IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
SID J. WHITE
MAY 6 1988
CLERK, SUPREME COURT
By ________ Deputy Clerk

HECTOR FUENTE	:	
	:	
Appellant	:	
vs.	:	Case No. 69,196
STATE OF FLORIDA		
	:	
Appellee	:	
	:	

SUPPLEMENTAL BRIEF OF APPELLANT

Simson Unterberger, Esquire
Suite 1602, One Mack Center
501 East Kennedy Boulevard
Tampa, Florida 33602
(813) 229-8548
Attorney for Appellant
Florida Bar Number 158800

TABLE OF CONTENTS

	Page:
STATEMENT OF THE CASE...............................	1
STATEMENT OF THE FACTS..............................	3
FIRST ARGUMENT (UPON ISSUE I).........................	11
SECOND ARGUMENT (UPON ISSUE II)......................	22
THIRD ARGUMENT (UPON ISSUE III)......................	40
CONCLUSION...	47

ISSUES

I. Whether Appellant was unable to stand trial for the 78 days from August 1 to October 18, 1985.

11. Whether Appellant's physical or medical condition rendered him unable to stand trial from August 1 to October 18, 1985.

111. Whether the failure of the warden of the penal institution in which Appellant was incarcerated at the time he requested final disposition to comply with Chapter 941.45(3) Florida Statutes nullifies the request.

TABLE OF CITATIONS

CASES PAGE

Nash v. Jeffes. 739 F.2d 879 (3d Cir 1984) 18. 19

State ex rel. Century v. Fitzpatrick, 327 So.2d 46 (Fla. 1st DCA 1976) 11

State v. Ivey. 410 So.2d 636 (Fla. 2d DCA 1982) 16. 17

State v. Minnick, 413 So.2d 168 (Fla. 2d DCA 1983) 14. 15. 34

State v. Roberts. 427 So.2d 787 (Fla. 2nd DCA 1983) 32

State v. Yawn. 320 So.2d 880 (Fla. 1st DCA 1975) 11

Stroebel v. Anderson. 587 F.2d 830 (6th Cir. 1978) 30. 37

United States of America ex. rel., Esola v. Grooms. 520 F.2d 830 (3d Cir 1975) 36. 37

United States of America v. Ford. 550 F.2d 732 (2nd Cir. 1977) 37

United States of America v. Hutchins. 489 F.Supp 701 (USDC, N.D., Ind. 1980) 17, 37, 43, 44

Young v. Mabry, 47i F.Supp 553 (USDC ED. Ark. 1978) 36

United States v. Mason. 372 F. Supp 651 (USDC. ND Ohio. 1973) 15

STATUTES

Chapter 941.45 Florida Statutes 5. 37, 38, 48. 49

Chapter 941.45 (1) Florida Statutes 18

Chapter 941.45 (2)(a) Florida Statutes 13

Chapter 941.45(2)(b) Florida Statutes 13

Chapter 941.45(2)(c) Florida Statutes 15

Chapter 941.45(3) Florida Statutes 2, 12, 13, 14, 15, 21, 22, 36. 43. 47. 48, 49

Chapter 941.45(3)(a) Florida Statutes 2, 40, 45

Chapter 941.45 (3)(a)(b)(c) Florida Statutes 40

Chapter 941.45(3)(a)(b)(d) Florida Statutes 42

Chapter 941.45(3)(a)(d) Florida Statutes 49

Chapter 941.45(5) Florida Statutes 14

Chapter 941.45(6)(a) Florida Statutes 2 12, 13, 6

Chapter 941.45(9) Florida Statutes 38

IN THE SUPREME COURT OF THE STATE OF FLORIDA

HECTOR FUENTE

Appellant

VS.

Case No. 69,196

STATE OF FLORIDA

Appellee

STATEMENT OF THE CASE

Appellant was convicted of first degree murder (1898, 2165) and sentenced to death (2167, 2170-2176). The conviction and sentence were directly appealed to The Florida Supreme Court. One of the issues raised by the appeal was whether Appellant was entitled to dismissal with prejudice of the Indictment (1900-1901) charging said first degree murder by reason of Appellee's failure to try Appellant within the 180 day period referred to in the Interstate Agreement on Detainers (IADA), specifically Chapter 941.45(3) Florida Statutes.

Oral argument of the appeal occurred on June 30, 1987. Thereafter, by its Order entered on December 3, 1987, The Florida Supreme Court relinquished jurisdiction of the cause to the Circuit Court for further proceedings upon said issue and for the Circuit Court to make certain findings of fact, to-wit:

a. When did Appellee receive Appellant's request for final disposition, referred to in Chapter 941.45(3)(a) Florida Statutes of Appellant?

b. Whether, if said 180 day period was commenced by Appellant's request for final disposition, it was tolled as per Chapter 941.45(6)(a) Florida Statutes, and if so, for how long?

The further proceedings were conducted on February 29, 1988, and, as a result thereof, the Circuit Court entered an Order Finding Facts on April 7, 1988. Via its Order Finding Facts (2742-2745), the Circuit Court determined that:

a. Appellee received or was on notice of Appellant's request for final disposition on July 2, 1985.

b. The 180 day period referred to in Chapter 941.45(3) Florida Statutes commenced running on July 2, 1985.

c. Said 180 day period was tolled from August 1, 1985, to October 18, 1985, a period of 78 days.

STATEMENT OF THE FACTS

In view of the further proceedings conducted in the Circuit Court on February 29, 1988, and the factual findings contained in the Order Finding Facts entered as a result thereof, the relevant facts upon the issue of Appellant's entitlement to discharge upon and dismissal with prejudice of the Indictment (1900-1901) filed in this cause are as follows:

a. In November 1984, a fifteen year sentence of imprisonment was imposed upon Appellant on a federal criminal charge (2414).

b. On April 24, 1985, Appellant arrived at the Federal Correctional Institute, Memphis, Tennessee ("FCI") (2667).

c. At all times from April 24, 1985, to December 8, 1985, Appellant was a prisoner in the custody of the United States Department of Justice, Bureau of Prisons, by reason of and for the purpose of serving the fifteen year sentence imposed upon said federal criminal charge (2742).

d. On May 22, 1985, the Indictment (1900-1901) charging Appellant with first degree murder was filed in this cause (2742).

e. From May 22, 1985, to July 31, 1985, Appellant was a prisoner at FCI at which he was serving the fifteen year sentence upon said federal criminal charge (2742).

f. Within fourteen days of his arrival at FCI, Appellant was assigned to work as a teacher of English to Spanish speaking inmates at FCI and as librarian at FCI's library (2646).

g. From the time he received said assignments until July 31, 1985, Appellant worked as a teacher and librarian at FCI (2646, 2647).

8

h. From April 24, 1985, to July 31, 1985, Appellant engaged in weight lifting at FCI's workout facilities (2647).

i. From April 24, 1985, to July 31,1985, Appellant, at FCI, engaged in activities of daily living which included cleaning his room daily, cleaning his bathroom facilities daily, making his bed daily, periodically cleaning windows, vents and walls and periodically cleaning his clothes (2647).

j. Between May 22, 1985, and June 17, 1985, Appellee filed a detainer against Appellant for the first degree murder referred to in the Indictment (1900-1901) with the authorities in whose custody he was by reason of serving the fifteen year sentence upon said federal criminal charges (2742-2743).

k. On June 17, 1985, pursuant to the IADA, Chapter 941.45 et seq. Florida Statutes, Appellant was notified by FCI's warden of the filing of said detainer (2414).

1. On July 2, 1985, pursuant to the IADA, Appellant requested final disposition of and upon the Indictment (1900-1901). (2743, 2744).

m. Appellee received or was on notice of Appellant's request for final disposition on July 2, 1985. (2744).

n. On July 25, 1985, unbeknownst to Appellant **(2415)**, it was, as per a Transfer Order (2426, 2472), ordered that he be transferred from FCI to the United States Penitentiary, Lompoc, California, ("USP"). (2414, 2415).

o. On August 1, 1985, pursuant to the Transfer Order (2426), Appellant commenced travel from FCI to USP

(2743).

p. On August 1, 1985, pursuant to said Transfer Order (2426, 2472), Appellant was removed from FCI, placed upon a bus and driven approximately six hours to a federal penal facility in Texarkana, Texas, arriving thereat later in the day on August 1, 1985, (2415).

q. Appellant remained at said Federal Penal Facility, Texarkana, Texas, from August 1, 1985, to August 5, 1985, and while there was medically screened and examined and was found to have no acute problems as per a report of medical history, and was found not to require any medical restrictions as per Temporary Medical Restrictions/Special Permit Sheet (2414-2416, 2427-2429).

r. On August 5, 1985, Appellant was removed from the federal penal facility, Texarkana, Texas, placed upon a bus and driven approximately eight hours to a federal penal facility in El Reno, Oklahoma, arriving thereat later in the day on August 5, 1985 (2414, 2416).

s. Appellant remained at said federal penal facility, El Reno, Oklahoma, until August 20, 1985, (24-14, 24-16).

t. While at said Federal Penal Facility, El Reno, Oklahoma:

(1) Appellant's status was "hold-over".

(2) Appellant was medically screened and approved for temporary work assignments as per Intake Screening (Medical).

(3) Appellant was kept in a cell known as the "Hole" which is usually utilized as a punishment cell, though Defendant was being held therein as a hold-over for further transfer and not because of any punishment imposed upon him.

(4) The temperatures inside said hole, a six foot by nine foot cell containing one small window, frequently exceeded one hundred degrees Fahrenheit (2414, 2416).

(5) Appellant requested to see a doctor on August 7, 1985, as per an Inmate Request to Staff Member and received the response handwritten thereon two days later. (2414, 2416, 2431).

(6) Appellant requested to see a doctor on August 10, 1985, as per an Inmate Request to Staff Member and received the response typewritten thereon two days later.

(2414, 2416, 2433).

u. On August 20, 1985, Defendant was removed from the federal penal facility, El Reno, Oklahoma, and placed upon a Boeing 727 jet aircraft and flown to USP, arriving thereat later in the day on August 20, 1985. (2414, 2417).

v. At 5:30 p.m. on August 20, 1985, at USP, Appellant underwent a medical intake screening conducted by a physician's assistant as a result of which Appellant was assigned to the general population of USP and not approved for temporary work assignments pending medical evaluation, all as per an Intake Screening/Medical (2414, 2417, 2434).

w. From August 20, 1985, to October 1, 1985, Appellant was an inmate at USP. (2414, 2417, 2743).

x. On October 1, 1985, Appellant was removed from USP, placed on a Boeing 727 jet aircraft and flown to a federal penal facility in Tuscon, Arizona, at which he arrived later in the day on October 1, 1985 (2414, 2418).

y. On October 2, 1985, Appellant was removed from the federal penal facility, Tuscon, Arizona, placed on a Boeing 727 jet aircraft and flown to a federal penal facility in Talladega, Alabama, arriving thereat later in the day on

October 2, 1985, (2414, 2418).

z. Appellant remained at said federal penal facility, Talladega, Alabama, until October 18, 1985. (2414, 2418).

aa. On October 18, 1985, Appellant was removed from said federal penal facility, Talladega, Alabama, placed on a bus and driven to FCI, arriving thereat later in the day on October 18, 1985, (2414, 2418).

bb. From October 18, 1985, until December 8, 1985, the date of his removal from FCI for return to the Hillsborough County, Florida, Jail to face charges contained in the Indictment (1900-1901), Appellant was an inmate at FCI. (2647, 2743).

cc. Within three days of October 18, 1985, Appellant was assigned to work as a teacher of English to Spanish speaking inmates at FCI and as librarian at FCI's library (2647).

dd. From the time he received said assignments until December 8, 1985, Appellant worked as a teacher and librarian at FCI (2647).

ee. From October 18, 1985, to December 8, 1985, Appellant engaged in weight lifting at FCI's workout facilities (2647).

ff. From October 18, 1985, to December 8, 1985, Appellant, at FCI, engaged in activities of daily living which included cleaning his room daily, cleaning his bathroom facilities daily, making his bed daily, periodically cleaning windows, vents and walls, and periodically cleaning his clothes (2647).

gg. On December 8, 1985, Appellant commenced travel from FCI to the Hillsborough County, Florida, Jail arriving at said jail on December 12, 1985 (2743).

To the extent that the foregoing listing of facts draws upon the Proffer upon Motion for Discharge (2414, 2440), and Amendment to Proffer upon Motion for Discharge (2646, 2648), such is done because of the Circuit Court's finding contained in its Order Finding Facts (2742-2745) by which it concluded that Appellant would have testified to the facts set forth in Paragraphs 1 through 8 and 11 through 32 of Proffer upon Motion for Discharge (2414, 2440) and Paragraphs 2 through 14 of Amendment to Proffer upon Motion for Discharge and thus admitted said facts into evidence (2743, 2744).

FIRST ARGUMENT

The Circuit Court found that Appellant duly made a request for final disposition as per Chapter 941.45(3) Florida Statutes, that Appellee received or was on notice of the request for final disposition on July 2, 1985, and that, accordingly, the 180 day period, Chapter 941.45(3) Florida Statutes, for bringing Appellant to trial upon the Indictment (1900-1901) commenced running on July 2, 1985, (2744). A simple counting of days discloses that the 180 day period expired on December 29, 1985.

The Record on Appeal in this case reveals that no trial of Appellant upon the Indictment (1900-1901) commenced on or before December 29, 1985. What the Record on Appeal does reveal with regard to trial is that at arraignment on December 18, 1985, trial was scheduled for February 3, 1986, (1897). The February 3, 1986, trial date was continued to March 17, 1986, as a result of the granting on January 24, 1986, of Appellant's Motion for Continuance Without Waiver of Speedy Trial (1975-1980) setting forth circumstances and problems like those discussed in State v. Yawn, 320 So.2d 880 (Fla. 1st DCA 1975) and State ex rel. Century v. Fitzpatrick, 327 So.2d 46 (Fla. 1st DCA 1976). In other words, the trial

scheduled for February **3, 1986,** was continued at Appellant's request but only upon the specific finding and with the understanding that the seeking of and granting of the request for continuance not constitute a waiver or relinquishment by Appellant of any "speedy trial" right he possessed by reason of any statute, law, constitutional provision, rule of criminal procedure or rule of court **(1560-1568).** Thereafter, on March **4, 1986,** Appellant filed his Motion for Discharge (2012, 2017) claiming entitlement to discharge/dismissal with prejudice upon and of the Indictment **(1900-1901)** for Appellee's failure to timely try him in compliance with Chapter **941.45(3)** Florida Statutes.

The upshot of the preceding is that Appellant remained untried for the **246** days which elapsed from July **2, 1985,** to March **4, 1986,** and had not compromised, vitiated, waived, or relinquished his right to be tried in accordance with Chapter **941.45(3)** Florida Statutes. Thus, on the issue of Appellant's entitlement to discharge/dismissal with prejudice, the question is whether or not the **180** day period, which commenced on July **2, 1985,** was tolled as per Chapter **941.45(6)(a)** Florida Statutes for the **78** days from August 1, **1985,** to October **18, 1985,** as found by the Circuit Court

(2744). Because the 180 day period could only be tolled for periods of time during which Appellant was "unable to stand trial", Chapter 941.45(6)(a) Florida Statutes, inquiry must now be made into the justification for the Circuit Court's conclusion that Appellant was "unable to stand trial" from August 1, 1985, to October 18, 1985.

Chapter 941.45(2)(a) Florida Statutes defines a "State" for the purposes of the IADA, Chapter 941.45 et seq. Florida Statutes, as including the United States of America (to-wit: the United States Department of Justice, Bureau of Prisons). Chapter 941.45(2)(b) Florida Statutes defines a "Sending State" as a state in which a prisoner is incarcerated at the time he initiates a request for final disposition, pursuant to Chapter 941.45(3) Florida States. Therefore, under the facts of Appellant's case, the United States of America was at all times material to the issue here under scrutiny, the Sending State and the period from August 1, 1985, to October 18, 1985, represents a time during which:

a. From August 1, 1985, to August 20, 1985, the Sending State was transporting Appellant from one of its penal institutions (FCI) to another of its penal institutions (USP) with stops along the way at various of its other penal

institutions (2415-2417, 2743).

b. From August 20, 1985, to October 1, 1985, Appellant was a prisoner at one of the Sending State's penal institutions, to-wit: **USP** (2417-2418, 2743).

c. From October 1, 1985, to October 18, 1985, the Sending State was transporting Appellant from its penal institution, **USP,** to another of its penal institutions, FCI, with stops along the way at various of its other penal institutions (2418, 2743).

What is there about the events described in a. through c. above which rendered Appellant unable to stand trial upon the Indictment (1900-1901)? The answer is nothing.

While certain cases have found a tolling of the time periods within which trial must occur pursuant to Chapter 941.45(3) and (5), Florida Statutes, when a prisoner has been moved between penal institutions and State(s), none are applicable to Appellant's case. In State v. Minnick, 413 So.2d 168 (Fla. 2d DCA 1983), the process pursuant to the IADA for bringing Minnick to trial upon untried charges pending against him in New Mexico and Florida was initiated while he was incarcerated by the Commonwealth of Virginia. Virginia sent Minnick to New Mexico for trial upon that

state's pending charges. Upon his Florida charges, Minnick sought dismissal with prejudice on the ground that Florida had not tried him within the 180 day period contained in Chapter 941.45(3) Florida Statutes. The dismissal with prejudice was denied on the theory that the 180 period was tolled while Minnick was in New Mexico on that state's charges. State v. Minnick, supra, represents a three state situation in which the Sending State sent the prisoner to one of two simultaneously existing Receiving States, Chapter 941.45(2)(c) Florida Statutes, thereby tolling the 180 day period for the Receiving State to which the prisoner was not sent for the length of time he was in the other Receiving State. When in New Mexico for trial, Minnick could also not be in Florida for trial, since he could not be in two states at the same time for the purpose of standing trial. United States v. Mason, 372 F. Supp. 651 (USDC, ND Ohio, 1973). Appellant's case does not involve three states. It only involves two states, to-wit: the United States of America (Sending State) and Florida (Receiving State). This significant factual distinction renders the opinion in State v. Minnick, supra, irrelevant to the issue and inquiry at hand.

In State v. Ivey, 410 So.2d 636 (Fla. 2d DCA 1982), Ivey was incarcerated in a federal penal facility in Miami, Florida, when he had untried charges pending in **Polk** County, Florida. Due to the filing of a detainer and initiation of the process pursuant to the IADA to have Ivey tried on the Polk County charges, Ivey was placed into the custody of the State of Florida. Before trial occurred on the **Polk** County charges, a federal court issued a Writ of Habeas Corpus Ad Testificandum pursuant to which Ivey was removed from the custody of the State of Florida for the purpose of appearing before a federal grand jury. After the grand jury appearance, though the Writ of Habeas Corpus directed that he be forthwith returned to the custody of the State of Florida, Ivey was incarcerated in the Miami federal penal facility. When Ivey requested dismissal with prejudice of the **Polk** County charges upon expiration of the time limits contained in the IADA for trying him thereon, the request was denied on the rationale that the time limit was tolled for the period, after the grand jury appearace, when Ivey was again incarcerated in the Miami federal penal facility. The obvious distinction between State v. Ivey, supra, and Appellant's case is that in the former the movement of the

prisoner was back and forth between the custody of the Sending and Receiving State. Not so in Appellant's case in which he was at all material times within the custody of the Sending State and was merely moved between two of its penal institutions. Thus, State v. Ivey, supra, provides no assistance to Appellee in dealing with the issue here being analyzed. Appellant would also venture to say that the opinion in State v. Ivey, supra, constitutes bad law due to its failure to take into account the fact that Ivey's "inability" to stand trial upon the Polk County charges was totally and completely unattributable to any act, condition or fault of his and was solely a consequence of the neglect, error or violation of judicial order of or by the Sending State. As noted in United States of America v. Hutchins, 489 F.Supp. 701 (USDC, N.D., Ind., 1980), a prisoner's rights under the IADA will not be obstructed by the oversight or design of the sending or receiving state. To further illuminate his position asserted herein, Appellant finds certain common situations to be demonstrative. For example, what if the movement of Appellant back and forth from FCI to USP had been for the purpose of temporarily relieving overcrowding at FCI? What if the movement had been

due to USP's temporary need for an inmate with a particular skill which Appellant happened to possess? In such circumstances, would the mere fact that Appellant had been moved between the Sending State's penal institution's justify a tolling of his statutory right to be tried upon Florida's Indictment **(1900-1901)** during the period of movement? Appellant doubts such a result since same would constitute an abrogation and disruption of the policy and purpose of the IADA to ''encourage the expeditious and orderly disposition" of a Receiving State's untried charges. Chapter 941.45(1) Florida Statutes. Support for this view is found in Nash v. Jeffes, **739** F.2d **879** (3d Cir **1984)** in which Nash, while on probation upon a New Jersey conviction, was arrested in Pennsylvania for crimes committed in that state. Eight days after the arrest, New Jersey lodged a detainer for probation violation with the Pennsylvania authorities. After his conviction of the Pennsylvania charges, Nash requested final disposition of the New Jersey probation violation. At the time the request was made, Nash was confined in a Pennsylvania penal facility in Dallas, Pennsylvania. When New Jersey authorities arrived at Dallas to take custody of Nash for the purpose of returning him to New Jersey for a

hearing upon his probation violation, they discovered that the Pennsylvania authorities had temporarily moved Nash from their penal facility at Dallas to their penal facility at Graterford, Pennsylvania. Rather than seeking Nash's custody from the Graterford facility, the New Jersey authorities decided to wait until the Pennsylvania authorities returned him to Dallas from Graterford before again attempting to secure custody of him. With regard to the delay due to the movement of Nash by the Pennsylvania authorities back and forth from Dallas to Graterford to Dallas, the court in Nash v. Jeffes, supra, noted as follows:

> "The fact that Nash's hearing was again delayed due to his transfer within the Pennsylvania correctional system, and that without this delay his probation violation proceeding would have fallen within the 180-day period, does not excuse New Jersey from the 180-day requirement. Had the New Jersey authorities acted in a timely manner in August (when Nash made his request for final disposition), Nash's transfer from the Dallas prison to Graterford would not have delayed the adjudication of the probation violation. Given their failure to do so, the burden of obtaining custody of Nash from Grateford fell on the shoulders of the state officials."

The clear implication of and the principle of law inherent in the aforequoted language is that a prisoner who has duly invoked his right to be tried within the time limits set forth in the IADA will not be deemed unable to stand trial,

for the purpose of tolling the time limit, merely because he was incarcerated in various of the Sending State's penal institutions subsequent to the invocation of the right. The Circuit Court, via its Order Finding Facts (2742-2745), tolled the 180 period duly initiated by Appellant for the 78 days from August 1, 1985, to October 18, 1985, and merely because after the initiation, the Sending State transported Appellant back and forth to and from and incarcerated him at a penal institution different from the one in which it had him incarcerated when he initiated the 180 day period. As has now been demonstrated, this act by the Sending State, the United States of America, did not render Appellant unable to stand trial in Florida upon the Indictment (1900-1901). After all, the simple questions are:

a. Why was Appellant not sent back to Florida before he embarked unbeknownst to Appellant (2415) and, at the Sending State's instance, on the trip from FCI to USP?

b. Why was Appellant not sent back to Florida during the trip from FCI to USP?

c. Why was Appellant not sent back to Florida during the period he was an inmate at USP?

d. Why was Appellant not sent back to Florida

during the trip from USP to FCI?

No answers to these questions are available, because, under the facts of Appellant's case as they now exist, there is no answer or explanation, except perhaps for bureaucratic laxity on the part of the Sending State, bureaucratic lethargy by the Receiving State and a rather blithe inattentiveness to and concern for the very significant rights invoked by and granted to Appellant pursuant to Chapter **941.455(3)** Florida Statutes. Without the answer, there is no justification in law or fact for the trial court's finding that the 180 day period was tolled for the **78** days mentioned in its Order Finding Facts **(2742-2745).** Succinctly put, there is no evidence that Appellant was unable to stand trial during the **78** day period.

SECOND ARGUMENT

In his Initial and Reply Briefs filed in this case, Appellant extensively concentrated on establishing that, except for the time from September 12, 1985, to September 30, 1985, during which he was an inpatient at USP's infirmary for treatment of and recovery from an ailment which arose well after his arrival at USP (2453, 2513, 2525), his physical and medical condition did not render him unable to stand trial and therefore did not otherwise toll the 180 day period contained in Chapter 941.45(3) Florida Statutes. In view of the Circuit Court's conclusion that the 180 day period was tolled for the entire 78 days Appellant spent traveling between FCI and USP and in custody at USP, it would seem that, for the purposes of this appeal, Appellant's physical and medical condition no longer bears upon the question of the correctness of the Circuit Court's finding with regard to tolling and the Circuit Court so noted (2738). However, because Appellant anticipates that Appellee will attempt to tie the 78 day tolling to his physical and medical condition and because the Order of December 3, 1987, of The Florida Supreme Court provides no opportunity to Appellant to reply

to Appellee's supplemental brief, Appellant will now discuss the effect of his physical and medical condition upon the 78 day tolling found by the Circuit Court in its Order Finding Facts.

In its Answer Brief, Appellee suggested that Appellant was sent from FCI to USP for medical treatment and that, by reason thereof, federal penal authorities declined to return Appellant to Florida during the **78** days, thereby rendering him unable to stand trial. This suggestion arose from a dialogue which occurred between the Circuit Court and Appellee on March 7, **1986,** during initial proceedings upon Appellant's Motion for Discharge (2012-2017) which dialogue is as follows:

> "MR. ATKINSON: If it please the Court, Your Honor, Mr. Fuente did make the request as indicated by counsel and, in fact, the documents necessary to return him to the State of Florida were prepared and signed and transmitted to the Governor's Office as required by law and they include documents signed by Your Honor, so that he could properly be returned to the State of Florida.
>
> By August **1985,** well within the time period allowed, the State of Florida's representative's were prepared to take custody of Mr. Fuente and bring him back.
>
> Unfortunately, the federal government would not release him because his physical condition was

such that in their opinion, and in the opinion of the doctors where he was housed in California, where they moved him from the Federal Correctional Institute in Tennessee, he could not and would not be released from custody until he was physically capable of safely traveling.

THE COURT: What was the general nature of the problem supposedly?

MR. ATKINSON: As it was advised to us, he had suffered an attack and was suffering from internal bleeding which required them to transfer him.

THE COURT: Some sort of prison fight or something?

MR. ATKINSON: No, not that I know of. I do not have his medical records.

THE COURT: It doesn't matter. Go ahead.

MR. ATKINSON: They felt it was serious enough to transfer him from the Federal Correctional Institute in Memphis which has modest clinical facilities to a hospital in Lompoc, California, where they have full critical care for Mr. Fuente.

As soon as we were advised by the Federal Government that Mr. Fuente was, in fact, available for transfer, we attempted once again to have him transferred to the State of Florida, and it is for that reason that the third document was prepared by the prison authorities, because they went to him and got their temporary custody documents prepared." (1605-1606)

The factual statements made by Appellee in the dialogue are not evidence in this case because they were not made under oath, are replete with hearsay and were only made in

response to the Circuit Court's following statement.

> "THE COURT: Well, nothing is being accepted in here by either party until such time as I get some general outline of what the problems are; and once I get that general outline, then we will see where we stand, which looks like, to me, there is going to be some complicated deposition taking. Go ahead." **(1604-1605)**

Nevertheless, these factual statements, for whatever they are worth, have been, since made, unequivocally demonstrated to be incorrect.

In the dialogue, after acknowledging that Appellant had in fact made the request (for final disposition), Appellee **stated that:**

a. Internal bleeding by Appellant was the reason for his transfer from FCI to USP **(1605-1606).**

b. The seriousness of the internal bleeding required the transfer because of the modest medical facilities at FCI and the critical care medical facilities available at USP **(1606).**

With regard to a. above, the deposition of Philip Judson Campbell, M.D., which has been admitted into evidence **(2744),** completely disproves the statement that internal bleeding was the reason for the transfer. Dr. Campbell was the physician

at FCI from the time Appellant arrived thereat on April 24, 1985, until August 1, 1985, when he embarked upon his travels to USP (2415-2417, 2448, 2667-2668). During this period, Appellant received no new diagnoses, was medically stable, was never hospitalized, was physically capable of working at FCI as a teacher of Spanish and librarian and never experienced any acute distress (2655, 2670, 2676, 2677). The essence of Dr. Campbell's testimony is that Appellant arrived at FCI with a history of cardiac and cardiac related problems (2655, 2656, 2667, 2668, 2688, 2689, 2690). Dr. Campbell was concerned about FCI's ability to deal with any medical episode or incident arising from the history (2679-2682, 2690, 2691) and thus sought to have Appellant medically reevaluated (not treated) and reassigned to another federal penal facility more capable of dealing with any episode or incident which might occur (2679-2682). Nowhere in his deposition did Dr. Campbell, in response to questions posed by Appellant or Appellee (at whose instance the deposition was taken) concerning Appellant's physical or medical condition while a prisoner at FCI, mention, allude to or imply that Appellant experienced any internal bleeding

between April 24, 1985, or August 1, 1985. Accordingly, insofar as the record in this case is concerned, it does not establish that the transfer from FCI to USP was attributable to any need for treatment, much less treatment for internal bleeding. Corroboration for this assertion is inherent in the following facts found in the record, to-wit: that 45 days elapsed from when Dr. Campbell initially sought, on June 10, 1985, Appellant's transfer out of FCI for evaluation as aforesaid and July 25, 1985, the date of the Transfer Order (2472, 2687, 2688) by which Appellant was transferred from FCI to USP; that six days elapsed between July 25, 1985, and August 1, 1985, the date on which Appellant embarked upon his twenty day trip to USP (2472, 2415-2417, 2448, 2449); and, that Appellant's trip from FCI to USP consumed twenty days (2449, 2450, 2464, 2465-2483) under the conditions and with the intermediate stop described and referred to in those portions of Appellant's Proffer Upon Motion for Discharge (2414, 2440), which has been admitted into evidence (2743, 2744). If bleeding internally, why wait 45 days to issue a Transfer Order? If bleeding internally, why wait six days after the issuance of the transfer order before commencing

the transfer? If bleeding internally, why expend twenty days moving the patient to the place where treatment for the internal pleading was to be provided? No answers to these questions exist because Appellant was not bleeding internally (seriourslу or otherwise) and therefore internal bleeding could not have been the basis for his transfer from FCI to **USP.**

With regard to b. above, its incorrectness is established by the deposition admitted into evidence in this case (2631), of Mark Edward Mueller, M.D., a physician at **USP** who testified that **USP** maintained an infirmary analogous to what might be found at a university, a step down from an acute care hospital **(2492).** Hardly a critical care medical facility as suggested by Appellee!

When all of the foregoing is considered along with the facts cited in Appellants Initial and Reply briefs which establish that, except for the eighteen days from September 12, **1985,** to September **30, 1985,** Appellant was stable, relatively healthy, and in no acute distress at any time from August 1, **1985,** to October **18, 1985 (2524, 2525),** one is left to wonder what relationship existed between Appellant's

physical and medical condition and his 78 day odyssey back and forth to and from and at USP. In further support of the view that the odyssey was unrelated to any need for medical treatment, Appellant cites the rather strange fact that he commenced travel from USP to FCI on October 1, 1985 (2418, 2525). What is strange about this fact is that October 1, 1985, is the day after Appellant was discharged as an inpatient from USP's infirmary where he had been since September 12, 1985, being treated for and recovering from the ailment which had arisen after his arrival at USP on August 20, 1985 (2525, 2540), and is the first day of an eighteen day journey back to FCI under the conditions and with the intermediate stops described and referred to in said Proffer upon Motion for Discharge (2414, 2440, 2525). If, as only Appellee has suggested, the rationale for sending Appellant to USP was his need for medical treatment, then why was he released and transferred therefrom immediately upon the completion of treatment for and recovery from an ailment which did not exist on or before August 1, 1985, the date he left FCI for USP, but only arose three weeks after his arrival on August 20, 1985, at FCI. One would think that

Appellant would have been kept at USP so that the treatment, whatever it was supposedly to be, could continue for the condition for which only Appellee claims he was sent to USP in the first place.

Though the Transfer Order (2472) states that the transfer was for "medically treatment'' and though Appellee would suggest that medical treatment was the reason for the transfer, the evidence just cited establishes beyond any doubt that Appellant was not in need of medical treatment either at any material time before or at the moment he began his journey from FCI to USP. And, since Appellant was not in need of medical treatment, such does not provide a basis for concluding that from August 1, 1985, to October 18, 1985, Appellant was unable to stand trial. In Appellant's case, as in Stroebel v. Anderson, 587 F.2d 830 (6th Cir. 1978), "...there is no showing in this record that he was physically or mentally disabled" and therefore unable to stand trial.

So the mystery remains. Why was Appellant sent from FCI to USP? From the evidence in this case, there is no real explanation. The only rationale which ostensibly makes any sense derives from Dr. Campbell's testimony to the effect

that he desired Appellant's placement in a federal penal facility better equipped to handle any episode or incident which might arise from Appellant's medical history. FCI's medical facilities consisted of a dispensary. Those at **USP** consisted of an infirmary. For the purposes hereof, Appellant will concede that the facilities at **USP** represented a slight upgrade from those at FCI. Of course, even the logic of this rationale crumbles by virtue of Appellant's return to FCI and its rather meager medical facilities. After all, not even Appellee suggests the disappearance, neutralization or curing of Appellant's historical cardiac and cardiac related problems by reason of his stay at **USP** and the availability of the services of the infirmary.

Though, precisely why Appellant was sent to USP and why he was sent from USP back to FCI is unknown, the following is known, to-wit: that during the following times:

a. From July **2, 1985,** to August **1, 1985,** the period from Appellant's request for final disposition to the commencement of his trip from FCI to **USP,** and

b. From August 1, 1985, to August 20, **1985,** the period during which Appellant traveled from FCI to **USP,** and

c. From August 20, 1985, to September 12, 1985, the period between Appellant's arrival at **USP** until his admission to its infirmary for an ailment which arose after said arrival, and

d. From September 30, 1985, to October 1, 1985, the period between Appellant's discharge from said infirmary to the commencement of his trip from **USP** to FCI, and

e. From October 1, 1985, to October 18, 1985, the period during which Appellant traveled from **USP** to FCI

nothing attributable to Appellant including his physical, medical or mental condition prevented him from standing trial, that is, being present in a courtroom in Hillsborough County, Florida, to listen to testimony, view tangible evidence, and communicate with his attorney concerning the testimony, evidence, tactics and strategy.

Appellant's case bears a striking resemblance to State v. Roberts, 427 So.2d 787 (Fla. 2d DCA 1983) in which the following occurred.

a. In December 1979, Roberts was arrested in New York on New York criminal charges.

b. On January 8, 1980, Pasco County, Florida, filed Informations against Roberts.

c. As of March 1980, Roberts was awaiting sentencing on the New York charges.

d. On March 7, 1980, Pasco County, Florida, wrote to New York to confirm that its charges were being used as a detainer against Roberts and requesting notification of the disposition of the New York charges.

e. On November 21, 1980, Pasco County was advised by New York that Roberts had been sentenced on the New York charges to a term of imprisonment of 1 1/2 to 3 years at Ossining (New York) Correctional Facility.

f. On November 28, 1980, Roberts was transferred by New York to its downstate correctional facility at Fishkill, New York.

g. On December 15, 1980, Pasco County received Robert's request for final disposition pursuant to the IADA.

h. In late December 1980, Roberts was transferred by New York to its correctional institute at Otisville, New York.

i. Roberts remained at Otisville until July 15, 1981, at which time he was returned to Florida to stand trial on the Pasco County Informations.

j. July 15, 1981, was more than 180 days after December 15, 1980.

Roberts Pasco County charges were dismissed with prejudice because of the 180 day lapse without trial and the opinion affirming the dismissal noted that:

> "The State's argument that it should not be required to 'chase' a defendant who seeks to invoke the provisions of the IADA, is without merit under the facts of this case. See State v. Minnick, 413 So.2d 168 (Fla. 2d DCA 1982). Roberts had not been transferred out of the New York state prison system to another jurisdiction's prison system; he remained in the New York system throughout the entire time period."

Like Roberts, throughout the time period pertinent to his case, Appellant was always in the prison system of the Sending State. Why didn't Appellee "chase" him. Appellee would say, as it has, that it did not "chase" Appellant because the Sending State, the United States of America, would not release him because his physical and medical condition necessitated his transfer from FCI to USP for treaatment and would only release him when he was capable of

safely traveling. Accordingly, says Appellee, it sought Appellant's return to Florida when it, as the Receiving State, was advised by the Sending State of Appellant's availability for transfer to Florida. However, this rather feeble excuse for not ''chasing" falls flat, because:

a. As already demonstrated herein, Appellant's medical and physical condition did not necessitate his transfer from **FCI** to **USP.**

b. Appellant was obviously able to safely travel as demonstrated by his twenty day journey from **FCI** to **USP** and his eighteen day journey from **USP** to **FCI.**

c. Appellant was healthy during his first three weeks at **USP** until he fell ill for only eighteen days due to an ailment which arose after his arrival at **USP.**

d. The lack of any indication in the record in Appellant's case of inquiry by Appellee concerning:

(1) Appellant's condition, circumstances and whereabouts during the twenty days of travel from **FCI** to **USP.**

(2) Appellant's condition during his first three weeks at **USP.**

(3) Appellant's condition, circumstances and

whereabouts during the eighteen days of travel from USP to FCI.

e. The lack of any effort by Appellee at any time to seek a judicial tolling of any time period mandated by the IADA. Chapter 941.45(6)(a) Florida Statutes.

Appellee's efforts to shift blame onto the United States of America, as the Sending State, for Appellee's failure to try Appellant in compliance with Chapter 941.45(3) Florida Statutes must fail. As just demonstrated, the evidence does not sustain the assertion that Appellant's physical and medical condition required his transfer from FCI to USP for medical treatment or that, except for the aforementioned eighteen days, his physical or medical condition precluded or interfered with his ability to stand trial upon the Indictment (1900-1901). The United States of America is a party to and bound by the IADA, United States of America ex. rel., Esola v. Grooms, 520 F2d 830 (3d Cir 1975) as is Appellee, the State of Florida. As such Appellant's rights thereunder flowed from the action of both the United States of America and Appellee. Young v. Mabry, 471 F.Supp. 553 (USDC ED. Ark. 1978); United States of America ex. rel. Esola

v. Grooms, supra. By entering into the IADA, which Chapter **941.45** et seq. Florida Statutes recognizes to be an "interstate compact", Appellee yielded some measure of its sovereignty. Strobel v. Anderson, supra. Accordingly, Appellee, insofar as the issue at hand is concerned, must live and die by its own actions as well as those of its partners in the IADA in that the neglect, mistakes, errors, ignorance and/or inattentiveness of one or both of the parties will not result in the jettisoning of a prisoner's rights duly invoked and granted thereby. Such rights will not be denied when their fulfillment is obstructed either by the oversight or design of Sending and/or Receiving States. United States of America v. Hutchins, **489** F.Supp 710 (USDC, N.D. Ind. **1980).** Thus, dismissal with prejudice is in order when a prisoner has satisfied his duties under the IADA, as did Appellant, but the Sending and/or Receiving States fail to satisfy theirs. The IADA is remedial in nature, that is its enactment was for the purpose of alleviating many problems including those referred to in Chapter **941.45(1)** Florida Statutes. United States of America ex. rel. Esola v. Grooms, supra, and United States of America v. Ford, **550** F.2d

732 (2d Cir. 1977). And, this remedial nature, obviously accounts for the requirement that the IADA be liberally construed. Chapter 941.45(9) Florida Statutes. Appellant's position is that a conservative construction of Chapter 941.45 et. seq. Florida Statutes, under the facts of his case, would lead to a dismissal with prejudice and that a liberal construction mandates a dismissal with prejudice.

The reality of Appellant's situation is that the facts of his case as they now exist by virtue of the Order Finding Facts leave fully in tact and further substantiate his original position as asserted in his Initial and Reply briefs, to-wit: that except for the eighteen days during which he was an inpatient at USP's infirmary, at all other times from July 2, 1985 (the date Appellee received his request for final disposition) to March 4, 1986 (the date he filed his Motion for Discharge) a total of 246 days, he was well able to stand trial. When the eighteen days is tolled and subtracted from the 246 days, the result is that Appellant remained untried upon the Indictment for at least 228 days. Otherwise stated, despite the fact that Appellee had 198 days (180 days plus eighteen days as an inpatient)

within which to try Appellant, *he* remained untried for 246 days. Succinctly put, when Appellant filed his Motion for Discharge (2012-2017), Appellee had already exceeded its time limit for trying Appellant upon the Indictment (1900-1901) by at least 48 days.

THIRD ARGUMENT

As per paragraph 1.b. of the Order Finding Facts (2742-2745), the Circuit Court found, among other things, that Appellee:

> "...received or was on notice of Fuente's request for final disposition of and upon said Indictment on July 2, 1985."

According to Chapter 941.45(3)(a)(b)and(c), Florida Statutes, a request for final disposition must be given or sent by the prisoner to the official having custody of him and said official is to forward the request along with certain other documents required by the statute to the appropriate prosecuting officer and court. In Appellant's case, Appellee's file does not reflect its receipt of Appellant's request for final disposition and the aforementioned documents (2709, 2713, 2714), though Appellee acknowledges that its Assistant State Attorney was notified by telephone on July 2, 1985, of Appellant's request for final disposition (2714). Thus, the question is whether Appellant's invocation of the 180 day time period contained in Chapter 941.45(3)(a) Florida Statutes is somehow nullified by the Appellee's claim that it did not receive the request and other documents

though Appellee acknowledges actual telephonic notice of the request for final disposition. The answer to the question is in the negative.

According to paragraph N. of Order Finding Facts (2743, 2744), the facts stated in Appellant's Proffer upon Motion for Discharge (2414-2440) were admitted into evidence. According to paragraphs 6. through 8. of the Proffer Upon Motion for Discharge (2414-2440), on July 2, 1985, Appellant executed and had notarized a document (Exhibit "C" to the Proffer upon Motion for Discharge), which clearly stated Appellant's request, "...to initiate the prosecution and disposition of any and all pending detainers and Indictments, etc.", and instructed the notary public, an employee in the administrative offices of FCI, to deliver the original to FCI's warden. That these acts did in fact occur is corroborated and verified by Appellee's acknowledgment that, on the same day its Assistant State Attorney, who, at the time, was responsible for extraditions (2709), received the telephone call advising of Appellant's request for final disposition (2714). The only reasonable inference from the foregoing is that the telephone call came either from the

warden or other employee of FCI, who had received Appellant's request for final disposition in accordance with Appellant's instruction referred to in paragraph 8. of Proffer upon Motion for Discharge (2414-2440).

From the foregoing, the following are obvious and clearly established, to-wit:

a. On July 2, 1985, Appellant performed the actions referred to in paragraphs 6. through 8. of Proffer upon Motion for Discharge (2414-2440).

b. On July 2, 1985, Appellee was advised by FCI that Appellant had requested final disposition.

c. The warden of FCI failed to fulfill the duties imposed upon him by the IADA to promptly forward to the appropriate prosecuting official and Court by registered or certified mail the written notice, request for final disposition and certificate referred to therein, Chapter 941.45(3)(a)(b)and(d) Florida Statutes.

Therefore, the specific question at hand is whether the failure referred to in c. immediately above voids the request for final disposition and the 180 day time limit invoked thereby. For several reasons, the answer must be in the

negative.

The first reason is that once Appellant fulfilled his duties under Chapter **941.45(3)** Florida Statutes by giving his request for final disposition to FCI's warden, United States of America v. Hutchins, **489** F.Supp 710 (USDC, ND Ind., **1980),** duties over which Appellant had no control, then devolved upon FCI's warden to forward by mail certain documents to Appellee. Apparently, FCI's warden failed or neglected to fulfill this rather simple duty to forward documents as aforesaid and instead telephoned Appellee with the most important and significant information contained in the documents, to-wit: that Appellant had requested final disposition. Acordingly, Appellant's duly invoked right to be tried within the **180** days set forth in Chapter **941.45(3)** Florida Statutes should not be compromised for the failures or neglect of others to carry out their assigned legal responsibilities imposed by the IADA. And, this is especially true in this case in which Appellee was not prejudiced because it was actually notified of the invocation by Appellant of his right to be tried within the **180** day period and treated his right to be so tried as commencing on

July 2, 1985 (2712).

The second reason arises from United States of America v. Hutchins, supra. In this case, Hutchins was charged by the State of Nevada with grand larceny on January 1, 1979, and taken into custody until February 26, 1979, on which date he entered a guilty plea and was released. Hutchins failed to appear for a parole and probation interview and on April 5, 1979, a warrant was issued for his arrest. In late April 1979, Hutchins was arrested in East Chicago, Indiana, but released three days later. Shortly after this arrest, Hutchins was rearrested in East Chicago, Indiana, on the Nevada warrant. By May 11, 1979, Hutchins was in the custody of Nevada authorities. On May 10, 1979, a detainer was lodged against Hutchins with the Nevada authorities by reason of a federal robbery charge emanating from the northern district of Indiana. On May 11, 1979, a United States Marshall advised Hutchins of the basis of the detainer and his right to speedy trial. On May 11, 1979, Hutchins demanded a speedy trial on the bank robbery charge. On May 16, 1979, the United States Attorney for the northern district of Indiana received Hutchins' demand. On May 21,

1979, Hutchins was adjudicated guilty on the Nevada charge and ordered held in jail pending sentencing. On June 25, 1979, Nevada sentenced Hutchins to four years Imprisonment. On the federal bank robbery charge, nothing happened until December 17, 1979, when the United States of America petitioned for the issuance of a Writ of Habeas Corpus ad Prosequendum. Hutchins requested dismissal of the federal bank robbery charge for failure to try him thereon within 180 days as per the IADA. In defense of this request, the United States of America asserted that Hutchins' demand (request for final disposition) was ineffective and a nullity because the United States Marshall mistakenly and unnecessarily caused Hutchins to be informed of the detainer and his rights with regard to trial upon the federal bank robbery charge before he had entered upon a "term of imprisonment." Chapter **941.45(3)(a)** Florida Statutes. This defense was rejected upon the following rationale:

> "In the context of this case, a correllary to the Government's argument is that the rights of a sentenced prisoner under the Agreement can be successfully torpedoed when prison authorities having custody of the prisoner neglect to fulfill their duties under Article III.c. to provide notice and opportunity.

> But Congress could not have intended that prisoner's rights under the Agreement would be so easily jettisoned. (emphasis added)."

Certainly, the underlined portion of the above quote would apply to the apparent failure or neglect of FCI's warden alluded to herein, especially when same resulted in no prejudice to the Appellee because of the act by the warden or FCI's employee of actually notifying Appellee on July 2, 1985, that Appellant had indeed requested final disposition upon and of the Indictment (1900-1901).

CONCLUSION

As a result of the proceedings conducted pursuant to the Order of December 3, 1987, of the Florida Supreme Court, Appellant's position regarding his entitlement to dismissal with prejudice of the Indictment has only been strengthened. Before the occurrence of those proceedings, though never disputed, Appellant was traveling solely upon his assertion that in July 1985 he requested Final Disposition of and upon the Indictment in accordance with Chapter 941.45 et seq. Florida Statutes. Now, this assertion is corroborated by:

1. Appellee's acknowlegment that it was notifed of Appellant's request for final disposition by the very penal institution to whose warden it was given on the very day (July 2, 1985) when Appellant states he initially presented the request.

2. Appellee's acknowledgment that it treated Appellant's case, beginning on July 2, 1985, as one in which a request for final disposition had been made in accordance with Chapter 941.45(3) Florida Statutes.

Before the occurrence of those proceedings, Appellee's assertion that Appellant was transferred from FCI to USP for medical treatment due to internal bleeding, though never

substantiated by evidence, also stood unrebutted. Now, this assertion has been totally rebutted by the deposition testimony of FCI's physician which clearly and unequivocally establishes that, while at FCI, Appellant suffered from no medical or physical condition (including internal bleeding) which necessitated his transfer therefrom for medical treatment.

Accordingly, with all of the foregoing now in evidence in this case and proven beyond all doubt, Appellant's position is as it has always been, that is, except for the eighteen days during which he was in USP's infirmary for a condition which arose approximately three weeks after his arrival at USP, he was at all other times subsequent to July 2, 1985, (well) able to stand trial in Hillsborough County, Florida, upon the Indictment. Since 246 days elapsed between July 2, 1985, and the date of the filing of Appellant's Motion for Discharge and even assuming that the 180 day (speedy) trial contained in Chapter 941.45(3) Florida Statutes was "tolled" for the eighteen days from September 12, 1985, to September 30, 1985, when he was an inpatient at USP's infirmary as aforesaid, the undeniable facts remain that Appellant:

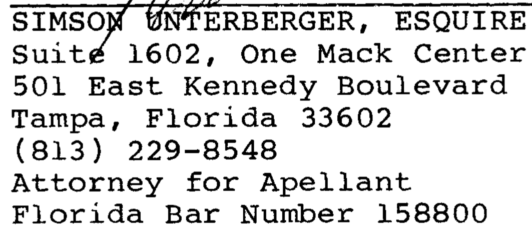
a. Was untried upon the Indictment for at least 228 days in violation of Chapter 941.45(3) Florida Statutes and

b. Was, throughout said 228 day period, medically, physically, and mentally capable of standing trial in Hillsborough County, Florida, upon the Indictment.

Appellant satisfied all requirements imposed upon him by Chapter 941.45 et seq, Florida Statutes. The Sending and Receiving States failed to fulfill the responsibilities imposed upon them by the statute for at least 246 days. The 180 day "speedy trial" contained in the statute was arguably tolled for eighteen days. Thus, for at least 228 days Appellant was untried. Accordingly, Appellant is entitled to a dismissal with prejudice of the Indictment as per Chapter 941.45(3)(a) and (d), Florida Statutes, and the failure to do so as requested in his Motion for discharge was error. Therefore, the denial of his Motion for Discharge should be reversed and a dismissal with prejudice of the Indictment be ordered.

NOTE: To the extent that Appellant has not addressed herein points argued in his Initial and Reply Briefs filed in this cause, Appellant stands upon the arguments upon said points contained in the Initial and Reply Briefs.

Respectfully submitted,



SIMSON UNTERBERGER, ESQUIRE
Suite 1602, One Mack Center
501 East Kennedy Boulevard
Tampa, Florida 33602
(813) 229-8548
Attorney for Apellant
Florida Bar Number 158800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 4th day of May, 1988, to William I. Munsey, Esquire, Assistant Attorney General, Park Trammell Building, 1313 North Tampa Street, Tampa, Florida 33602.

SIMSON UNTERBERGER, ESQUIRE