IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,019

THE STATE OF FLORIDA,

Petitioner,

v.

WILLIAM R. WOODRUFF,

Respondent,

RESPONDENT'S BRIEF ON THE MERITS

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT, (CASE NO: 94-309)

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Introduction

This case involves two separate actions -- one brought in the county court and the other brought in the circuit court -- arising from the same accident. The county court charges were effectively discharged when the State failed to prosecute Mr. Woodruff before the expiration of the speedy trial period. As a result of the speedy trial violation in county court, the circuit court dismissed the related felony information.

We ask this Court to affirm the decision in State v. Woodruff, 654 So. 2d 585 (Fla. 1995), because the Third District Court of Appeal properly ruled that the State, by operation of the speedy trial rule, is estopped from prosecuting the same offense from which the Respondent, William R. Woodruff ("Woodruff"), was previously discharged.

STATEMENT OF THE FACTS

On the evening of July 4, 1993, Woodruff was involved in a two-car accident in Hialeah, Florida. (TR. 2, R. 33-34).[2]

STATEMENT OF THE CASE

The Simultaneous Prosecutions

On July 5, 1993, the State charged Mr. Woodruff with two counts of driving under the influence (hereinafter "DUI") with

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[1] The Respondent acknowledges Fla. R. App. P. 9.210(c). For the sake of clarity, however, the Respondent sets forth his own Statement of the Case and Facts.

[2] Cites to the transcript within the text of this brief will be designated with the symbol "TR" while cites to the record will be designated with the symbol "R".

serious bodily injury, two counts DUI property damage and one for driving with a suspended license. (R. 33-34). On the same day, Mr. Woodruff entered a not guilty plea at the county court arraignment and demanded a jury trial.

On August 4, 1993, the State filed an information in circuit court charging Mr. Woodruff with one count of felony DUI, two counts of DUI property damage, one count of DUI impairment, and one count of driving with a suspended license. (R. 1-7). It is undisputed that these charges arose from the same conduct as the charges in county court.

No Consolidation of the Simultaneous Actions Occurred

Initially, an Assistant State Attorney set Mr. Woodruff for an arraignment in circuit court on July 26, 1993. (TR. 4). However, on the initial arraignment date, the clerk for the county court tried sua sponte to transfer the charges pending in county court to the circuit court for consolidation. (TR. 4-5). It is undisputed that the clerk of the county court tried to transfer the county court charges without either the State or the Defense filing a motion to transfer or consolidate and without the judge ordering such a transfer or consolidation. Moreover, neither the circuit court nor the county court had a hearing on any consolidation or transfer. (R. 16).

The State's Speedy Trial Violation

On October 4, 1993, the speedy trial period expired in Mr. Woodruff's county court case. The Assistant Public Defender handling Mr. Woodruff's county court charges then filed a Notice of

Expiration of Speedy Trial on October 15, 1993. (R. 20). After the Notice of Expiration was filed, the State failed to take any action within the fifteen day window period allotted by the Florida Rule of Criminal Procedure 3.191(p)(3). Subsequently, on December 2, 1993, Mr. Woodruff filed a motion to discharge pursuant to Florida Rule of Criminal Procedure 3.191. (R. 24).

In addition, Mr. Woodruff also filed a motion to dismiss all charges in the circuit court information because they arose out of the same incident as the charges pending in the county court. (R. 12). The State, however, in a belated attempt to avoid the consequences of its violation of the speedy trial period, entered a nolle prosequi to all of the county court charges on December 3, 1993. (TR. 3).

Hearing on the Motion to Dismiss

On December 13, 1993, the circuit court heard the motion to dismiss the charges. Mr. Woodruff's defense counsel pointed out to the court that a Notice of Expiration of Speedy Trial was filed on October 15, 1993. (TR. 3). The Defense also asserted that "the case sat and sat until December 3rd when the State . . . null pros [sic] the case." (TR. 3). The trial court then pointed out that the nol pros was outside the window period for state action, and was thus unnecessary. (TR. 3-4). The public defender responded by stating that "[i]t was a frivolous effort on their [the State's] part to do something." (TR. 4).

Subsequently, the public defender argued that the circuit court case should be dismissed on double jeopardy grounds because

the circuit court charges consisted of the same "elements" and "circumstances" as the charges brought in the county court. (TR. 4). When the State argued that "[t]he felony information supersede[d] the misdemeanor charging document at that point," the court asked the State whether it had filed a motion for consolidation in the county court. (TR. 5). The State, however, responded that "[t]he clerk's office [had done] that on July 26th." (TR. 5).[3]

The State, while stipulating that "the misdemeanor case and felony case filed before this Court all arise from the same episode," argued that there should be no dismissal because since Mr. Woodruff was not tried in county court, he was not placed in jeopardy. (TR. 9). The trial court then pointed out:

> There [was] no motion filed for consolidation or transfer to the circuit court. The clerk cannot do that on its own. . . . If a timely Motion To Discharge was filed in County Court by operation of law, 15 days run, and if it's not brought to trial in the window, the Defendant is discharged. I don't see how it's brought back up and you're able to proceed in the felony case.

(TR. 11).

As a result, the court granted Mr. Woodruff's motion to

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[3] Still troubled by the transfer from the county court, the court stated "[w]hat I'd like to know is the mechanics of how the County Court citation makes it up to Circuit Court without any pending motion?" (TR. 7). What defense counsel pointed out was that "[i]t [was] an ex parte transfer. The Public Defender's office was not notified." (TR. 7). Defense counsel also pointed out that both the State Attorney's Office and the Public Defender's Office continued to work on both the county court case and the circuit court case. (TR. 8-9). In fact, as Woodruff's counsel explained, depositions were even taken for the county court case as late as September 15, 1993, despite the fact that the State was taking the position that the case had been transferred to the circuit court on July 26, 1993. (TR. 8).

dismiss the circuit court charges. (TR. 13). On December 17, 1993, a written order on the motion to dismiss was filed, granting Mr. Woodruff's motion to dismiss. (R. 15). On December 27, 1993, the State filed a notice of appeal. (R. 17).

The Affirmance by the Third District Court of Appeal

The Third District Court of Appeal affirmed the trial court's dismissal of the information.[4] That court relied primarily on the plain language of the speedy trial rule and asserted:

> As a matter of law, defendant is forever discharged from the county court charges. After the speedy trial period ran on the misdemeanor ticket offenses, defendant filed appropriate motions for discharge. The state's nolle prosequi was a nullity because the state took no action pursuant to Rule 3.191(p)(3) after the notice of expiration of speedy trial period was filed. Rule 3.191(p)(3) provides that a defendant not brought to trial within 10 days of a hearing on a notice of expiration of speedy trial "shall be forever discharged from the crime."

Woodruff, 654 So. 2d at 587.

The State sought a rehearing, certification and clarification, which the Third District denied.

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[4] In so doing, the Woodruff court addressed the issue of consolidation and asserted:

> The state's argument that the charges were consolidated is without merit. Consolidation may be authorized by only the trial judge upon the proper motion of a party. Ashley v. State, 265 So. 2d 685 (Fla. 1972); Fla. R. Crim P. 3.151. Neither the state nor the defendant filed a motion to consolidate. The court clerk's transfer of the case did not effect a consolidation, and the clerk had no authority to consolidate the cases. State v. Woodruff, 585 So. 2d 585, 587 (Fla. 3d DCA 1995).

SUMMARY OF THE ARGUMENT

This Court should affirm the Third District's decision in State v. Woodruff, 654 So. 2d 585 (Fla. 3d DCA 1995), for four separate reasons.

First, as we will show, the Third District decision comports with the plain language of the speedy trial rule. Specifically, because Mr. Woodruff was "forever discharged" under the speedy trial rule from the county court DUI charges, the circuit court properly dismissed the identical DUI charges pending before it. In this respect, we show that the county court and circuit court charges are identical because the felony DUI is merely an aggravated form of the same underlying offense of misdemeanor DUI. Also, the only conceivable difference between the misdemeanor DUI and felony DUI is the punishment enhancement, which is not an "element" under the applicable test. Further, we demonstrate that because the county court charges were properly discharged, the State is estopped from prosecuting the identical offense in circuit court and that the State's attempted nol pros was a nullity and thus, cannot change a thing.

Second, we will show that the Third District decision also comports with the plain language of the consolidation rule. Because the State failed to consolidate the county and circuit court charges, it waived its right to avail itself of the benefit of consolidation -- namely, the longer felony time period.

Third, as we will show, the Third District's decision is the correct one because it is consistent with numerous decisions of

this Court. Also, the decision below can be distinguished from Nesworthy v. State, 648 So. 2d 259 (Fla. 5th DCA 1994), which apparently involved misdemeanor and felony charges that were arguably different from one another. In contrast, here the county and circuit court charges were indeed "identical."

Fourth, we further demonstrate that the Nesworthy decision is wrong. Specifically, we submit that this Court has either overruled Nesworthy or should overrule it now. In connection with this point, we assert that because Nesworthy involved two sets of charges that contained the "same elements," the felony should have been discharged under the speedy trial rule. Also, we point out that if the Nesworthy court had had the benefit of this Court's more recent decisions, it would have reached the same result that the Third District reached in Woodruff.

ARGUMENT

I. THE DECISION IN State v. Woodruff, 654 So. 2d 585 (Fla. 3d DCA 1995), SHOULD BE AFFIRMED UNDER THE PLAIN LANGUAGE OF THE SPEEDY TRIAL RULE.

A. Here the State's Violation of the Speedy Trial Rule Means That the Defendant Is Forever Discharged From the County Court Charges.

As this Court has said, "the speedy trial rule . . . implement[s] the practice and procedure by which the defendant may seek to be guaranteed his fundamental right to a speedy trial." Singletary v. State, 322 So. 2d 551, 553-54 (Fla. 1975) (citations omitted)(emphasis added). That fundamental right is critical because, as the United States Supreme Court has emphasized, "even if an accused is not incarcerated prior to trial, he is still

disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." Barker v. Wingo, 407 U.S. 514, 533, 92 S. Ct. 2182, 2193, 33 L. Ed. 2d 101, 118 (1972). The speedy trial rule does not just administer to the defendant, but it also serves society through the implementation of a swift, efficient administration of criminal justice. Id. at 519.

These important objectives reside in Rule 3.191(a) of the Florida Rules of Criminal Procedure, which provides in relevant part:

> **Speedy Trial Without Demand.** Except as otherwise provided by this rule, and subject to the limitations imposed under subdivisions (e) and (f), every person charged with a crime by indictment or information shall be brought to trial within 90 days if the crime charged is a misdemeanor or within 175 days if the crime charged is a felony.

§ 3.191(a), Fla. Stat. (1993). The rule also states that if a trial does not commence within the above time limits, the defendant is entitled to the appropriate remedy as set forth in subdivision (p) of the speedy trial rule. That remedy includes the following provision:

> **Remedy For Failure to Try Defendant Within the Specified Time.** (3) No later than 5 days from the date of the filing of a notice of expiration of speedy trial time, the court shall hold a hearing on the notice and, unless the court finds that one of the reasons set forth in subdivision (j) exists, shall order that the defendant be brought to trial within 10 days. A defendant not brought to trial within the 10-day period through no fault of the defendant, on motion of the defendant or the court, shall be forever discharged from the crime.

§ 3.191(p)(3), Fla. Stat. (1993) (emphasis added). What the above subdivision offers is a "window of recapture" to the State, which allows prosecutors to correct speedy trial violations and thus,

avoid the result of an automatic dismissal of the charges. That subdivision makes sense because it effectuates a balance between the interests of the defendant and those of society by "provid[ing the State with] a limited chance . . . to correct its mistakes."[5] The rule unambiguously spells out the result of the State's failure to capitalize on this last chance: that is, the defendant is "forever discharged from the crime."

Here, too, the speedy trial rule means exactly what is says. In the present case, the State is forever discharged from prosecuting Mr. Woodruff's county court charges of DUI with serious injury, DUI with property damage, and driving with a suspended license. This is the result of the State's violation of the clear mandate of 3.191(a). Stated otherwise, when the State failed to bring Mr. Woodruff to trial by October 4, 1993 -- the end of the applicable speedy trial period for misdemeanors -- those charges were gone forever.

In fact, the situation here is quite egregious: even though defense counsel filed a notice of expiration of speedy trial pursuant to Rule 3.191(p) on October 15, 1993, the State did not take advantage of its window of recapture. In other words, the

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[5] James E. Moore, Note, State v. Hoffman: The 180-Day Rule and a Lack of Balance, 33 **S.D. L. Rev.** 165, 172 & n.91 (1987-1988). The article further cites to the commentary in The Florida Bar Re: Amendment to Rules--Criminal Procedure, 462 So. 2d 386, 388 (Fla. 1984), which states: "The total 15 day period was chosen carefully by the committee, the consensus being that the period was long enough that the system could, in fact, bring to trial a defendant not yet tried, but short enough that the pressure to try defendants within the prescribed time period would remain."

State did not even try to correct its mistake.[6] As such, the dismissal of the county court charges was proper.

B. Here Being "Forever Discharged From the Crime" Means That the Circuit Court Charges Should Likewise Be Dismissed Because They Are the Same Crime as the County Court Charges.

Under the speedy trial rule, the ramifications of being "forever discharged" from a crime are as follows:

> **(n) Discharge from Crime; Effect.** Discharge from a crime under this rule shall operate to bar prosecution of the crime charged and of all other crimes on which trial has not commenced nor conviction obtained nor adjudication withheld and that were or might have been charged as a result of the same conduct or criminal episode as a lesser degree or lesser included offense.

Fla. R. Crim. P. 3.191(n) (1994). The trial court's astute observations at the hearing on the motion to dismiss were as follows:

> If a timely Motion to Discharge was filed in County Court by operation of law, 15 days run, and if it's not brought to trial in the window, the Defendant is discharged. I don't see how it's brought back up and you're able to proceed in the felony case. (TR. 11)(emphasis added).

In dismissing the charges, the circuit court found that Mr. Woodruff "was arraigned in Circuit Court . . . for the identical charges for the same incident as that in the County Court case." (R. 15).

The trial court was indeed correct in concluding that the

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[6] The trial court correctly recognized that because the State did not bring Mr. Woodruff to trial within 15 days of his motion to discharge, Mr. Woodruff was properly discharged in county court. (TR. 11). And, the Third District Court of Appeal, of course, agreed with the trial court that, "[a]s a matter of law, [Mr. Woodruff] is forever discharged from the county court charges." State v. Woodruff, 654 So. 585, 587 (Fla. 3d DCA 1995).

county court and circuit court charges were identical. Mr. Woodruff was issued tickets for DUI (R. 39, 41, 43, 45). The arrest form reflects that Mr. Woodruff was charged with two counts of DUI with serious injury and two counts of DUI with property damage under § 316.193, Fla. Stat. (1993) (R. 33). The Information charged Mr. Woodruff with one count of felony DUI, two counts of DUI with property damage, one count of DUI with personal damage, and one count of DUI impairment all of which are in violation of § 316.193. (R. 1-7).

At the hearing on the motion to dismiss, defense counsel asserted:

> MR. TARLOW: Judge, with the DUI charge as, Your Honor, knows, you can file it in any jurisdiction you want. You can file it in Cirucit Court with serious bodily injuries or you can file it in County Court. That's what they [the State] did. They did it in County Court first and discovery was invoked, the case worked up. Subsequently, they filed it in Circuit Court. The case was lost in County Court because of the State's failure to bring it to trial within the perimeter set by the Florida Rules of Criminal Procedure. <u>It's the same case</u>. <u>It's the same case</u>.

(R. 12-13)(emphasis added). The court, correctly agreeing with defense counsel, deemed the motion "granted." (R. 12-13). In fact, the plain language of Rule 3.191(n) alone warranted that dismissal. Specifically, under the rule, "[d]ischarge from a crime [here, the county court § 316.193 DUI] shall operate to bar prosecution of the crime charged [here, the same § 316.193 DUI in circuit court] . . . ." Fla. R. Crim. P. 3.191(n) (1994).

1. The County Court and Circuit Court Charges Are the Same Under the Blockburger Test.

In dismissing the charges below, the circuit court employed a double jeopardy test.[7] The double jeopardy test is, of course, the "same elements" test defined in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under Blockburger, the essential inquiry is "whether each offense contains a [statutory] element [that is] not contained in the other." United States v. Dixon, 113 S. Ct. 2849, 2856, 125 L. Ed. 2d 556, 568 (1993). That is, under Blockburger, "[i]f each offense has at least one element that the other does not, then the offenses are separate crimes, and double jeopardy does not bar multiple punishment and successive prosecution." State v. Murray, 644 So. 2d 533, 534 (Fla. 4th DCA 1994) (citing Blockburger, 284 U.S. at 304). In fact, the Florida Legislature has codified the Blockburger test as follows:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense . . . . For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence

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[7] The trial court found that under United States v. Dixon, 113 S. Ct. 2849, 2856, 125 L. Ed. 2d 556, 568 (1993), "where the two offenses for which the Defendant is punished or tried cannot survive the "same elements" test, the Double Jeopardy bar applies [sic]." (R. 16). In Dixon, the Supreme Court reaffirmed that, for double jeopardy purposes, courts are to use the "Blockburger test" in order to determine whether or not two offenses are the same. Id. at 2856.

> for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
> 1. Offenses which require identical elements of proof.
> 2. Offenses which are degrees of the same offense as provided by statute.
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.[8]

§ 775.021(4)(a), (b), Fla. Stat. (1993) (emphasis added).

While we are not urging that the present case is a pure double jeopardy case, we submit that the use of the Blockburger test is nevertheless relevant. That is, Blockburger provides us with an accepted language for addressing what we have here -- the sameness of the circuit court charges and the county court charges.

2. The County Court and Circuit Court Charges Are the Same Under this Court's Sirmons Analysis Because the Felony DUI is Merely an Aggravated Form of the Same Underlying Offense of Misdemeanor DUI.

The State charged Mr. Woodruff with misdemeanor DUI in county court and felony DUI in circuit court. Both charges fall under § 316.193 entitled "Driving under the influence; penalties," which provides in pertinent part:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if such person is driving or in actual physical control of a vehicle within this state and:

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[8] Justice Kogan explained in Sirmons v. State, 634 So. 2d 153, 154-55 (Fla. 1994), that § 775.021(b)1-3 represents the "second tier" of the double jeopardy multiple punishments analysis that may be used after applying the Blockburger test. Subsections 1 through 3 bar multiple punishments for offenses that do not technically meet the Blockburger test, but are "necessarily included offenses," offenses that are merely "aggravated forms of underlying core offenses," and offenses that are "permissive lesser included offenses." Id. at 155.

> (a) The person is under the influence of alcoholic beverages, . . . when affected to the extent that his normal faculties are impaired; or
>
> (b) The person has a blood or breath alcohol level of 0.10 percent or higher.

§ 316.193(1)(a),(b), Fla. Stat. (1993) (emphasis added).

In order to be punished for felony DUI, a defendant must be convicted at least four times under § 316.193(1). The legislature, of course, relegated the felony DUI part to the "punishment" section of the DUI statute. It provides:

> (b) Any person who is convicted of a fourth or subsequent violation of subsection (1) is guilty of a felony of the third degree, punishable as provided in s. 775.082 [penalties], s. 775.083 [fines], or s. 775.084 [habitual offender enhancement].

§ 316.193(2)(b), Fla. Stat. (1993). The reason the legislature put the felony DUI part in the punishment section is because all felony DUI really is is an aggravated form of the DUI or a mere punishment enhancement.

The State takes the position that because felony DUI requires proof of at least three previous convictions of misdemeanor DUI, this somehow makes the enhancement into an additional "element," which thus almost magically transforms felony DUI into a separate offense for Blockburger purposes. This is incorrect and, in fact, this Court's decision in Sirmons v. State, 634 So. 2d 153 (Fla. 1994), supports our position that the felony DUI is not a separate offense from the misdemeanor DUI.

In Sirmons, the defendant was convicted of grand theft of an automobile and robbery with a weapon. On appeal to the district court, the defendant argued that because the offenses differ only

in degree, the convictions were improper. The district court, however, concluded that the dual convictions were proper because each offense contains an element that the other does not.

On appeal, this Court reversed and determined that section 775.021(4)(b) bars dual convictions where the charges are simply aggravated forms of the same underlying offense and are distinguished from each other only by degree factors. Specifically, this Court held that robbery with a weapon and grand theft of an automobile were merely degree factors of the core offense, which was theft. This Court reasoned that the degree factors of force and use of a weapon simply aggravated the theft offense into a felony robbery. Id. at 154.

This Court's decision in Goodwin v. State, 634 So. 2d 157 (Fla. 1994), is similarly supportive. In Goodwin, this Court confronted the issue of whether a defendant can be convicted of UBAL manslaughter and vehicular homicide arising from one death. In fact, this Court again found that the two offenses were simply "aggravated forms of a single underlying offense distinguished only by degree factors." Id. at 157.

The present case is such a close analogue to Sirmons and Goodwin. Here, the felony DUI charge under § 316.193(2)(b) is also merely a "degree variant of the core offense" of DUI as defined in § 316.193(1). Sirmons, 634 So. 2d at 154. Stated otherwise, there is no way that the State can convict a defendant of felony DUI without first proving that the defendant was guilty of the core

offense, the DUI.[9] In short, an application of Blockburger, Sirmons and Goodwin should spell an affirmance here.

3. The County and Circuit Court Charges Are the Same Because the Only Difference Between the Misdemeanor DUI and Felony DUI Is the Punishment Enhancement, Which Is Not an "Element" Under Blockburger.

Felony DUI may also be accurately denominated as a punishment enhancement feature. In a recent decision, Salazar v. State, 20 Fla. L. Weekly D2431 (Fla. 4th DCA Nov. 1, 1995), the Fourth District described DUI as a basic offense, but one with enhanced penalties. In Salazar, the defendant was involved in an automobile accident that resulted in the death of one person, injuries to three others (one seriously), and damage to the property of two separate items. The State convicted the defendant on one count of DUI manslaughter, one count of DUI with serious bodily injury, one count of driving with a suspended license, two counts of DUI with bodily injury and two counts of DUI with property damage.

On appeal, the Fourth District upheld the convictions for DUI manslaughter, DUI with serious bodily injury, and driving with a suspended license. The court, however, determined that the defendant should have only been convicted on a single count of either DUI with bodily injury or DUI with property damage. Id.

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[9] In affirming the dismissal below, the Third District Court of Appeal, examining the misdemeanor DUI and felony DUI charges, found that "[b]ecause neither offense contain[ed] a statutory element that the other offense d[id] not, they d[id] not constitute separate offenses . . . and the Blockburger test is not met; both offenses are identical." Woodruff v. State, 654 So. 2d at 587 (citations omitted) (emphasis added). This, of course, is the right finding.

In so doing, the court reasoned that under this Court's holding in Boutwell v. State, 631 So. 2d 1094, 1095 (Fla. 1994), DUI is an offense that "is complete whenever a driver gets into a vehicle and drives . . . under the influence of alcohol . . . ." Id. The court then explained that, under the DUI statute, "the penalty for DUI is enhanced, or made more serious, if injury to person or property results during the forbidden driving episode," and that DUI with bodily injury [a misdemeanor] and DUI with serious bodily injury [a felony] "are enhancements to the basic offense [of simple DUI]." Id.

Consequently, the Salazar court found that, "regardless of the number of persons injured or items of property damaged," the defendant could only be convicted of a single offense. Id. The court noted that the defendant "did not intend to commit separate crimes by his single act of driving under the influence, and it was, to use the terminology of Boutwell, 'fortuitous' that the single traffic accident injured three persons and damaged two separate properties." Id.

Similarly, in Hlad v. State, 585 So. 2d 928 (Fla. 1991), this Court dealt with the relationship between prior DUI convictions and felony DUI. In characterizing the conviction, this Court explained that "Hlad was convicted of driving under the influence of alcohol (DUI) after having been three times previously convicted of DUI, a crime which was enhanced to a felony because of the three prior

convictions pursuant to section 316.193(2)(b)."[10] Id. at 928 (emphasis added).

It is clear here that simple DUI could be enhanced to felony DUI merely because Mr. Woodruff "fortuitously" had three prior DUI convictions. Here, just as the court in Salazar found, DUI with serious bodily injury was an enhancement of simple DUI, and here, just as the court in Hlad deemed, the felony DUI was an enhancement of misdemeanor DUI. In this respect, this Court's discussion in State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991), is also helpful.

In Rodriguez, the defendant was charged in circuit court with felony DUI under § 316.193(2)(b). In discussing the circuit court's jurisdiction over that charge, this Court pointed out that felony DUI "is a felony only by virtue of the fact that the defendant has been convicted of three or more prior DUI violations." Id. at 1265 (emphasis added). In fact, this Court's discussion of procedure indicates that the "felony" component of the DUI statute is addressed in what is really a sentencing proceeding:

> if a defendant charged with felony DUI elects to be tried by jury, the court shall conduct a jury trial on the elements of the single incident of DUI at issue without allowing the jury to learn of the alleged prior DUI offenses. If the jury returns a guilty verdict as to that single incident of DUI, the trial court shall conduct a separate proceeding without a jury to

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[10] In the Hlad case in the Fifth District, the court noted that: "Section 316.193, Florida Statutes, is written as if prior convictions were only punishment enhancing factors. In this case the prior convictions were alleged in the information to allege a felony DUI and vest jurisdiction in the circuit court." Hlad v. State, 565 So. 2d 762, 768 & n.7 (Fla. 5th DCA 1990) (Cowart, J., dissenting) (emphasis added).

> determine, in accord with general principles of law, whether the defendant had been convicted of DUI on three or more prior occasions.

Id. at 1266 (emphasis added). Even though this Court referred to the three prior convictions as "combin[ing] as an essential element of felony DUI," id. at 1265, this Court did not mean and could not have meant that the punishment enhancer becomes an "element" within the technical parameters of the Blockburger test. In fact, this Court in Rodriguez characterized the non-jury-sentencing-type proceeding, the one which ascertains the existence of prior convictions, as merely a consideration of "historical fact[s]." Id. at 1266. Significantly, this Court emphasized that the non-jury proceeding occurs only after the elements of the underlying offense at issue have been proven. Id. (citing State v. Harris, 356 So. 2d 315, 317 (Fla. 1978)).

It is quite basic that "[i]n a jury trial it is the sole province of the jury to determine whether the state has proved each essential element beyond a reasonable doubt." Starks v. State, 627 So. 2d 1194, 1196 (Fla. 3d DCA 1993) (emphasis added). This Court has emphasized that "[i]t is elementary that every element of a criminal offense must be proved sufficiently to satisfy the jury (not the court) of its existence." Henderson v. State, 20 So. 2d 649, 651 (Fla. 1945) (emphasis added).

It thus follows from such basic propositions that because the judge in a felony DUI case determines the existence of the three prior DUI convictions outside of the presence of the jury, such a determination cannot be deemed a technical "element" of the crime.

In the context of felony DUI, the judge's consideration of the prior DUI convictions is part and parcel of a sentencing proceeding, which requires the judge to address "historical facts." Rodriguez, 575 So. 2d at 1266.

It is also significant that this Court stated in Rodriguez, that its "reading of the felony DUI statute is wholly consistent with all of the penalty provisions set by the legislature for DUI, including its intent to apply the penalty enhancement provisions of the habitual felony offender statute." Id. at 1265 & n.4. In so doing, this Court analogized the penalty enhancement in the felony DUI statute to that in the habitual offender context. In this respect, this Court's decision in Nappier v. State, 363 So. 2d 803 (Fla. 1978), is applicable because it illustrates the sentencing function a trial judge performs in the enhancement proceeding for the habitual offender.

In Nappier, the defendant was tried for "strong arm" robbery under section 812.13(2)(c), Florida Statutes (1975). At trial, the judge, in the absence of an objection by the defense, instructed the jury that the maximum penalty the defendant could receive upon conviction was fifteen years. The trial judge, however, did not inform the jury that if the defendant was convicted, the defendant might be subject to the enhanced sentencing provision for habitual offenders. After the jury found the defendant guilty for "strong arm" robbery, the trial court, at a subsequent sentencing proceeding, deemed the defendant a habitual offender and sentenced him to an extended prison term.

On appeal, the defendant argued that the trial court erred in failing to inform the jury that the defendant might face enhanced sentencing in a separate proceeding under the habitual offender statute. According to the defendant, this purported error entitled him to a reduced sentence. In rejecting this argument, the Second District noted that "had the judge . . . told the jury that [the defendant] could receive up to thirty years in prison because of his status as an habitual felony offender, this would have improperly revealed to the jury that [the defendant] had been previously convicted of a crime." Id. at 803-04. That court further stressed that "the determination of the extent of punishment rests solely within the discretion of the trial judge, not the jury," id. at 803-04 (emphasis added), and explained that the habitual offender statute:

> requires that a separate proceeding must be conducted to determine whether, for the protection of the public, it is necessary to sentence the defendant to an extended term. Thus, at the time the trial judge instructs the jury as to the possible penalties should they convict the accused, he has absolutely no way of knowing whether the defendant will be found to be an habitual felony offender in the subsequent proceeding.

Id. at 804. In Nappier v. State, 363 So. 2d 803, 804 (Fla. 1978), this Court affirmed both the "rationale and holding" of the Second District's decision.

This Court's analysis in Eutsey v. State, 383 So. 2d 219 (Fla. 1980), is consistent with the reasoning in Nappier and with our point that the prior convictions of DUI is a sentence enhancement. In Eutsey, this Court said that "[t]he purpose of the habitual offender act is to allow enhanced penalties for those defendants

who meet objective guidelines indicating recidivism. The enhanced punishment, however, is only an incident to the last offense. The act does not create a new substantive offense." Id. at 223 (emphasis added). Similarly in felony DUI, the enhanced punishment is only an incident to the last offense -- not a new substantive offense.

In Woodruff, the Third District correctly concluded that "[t]he elements of proof of both felony and misdemeanor DUI offenses are identical" and elaborated:

> Section 316.193 defines only one type of DUI offense . . . punished with increasing severity in successive violations. . . . Although proving the existence of three prior DUI convictions is an essential element of felony DUI offense, State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991), the sole distinguishing factor between the misdemeanor and the felony is the severity of punishment prescribed by section 316.193(2). . . . Hence, the offenses fall under the section 775.021(4)(b)1. double jeopardy bar for 'Offenses which require identical elements of proof.'"

Id. at 587 (citations omitted)(emphasis added). Both the conclusion and the elaboration comport with this Court's decisions in Sirmons, Goodwin, Rodriguez and Hlad. As such, this Court should not hesitate to agree with the Third District.

4. Because the County Court Charges Were Properly Discharged, the State Is Estopped From Prosecuting the Identical Offense in Circuit Court.

In affirming the trial court's dismissal, the Third District also properly abided by this Court's reasoning in Rawlins v. State, 322 So. 2d 10 (Fla. 1975).

In Rawlins, after the police arrested the defendant for two separate robberies, the State filed a three count petition charging

the defendant with those robberies. After the speedy trial period had passed, the defense filed a motion for discharge, which the trial court granted. Two months later, the State obtained two grand jury indictments charging the defendant with the very crimes that had been previously discharged. The defendant moved to dismiss the indictments on the basis of collateral estoppel, res judicata, and/or double jeopardy. After the trial court denied the defendant's motion, the Fourth District issued a writ prohibiting the trial court from asserting jurisdiction on double jeopardy and estoppel grounds.

Although on appeal this Court noted that a "[d]ischarge under the speedy trial rule for failure to timely prosecute cannot serve to support a plea of former jeopardy because the defendant has not been put in jeopardy," Rawlins, 322 So. 2d at 13, this Court nevertheless affirmed. In so doing, it said that "since the discharge under the rule is for failure of state action to timely prosecute, such discharge by the clear language of the rule would rate as an estoppel against prosecution of defendant for the same offenses from which he has been previously discharged." Id. Implicit in Rawlins is the message that whether you call it "double jeopardy" or "estoppel," the result is the same -- that is, the case is over.

Here, as in Rawlins, the trial court was faced with the application of the speedy trial rule. Here, although the county court defense counsel filed a notice of expiration of speedy trial on October 15, 1993, the State did not respond. On December 2,

1993, the county court public defender filed a motion for discharge on the basis that the State failed to bring the defendant to trial before expiration of the fifteen day period. The following day, December 3, the State tried to nol pros the matter. On November 18, 1993, the circuit court public defender sought a dismissal of the charges on the basis that because the speedy trial period had elapsed in county court, the state was barred from prosecuting the same offenses.

At the hearing, the trial court ruled that the State could not prosecute the felony charges in circuit court because the charges were identical to the county court charges. Although the State insisted that jeopardy could not attach to a speedy trial discharge (R. 12-13), the trial court concluded that a dismissal was the right result. Under Rawlins, a dismissal was indeed the right result because Mr. Woodruff's discharge from the county charges "rates as an estoppel against prosecution" of the circuit court charges which are "the same offenses from which he has been previously discharged." Id. at 13. Thus, the trial court properly granted Mr. Woodruff's motion to dismiss and the Third District properly upheld that dismissal.

C. The State's Attempted Nol Pros Was a Nullity and Thus, Does Not and Cannot Change the Proper Result of Dismissal.

The speedy trial rule states: "the intent and effect of this rule shall not be avoided by the state by entering a nolle prosequi to a crime charged and by prosecuting a new crime grounded on the same conduct or criminal episode." Fla. R. Crim. P. 3.191(o).

While the language of this rule is plain and unambiguous and precludes precisely what the State tried to do here in the court below, this Court's decisions in State v. Agee, 622 So. 2d 473 (Fla. 1993), and Reed v. State, 649 So. 2d 227 (Fla. 1995), further show that the Third District was correct.

In Agee, the defendant was originally charged with attempted second degree murder. The State filed a nol pros thirty-three days before the expiration of the speedy trial period because the victim was in a coma. Once the victim emerged from the coma, the State filed a new information, charging the defendant with premeditated attempted first degree murder. The trial court then dismissed the new charges on the basis that the State had nol prossed in an attempt to circumvent the speedy trial time period.

On appeal, this Court affirmed the trial court's ruling and said that "when the State enters a nol pros, the speedy trial period continues to run and the State may not refile charges based on the same conduct after the period has expired." Agee, 622 So. 2d at 475. This Court emphasized that "the State cannot circumvent the intent of the [speedy trial] rule by suspending or continuing [a] charge or by entering a nol pros and later refiling charges." Id. at 475. This Court, in fact, elaborated on its concerns:

> To allow the State to unilaterally toll the running of the speedy trial period by entering a nol pros would eviscerate the rule--a prosecutor with a weak case could simply enter a nol pros while continuing to develop the case and then refile charges based on the same criminal episode months or even years later, thus effectively denying an accused the right to a speedy trial while the State strengthens its case.

Id. at 475.[11]

The present case is a lot like Agee. Here, the State nol prossed the county court charges on December 3, 1993. It did that in an attempt to avoid the consequences of a dismissal of the identical circuit court charges. In fact, the State knew that the dismissal was coming because Mr. Woodruff had moved for the dismissal of the circuit court charges on November 18, 1993. Basically, the State was trying to employ a tactical maneuver to "wipe the slate clean" of the charges against Mr. Woodruff so that it could get 175 days.[12]

In Reed, which is similar to Agee, the defendant was arrested on January 4, 1991, for armed robbery and several related traffic offenses. On January 24, 1991, the State filed an information charging the defendant with two counts of leaving the scene of an accident involving personal injury. The State then nol prossed the charges on June 27, 1991. On July 15, 1991, the defendant filed his motion to discharge. After this motion was filed, the State

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[11] In addition, the dissent in Agee agreed that the use of a nol pros should not be used to manipulate the effects of the speedy trial rule and noted that: "[o]ne of the purposes of rule 3.191 is to prevent the State from violating a defendant's right to a speedy trial through tactical maneuvers." 622 So. 2d at 476 (emphasis added).

[12] As the public defender stated in the motion to dismiss hearing, "What they [the State] are doing is working on the County Court case and working on the Circuit Court case using both jurisdictions to their advantage." (TR. 8). In fact, subsequently during the proceeding, the judge echoed these sentiments when he asked the prosecutor point blank: "Would you agree that the proper thing for the State to have done was to null pros the County Court case prior to the filing of the Motion to Discharge? (TR. 11).

then filed an information, charging Reed with various felonies arising out of the robbery. After the denial of the motion to discharge, the State filed an information adding other felonies related to the robbery and recharging Reed with the two original counts.

On appeal, this Court concluded that once a defendant is arrested and the speedy trial period runs on any of the charges, the State cannot avoid the speedy trial period by filing a nol pros. Reed, 649 So. 2d at 229. This Court also deemed Reed to be entitled to a discharge from all of the charges because the State had violated the speedy trial rule, id., and stated:

> The premise upon which Reed's motion for discharge was denied was that because there were no charges pending against him at the time, his motion was a nullity. Taken to its extreme, this reasoning would mean that even though a defendant had been arrested and taken into custody, the speedy trial time for the conduct which precipitated the arrest would never begin to run until the State chose to file an information or indictment. This is contrary to both the letter and the spirit of the speedy trial rule.

Id. (emphasis added).

The Third District decision comports with this Court's reasoning in Agee and Reed. Specifically, the Third District determined that "[t]he state's nolle prosequi was a nullity because the state took no action pursuant to Rule 3.191(p)(3) after the notice of expiration of speedy trial period was filed." Woodruff, 654 So. 2d at 587. Here, the State incorrectly contends that the Third District placed an undue emphasis on the fact that the State attempted to nol pros the misdemeanor charges after the speedy trial period applicable to

the misdemeanor charges had expired. (Petitioner's Brief on Jurisdiction 8). The flaw in such a contention is that the decisions in Agee and Reed require Florida courts to frown on precisely the nol pros tactics that the State tried to use below. Here, the State attempted to nol pros the county court charges which were identical to the offenses pending in circuit court. This was an outright attempt to avoid the binding effect of the speedy trial rule. Specifically, the State was manipulating to create the fiction that the slate against Mr. Woodruff was clean. Through such a fiction, it tried to begin again with the identical offenses, the very ones that had been forever discharged one day earlier.

II. THE DECISION IN THE COURT BELOW SHOULD BE AFFIRMED UNDER THE PLAIN LANGUAGE OF THE CONSOLIDATION RULE.

A. The State Failed to Consolidate the Identical Misdemeanor and Felony Charges.

Here, the State insists that the circuit court offenses may be prosecuted under the speedy trial period for felonies, even though it failed to prosecute the identical offense within the ninety day period for misdemeanors. Such a notion is not just contrary to the speedy trial rule as a whole, but also inimical to the provision in the speedy trial rule, Fla. R. Crim. P. 3.191(f), that states that a "misdemeanor shall be governed by the same time period applicable to a felony" when a felony and misdemeanor have been consolidated for disposition in circuit court.

It is well-settled that a valid consolidation of offenses

pursuant to Fla. R. Crim. P. 3.151 becomes effective only "upon motion of a party to the cause and . . . [order] by the Court." Kilgore v. State, 271 So. 2d 148, 150 (Fla. 2d DCA 1972); Sharif v. State, 436 So. 2d 420, 422 (Fla. 4th DCA 1983). Also, as this Court noted in Ashley v. State, 265 So. 2d 685, 688 (Fla. 1972), "[i]t is well recognized that the consolidation for trial of criminal cases rests within the sound discretion of the trial court." An order of consolidation, of course, is not something the clerk's office can issue.

The plain language of the consolidation rule is worth reiterating:

> **Consolidation of Indictments or Informations.** Two or more indictments or informations charging related offenses shall be consolidated for trial on a timely motion by a defendant or by the state. The procedure thereafter shall be the same as if the prosecution were under a single indictment or information. Failure to timely move for consolidation constitutes a waiver of the right to consolidation.

Fla. R. Crim. P. 3.151(b).

The reasoning in Kilgore shows that Florida courts strictly adhere to the plain language of the consolidation rule. In Kilgore, the defendant was charged by separate informations with second degree murder and carrying a concealed weapon. The court then set a trial by jury for each information through separate trial orders. On the trial date, the judge then ordered the empaneling of a single jury to try jointly the two informations.

On appeal, the Second District noted that "[t]he

consolidation of two or more separate criminal charges is not a matter of right by either party. It must be properly moved for in an orderly fashion by the party so desiring it, either the State or the defendant." Id. at 150 (emphasis added). Because the record did not reveal that any party had moved for consolidation, the court ruled that it was "procedural error" for the trial judge to have sua sponte consolidated the charges. Id.

What the State is urging here is a redrafting of the consolidation rule. In the court below, the State attempted to circumvent the speedy trial rule by asking the court to put some belated imprimatur on an invalid attempted transfer of the county court charges. The situation here, however, is even more egregious than that in Kilgore. Here, the State sought to rely not on the judge's decision, but on the "ruling" of a court clerk who had tried to effectuate a sua sponte transfer or consolidation.[13]

In sum, because the clerk's attempt to transfer or

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[13] In fact, at the December 13th hearing on the motion to dismiss, the State argued, "[a]s I understand it, the clerk's office did the correct thing in transferring it. Somehow there was an error made --." (TR. 7). Defense counsel countered such a contention by pointing out that: "[it] was an ex parte transfer. The Public Defender's office was not notified." (TR. 7). The trial judge essentially indicated that it was not only ex parte in the purest sense, but also ex-judicial because "[i]t was done by the clerk's office," and even the court had no notice of it. (T. 7). It is thus not surprising that the Third District noted in its Woodruff decision that "[t]he state's argument that the charges were consolidated is without merit. Consolidation may be authorized by only the trial judge upon the proper motion of a party." 654 So. 2d at 587 (citing Ashley, 265 So. 2d at 688).

consolidate was a nullity, the State cannot rely on the purported nullity-transfer-consolidation for proceeding with the "forever discharged" charges.

B. The Result of the State's Failure to Obtain a Consolidation Is a Waiver of the Benefit of the Longer Felony Time Frame.

Under Rule 3.151(b) of the Florida Rules of Criminal Procedure, the "[f]ailure to timely move for consolidation constitutes a waiver of the right to consolidation." Specifically, the State could not prosecute Mr. Woodruff under the felony time period because it did not avail itself of the procedure set forth in 3.151(b).

The concept of "waiver" is a basic one in our judicial system. It is apodictic that "[t]he doctrine of waiver can encompass not only the intentional or voluntary relinquishment of known rights, but also conduct that warrants an inference of the relinquishment of those rights." Miami Dolphins, Ltd. v. Genden & Bach, P.A., 545 So. 2d 294, 296 (Fla. 3d DCA 1989). All waiver really means is that you don't get what you would have gotten had you done it.

In the present case, the State, either intentionally or voluntarily or through its conduct, relinquished its right to prosecute Mr. Woodruff under the applicable time for felonies by not seeking a consolidation in the manner prescribed by Rule 3.151(b). In fact, the trial judge delivered quite a diatribe on the State's omissions:

> THE COURT: I'll tell you the reason why the misdemeanor is still remaining in the County Court.

> There is no motion filed for consolidation or transfer to the Circuit Court. The clerk can not do that on its own. There has to be some kind of intervention by the Court, the State, or Defense, to discuss the matter. I don't think it's proper for the clerk to do that on its own. There is no process that I'm aware of that's provided in the Rules of Criminal Procedure that allows a clerk to do that on its own. If a timely Motion to Discharge was filed in County Court by operation of law, 15 days run, and if it's not brought to trial in the window, the Defendant is discharged. I don't see how it's brought back up and you're able to proceed in the felony case.

(TR. 10-11)(emphasis added).

The meaning of waiver is quite clear here: the State does not get to use the felony time period because the State did not do what it needed to do in order to get the felony time period. Thus, the dismissal here is precisely what the waiver provision in the consolidation rule contemplates.

III. THE COURT'S DECISION BELOW SHOULD BE AFFIRMED BECAUSE IT COMPORTS WITH PREVIOUS DECISION OF THIS COURT AND IS NOT IN CONFLICT WITH THE DECISION IN NESWORTHY.

A. The Decision Below is in Harmony With Decisions of This Court.

As should be apparent from the discussion above, this Court should affirm the Third District decision because it comports with numerous decisions of this Court. As we said, in Sirmons, this Court determined that section 775.021(4)(b), the "second tier" of the Blockburger analysis, prohibits dual convictions where, as here, the charges are simply aggravated forms of the same underlying offense and are distinguished from each other only by degree factors. 634 So. 2d at 154. Likewise, in Goodwin, this Court held that a defendant cannot

be convicted of two offenses that are simply "aggravated forms of a single underlying offense distinguished only by degree factors." 634 So. 2d at 157. The Woodruff decision is consistent with these cases because as we said, felony DUI is merely an aggravated form of the underlying offense of DUI.

Also, the Third District decision comports with this Court's decisions in Hlad, Rodriguez, Nappier and Eutsey. These cases espouse the proposition that felony DUI is merely a punishment enhancement of misdemeanor DUI, which is based solely on the "historical fact" of a defendant's prior convictions. What this Court explained in Rodriquez, that felony DUI "is a felony only by virtue of the fact that the defendant has been convicted of three or more prior DUI violations," 575 So. 2d at 1265, rings true. Specifically, the judge -- not the jury -- considers the "historical fact" and such consideration occurs only after the jury has convicted the defendant of the underlying offense. As such, the judge's determination of the existence of the prior convictions takes place in what is the functional equivalent of a sentencing. Such a proceeding is a lot like the one that the habitual offender statute contemplates -- where the enhanced punishment is only an "incident to the last offense," and "does not create a new substantive offense." Eutsey, 383 SO. 2d at 223.

In addition, the Third District decision is consistent with this Court's decision in Rawlins, in which this Court held that a speedy trial rule discharge bars the State from

prosecuting the defendant "for the same offenses from which he has been previously discharged." 322 So. 2d at 13. Here the State's violation of the speedy trial rule and failure to consolidate the county court charges with the same circuit court charges means that all of the charges are gone.

Further, the Third District decision comports with this Court's decisions in Agee and Reed. As this Court said in Agee, "when the State enters a nol pros, the speedy trial period continues to run and the State may not refile charges based on the same conduct after the period has expired." 622 So. 2d at 475 (emphasis added). As this Court said in Reed, once a defendant is arrested and the speedy trial period runs on any of the charges, the State cannot avoid the speedy trial period by a filing a nol pros. 649 So. 2d at 229. What underlies the Agee and Reed decisions and other decisions is a policy against allowing the State to use a mechanism, such as a nol pros, to unilaterally extend the time frame under the speedy trial rule.

In the present case, if the State could somehow nevertheless proceed with the same charges after the expiration of the speedy trial rule, it would contravene not only the plain language of the speedy trial rule but also the ruling and spirit of Sirmons, Goodwin, Hlad, Rodriguez, Eutsey, Rawlins, Agee and Reed. That is, anything other than an affirmance here, would give prosecutors a way to unilaterally extend the time frame under the speedy trial rule by the mere filing of

the identical charges in both county court and circuit court. Such duplicative filing would become a form of speedy trial time extension "insurance" and a way for the State to circumvent the "forever discharged" language of the speedy trial rule when and if they happen to mess up in county court.

B. Woodruff Is Not in Conflict With Nesworthy.

Contrary to the State's contention, the Third District's decision is not in conflict with Nesworthy v. State, 648 So. 2d 259 (Fla. 5th DCA 1994), which is distinguishable and actually consistent with the result below. In Nesworthy, the defendant was charged with particular misdemeanor and felony offenses which were different.[14] Here, however, Woodruff's misdemeanor and felony charges were identical.

Also, in Nesworthy, the defendant was initially charged with "misdemeanor driving under the influence." After the speedy trial period had expired, the defendant filed a motion to discharge the misdemeanor charge. After the hearing on the motion was held, the parties set a date for a plea. Two days later, the State nol prossed the misdemeanor charge. One month later, however, the State filed a two count petition charging the defendant with felony DUI serious bodily injury and DUI

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[14] Nesworthy was originally charged with misdemeanor DUI under which, pursuant to § 316.193(1)(a)-(b), Fla. Stat. (1993), the State must prove that the defendant was "driving . . . and . . . under the influence . . . or has a blood alcohol level of 0.10 percent or higher." Under the felony charge of DUI with serious bodily injury, the State must show that the defendant was driving under the influence and additionally must prove "serious bodily injury to another." § 316.193(3)2., Fla. Stat. (1993).

personal or property damage, a misdemeanor. The defendant then filed a motion for discharge based on the double jeopardy violation. The court granted the discharge on the misdemeanor, but not on the felony.

On appeal, the defendant argued that this Court's holding in Agee warranted a reversal of the trial court's ruling. The defendant argued that, because the State nol prossed the misdemeanor, it was barred from prosecuting the new crimes. The Fifth District, however, relied not on Agee but on its earlier holding in Spurlock v. Cycmanick, 584 So. 2d 1015 (Fla. 5th DCA 1991), and concluded that the speedy trial time period for a misdemeanor does not affect the speedy trial time period for a felony. Nesworthy, 648 So. 2d at 260.

In Spurlock, the court held that "a dismissal on speedy trial grounds of a necessarily included lesser offense does not bar a prosecution for the greater offense." 584 So. 2d at 1016. In Spurlock, the defendant was charged with misdemeanor battery. While that charge was pending, an information charging the defendant with the felony of aggravated battery based on the same underlying conduct was filed within 180 days of the defendant's arrest. The misdemeanor was eventually dismissed because the defendant was not brought to trial within the 90 day period required for misdemeanors.

The defendant then filed a writ of prohibition to prevent the trial judge from trying the defendant on the felony charge of aggravated battery. The defendant argued that trying him on

the felony charge would violate his Fifth Amendment rights. The Fifth District said that the speedy trial rule "neither expressly nor impliedly . . . bar[s] prosecution for greater degree crimes which might have been charged as a result of the same conduct or criminal episode." Id. at 1016. The court also noted that the defendant was not placed in jeopardy "because the county court never empaneled and swore in a jury to try the charge." Id. at 1017.

Because, Nesworthy and Spurlock appear to stand for the proposition that "a dismissal on speedy trial grounds of a necessarily included lesser offense does not bar a prosecution for the greater offense," Spurlock, 584 So. 2d at 1016, they can be deemed inapplicable. Here, there was no discharge on a necessarily included lesser offense. The State here originally filed various misdemeanors in county court, including two counts of DUI serious injury and two counts of DUI property damage. The State then filed an information in circuit court charging Mr. Woodruff with one count of felony DUI, two counts of DUI property, and one count of DUI personal damage. Clearly, the misdemeanor charges brought at the county court level were not necessarily included lesser offenses of the circuit charges.[15] Here, as we explained above, the county

[15] For example, this Court in The Florida Bar. In re Rules of Practice and Procedure for Traffic Courts, 536 So. 2d 181, 186 (Fla. 1988) reviewed the language contained in Rule 6.290 (addressing the issue of "when withholding adjudication is prohibited"). In doing so, this Court noted that "[p]aragraph (b) was eliminated by the Committee as there is no 'lesser offense' for a DUI."

court charges have the same elements as the circuit court charges.[16]

IV. THE DECISION IN THE COURT BELOW SHOULD BE AFFIRMED BECAUSE THE DECISIONS IN NESWORTHY AND SPURLOCK ARE WRONG AND ARE EITHER OVERRULED OR SHOULD BE OVERRULED NOW.

A. This Court Has Already Implicitly Overruled Nesworthy and Spurlock.

If the Fifth District had had the benefit of this Court's decision in Reed, it would have reached a contrary result in the Nesworthy case. In Nesworthy, the defendant was involved in an accident on November 5, 1993. Not until January 5, 1994, did the State serve notice to the defendant to appear on a charge of misdemeanor DUI. Because the State had not brought her to trial within 90 days, the defendant moved for a discharge under the speedy trial rule on April 20, 1994. A hearing on the motion was held and the parties set a date for a plea. The State, however, then pulled a "sucker punch" by nol prossing the misdemeanor DUI charge and subsequently filing an information alleging felony and misdemeanor charges approximately one month later -- approximately six and a half months after the accident. This maneuver, under Reed, is clearly unacceptable. In Reed this Court stated:

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[16] Also, the Florida Standard Jury Instructions reveals that DUI serious injury and DUI property damage are not necessarily included lesser offenses of felony DUI which only requires a minimum of four previous convictions. Fla. Std. Jury Instr. (Crim.) 280c. As a result, the Nesworthy, 648 So. 2d 259 (Fla. 5th DCA 1994) and Spurlock, 584 So. 2d 1015 (Fla. 5th DCA 1991) decisions should have no impact on this Court's decision.

> We recognize that under some circumstances there may be legitimate reasons why the State is not ready to file charges against a defendant who has previously been arrested. However, the State cannot simply wait and let the speedy trial period run. The State's remedy would appear to be to file the charges before the expiration of the speedy trial time and seek an extension under the provisions of the speedy trial rule.

649 So. 2d at 229.

Based on the holding in Reed, the State in the Nesworthy case, should not have been allowed to wait so long, let the misdemeanor trial time run for no apparent valid reason, wipe the slate clean and refile new charges against the defendant and be granted extra time to prosecute her. This is clearly "contrary to both the letter and the spirit of the speedy trial rule." Id. Thus, if the Nesworthy court had had the benefit of this Court's decision in Reed, the Fifth District would have and should have reached a different result.

B. Nesworthy and Spurlock Are Wrong and This Court Should Overrule Them Now.

The Fifth District's decisions in both Nesworthy and Spurlock are plain wrong and, we submit, cannot be good law. That is, even if this Court somehow feels that here the misdemeanor charges were simply necessarily included lesser offenses of the felony DUI charge, the Blockburger "same elements" test nevertheless has to require an affirmance of the Third District decision. As we have previously stated, the holdings in Spurlock and Nesworthy can not harmoniously co-exist with the Blockburger "same elements" test that this Court has adopted. Specifically, Spurlock and Nesworthy mean that the

State is free to prosecute a greater offense even if a speedy trial violation completely discharged the lesser included offense. This premise could lead to absurd results in cases such as the present, in which the county court dismissed the identical charges which the State is seeking to prosecute at the circuit court level.[17] Simply put, how can the State even prosecute Mr. Woodruff or any defendant for felony DUI when the court has discharged him from the underlying core offense of misdemeanor DUI?

The Blockburger test, however, compels courts not to consider the greater/lesser distinction, but instead to only consider whether "each offense has at least one element that the other does not" in determining whether the State can proceed. Consequently, in almost every conceivable situation where there is a discharge of a lesser included offense, by definition the lesser included offense will have the "same elements" as the greater offense.

The decisions in Nesworthy and Spurlock also blatantly

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[17] As Judge Cowart stated in his thoughtful dissent in Spurlock v. Cycmanick, 584 So. 1015, 1021 (Fla. 5th DCA 1991):

> The issue should not be whether the trial judge or appellate judge likes or dislikes the result of applying the speedy trial rule. The Supreme Court of Florida adopted concepts involved in the words employed in the speedy trial rule at the special and express direction of the legislature to implement the right to a speedy trial guaranteed by the Constitution of the State of Florida and until that court states it did not mean the plain meaning of the words in the rule, the words should be construed to mean what they state . . . and be given meaning and substance that cannot be manipulated away by changes in form of the charges.

contravene the plain language of Rule 3.191(n) which states:

> **Discharge From Crime; Effect.** Discharge from a crime under this rule shall operate to bar prosecution of the crime charged and of all other crimes on which trial has not commenced nor conviction obtained nor adjudication withheld and that were or might have been charged as a result of the same conduct or criminal episode as a lesser degree or lesser included offense.

Fla. R. Crim. P. 3.191(n)(emphasis added).

Clearly, a discharge on double jeopardy principles on a lesser included offense bars a future prosecution on the greater offense if the two offenses are based on the same criminal conduct. In addition, Rule 3.191 bars a future prosecution of a greater crime if the two crimes are the result of the same criminal episode.[18]

Here, the rule clearly states that a discharge from a crime will bar the State from prosecuting "the crime charged and of all other crimes" that arise from the same criminal episode. Fla. R. Crim. P. 3.191(n). Because the misdemeanor DUI

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[18] In his dissenting opinion in Spurlock, Justice Cowart further explained that the majority should have focused on Rule 3.191(i)(3) which provides that at the expiration of the speedy trial time period the defendant would be "forever discharged." Justice Cowart then determined that:

> The only question is whether a "discharge" under the speedy trial rule is as effective as a discharge under the double jeopardy principles. This question involves the intent of the speedy trial rule. The rule uses the words "forever discharged." Those words do not contain substance and do not mean too much if they mean that after a misdemeanor battery a person can be tried for the same conduct if it is repackaged and recharged as part of another criminal offense and labeled something else (i.e., a felony or an aggravated battery). 584 So. 2d at 1021.

charges and the felony DUI charges arose from the same criminal episode, Rule 3.191(n) bars the prosecution of the felony DUI in the circuit court. As such, the Fifth District cases, Nesworthy and Spurlock, cannot coexist with binding precedent from this Court and with the plain language of the speedy trial rule.

CONCLUSION

In sum, in State v. Woodruff, 654 So. 2d 585 (Fla. 3d DCA 1995), the Third District Court of Appeal properly concluded that the State, by operation of the speedy trial rule, is estopped from prosecuting the same offense from which Mr. Woodruff was previously discharged. Because the Third District decision comports with the plain language of the speedy trial rule and the consolidation rule and is entirely consistent with binding precedent from this Court, we request this Court to affirm the decision below.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Michael Niemand of the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128 and Beth Weitzner of the Assistant Public Defender's Office, Eleventh Judicial Circuit of Florida, 3230 Northwest 14th Street, Miami, Florida 33125 this 16th day of November, 1995.

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