ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,139

STATE OF FLORIDA,

Petitioner,

-vs-

SALVADOR SALZERO,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

Respondent, Salvador Salzero, was the appellant in the district court of appeal and the defendant in the Circuit Court. Petitioner, State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal, and the symbol "TR" will be used to designate the transcripts of hearings. All emphasis is supplied unless the contrary is indicated,

STATEMENT OF THE CASE AND FACTS

On February 11, 1996, Salvador Salzero was arrested and charged with possession of cocaine and possession of drug paraphernalia (R. 1, 5, 9). The 175-day speedy trial period for trial on these charges expired on August 4, 1996. On August 5, 1996, Salzero filed a notice of expiration of the speedy trial period, alleging that he had been continuously available for trial since the date of his arrest (R. 9).

On August 6, 1996, the court held a hearing on the notice of expiration (TR. 1, 3). At that hearing, the court noted that a trial date of August 19, 1996 had been previously set (TR. 3). The court asked if that date was "within the window," and the prosecutor replied, "No." (TR. 3). The court then determined that August 19, 1996 would be the last day on which the case could be tried (TR. 3). The court advised both sides to be ready for trial on that date (TR. 3). When the prosecutor could not tell the court why the case had been set for August 19, the court reset the case for the following day (TR. 3-4). The prosecutor told the court that he would get his tile and have some answers for the court on the following day (TR. 4).

At the hearing on the following day, August 7, the court again inquired about the August 19 trial date (TR. 8). The prosecutor stated, "I checked it and it appears to be that the notice was well taken, I just need it set for that date." (TR. 8).

On August 19, 1996, Salzero filed a motion for discharge, based on the State's failure to bring him to trial within ten days of the hearing on the notice of expiration (R. 1 O-l 1). At a hearing on that same date, the court denied the motion (TR. 14). The court ruled that because on August 6 the court had only reaffirmed a trial date which had been set earlier, the State was not required to bring Salzero to trial within ten days of the August 6 hearing (TR. 13-14).

Following the court's denial of the motion for discharge, Salzero entered a plea specifically reserving for appellate review the court's denial of the motion (TR. 18-20). The court entered

adjudications of guilt, and sentenced Salzero to serve six months in the Dade County Jail, with six months credit for time served (R. 13-14, TR. 20). Notice of appeal was timely filed (R. 25), and this appeal followed.

On appeal, the Third District Court of Appeal, sitting en *banc*, reversed the judgments of conviction and sentences, and remanded the case with directions to discharge the defendant (R. 29-43). The court held that since the defendant had not been brought to trial within ten days of the hearing on his notice of expiration of speedy trial time period, he was entitled to be discharged under Florida Rule of Criminal Procedure 3.19 1 (p)(3). The court certified conflict with the decisions in *State v. Driggers*, 680 So. 2d 601 (Fla. 2d DCA 1996), *review denied* 689 So. 2d 1069 (Fla. 1997); *State v. McGruder*, 664 So. 2d 1126 (Fla. 2d DCA 1995); and *Climpson v. State, 528 So.* 2d 1296 (Fla. 1st DCA 1988). The court also certified to this Court the following question of great public importance:

> "DOES THE 1984 AMENDMENT TO RULE 3.191, NOW 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?"

On July 29, 1997, the State of Florida filed a notice to invoke this Court's discretionary jurisdiction. On August 6, 1997, this Court entered its order postponing decision on jurisdiction and setting a briefing schedule.

SUMMARY OF ARGUMENT

ISSUE 1

In its decision in the present case, the Third District Court of Appeal, sitting en *banc*, correctly held that Florida Rule of Criminal Procedure 3.191(p)(3) required the discharge of a defendant who had been brought to trial within fifteen days of the filing of his notice of expiration of speedy trial time period, but thirteen days after the hearing on the notice of expiration. Rule 3.191(p)(3) expressly and unambiguously states that if a defendant is not brought to trial within ten days of the hearing on the notice of expiration of the speedy trial time period, the defendant shall be forever discharged. That rule imposes a clear duty on the State and the trial courts to bring a defendant to trial within ten days of the hearing on the notice of expiration The State and the trial court failed to meet this obligation in the present case, and therefore the Third District Court of Appeal properly enforced the rule promulgated by this Court, and held that the defendant was entitled to be discharged,

The committee note to the 1984 amendment to the speedy trial rule does not effect the issue in this case, as this Court specifically refused to adopt that committee note when the rule was amended. Rule 3.191(p)(3) cannot be read to provide that absent a showing of prejudice to a defendant, failure to bring the defendant to trial within ten days of the hearing on the notice of expiration is harmless error, if the defendant is brought to trial within fifteen days of the filing of the notice of expiration. Rule 3.19 1(p)(3) presently contains no such provision, and any such amendment would have to be enacted through the appropriate rule-making process. The complaints of the State and the dissenting opinion in this case about the effects of rule 3.191(p)(3) as it is presently written are nothing more than complaints about the wisdom of the amendments to the speedy trial rule enacted in 1984. Those complaints, however, are properly addressed to the Criminal Procedure Rules Committee, and to this Court as a part of the rule-making process. The

complaints have no place in a case such as the present case where the rule must be applied as it is presently written.

The decision of the Third District in this case does nothing more or less than enforce the express and unambiguous language of a rule promulgated by this Court. As such, that decision should be approved by this Court, and the decisions of the Second District Court of Appeal in *State* v. *Driggers*, 680 So. 2d 601 (Fla. 2d DCA 1996), *review denied,* 689 So. 2d 1069 (Fla. 1997), and *State* v. *McGruder*, 664 So. 2d 1126 (Fla. 2d DCA 1995) should be disapproved.

ISSUE II

The 1984 amendment to the speedy trial rule did not in any way effect the principles set forth by this *Court* in *Stuart* v. *State,* 360 So. 2d 406 (Fla. 1978). *Stuart* plainly and emphatically establishes that not only should defense counsel not be faulted for failing to correct a trial judge who sets a trial date outside the speedy trial period, but that correcting a trial judge under such circumstances would raise serious concerns under the Florida Rules of Professional Conduct. The 1984 amendment to the speedy trial rule does not in any way provide, contrary to *Stuart,* that a defense attorney is required to correct a trial judge who sets a trial date outside the speedy trial period. The 1984 amendment simply provides that the failure to bring the defendant to trial within the ten-day period must not be the fault of the defendant---in other words, that the defendant not have delayed the proceedings or taken any other action which prevented the State and the court from bringing him to trial within the ten-day period. This Court in *Stuart* specifically held that the defense does nothing wrong by failing to correct a judge who erroneously sets a trial date outside the speedy trial period, and therefore the failure to bring the defendant to trial within the ten-day period under such circumstances cannot in any way be deemed to be the fault of the defendant. Accordingly, the question certified to this Court by the district court of appeal should be answered in the negative.

Furthermore, there is no basis for this Court to recede from its decision in ***Stuart,*** as that decision is not in any way inconsistent with the contemporaneous objection rule. It is firmly established that where a constitutional provision, statute or rule of procedure requires the trial court to take certain actions to ensure that a defendant's rights are protected, the failure of defense counsel to object to the trial court's failure to take those actions does not constitute a waiver of the right involved. This Court's decision in ***Stuart*** is fully consistent with that principle. As the responsibility for ensuring that a defendant is brought to trial within the applicable speedy trial period falls squarely on the shoulders of the trial court and counsel for the State, this Court correctly ruled in ***Stuart*** that the defendant in that case was entitled to discharge notwithstanding the failure of the defendant to object when the trial court and the State erroneously set the case for trial after the expiration of the applicable speedy trial period.

The arguments raised in the concurring opinion in this case are the same arguments raised by the State in ***Stuart.*** This ***Court*** in ***Stuart*** carefully considered those arguments in light of the differing responsibilities of the trial court, the State, and defense counsel under the speedy trial rule, and firmly rejected the arguments. Neither the contemporaneous objection rule, nor any other recognized principle of law, supports the abandonment by this Court of the principles established in ***Stuart.***

ARGUMENT

I.

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY HELD THAT PURSUANT TO THE EXPRESS, UNAMBIGUOUS LANGUAGE OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.191(p)(3), A DEFENDANT IS ENTITLED TO BE DISCHARGED FROM ALL FURTHER PROSECUTION IF NOT BROUGHT TO TRIAL WITHIN TEN DAYS OF THE HEARING ON THE DEFENDANT'S NOTICE OF EXPIRATION OF THE SPEEDY TRIAL PERIOD.

The first question to be answered in this case is whether a defendant is entitled to discharge under Florida Rule of Criminal Procedure 3.191(p)(3) when he or she is brought to trial within fifteen days of the filing of a notice of expiration of the speedy trial time period, but not within ten days of the hearing held on the notice of expiration, In its decision in the present case, the Third District Court of Appeal, sitting *en banc*, held that a defendant is entitled to discharge under such circumstances, based on the express, unambiguous language of Rule 3.19 1 (p)(3). On the other hand, in State *v. Driggers*, 680 So. 2d 601 (Fla. 2d DCA 1996), *review denied, 689* So. 2d 1069 (Fla. 1997), and *State* v. *McGruder*, 664 So. 2d 1126 (Fla. 2d DCA 1995), the Second District Court of Appeal held that a defendant is not entitled to discharge under such circumstances, absent a showing of prejudice. In its decision in the present case, the Third District Court of Appeal certified conflict with *Driggers* and *McGruder*.[1]

Florida Rule of Criminal Procedure 3.19 1 (a) requires that a defendant charged with a felony offense be brought to trial within 175 days of the date on which the defendant is taken into custody.

'The Third District Court of Appeal also certified conflict with the decision of the First District Court of Appeal in *Climpson* v. *State*, 528 So. 2d 1296 (Fla. 1st DCA 1988). However, in *Climpson*, the defendant was brought to trial within ten days of the hearing on the notice of expiration, and therefore the holding of that case does not conflict with the holding of the Third District in the present case.

A person whose trial has not commenced during this period of time may file and serve a notice of expiration of time for speedy trial at any time after the expiration of this 175-day period. Fla.R.Crim.P. 3.191(h). Once such a notice of expiration is filed, rule 3.191(p)(3) governs the procedures to be followed and the remedy to be provided:

> 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 *State* v. *Thomas,* 659 So. 2d 1322 (Fla. 3d DCA 1995), the Third District Court of Appeal affirmed an order discharging the defendant based on rule 3.191(p)(3) where the defendant was brought to trial within fifteen days of the filing of the notice of expiration, but fourteen days after the hearing on the notice of expiration. 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. 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).

In its decision in the present case, the Third District, sitting *en banc*, likewise held that rule 3.191(p)(3) required the discharge of a defendant who had been brought to trial within fifteen days of the filing of his notice of expiration, but thirteen days after the hearing on the notice of expiration:

> 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, he was entitled to "be forever discharged from the crime." Fla.R.Crim.P. 3.191(p)(3).

Salzero v. State, 697 So. 2d 553, 554 (Fla. 3d DCA 1997)(footnote omitted).

In its decisions in *Thomas* and the instant case, the Third District properly applied the express, unambiguous language of rule 3.19 1 (p)(3). That language requires that a defendant must be brought to trial within ten days of the hearing on the notice of expiration, and mandates the remedy of discharge for any violation of that requirement:

> 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.

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

Had this Court intended to limit the entitlement to discharge to circumstances where the accused was not brought to trial within fifteen days of the filing of the notice of expiration, then that is what the rule would say. However, rule 3.191 (p)(3) does not provide that "the court shall order that the defendant be brought to trial within 15 days of the date on which the notice of expiration was filed." Nor does rule 3.191(p)(3) provide that "a defendant not brought to trial within 15 days of the date the notice of expiration was filed shall be forever discharged," To the contrary, rule 3.191 (p)(3) plainly provides that "[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."

While rule 3.191(p)(3) expressly and unambiguously mandates discharge when a defendant is not brought to trial within ten days of the hearing on the notice of expiration, the rule does not expressly provide a remedy for the court's failure to hold a hearing within five days of the filing of the notice of expiration. Accordingly, it has been repeatedly held that the failure to hold the hearing

five days from the date the notice was filed.

The State contends that rule 3.191(p)(3) should be read to provide that absent a showing of prejudice to a defendant, failure to bring the defendant to trial within ten days of the hearing on the notice of expiration is harmless error, if the defendant is brought to trial within fifteen days of the filing of the notice of expiration The dissenting opinion in the present case, and the Second District Court of Appeal in *Driggers* and *McGruder*, take the same position. The fatal flaw in this argument was exposed by the majority decision in the present case:

> [T]he 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. *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.

Salzero v. State, 697 So. 2d at 554-555 (footnote omitted).

These words in the majority decision in this case echo this Court's statement regarding the speedy trial rule in *State v. Lott, 286 So.* 2d 565,566 (Fla. 1973):

> The Supreme Court is vested with the sole authority to promulgate, rescind and modify the rules, and until the rules are changed by the source of authority, they remain inviolate. This is not to say that a trial court is without authority to construe the rules in applying them to given cases, but this authority does not extend to nullification of the rules . . . Rules of practice and procedure adopted by this Court are binding on the court and clerk as well as litigants and counsel.

See also Reiter v. Gross, 599 So. 2d 1275 (Fla. 1992)("[T]he courts of this state are bound to follow the decisions and rules of this Court, and only this Court can void or modify a rule it has adopted").

The complaints of the State and the dissenting opinion in this case about the effects of rule 3.191(p)(3) as it is presently written are nothing more than complaints about the wisdom of the amendments to the speedy trial rule enacted in 1984. Those complaints, however, are properly addressed to the Criminal Procedure Rules Committee, and to this Court as a part of the rule-making process. The complaints have no place in a case such as the present case where the rule must be applied as it is presently written.

The State's request that the plain language of rule 3.191 (p)(3) be ignored is particularly inappropriate considering the fact that the provisions of rule 3.191(p)(3) were added to the speedy trial *rule at the request of the State.* The procedures set forth in rule 3.19 1 (p)(3) were implemented by the 1984 amendment to rule 3.191. *See The Florida Bar Re: Amendment to Rules--Criminal Procedure, 462 So.* 2d 386 (Fla. 1984). Prior to the 1984 amendment, a defendant charged with a felony offense was entitled to outright discharge upon the expiration of the 1 SO-day time period from the date the defendant was taken into custody. The change in the rule came upon the petition of the Florida Prosecuting Attorneys' Association, see 462 So. 2d at 386, and the new rule is properly characterized as a "safety valve" enacted chiefly for the State's benefit. *Lasker v. Parker, 5* 13 So. 2d 1374 (Fla. 2d DCA 1987); *Apolinari* v. *Ulmer,* 483 So. 2d 75 (Fla. 2d DCA), *review denied, 492* So. 2d 1335 (Fla. 1986).

The Florida Prosecuting Attorneys' Association asked for the speedy trial rule to be changed to give them a safety valve, and their request was granted, If the State is now unhappy with the type of safety valve which was installed in the speedy trial rule, the State can again petition this Court to install a different type of safety valve which establishes a uniform 1 S-day time period from the tiling of the notice of expiration in which to bring the accused to trial. In the meantime, the State and the courts are obligated to follow the rules as they are presently written. Those rules expressly and unambiguously state that if a defendant is not brought to trial within ten days of the hearing on the notice of expiration of the speedy trial time period, the defendant shall be forever discharged. Those rules impose a clear duty on the State and the trial courts to bring a defendant to trial within ten days of the hearing on the notice of expiration. The State and the trial court failed to meet this obligation in the present case, and therefore the Third District Court of Appeal properly enforced the rules and held that the defendant was entitled to be discharged. The decision of the Third District does nothing more or less than enforce the express and unambiguous language of a rule promulgated by this

Court. As such, that decision should be approved by this Court, and the decisions of the Second District Court of Appeal in *Driggers* and *McGruder* should be disapproved.

II.

THE 1984 AMENDMENT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.191, WHICH REQUIRES DISCHARGE SHOULD THE DEFENDANT NOT BE BROUGHT TO TRIAL WITHIN THE RULE'S TEN-DAY PERIOD THROUGH NO FAULT OF THE DEFENDANT, DOES NOT SUPERSEDE THE HOLDING IN *STUART v. STATE*, 360 So. 2d 406 (Fla. 1978) THAT 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 second question to be answered in this case is the following question certified to this Court as a question of great public importance:

> "DOES THE 1984 AMENDMENT TO RULE 3.191, NOW 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?'

Salzero v. State, 697 So. 2d at 555. A review of this Court's decision in *Stuart v. State, 360 So.* 2d 406 (Fla. 1978) establishes that the 1984 amendment to rule 3.191 did not in any way effect the principles set forth by this Court in Stuart.

In *Stuart,* this Court squarely addressed the issue of the obligation of a defense attorney to correct a trial court's erroneous impression that the trial date as set by the court would be timely under the speedy trial rule. On the last day of the applicable speedy trial period in *Stuart,* May 7, 1975, the case was called for trial. Counsel for the defense appeared and announced ready for trial. The State expressed a desire to start trial on the following day due to the absence of its chief witness. When the court asked if any speedy trial problem existed, counsel for the State erroneously advised the court that if trial commenced any day that week it would be timely. The trial judge

agreed with the State's position, and stated that he did not want anyone complaining that they could not get a speedy trial, Defense counsel did not object to the court's action in continuing the case to the next day, and did not advise the trial court that such a trial date would be outside the applicable speedy trial time period. When the case was called for trial the following day, defense counsel moved for discharge based on the expiration of the speedy trial time period.

When the speedy trial issue reached this Court, the State argued that defense counsel had misled the trial judge by failing to assert at the May 7, 1975 hearing that a speedy trial issue existed and that the defense would move for discharge if the trial were continued to the next day. The State further argued that had the defense brought these matters to the court's attention at the May 7 hearing, the court could have started the trial prior to the expiration of the speedy trial period. This Court flatly rejected the State's arguments, and made it clear that defense counsel had acted properly in remaining silent at the May 7 hearing:

> We deal here with a question that goes to the very nature and purpose of the speedy trial rule and to the basic principles of advocacy in an adversary system of criminal justice. Petitioner had a constitutional right to be brought to trial within a reasonable time. The rule of 180 days provides a practical way to effectuate the constitutional right. Defense counsel had tried to protect petitioner's constitutional right by announcing readiness for trial numerous times following the filing of the information. By the time of the hearing on the 180th day, petitioner's constitutional right had been stretched almost to the limit. *By this point defense counsel was properly more concerned with protectingpetitioner's entitlement to the remedy that follows from the violation of the rule.* The proper time to argue about the operation of the rule and the entitlement to a discharge is at a hearing on a motion therefor, and a motion for discharge can only be effectively made when the movant is entitled to one after the period has run. Florida Rule of Criminal Procedure 3.191 (d)(1). *Defense counsel was under no duty to correct the court's impression and to argue to the court that trial had to begin that day simply because he might have succeeded. This would have jeopardized his client's chances ofgetting the remedyfor a violation of the speedy trial rule. As serious as is the duty of an attorney to keep the court apprised of its position and to advise on the ramifications of court action, the duty to promote and defend the rights and lawful interests of a client accused of crime is even weightier.[FN*] In the situation we consider, no concept of a duty of open dealing before the court can justify requiring the defense to do the state's job.*

> FN* A lawyer should represent a client zealously within the bounds of the law. Canon 7, Fla.Bar Code Prof.Resp. Ethical Consideration 7-3 states, "While serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law," This duty of zealous representation is a duty owed by a lawyer both to his client and to the adversary system of justice. Id., E.C. 7-19.

Stuart v. State, 360 So. 2d at 413.

Stuart plainly and emphatically establishes that not only should defense counsel not be faulted for failing to correct a trial judge who sets a trial date outside the speedy trial period, but that correcting a trial judge under such circumstances would raise serious concerns under the Florida Rules of Professional Conduct. The 1984 amendment to the speedy trial rule does not in any way provide, contrary to *Stuart,* that a defense attorney is required to correct a trial judge who sets a trial date outside the speedy trial period. The 1984 amendment simply provides that the failure to bring the defendant to trial within the ten-day period must not be the fault of the defendant---in other words, that the defendant not have delayed the proceedings or taken any other action which prevented the State and the court from bringing him to trial within the ten-day period. This Court in *Stuart* specifically held that the defense does nothing wrong by failing to correct a judge who erroneously sets a trial date outside the speedy trial period, and therefore the failure to bring the defendant to trial within the ten-day period under such circumstances cannot in any way be deemed to be the fault of the defendant.

Indeed, the principles established by this Court in *Stuart* apply with even greater force under the speedy trial rule as amended in 1984. Pursuant to the 1984 amendment, the speedy trial time period for bringing a defendant charged with a felony to trial expires 175 days after the defendant is taken into custody. P.S. *v. State,* 658 So. 2d 92 (Fla. 1995); *Williams v. State, 622* So.2d 477 (Fla. 1993). Once that time period expires, as it did in this case, the only remaining issue is the proper

remedy to be imposed under rule 3.19 1 (p)(3). In *Stuart*, this Court found that by the time of the last day of the applicable speedy trial time period, it was proper for defense counsel to focus his attention on protecting the defendant's remedy which followed from the violation of the rule, rather than obtaining the right guaranteed by the rule:

> By the time of the hearing on the 180th day, petitioner's constitutional right had been stretched almost to the limit. *By this point defense counsel was properly more concerned withprotectingpetitioner's entitlement to the remedy thatfollowsfrom the violation of the rule.* The proper time to argue about the operation of the rule and the entitlement to a discharge is at a hearing on a motion therefor, and a motion for discharge can only be effectively made when the movant is entitled to one after the period has run. Florida Rule of Criminal Procedure 3.191(d)(1). Defense *counsel was under no duty to correct the court's impression and to argue to the court that trial had to begin that day simply because he might have succeeded. This would have jeopardized his client's chances of getting the remedy for* a *violation of the speedy trial rule.*

Stuart v. State, 360 So. 2d at 413.

If under the previous version of the speedy trial rule defense counsel's attention was properly focused on the remedy to be obtained for a rule violation on the final day of the speedy trial time period, then certainly under the amended rule, once the speedy trial period has actually expired and the issue becomes the proper remedy to be imposed under rule 3,191(p)(3), defense counsel's obligation is to do everything he can to obtain the remedy of discharge for his client. Thus, *Stuart* establishes that under the amended rule, the defense does nothing wrong by failing to correct a judge who erroneously sets a trial date outside the ten-day period specified in rule 3.191 (p)(3), and therefore the failure to bring the defendant to trial within the ten-day period under such circumstances cannot in any way be deemed to be the fault of the defendant. Accordingly, the question certified to this Court by the Third District Court of Appeal should be answered in the negative.

The concurring opinion in this case, written by Judge Cope, urges this Court "to revisit, and recede from," *Stuart. Salzero v. State,* 697 So. 2d at 555. The concurring opinion implies that *Stuart* cannot be reconciled with the contemporaneous objection rule, which bars a defendant from raising a trial error on appeal if the error was not first brought to the attention of the trial court. This Court's decision in *Stuart* is not in any way inconsistent with the contemporaneous objection rule.

First, the trial error in this case is the failure to bring the defendant to trial within the applicable speedy trial time period, That error was properly brought to the attention of the trial court when the defendant filed his motion for discharge after the speedy trial period expired without his having been brought to trial. If a defendant claimed for the first time on appeal that he was entitled to discharge under the speedy trial rule, but failed to file a motion for discharge in the trial court, the contemporaneous objection rule would bar that defendant from raising the speedy trial issue on appeal. That, however, is not what happened in this case.

What the concurring opinion in this case is really saying is that the contemporaneous objection rule should be applied in this case because the defendant did not object when the trial court and the State failed to uphold their responsibility to ensure that his case was set for trial within the applicable speedy trial time period, and set the case for trial after the expiration of the applicable speedy trial period.. However, it is firmly established that where a constitutional provision; statute or rule of procedure requires the trial court to take certain actions to ensure that a defendant's rights are protected, the failure of defense counsel to object to the trial court's failure to take those actions does not constitute a waiver of the right involved. For example, prior to its amendment effective January 1, 1997, Florida Rule of Criminal Procedure 3.180 mandated that a defendant had a right to be physically present at a bench conference to discuss juror challenges. *Coney v. State, 653 So.* 2d 1009 (Fla. 1995), *cert. denied,* --- U.S. ----, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995). Pursuant to that rule, the trial court was obligated to ensure the defendant's presence at such bench

conferences unless the defendant affmnatively waived his right to be present. Coney, 653 So.2d at 1013. A defendant's contemporaneous objection to his absence from the bench conference was not required because it was the obligation of the trial court and the State to ensure his presence at the bench conference. See *Chavez v. State,* 22 Fla. L. Weekly D1591 (Fla. 3d DCA July 2, 1997).

Another example where a contemporaneous objection is not required is where the trial court fails to fulfill its responsibility to protect the defendant's right to a trial by *jury,* In *Tucker v. State,* 559 So. 2d 218 (Fla. 1990), this Court stated that convictions were properly reversed where the record contained no written waiver of a jury trial and the trial court failed to inquire into the defendant's waiver of a jury trial or conducted an insufficient inquiry. A defendant is not required to contemporaneously object to the failure of the trial court and the State to provide him the jury trial to which he is entitled under the constitution and Florida Rule of Criminal Procedure 3.25 1.

Yet another example where a contemporaneous objection is not required is where the trial court fails to fulfill its responsibility to protect the defendant's double jeopardy rights by granting a mistrial without the consent of the defendant and in the absence of a manifest necessity for such a mistrial. A defendant is not required to make a contemporaneous objection to the granting of a mistrial under such circumstances in order to raise a claim that retrial would be a violation of his double jeopardy rights. *Wilson v. State, 693 So.* 2d 616 (Fla. 2d DCA 1997); *C.A.K. v. State,* 661 So. 2d *365* (Fla. 2d DCA 1995); *Feria v. Spencer,* 616 So. 2d 84 (Fla. 3d DCA 1993).

This Court's decision in *Stuart* is fully consistent with the principles espoused in the foregoing cases. As Justice Wells pointedly recognized in his concurring opinion in *Landry v. State,* 666 So. 2d 121, 129 (Fla. 1995), the responsibility for ensuring that a defendant is brought to trial within the applicable speedy trial period falls squarely on the shoulders of the trial court and counsel for the State:

> There is a gross failure of the judicial system when a person convicted of murder does not have his conviction reviewed and finalized on substantive issues, but rather, that person must be discharged because our circuit court either did not understand or ignored a rule of criminal procedure. The responsibility for this failure must be borne by the trial court and counsel who represented the State. They are charged with the duty to know and apply the rules. The administration ofjustice is dependent upon the trial court and counsel for the State competently and faithfully fulfilling this duty.

As it is the responsibility of the trial court and counsel for the State to ensure that a defendant is brought to trial within the applicable speedy trial period, this Court correctly ruled in Stuart that the defendant in that case was entitled to discharge notwithstanding the failure of the defendant to object when the trial court and the State erroneously set the case for trial after the expiration of the applicable speedy trial period.

The arguments made by the concurring opinion in this case are the exact same arguments made by the State in ***Stuart,*** The concurring opinion in this case argues:

> 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.
>
> * * * * *
>
> 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.
>
> * * * * *
>
> 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.

Salzero, 697 So. 2d at 555, 556. The State made the following arguments in ***Stuart:***

> The state argues that the failure to assert at that point in time that a speedy trial issue existed and that if trial were continued to the next day defense would move for discharge misled the judge. Had the defense at that time made its position clear by explicitly challenging the court's apparent posture (that trial could be timely

> commenced the next day), the court, it is argued, would then have had an opportunity to decide the matter.

360 So. 2d at 413.

This *Court* in *Stuart* carefully considered these arguments in light of the differing responsibilities of the trial court, the State, and defense counsel under the speedy trial rule, and firmly rejected the arguments. Neither the contemporaneous objection rule, nor any other recognized principle of law, supports the abandonment by this Court of the principles established in *Stuart*. As those principles apply with equal force to the speedy trial rule as amended in 1984, the question certified to this Court by the Third District Court of Appeal should be answered in the negative.

CONCLUSION

Based on the foregoing facts, authorities and arguments, respondent respectfully requests this Court to: (1) approve the decision of the district court of appeal in this case, and disapprove the decisions of the Second District Court of Appeal in *State v. Driggers*, *680 So.* 2d 601 (Fla. 2d DCA 1996), *review denied,* 689 So. 2d 1069 (Fla. 1997), and *State* v. *McGruder*, 664 So. 2d 1126 (Fla. 2d DCA 1995); and (2) answer the certify question in the negative, and reaffirm the principles established by this *Court* in *Stuart v. State,* 360 So. 2d 406 (Fla. 1978).

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33 13 1, this 22nd day of September, 1997.

HOWARD K. BLUMBERG
Assistant Public Defender

Appendix

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1997

SALVADOR SALZERO, **

Appellant, **

vs. ** CASE NO. 96-2678

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.[1] 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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[1] 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); Climwson v. State, 528 So. 2d 1296 (Fla. 1st DCA 1988). We certify conflict with these decisions.

fault that the trial date was beyond the rime 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. Thou, 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 OK 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-i-n 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 diligent, 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."