IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,139

THE STATE OF FLORIDA,

Petitioner,

-vs-

SALVADOR SALZERO,

Respondent.

FILED
SID J. WHITE
AUG 27 1997
CLERK, SUPREME COURT
Chief Deputy Clerk

ON APPEAL PROM THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This case is an appeal from the Third District Court of Appeal (hereafter, "Third DCA"). In its opinion, which is attached hereto as an appendix, the Third DCA certified conflict with the following decisions: State v. Driggers, 680 So. 2d 601 (Fla. 2nd DCA 1996), rev. denied, 689 So. 2d 1069 (Fla. 1997); State v. McGruder, 664 So. 2d 1126 (Fla. 2nd DCA 1995); Climnson v. State, 528 So. 2d 1296 (Fla. 1st DCA 1988); and certified the following question of great public importance:

> "DOES THE 1984 AMENDMENT TO RULE 3.19 1 , NOW RULE 3.19 1 (p)(3), WHICH REQUIRES A DEFENDANT'S DISCHARGE SHOULD HE OR SHE NOT BE BROUGHT TO TRIAL WITHIN THE RULE'S TEN-DAY PERIOD THROUGH NO FAULT OF THE DEFENDANT, SUPERSEDE THE HOLDING IN STUART V. STATE, 360 SO. 2D 406 (FLA. 1978) THAT A DEFENSE COUNSEL IS UNDER NO DUTY TO CORRECT A TRJAL COURT'S ERRONEOUS IMPRESSION THAT THE TRIAL DATE AS SET BY THE COURT WOULD BE TIMELY?"

The Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the Third DCA. The Respondent, SALVADOR SALZERO, was the Defendant in the trial court and the Appellant in the Third DCA. In this brief, the parties will be referred to as they stood in the trial court. The symbols "R. " and "T. " will refer to the record on appeal and the transcripts of the proceedings, respectively.

STATEMENT OF THE CASE AND FACTS

On February 11, 1996, the Defendant was arrested and charged with possession of cocaine and possession of drug paraphernalia. (R. 1-4). On August 5, 1996, he filed his notice of expiration of the 175-day post-arrest speedy trial period. (R. 9). On August 6, 1996, the trial court held the hearing on the notice of that expiration. (R. 1-5). The trial court determined that trial had previously been set for August 19, 1996 and specifically stated, "I see that the trial was set for 8- 19 and that is the final date in the window." (T. 8). On August 19, the Defendant filed a motion for discharge, based upon the State's failure to bring him to trial within ten days of the hearing on the notice for expiration. (R. 10-11). The trial court denied this motion, and the Defendant entered a plea to the charges, reserving for appeal the trial court's denial of his motion. (T. 12-14; 18-20). The Defendant was sentenced to serve six months in the Dade County Jail, with six months credit for time served. (T. 20; R. 13-14).

On September 16, 1996, the Defendant filed his notice of appeal. (R. 25). On July 9, 1997, the Third DCA reversed the trial court, certified conflict with the following decisions: State v. Driggers, 680 So. 2d 601 (Fla. 2nd DCA 1996), rev. denied, 689 So. 2d 1069 (Fla. 1997); State v. McGruder, 664 So. 2d 1126 (Fla. 2nd DCA 1995); Climnson v. State, 528 So. 2d 1296 (Fla. 1st DCA 1988); and certified the following question of great public importance:

> "DOES THE 1984 AMENDMENT TO RULE 3.191, NOW RULE 3.19 1 (p)(3), WHICH REQIJIRES A DEFENDANT'S DISCHARGE SHOULD HE OR SHE NOT BE BROUGHT TO TRIAL WITHIN THE RULE'S TEN-DAY PERIOD THROUGH NO FAULT OF THE DEFENDANT, SUPERSEDE THE HOLDING IN STUART V. STATE, 360 SO. 2D 406 (FLA. 1978) THAT A DEFENSE COUNSEL IS UNDER NO DUTY TO CORRECT A TRIAL COURT'S ERRONEOUS IMPRESSION THAT THE TRIAL DATE AS SET BY THE COURT WOULD BE TIMELY?"

The State filed its notice to invoke discretionary jurisdiction on July 28, 1997. 'This appeal now follows.

RULE AT ISSUE

The following Florida Rule of Criminal Procedure is at issue in the instant appeal:

3.191(p)(3). Remedy for Failure to Try Defendant Within the Specified Time.

"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 1 O-day period through no fault of the defendant, on motion of the defendant or the court, shall be forever discharged from the crime."

POINT INVOLVED ON APPEAL

WHETHER THE LOWER COURT ERRED IN HOLDING THAT FLA. R. CRIM. P. 3.191(p)(3) ONLY PROVIDES FOR SEPARATE TIME PERIODS OF 5 AND 10 DAYS, AS OPPOSED TO ONE 15-DAY WINDOW PERIOD.

SUMMARY OF THE ARGUMENT

The Third DCA erred in holding that Fla. R. Crim. P. 3.191(p)(3) only provides for separate time periods of five and ten days, as opposed to one fifteen-day window, within which to bring a defendant to trial following the filing of his notice of expiration of speedy trial. Based on the committee notes following Rule 3.19 1 (p)(3), Florida Rules of Criminal Procedure (1996), it is clear that the intent of the rule was to provide the State with a fifteen day time period within which to bring a defendant to trial, following a defendant's notice of expiration of speedy trial. Because the Defendant's trial date was set to begin within fifteen days of the date that he filed his notice of expiration of the speedy trial time period, and because the Defendant suffered no prejudice, the trial court did not err in denying the Defendant's motion for discharge. As such, the decision of the Third DCA should be reversed.

ARGUMENT

THE LOWER COURT ERRED IN HOLDING THAT FLA. R. CRTM. P. 3.191(p)(3) ONLY PROVIDES FOR SEPARATE TIME PERIODS OF 5 AND 10 DAYS, AS OPPOSED TO ONE 15-DAY WINDOW PERIOD, WITHIN WHICH TO BRING A DEFENDANT TO TRIAL FOLLOWING THE FILING OF HIS NOTICE OF EXPIRATION OF SPEEDY TRIAL.

The Third DCA's holding that the trial court erred in denying the Defendant's motion for discharge because he was not brought to trial within ten days of the hearing on his notice of expiration of the speedy trial time period is incorrect. The State respectfully submits that absent a showing of prejudice to a defendant, failure to strictly comply with the ten day requirement of Rule 3.19 1 (p)(3), Florida Rules of Criminal Procedure (1996) is harmless error, if the defendant is brought to trial within fifteen days.

Rule 3.191(p)(3) provides that, "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." However, the committee notes to the 1984 Amendment to this rule, subsection (I), which is the current subsection (p), specifically state that, "The intent of (I)(4) is to provide the state attorney with 15 days within which to bring a defendant to trial from the date of the filing of the motion for discharge." As such, it is clear that the rule's intent was not to provide the state attorney with separate time periods of 5 days and 10 days, but rather to provide one 15 day time period within which to bring a defendant to trial.

The First and the Second District Courts of Appeal agree with this latter interpretation of the rule. For example, in State v. McGruder, 664 So. 2d 1126 (Fla. 2nd DCA 1995), whose facts are

similar to those of the instant case, the hearing on the defendant's notice of expiration of speedy trial was held two days after the defendant filed such notice, and the trial was scheduled thirteen days after this. The Second DCA held, "Given that the total time allowed the state is fifteen days, and that time period was met here, in addition to the fact that no prejudice was shown, we conclude that appellee was improperly discharged." McGruder at 1127. Also, in State v. Driggers, 680 So. 2d 601 (Fla. 2nd DCA 1996), the hearing on the defendant's filing of his notice of expiration of speedy trial was held the day after the filing, and the trial was scheduled thirteen days after that. Again, the court held that a defendant should not be discharged so long as the state brings the defendant to trial within fifteen days of the date of filing the notice of expiration of speedy trial. Id. at 603.

Similarly, in Climpson v. State, 528 So. 2d 1296, 1297 (Fla. 1st DCA 1988), the First DCA stated, "...the intent of the rule is to ensure that a defendant is brought to trial within the fifteen-day time period." Thus, the Climpson Court held that although the hearing itself exceeded the five-day time limit required by the rule, the fact that the defendant was to be tried within fifteen days rendered the untimely hearing harmless. Id.

Moreover, in State v. Miller, 672 So. 2d 855 (Fla. 5th DCA 1996), after the defendant filed his notice of expiration of speedy trial, the trial court set the trial within the fifteen days contemplated by the rule, without first holding the five-day hearing. The court held that the trial court acted in full compliance with the speedy trial rule and the defendant's trial was timely set. Id. at 857. Likewise, in State v. Kruger, 539 So. 2d 565 (Fla. 4th DCA 1989), the court stated that after the speedy trial time has run, the State is entitled to the additional fifteen-day grace period provided by Rule 3.19 1. Thus, from a reading of these cases, it appears as though the Fourth and Fifth DCAs also agree with the interpretation of the rule that after the expiration of the speedy trial time, the State

is entitled to one fifteen-day time period within which to bring a defendant to trial.

Strictly applying the rule, it is not unlikely that fifteen days could go by before a defendant has his day in court, following the tiling of his notice of expiration of speedy trial. For example, if a court waits five days to have the hearing on the notice of expiration of speedy trial, then sets trial for ten days after that, the full fifteen days would go by before a defendant has his trial. Clearly, then, a defendant cannot be said to suffer prejudice simply because his trial is set on the fifteenth day following the filing of his notice of expiration of speedy trial, or such a period would not have been provided for in the rule.

On the other hand, if the trial court expedites the hearing, having it the day following the filing of the notice of expiration of speedy trail, as was done in the instant case, a maximum of only eleven days could go by before a defendant's trial date, according to the rule. If the trial date were set beyond the ten-day period, but on the fifteenth day, the defendant would have to be discharged, according to the rule. It defies common sense to have the result in the second scenario be the discharge the defendant, simply because the court was diligent in having the initial hearing. Moreover, it is difficult to see what prejudice the defendant in the second scenario would suffer, simply because a full fifteen days would elapse before the date of his trial, when the defendant in the first scenario would suffer no prejudice, according to the rule.

It should be noted that during the notice hearing when the trial court determined that the Defendant's trial date had already been set for August 19, the Defendant's counsel kept silent and never complained that August 19 would be beyond the window period. (T. 8). As such, the Defendant was not without fault that the trial date was set outside the window period. Fla. R. Crim. P. 3.19 1 (p)(3) provides that a defendant not brought to trial within the 1 O-day period *through no*

fault of his own shall be forever discharged from the crime (emphasis added). In its opinion, the Third DCA stated that had it not been for this Court's decision in Stuart v. State, 360 So. 2d 406 (Fla. 1978), which held that a defense counsel is under no duty to correct a trial court's erroneous impression that the trial date would be timely, it would have decided that the Defendant was not entitled to be discharged. As such, the Third DCA certified the following question to be of great public importance:

> "DOES THE 1984 AMENDMENT TO RULE 3.191, NOW RULE 3.191 (p)(3), WHICH REQUIRES A DEFENDANT'S DISCHARGE SHOULD HE OR SHE NOT BE BROUGHT TO TRIAL WITHIN THE RULE'S TEN-DAY PERIOD THROUGH NO FAULT OF THE DEFENDANT, SUPERSEDE THE HOLDING IN STUART V. STATE, 360 SO. 2D 406 (FLA. 1978) THAT A DEFENSE COUNSEL IS UNDER NO DUTY TO CORRECT A TRIAL COURT'S ERRONEOUS IMPRESSION THAT THE TRIAL DATE AS SET BY THE COURT WOULD BE TIMELY?"

The State respectfully submits that this question should be answered in the affirmative. Just as a defendant must make a contemporaneous objection to preserve an issue for appeal, a defendant who seeks to obtain a speedy trial should have to participate in the scheduling of his trial, and object should the date fall outside the specified ten-day window period. As Judge Cope stated in State v. Thomas, 659 So. 2d 1322 (Fla. 3rd DCA 1995), "The purpose of the speedy trial rule is to assure a speedy trial, not a speedy discharge. If the defendant disagreed with the calculation of the window period in this case, the defendant was obliged to make a contemporaneous objection." Judge Cope was apparently disturbed by the fact that the defendant in Thomas benefitted from his failure to make an objection when the court scheduled the trial date. Similarly, in the instant case, the Defendant did not object to the scheduling of the **trial** date in the instant case, although he knew it went beyond

the specific ten-day time period provided for in the rule. As such, the Defendant should not have been allowed to claim the benefit of the rule in order to obtain a speedy discharge.

A reading of the committee notes to the 1984 Amendment to this rule clearly indicates that the purpose of Rule 3 . 191 (p)(3) is to provide the state attorney with an additional fifteen days within which to bring a defendant to trial, after a notice of expiration of speedy trial is filed. As the committee notes state, "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. In other words, it gives the system a chance to remedy a mistake." This window period not only forces the prosecution to bring a defendant to trial within fifteen days, or face having him discharged, but it provides a defendant with ample opportunity to prepare for trial. Stated another way, the purpose of this fifteen-day window is to provide a defendant with a speedy trial, which is what he supposedly wants, not a speedy discharge.

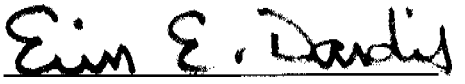
Thus, taking into account the intent of Rule 3.19 1(p)(3), as clearly evidenced by the committee notes to the 1984 Amendment, together with the fact that the Defendant's trial date was set, with no objection from the Defendant, within the fifteen-day window period, and due to the fact that the Defendant suffered no prejudice, the trial court did not err in denying the Defendant's motion for discharge. As such, the decision of the Third DCA should be reversed.

CONCLUSION

Based on the foregoing points and authorities, the Third DCA improperly held that Fla. R. Crim. P. 3.191(p)(3) does not provide for one fifteen-day window period within which to bring a defendant to trial, following the filing of his notice of expiration of speedy trial. This Court should reverse the Third DCA and direct the court to affirm the trial court's order denying the Defendant's motion for discharge.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was mailed this 25th day of August, 1997 to the Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33 125.

ERIN E. DARDIS
Assistant Attomcy General

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

L96-15967-X1

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1997

DOCKETED
JUL 9 1997
O.P.V.
ATTORNEY GENERAL

SALVADOR SALZERO, **

Appellant, **

vs. ** CASE NO. 96-267

THE STATE OF FLORIDA, ** LOWER TRIBUNAL
CASE NO. 96-4693

Appellee. **

Opinion filed July 9, 1997.

An appeal from the Circuit Court of Dade County, Michael A. Genden, Judge.

Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Erin E. Dardis, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and NESBITT, JORGENSON, COPE, LEVY, GERSTEN, GODERICH, GREEN, FLETCHER, SHEVIN, and SORONDO, JJ.

FLETCHER, Judge,

The defendant, Salvador Salzero, appeals his conviction and sentence for possession of cocaine and drug paraphernalia, on the ground that the trial court improperly denied his motion for

discharge, which motion alleged that the State had failed to follow rule 3.191(p)(3), Florida Rules of Criminal Procedure.* For the following reasons, we reverse the denial of Salzero's motion and direct the trial court to discharge him from the crimes.

Salzero was charged with the crimes on February 11, 1996 and filed his notice of expiration of the 175-day post-arrest speedy trial period on August 5, 1996. The trial court held the hearing on that notice on August 6, 1996. Under the rule the trial was required to be held within ten days of the August 6 hearing, i.e., no later than August 16, 1996. However, the trial court determined that trial had previously been set for August 19, 1996, and apparently concluded that since that date was within fifteen days of the expiration of the 175-day speedy trial period, Salzero could properly be tried at that time under the rule's "window" provisions.

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* Which reads:

> "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 subsection (j) [defense delays, continuances, unavailability, invalid demand] 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."

When the case was called on August 19, 1996 (thirteen days after the notice hearing), Salzero moved for discharge, asserting that rule 3.191(p)(3) requires that the defendant be brought to trial within ten days of the hearing on the notice of expiration, and since the ten-day post-hearing period expired on August 16, he could not be brought to trial thereafter and was entitled to discharge. The trial court disagreed and Salzero entered a plea to the charges, reserving the speedy trial issue for appeal.

We conclude that the trial court misread the rule. The language of rule 3.191(p)(3) requires that a defendant asserting speedy trial rights be brought to trial within ten days of the hearing on his notice of expiration, This ten-day period is neither. contracted nor expanded by the timing of the hearing within 'the five days allowed for it under the same rule; i.e., whether the notice hearing is held on the first day (as here) or the fifth day following the filing of the notice, the trial must be held no more than ten days from the hearing on the notice. Since.. Salzero's trial was set for a date after the expiration of the ten-day period through no fault of his own,[2] he was entitled to "be forever discharged from the crime." Fla.R.Crim.P. 3.191(p)(3).

This issue was addressed in State v. Thomas, 659 So. 2d 1322 (Fla. 3d DCA 1995), which involved a like situation, the trial

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[2] We shall return to the question of fault on Salzero's part.

having been set for fourteen days after the notice hearing, but otherwise within the rule's total fifteen-day window. In his opinion concurring with the majority opinion affirming the discharge, Judge Cope wrote:

> "The trial court's interpretation of the rule was correct. The text of the rule controls over the comment.[3] The rule provides for a five-day period to have the hearing on the notice of expiration, followed by a ten-day period to take the case to trial. In some cases, like the present one, the total time from the filing of the notice of expiration to the last day of the window period will be less than fifteen days."

Id. at 1323 (Cope, J., concurring).

The dissent herein appears to agree that the rule has been violated, but would conclude that such was harmless error as Salzero made no showing of prejudice. The rule, however, establishes prejudice where a defendant is not brought to trial by the tenth day following the notice hearing and mandates discharge for such violation.

> "A defendant not brought to trial within the 10-day period through no fault of the defendant . . . shall be forever discharged from the crime."

Fla.R.Crim.P. 3.191(p)(3)(emphasis added).

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3 The committee note to the 1984 amendment to rule 3.191 advises that the intent was to provide the state attorney with fifteen days within which to bring a defendant to trial from the date of the filing of the motion for discharge. The State urges us to apply that suggested intent. As Judge Cope noted, however, the text of the rule is controlling.

Thus the dissent would effectively amend the rule by adding the requirement that a defendant be discharged if the defendant alleges and proves prejudice. However, only our supreme court can amend the rule, not this court or the other district courts.[4] State v. Bryant, 276 So. 2d 184, 186 (Fla. 1st DCA), dismissed, 280 So. 2d 683 (Fla. 1973). If the rule needs to be changed, it should be done properly and not on an ad hoc basis.

We return now to the language of rule 3.191(p)(3) that requires for discharge that the delay beyond the ten-day period be "through no fault of the defendant." The transcripts herein reveal that Salzero's counsel kept silent during the crucial notice hearing and thus contributed to the trial judge's violation of the rule. Had Salzero's counsel complained at that time that the rule would be violated by a trial on August 19, 1996, the trial court could have avoided the error. Were it not for the Florida Supreme Court's decision in Stuart v. State, 360 So. 2d 406 (Fla. 1978), holding that a defense counsel is under no duty to correct a trial court's erroneous impression that the trial date would be timely, we would hold that Salzero, through his counsel, was not without

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[4] The First and Second District Courts have added a "showing of prejudice" requirement to the rule. State v. Driggers, 680 So. 2d 601 (Fla. 2d DCA 1996) rev. denied, 689 So. 2d 1069 (Fla. 1997); State v. McGruder, 664 So. 2d 1126 (Fla. 2d DCA 1995); Climpson v. State, 528 So. 2d 1296 (Fla. 1st DCA 1988). We certify conflict with these decisions.

fault that the trial date was beyond the time contemplated by rule 3.191(p)(3), and thus that Salzero was not entitled to be discharged. We do observe that in 1978 the supreme court in Stuart v. State was dealing with an earlier version of rule 3.191 which did not contain the "no fault" language we are discussing here, which language was added in 1984. See The Florida Bar re: Amendment to Rules - Criminal Procedure, 462 So. 2d 386 (Fla. 1984). As a consequence, we certify to the Florida Supreme Court the following question of great public importance:

> "DOES THE 1984 AMENDMENT TO RULE 3.191, NOW RULE 3.191(p)(3), WHICH REQUIRES A DEFENDANT'S DISCHARGE SHOULD HE OR SHE NOT BE BROUGHT TO TRIAL WITHIN THE RULE'S TEN-DAY PERIOD THROUGH NO FAULT OF THE DEFENDANT, SUPERSEDE THE HOLDING IN STUART V. STATE, 360 SO. 2D 406 (FLA. 1978) THAT A DEFENSE COUNSEL IS UNDER NO DUTY TO CORRECT A TRIAL COURT'S ERRONEOUS IMPRESSION THAT THE TRIAL DATE AS SET BY THE COURT WOULD BE TIMELY?"

Under the present circumstances, however, we hold that the trial court erred in not granting Salzero's discharge from the crimes as mandated by rule 3.191(p)(3).

Reversed and remanded with directions to discharge Salzero from the crimes: conflict certified; question certified.

JORGENSON, COPE, GERSTEN, GODERICH, GREEN and SHEVIN, JJ., concur.

COPE, J. (concurring).

I write separately to urge the Florida Supreme Court to revisit, and recede from, Stuart v. State, 360 So. 2d 406 (Fla. 1978).

The -real mischief in this case is that, at the crucial hearing, the defendant did not object to the trial court's erroneous calculation of the window period. This error could have been corrected if promptly called to the trial court's attention. Now, for the first time on appeal, defendant raises the error in this court even though he failed to do so in the trial court. This is a classic "gotcha" litigation tactic. See Salcedo v. Asociacion Cubana, Inc., 368 So. 2d 1337, 1339 (Fla. 3d DCA 1979).

The purpose of the speedy trial rule is to assure a speedy trial, not a speedy discharge. State v. Thomas, 659 So. 2d 1322, 1324 (Fla. 3d DCA 1995) (concurring opinion); see also State v. Joines, 549 So. 2d 771, 772 (Fla. 3d DCA 1989); State v. Brown, 527 So. 2d 209, 210 (Fla. 3d DCA 1986). Had defendant stated his objection, the trial would have been set for an earlier date, and the defendant would have received the speedy trial he says he desired.

There is no reason, much less a good reason, to relieve the defendant of an obligation to make a contemporaneous objection in this context, just as we require a defendant to make a

contemporaneous objection to virtually every other trial error. See generally Davis v. State, 661 So. 2d 1193, 1197 (Fla. 1995) (contemporaneous objection rule "prohibits trial counsel from deliberately allowing known errors to go uncorrected.").

The window-period rule provides that "[a] defendant not brought to trial within the ten-day period through no fault of the defendant, on motion of the defendant or the court, shall be forever discharged from the crime." Fla. R. Crim. P. 3.191(p)(3) (emphasis added). From a commonsense standpoint, it is precisely this defendant's fault that he was not brought to trial within the window period: he failed to object to the trial date at a time when the trial court could have done something about it.

The contemporaneous objection rule is sound policy and should be applied here. It is my hope that the Florida Supreme Court will see fit to recede from Stuart.

SCHWARTZ, C.J., and NESBITT, JORGENSON, LEVY and SORONDO, JJ., concur.

LEVY, Judge (dissenting).

I respectfully dissent. The Defendant, Salvador Salzero, appeals his conviction and sentence for possession of cocaine and drug paraphernalia, on the ground that the trial court improperly denied his motion for discharge. The motion for discharge alleged that his right to a speedy trial had been violated. For the following reasons, I believe that we should affirm the denial of the defendant's motion for discharge.

The Defendant was charged with the above violations on February 11, 1996. The Defendant filed a notice of expiration of the speedy trial period (the "Notice") on August 5, 1996. The next day, the trial court held a hearing regarding the Notice of expiration. At that time, it was determined that the trial was already set for Monday, August 19, 1996. The State was unable to answer the questions of the trial court, and stated, "[w]e will get a file. So [sic] we will have some answers tomorrow morning." The hearing was continued until the next day. The next morning, Wednesday, August 7, 1996, the State informed the court, "I checked it and it appears to be that the notice was well taken. I just need it set for that date [August 19, 1996]." On August 19, 1996, the Defendant filed a motion for discharge. The trial court, in my view, correctly denied the motion. Thereafter, on that same day

(August 19, 1996) the defendant entered a plea of guilty and was adjudicated guilty and sentenced after specifically reserving his right to appeal the denial of his motion to discharge.

The Defendant's motion to discharge alleged that the State failed to follow Rule 3.191 of the Florida Rules of Criminal Procedure. Sub-section (p)(3) of that rule provides:

> 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.

In the interest of clarity, I would re-affirm the language from our earlier decision in State v. Koch, 605 So. 2d 519 (Fla. 3d DCA 1992), where this Court stated:

> It is settled that the state has the burden of arranging that a hearing be conducted on the defendant's motion for discharge within five days after the filing thereof-- or, in lieu of that, conveying to the trial court its concession that the motion for discharge is well taken and its agreement to have the trial scheduled with reasonable notice within the ten-day period provided by Rule 3.191(i)(3). Lasker v. Parker, 513 So. 2d 1374, 1376 (Fla. 2d DCA 1987); Climpson v. State, 528 So. 2d 1296 , 1297 (Fla. 1st DCA 1988). The failure of the state to observe these requirements, however, is ordinarily harmless so long as the defendant is in fact brought to trial with reasonable notice within fifteen days after the filing of the motion for discharge, if the defendant cannot otherwise demonstrate prejudice. Climpson; Lasker,

Id. at 520, (emphasis added). In addition, since the language relating to the calculation of the time within which the defendant's trial must commence, found in State v. Thomas, 659 So.

2d 1322 (Fla. 3d DCA 1995), is inconsistent with Koch, we should specifically recede from that language found in Thomas.

In the instant case, the Defendant was brought to trial within fifteen days after the filing of the notice of expiration of speedy trial time.[5] The notice of expiration was filed on August 5, 1996, and the trial was scheduled for August 19, 1996, fourteen days after the date on which the notice was filed. In addition, no prejudice to the Defendant has been alleged or proven. Therefore, I conclude that any error in the setting of the trial date in this case was harmless. Koch; State v. McGruder, 664 So. 2d 1126 (Fla. 2d DCA 1995). Obviously, it was "error" for the trial court not to have commenced the trial within ten days after the hearing on the Notice, even though the trial did begin within fifteen days after the filing of the Notice. However, the very concept of "harmless error" assumes the commission of some error. The question presented herein, therefore, is whether or not the admitted "error" was harmless.-

In Climpson v. State, 528 So. 2d 1296 (Fla. 1st DCA 1988), where the hearing was held nine days after the filing of the Notice (instead of the required five), but the trial was commenced within four days thereafter (well within the total "window period" of fifteen days), the First District Court of Appeal held that:".

> [A]lthough the hearing itself exceeded the

[5]The Committee Notes to the 1992 Amendment to Rule 3.191 of the Florida Rules of Criminal Procedure state: "The initial 'motion for discharge' has been renamed 'notice of expiration of speedy trial time."'

> five-day time limit required by Rule 3.191(i)(4), the fact that appellant was to be tried within fifteen days from the date of the filing of his motion for discharge renders the untimely hearing harmless. Although not specifically adopted by the Florida Supreme Court in its adoption of the amendments to Rule 3.191, see The Florida Bar Re: Amendment to Rules--Criminal Procedure, 462 So. 2d 386 (Fla. 1984), the committee note appended to Rule 3.191(i)(4) provides that "[t]he intent of (i)(4) is to provide the state attorney with 15 days within which to bring a defendant to trial from the date of the filing of the motion for discharge. This time begins with the filing of the motion and continues regardless of whether the judge hears the motion."

Id. at 1297 (alteration and emphasis in original).

The majority disagrees with the foregoing and contends that the error in not bringing the defendant to trial within ten days after the Hearing on the Notice of expiration of speedy trial time cannot ever be deemed harmless. In support of this position, the majority cites State v. Thomas, 659 So. 2d 1322, 1323. With all due respect, that reliance is misplaced, since that decision, which was rendered by a three-judge panel of this Court, and not by the Court sitting en banc, inappropriately conflicted with the very specific language in State v. Koch, 605 So. 2d 519, 520 (quoted above).

The majority apparently agrees that the State would have had fifteen days to bring the defendant to trial after the filing of the Notice if the trial court had held a hearing on the fifth day, after the filing of the Notice, and then commenced the trial on the tenth day after the hearing. However, the position of the majority

herein creates the absurd and unreasonable result of penalizing the State because the trial court in the instant case held the hearing within one day after the filing of the Notice (instead of the permissible five). In effect, the majority orders the discharge of the defendant because the trial court was too diliaent, i.e. the trial court acted too quickly in response to the Notice filed by the defendant.

Although the majority opinion suggests that my view, in effect, amends the "Speedy Trial Rule", I respectfully submit that the majority position implies that the title of the "Speedy Trial Rule" should be changed to the "Not Too Speedy Trial Rule."

To further, and graphically, illustrate the absurd and ridiculous consequences that will result from following the position advanced by the majority opinion in this case, I suggest consideration of the following scenario. Defendants "A" and "B" are arrested on the same day for unrelated offenses and are assigned to two different judges in separate courtrooms. Naturally, the time period provided by the Speedy Trial Rule begins to run for both defendants on the same day. Through no fault of their own, neither of the defendants are brought to trial-within the 175-day period required by the said Rule. Thereafter, both defendants "A" and "B" file "Notices of Expiration of the Speedy Trial Time Period" on the same day.

As a result of the filing of the said "Notice" by defendant "A", Judge "AA" sets a hearing in connection with defendant "A"'s

Notice for the fifth day following the date that the Notice was filed, as allowed by the Speedy Trial Rule. At the hearing (held on the fifth day), Judge "AA" determines that defendant "A"'s Notice is well taken and, in order to strictly comply with the requirements of the Speedy Trial Rule as mandated by the majority's position herein, orders that defendant "A"'s trial commence on the seventh day after the hearing, which, of course, is a total of twelve days after defendant "A" filed his Notice. Naturally, the majority would approve of all of the foregoing and hold that it would be.appropriate for defendant "A"'s trial to take place on the date set by the judge.

Meanwhile, in the courtroom next door, defendant "B"'s case was assigned to Judge "BB" who is an extraordinarily energetic,-efficient, and diligent trial judge. Accordingly, after receiving defendant "B"'s Notice (which, as noted above, was filed on the same date as defendant "A"'s Notice), Judge "BB" sets a hearing in connection with the Notice for the very next day after the date on which the Notice was filed. so, instead of taking up to five days to hold a hearing on the Notice (as permitted by the Speedy Trial Rule), Judge "BB" sets a hearing for defendant "B" within one day after the filing of the Notice. At the said hearing, Judge "BB" determines that defendant "B"'s Notice is well taken and orders that defendant "B"'s trial commence on a date that is eleven days after the date of the hearing. Therefore, defendant "B"'s trial is scheduled to commence on the twelfth day after the filing of

defendant "B"'s Notice.

As a result of the foregoing, although defendants "A" and "B" were arrested on the same date, and filed their Notices of Expiration on the same date, and were set to have their trial commence on the same date, the majority opinion in this case holds that defendant "A" can and should proceed to trial for the crimes that he has been charged with, while defendant "B" would be ordered discharged, thereby depriving the State of an opportunity to have its day in court. With all due respect, such a narrow and myopic reading of the Rule defies common sense and logical legal reasoning.[6]

For the foregoing reasons, I would affirm the denial of the Defendant's motion for discharge.

As far as the "Stuart" issue (discussed at the end of the majority 'opinion) is concerned, I agree with the majority's position and join in the certification that the issue is one of great public importance.

SCHWARTZ, C.J., and SORONDO, J., concur.

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[6] As so eloquently stated by Justice Holmes in Roschen v. Ward, 279 U.S. 337, 339 (1929), "we agree to all the generalities about not supplying criminal laws with what they omit, but there is no Canon against using common sense in construing laws as saying what they obviously mean." Equally apropos are the words of Justice Jackson found in United States ex rel Marcus v. Hess, 317 U.S. 537, 557 (1943), wherein he said "If ever we are justified in reading a statute, not narrowly as through a keyhole, but in the broad light of the evils it aimed at and the good it hoped for, it is here."