced with a completely different speedy-trial provision set forth in Rule 3.191(m).

Prior to the first appeal in this matter (Naveira I), the court concluded that the information was filed on the 176th day following Respondent's arrest, and that this finding entitled him to discharge under Rule 3.191. As the trial court concluded that this finding was dispositive, it did not address any other grounds for discharge raised by Respondent. Naveira I at 1256.

The State appealed this ruling and the DCA reversed, concluding that the trial court had inaccurately calculated the number of days since arrest. Id. The DCA explicitly refused to address any other grounds supporting the discharge order, as those grounds were not argued on appeal:

> The court below as a matter of law incorrectly included the day of arrest in the calculation of time for purposes of the speedy-trial rule. We hence reverse and remand for consistent proceedings. In so doing, we do not address whether there may be other grounds for discharging Naveira. Although this collateral issue was briefly addressed below, the trial judge declined to rule after noting that her ruling with respect to calculation of the speedy-trial time was dispositive of the case. Moreover, the collateral issue was not addressed by either Naveira or the State on appeal.

Id.

On remand, the State argued that Rule 3.191(m) permitted the State to try Respondent within 90 days following the Naveira I mandate, notwithstanding the speedy-trial status of the case prior to the first appeal. Rule 3.191(m) reads:

> **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 a 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).

Accordingly, the State argued that the trial court could not consider Respondent's other ground for discharge (i.e., that the State had not tried him within the recapture period under Rule 3.191(p)), because Rule 3.191(m) gives the State 90 days to try a defendant following an appeal, regardless of the speedy-trial status of the case prior to the appeal. The trial court rejected this argument, concluding that Naveira I authorized it to reconsider the recapture argument that was not addressed in the first appeal, and to discharge Respondent if it found that the State had improperly failed to try him within the recapture period, irrespective of the requirements of Rule 3.191(m) (R 101, 103, 124). The trial court then ordered another discharge on this other ground (R 101-109).

The State again appealed, arguing in part that Rule 3.191(m) controlled all post-appeal speedy-trial matters, regardless of the speedy-trial status of the case prior to the appeal. The DCA rejected this argument as follows:

> We are satisfied that the panel deciding the first appeal intended to permit the alternative ground for discharge to be considered on remand because the trial court had not previously addressed it. Therefore, appellee did not waive his right to raise that issue on remand, and the 90-day extension afforded by rule 3.191(m) would not come into play unless the trial court denied the motion for discharge.

Naveira II at 767. This ruling directly and expressly conflicts with this Court's decision in State v. Rohm, 645 So. 2d 968 (Fla. 1994).

This case is materially identical to Rohm. In Rohm, the State failed to try the defendant within the speedy-trial period. State v. Rohm, 596 So.2d 1271 (Fla. 4th DCA 1992)(earlier proceeding). The defendant moved for discharge, and the State argued that it was entitled to the 15-day recapture period. The trial court disagreed and discharged defendant. Rohm, 596 So.2d at 1271. The State appealed, and the district court reversed, holding that the State was entitled to try the defendant within the 15-day recapture period. Id. On remand, the trial court granted Rohm's motion for discharge when the State failed to bring him to trial within 15 days following the mandate. Rohm, 645 So.2d at 969. The trial court held the state was only entitled to the 15-day window period it had earlier been denied, and not the 90-day period provided in Rule 3.191(m). Id. The district court affirmed. Id.

This Court reversed the district court, ruling:

> We hold that the 90-day speedy trial period provided in Florida Rule of Criminal Procedure 3.191(m) applies **whenever** a trial has been delayed by appeal.

Id. at 968. Rohm clearly holds that following **any** appeal, the State has 90 days to try the defendant:

> Rule 3.191(m) sets forth a **uniform** time period within which a person must be brought to trial when that person's trial has been delayed by certain events, including an appeal.

Id. at 969.

The supreme court recognized that the effect of Rule 3.191(m) is to extend the speedy-trial period in some cases, but this did not alter this interpretation of the rule:

> We acknowledge that in many instances the rule has the effect of enlarging the overall speedy trial time already extended by an appeal. Both before and after the 1980 amendment [to the current Rule 3.191(m)], **there have been appeals taken when there was little of the basic 180-day period remaining, not unlike the 15-day period in dispute here.** No doubt that will continue to occur. **However, the policy choice was made to substitute an express and uniform time period, albeit usually a longer one, rather than attempting to compute an appropriate time period for trial after appeal in each case.**

Thus, Rohm unambiguously holds that Rule 3.191(m) expresses a policy that the State will be given 90 days following an appeal to try a defendant whose trial has been delayed by such appeal, no matter what the speedy-trial status of the case was prior to the appeal.

In spite of Rohm's clear holding that Rule 3.191(m) set a uniform speedy-trial period applicable to **all** post-appeal matters, the DCA below expressly provides two exceptions not authorized by Rohm. First, the DCA indicated that Rule 3.191(m) did not apply because "the panel deciding the first appeal intended to permit the alternative ground for discharge to be considered on remand because the trial court had not previously addressed it." Naveira II at 767. If the panel deciding the first appeal had so ruled that this situation constitutes an

exception to the clear language of Rule 3.191(m), then such ruling directly and expressly conflicts with this Court's ruling in State v. Rohm.

The fact that the trial court had not addressed the recapture issue in its first order discharging Respondent did not entitle it to address the issue on remand following Naveira I. The issue before this Court in Naveira I was whether the trial court erred in granting Appellee's motion for discharge. The court was not required to provide any written reasons at all for its first discharge of Respondent; the court could have simply ruled that Respondent was discharged pursuant to Rule 3.191. This is why only the propriety of the ruling itself is reviewed, and the **reasons** for the denial are reviewed only to the extent argued by the parties. See Caso v. State, 524 So. 2d 422, 424 (Fla. 1988), cert. denied, 488 U.S. 870 (1988)(decision will be affirmed even where based on erroneous reasoning); Grant v. State, 474 So.2d 259, 260 (Fla. 1st DCA 1985)(trial court may be "right for the wrong reason"). Moreover, because the trial court's decision is presumed correct, to support that decision,"the appellee can present **any argument supported by the record** even if not expressly asserted in the lower court." Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999).

The State is not arguing a general principle that an appellee's failure to make an argument on appeal waives that party's ability to properly make that argument in subsequent

proceedings. However, in this particular instance, the failure to raise such grounds does in fact have that effect. This result is a product of the speedy-trial rule itself. After an appeal, the basic speedy-trial period (175 days, plus recapture period) is extinguished and is replaced by a new, different 90-day period. Fla. R. Crim. P. 3.191(m); State v. Rohm. Accordingly, any reasons to support an order discharging him because the State failed to comply with the basic speedy-trial period are extinguished following an appeal, because that basic speedy-trial period is mooted after an appeal. This is the clear holding of Rohm, supra. The State had 90 days from this Court's mandate in Naveira I to try Appellee, regardless of the speedy-trial status before the appeal was taken. Accordingly, any issue regarding the earlier, basic speedy-trial period is moot.

Thus, if Appellee had any alternate grounds to support the correctness of trial court's ruling in Naveira I, he should have raised them there. If Appellee believed that the "collateral issue" discussed in Naveira I supported the correctness of the discharge order, he should have argued that, even if the trial court was incorrect in finding that the information was not timely filed, there was still an alternate ground to support the correctness of the order.

The State asserts that this was what the Naveira I meant when it stated that it would not address "whether there may be other grounds for discharging Naveira." This was not an

invitation to the trial court to reconsider these other grounds; rather, it was an observation that Respondent made no attempt to support the correctness of the trial court's ruling with other grounds that may have been available to him. The practical result of Respondent's failure to raise these grounds at the first appellate hearing is that he has waived further consideration of them.

Second, the DCA ruled that "the 90-day extension afforded by rule 3.191(m) would not come into play unless the trial court denied the motion for discharge." Again, this ruling directly and expressly conflicts with State v. Rohm. To repeat, Rohm holds that the provisions of Rule 3.191(m) apply to **all** post-appeal speedy-trial matters, and does not condition the rule's applicability on whether a discharge motion after the appeal is granted or denied. The decision below carves out an explicit exception to Rule 3.191(m) that is directly contrary to this Court's holding in Rohm.

Even if this ruling were not in direct conflict with Rohm, it would be incorrect. The DCA ruled that if the trial court had denied Respondent's renewed motion for discharge upon remand from Naveira I, then the State would have had 90 days to try Respondent following the denial, pursuant to Rule 3.191(m). In fact, if the trial court had denied the motion for discharge upon remand, it could only have done so because it found that Respondent's continuance waived his Rule 3.191 rights, and should not have been "charged to the State." If this were the

case, the waiver of Rule 3.191 rights would have included the right to be tried within 90 days following remand from an appellate court in accordance with Rule 3.191(m). See Koshel v. State, 689 So.2d 1229, 1230 (Fla. 5th DCA 1997):

> **A waiver of speedy trial waives all provisions of the speedy trial rule, including the 90-day provision of rule 3.191(m),** unless otherwise specified in the written waiver. Thus, Koshel's pre-trial waiver waived the 90-day period established in rule 3.191(m). See State v. Ryder, 449 So.2d 398 (Fla. 2d DCA), pet. for rev. denied, 456 So.2d 1182 (Fla. 1984)(holding that waiver of speedy trial applies throughout the trial phase of the proceedings, including a retrial after mistrial); State ex rel. Gibson v. Olliff, 452 So.2d 110 (Fla. 1st DCA 1984)(holding that once a defendant has waived his speedy trial right, the waiver operates to bar the assertion of the right to discharge under rule 3.191 even though the defendant was not brought to trial within 90 days following a mistrial). Accordingly, we hold that the trial court correctly denied Koshel's discharge motion.

If the court had denied Respondent's discharge motion, the state would have had no obligation to try him within 90 days pursuant to Rule 3.191(m), as that provision would have been waived by the continuance. In such a case, Respondent's only remaining right under the rule would have been to demand a speedy trial under Rule 3.191(b). Accordingly, the DCA's conclusion that "the 90-day extension afforded by rule 3.191(m) would not come into play unless the trial court denied the motion for discharge" not only carves out an exception to Rule 3.191(m) that conflicts with State v. Rohm, but constitutes a wholly incorrect application of the law.

The DCA erred in ruling that the 90-day post-appeal speedy-trial period of Rule 3.191(m) did not apply following remand from Naveira I. Such ruling improperly applied the speedy-trial rule, and in any event, directly conflicted with this Court's correct ruling in State v. Rohm. This Court should reverse and remand for trial.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 807 So.2d 766 should be disapproved, and the order discharging Respondent entered in the trial court should be reversed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Erik Courtney, Esq., 1507 N.W. 14th Street, Miami, Florida 33125, by MAIL on October 23, 2002.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JUAN NAVEIRA,

Respondent.

CASE NO. SC02-633

INDEX TO APPENDIX

A. Opinion or order to be reviewed
B. Chronology

Appendix A

Appendix B