IN THE SUPREME COURT OF FLORIDA

WILLIAM C. BULGIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO.: SC03-2214

Lower Tribunal No.: 1D02-3934

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIRST DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES CITED:

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

This case is before the Court based upon an express and direct conflict between the First and Fifth District Courts of Appeal. Jurisdiction arises under Art V, §3(b)(3), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(iv).

The record on appeal consists of one volume, which will be referenced

according to the letter "R", followed by the appropriate page number. The transcript of the motion hearing before the trial court will be referenced by the letter "T", followed by the appropriate page number.

Attached hereto as an appendix is the opnion of the lower tribunal, which has been reported as State v. Bulgin, 858 So. 2d 1096 (Fla. 1st DCA 2003).

STATEMENT OF THE CASE AND FACTS

On December 15, 2000, the Petitioner and several co-defendants were arrested for Trafficking in MDMA. (R 16; T 2). The Petitioner agreed to assist law enforcement as a confidential informant, and was immediately released from custody without being booked at the county jail. (T 2). On or about December 31,

2000, the Petitioner and his attorney met with law enforcement and executed a substantial assistance agreement. (T 3). Although the agreement contemplated that the Petitioner would not be immediately charged, the law enforcement officers neglected to obtain a waiver of speedy trial, nor did the parties discuss speedy trial at any time. (T 3). However, law enforcement did obtain waivers of speedy trial from other suspects that are not parties to this appeal. (T 3; R 17).

Following his release from custody on December 15, 2000, the Petitioner's whereabouts were known to law enforcement at all times. (T 4). Approximately 480 days following his initial arrest, the Petitioner was again arrested for the same drug charge for which his was originally arrested on December 15, 2000. (R 2). At that point, formal charges were filed for the first time, which the Petitioner moved to dismiss by filing a motion for discharge pursuant to Florida Rule of Criminal Procedure 3.191. (R 2). Finding a violation of the speedy trial rule, the trial court granted the motion and concluded that the Petitioner was entitled to the automatic discharge due to the failure to hold trial within 175 days of the original arrest. (R 1-3). In reaching that conclusion, the trial court relied upon the decision of the Fifth District in Williams v. State, 757 So. 2d 597 (Fla. 5th DCA 2000), in which the court held that unless a substantial assistance agreement contains a specific waiver of speedy trial, the protections of the speedy trial rule can not be avoided by law

enforcement officers immediately releasing a suspect from custody. (R 1-3).

An appeal was filed by the Respondent to the First District Court of Appeal to review the trial court's order. On October 13, 2003, the First District reversed the trial court's order in a consolidated opinion. Although the court announced its agreement with the Fifth District's holding in Williams, it attempted to distinguish that decision and held that the failure to hold trial within 175 days was attributable to the Petitioner and therefore speedy trial relief should have been denied pursuant to Rule 3.191(j)(2). The Petitioner's motions for rehearing and rehearing en banc were subsequently denied on November 17, 2003.

The Petitioner timely filed his notice to invoke the discretionary jurisdiction of this court on December 15, 2003, based on the express and direct conflict between the district court's opinion in the instant case and the Fifth District's decision in Williams. This Court accepted jurisdiction to review the decision of the First District on March 8, 2004.

SUMMARY OF ARGUMENT

The trial court correctly granted the Petitioner's motion for discharge where speedy trial began to run upon the Petitioner's initial arrest, continued to run, and expired prior to the filing of an information. In granting the motion, the trial court properly relied upon the Fifth District's opinion in Williams v. State, 757 So. 2d

597 (Fla. 5th DCA 2000), a decision consistent with the well settled principle that a defendant is entitled to the protection of Rule 3.191 regardless of whether the State files a "nol pros" of charges, announces a "no action," or takes no action at all prior to the expiration of the speedy trial period.

In reversing the trial court, the First District erred in holding that the Petitioner is not entitled to the protection of Rule 3.191 where the Petitioner entered into a substantial assistance agreement that contemplated a delay in booking until assistance is complete, but did not contain a waiver of speedy trial. The court further erred in holding that the Petitioner was precluded from obtaining speedy trial relief pursuant to the exception contained in Rule 3.191(j)(2). Finally, the holding of the First District effectively incorrectly permits the State to unilaterally toll the running of speedy trial, even in the absence of a waiver, contrary to several decisions of this Court. Accordingly, the decision of the First District should be quashed.

ARGUMENT

WHETHER AUTOMATIC DISCHARGE IS REQUIRED WHERE A DEFENDANT IS ARRESTED, IMMEDIATELY RELEASED PURSUANT TO A SUBSTANTIAL ASSISTANCE AGREEMENT THAT DOES NOT CONTAIN A WAIVER OF SPEEDY TRIAL, AND SUBSEQUENTLY

REARRESTED AND CHARGED BY INFORMATION MORE THAN 175 DAYS AFTER THE INITIAL ARREST.

A. Introduction

Florida Rule of Criminal Procedure 3.191(a) provides in pertinent part as follows:

> Except as otherwise provided by this rule . . . every person charged with a crime . . . shall be brought to trial within 90 days if the crime charged is a misdemeanor, or within 175 days if the crime charged is a felony . . . . The time periods established by this subdivision shall commence when the person is taken into custody.

The requirement of Rule 3.191(a) that a criminal defendant charged with a felony be brought to trial within 175 days of being taken into custody has been the subject of several opinions of this Court. For example, in State v. Agee, 622 So. 2d 473, 474 (Fla. 1993), the defendant was arrested and an information was filed charging him with attempted second-degree murder. The defendant then filed a written demand for speedy trial. See id. at 474. Because the victim was in a coma and there were no other witnesses, a nolle prosequi was entered on the charge against the defendant before the expiration of the speedy trial time period. See id. at 474. Subsequently, the defendant was sent to Tennessee to be incarcerated on other charges. See id. Two years later, the victim regained consciousness and two eyewitnesses were located. See id. The State proceeded to refile criminal charges,

which the trial court dismissed pursuant to the defendant's motion for discharge. See id. The trial court's decision was affirmed by the district court. This Court affirmed, holding that "when the State enters a nol pros, the speedy trial period continues to run and the State may not refile charges based on the same conduct after the period has expired." Id. at 475.

This Court subsequently examined Rule 3.191(a) as it applies to situations where the State announces an intent to take "no action" and subsequently files an information after the expiration of the speedy trial period. See Genden v. Fuller, 648 So. 2d 1183 (Fla. 1994). In Genden, the State announced it would bring a "no action" against a defendant after the defendant was arrested. Id. at 1183. More than six months after the first arrest, the State filed an information against the defendant based on the same events for which he had been arrested. See id. Five weeks later, the defendant was again taken into custody and, two weeks after the second arrest, he moved for discharge under the speedy trial rule. See id. The trial court denied the motion, ruling that the State had the fifteen day recapture period provided by Florida Rule of Criminal Procedure 3.191 within which to try the defendant. The district court granted the defendant's petition on the authority of Court's decision in Agee and certified the question to the Florida Supreme Court. See id. This Court affirmed the decision of the district court, holding that "the

speedy trial time begins to run when an accused is first taken into custody and continues to run when the State voluntarily terminates prosecution before formal charges are filed and the State may not file charges based on the same conduct after the speedy trial period has expired." Id. at 1185. In reaching its conclusion, the Court reasoned that to interpret the rule as the State urged would provide the State with a means by which to unilaterally toll the running of the speedy trial period, which the Court declined to do. The Court further observed that "[t]he State would be able to avoid the speedy trial rule by waiting to formally charge an arrestee." Id. at 1185.

In State v. Williams, 791 So. 2d 1088 (Fla. 2001), this Court was presented with the question of whether the holding in Genden applies to situations where the State takes *no action* prior to the expiration of the speedy trial period and then files an information after the period has expired. In Williams, the State filed an information 206 days following the defendant's arrest. 791 So. 2d at 1089. The defendant filed a motion for discharge, which the trial court denied. The Second District subsequently granted the defendant's petition for writ of prohibition, and certified the question as a matter of great public importance. This Court affirmed the decision of the district court, and held that there is no legally cognizable difference between the State announcing a "no action" and inaction, and further

held that Rule 3.191 could not be construed "to allow the State to effectively toll the running of the speedy trial period by allowing it to expire prior to the filing of formal charges." Id. at 1089. The Court also observed that the speedy trial time "begins to run when an accused is taken into custody and continues to run even if the State does not act until after the expiration of the speedy trial period. The State may not file charges based on the same conduct after the speedy trial period has expired." Id. at 1091. Finally, the Court held that as in Genden, the State was not entitled to a recapture period. Id. at 1091.

This Court's holdings in Agee, Genden, and Williams make clear that a defendant is entitled to the protection of Rule 3.191 regardless of whether the State enters a nolle prosequi, announces a "no action," or takes no action at all prior to the expiration of the speedy trial period. However, the district court in the instant case and the Fifth District in Williams v. State, 757 So. 2d 597 (Fla. 5th DCA 2000),[1] are in direct conflict concerning whether the protection of Rule 3.191 should apply where no action is taken within 175 days of a defendant's arrest where the defendant enters into a substantial assistance agreement that does not contain a waiver of speedy trial, but where the agreement contemplates that booking

[1] The Fifth District's decision in Williams is not to be confused with this Court's decision in State v. Williams, 791 So. 2d 1088 (Fla. 2001), which involved a different defendant.

and the filing of charges will occur at a later time. As discussed below, the Fifth District's decision in Williams is a logical extension of this Court's decisions in Agee and Genden, is consistent with this Court's holding in State v. Williams, 791 So. 2d 1088 (Fla. 2001), and should therefore be approved. In contrast, the decision of the First District improperly permits the State to unilaterally toll the running of speedy trial, even in the absence of a waiver. Accordingly, the decision of the First District should be quashed.

B. The Fifth District's Decision in Williams is a Logical Extension of this Court's Decisions in Agee, Genden, and Williams.

In Williams v. State, 757 So. 2d 597, 598-99 (Fla. 5th DCA 2000), the defendant was arrested for sale of cocaine. Identical to the Petitioner in the instant case, the defendant agreed to serve as a confidential informant, and pursuant to his substantial assistance agreement, was allowed to leave police custody with the understanding that he would be rearrested and charged at a later time. Id. at 599-600. As a result, "no court proceedings were ever scheduled and the trial was never set." Id. at 600. At the conclusion of his cooperation with law enforcement, just as in the instant case, the defendant was again arrested for the same delivery of cocaine for which he had once been arrested and then "unarrested." Id. at 598. Following his second arrest for the same offense, the defendant's case was

scheduled for court proceedings for the first time. Id. at 598, 600. The defendant subsequently filed a motion for speedy trial discharge, which was denied by the trial court. Id. at 598.

On appeal, the Fifth District rejected the State's contention that the defendant was "unavailable" for trial and thus not entitled to the protection of Rule 3.191, and held that a defendant cannot be considered unavailable where "no proceedings were ever scheduled and the trial was never set." Id. at 600. The court also rejected the State's contention that the defendant should be estopped from claiming protection under the speedy trial rule simply because he entered into a substantial assistance agreement that provided for his immediate release and delayed the filing of charges. Id. at 600. In holding that discharge should been granted, the court echoed the reasoning of Agee and Genden, and observed that the protections of Rule 3.191 cannot be avoided by the police "unarresting" a defendant:

> [T]he speedy trial rule provides that the intent and effect of the rule shall not be avoided by the state by nolle prossing a crime and then prosecuting a new crime grounded on the same conduct or criminal episode. Just as the state cannot avoid the effect of the rule by the prosecutor's actions in nolle prossing a crime, the state should not be able to avoid the effect of the rule by the actions of the police in "unarresting" the defendant.

Id. at 600.

Finally, the court held that "if the state is concerned about speedy trial, it could merely obtain a waiver from the defendant, as part of his substantial assistance agreement." Id. at 600.

The Fifth District's decision in Williams is a logical extension of Agee and Genden, and is consistent with this Court's subsequent decision in State v. Williams, 791 So. 2d 1088 (Fla. 2001), in which the Court held that a defendant is entitled to an automatic discharge when the State fails to act within 175 days of the defendant's arrest. Indeed, if the State is not permitted to toll the running of speedy trial by taking no action, then it is difficult to rationalize why the State would be permitted to achieve the same result by law enforcement simply releasing a defendant from custody pursuant to an assistance agreement that contains no waiver of speedy trial. The Petitioner would further note that the concern this Court expressed in Genden and Williams with respect to unilateral tolling of speedy trial by the State is particularly relevant in situations such as the instant case where the lack of any court proceedings following the initial arrest would have made it impossible for the Petitioner to file a demand for speedy trial or otherwise assert his automatic right to speedy trial pursuant to Rule 3.191(a).

In addition, the Fifth District's holding that it is the State's responsibility to ensure that the speedy trial time is observed (or a waiver is obtained) in situations

where a defendant is released pursuant to an assistance agreement is consistent with the well-settled principle that the burden is on the State to ensure that a defendant is brought to trial within the speedy trial period. See State v. Antonietti, 558 So. 2d 192, 194 (Fla. 4th DCA 1990) ("It is the state's duty to bring the defendant to trial and to do it swiftly"); Saunders v. State, 436 So. 2d 166, 169 (Fla. 2d DCA 1983) (holding that the burden to comply with the speedy trial rule is on the State); Gue v. State, 297 So. 2d 135, 135 (Fla. 2d DCA 1974) ("[W]e find nothing in the rule which places the burden of compliance elsewhere than on the state.")

Finally, at least one foreign jurisdiction has held that where a defendant is assisting law enforcement following an arrest, the burden falls on the State to observe the speedy trial time limits or obtain a waiver of speedy trial as part of the assistance agreement. See State v. Delockroy, 559 N.W. 2d 43 (Iowa Ct. App. 1996). In Delockroy, the defendant and her roommate were arrested on drug charges following a search of their home. 559 N.W. 2d at 44. Immediately after the arrest, the roommate entered into a cooperation agreement with law enforcement with the understanding that charges against the defendant would be limited to simple possession of marijuana once assistance was complete. Id. at 44. Approximately nine months later, the defendant was charged by information, which she moved to dismiss based upon the fact that charges were not filed within 45

days of her arrest.[2] Id. at 44. In holding that the defendant was protected by the speedy trial rule and entitled to discharge, the Iowa Court of Appeals held:

> If law enforcement desire to utilize cooperation agreements after an arrest, and to delay the filing of charges pending completion of the agreement, a waiver of the speedy indictment rule can be requested as a part of the cooperation agreement. Without a waiver or good cause, the time limitation imposed by the rule must be met.

Id. at 47.

As the foregoing discussion demonstrates, the Fifth District's decision is consistent with the requirements of Rule 3.191, this Court's decisions in Agee, Genden, and Williams, and with the principle that the burden falls on the State to ensure that a defendant is brought to trial within the time periods prescribed the by rule. Accordingly, the Fifth District's decision should be approved.

C. The First District Misapplied Rule 3.191 and Incorrectly Determined that the Petitioner Was Not Entitled to Discharge.

In contrast to the Fifth District in Williams, the First District in the instant

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[2] Iowa's speedy trial rule is similar to Florida's in that Iowa Rule of Criminal Procedure 27(2)(a) requires an information or indictment to be dismissed if it is not filed within 45 days of arrest, absent good cause or waiver. See Delockroy, 559 N.W. 2d at 44. Similarly, this Court has interpreted Florida Rule of Criminal Procedure 3.191(a) as requiring discharge where the State fails to act within 175 days of arrest by filing an information, unless the defendant waives speedy trial or some other recognized exception is present. See State v. Williams, 791 So. 2d 1088, 1091 (Fla. 2001).

case concluded under factually identical circumstances that the Petitioner was not entitled to discharge pursuant to Rule 3.191. See State v. Bulgin, 858 So. 2d 1096, 1097 (Fla. 1st DCA 2003). In assessing whether the Petitioner was correctly granted discharge by the trial court, the First District acknowledged that the Petitioner's trial "did not commence within the time periods established by the speedy trial rule," and further observed that the law enforcement officers failed to obtain either oral or written waivers of speedy trial. See id. at 1097. However, the district court concluded that the lower court erred in granting discharge because rule 3.191(j)(2) precludes relief where the "failure to hold trial is attributable to the accused." Id. at 1097. In response to the Petitioner's argument that the Fifth District's decision in Williams was controlling, the court observed:

> The defendants cite Williams v. State, 757 So. 2d 597 (Fla. 5th DCA 2000), as controlling authority . . . . The Fifth District Court of Appeal held that the initial arrest starts the running of the speedy trial time and that, for the purposes of the rule, **there is no such thing as an "unarrest**." **We agree with that holding**, but that is not the case presented here. The **defendants were not subject to any procedures labeled an "unarrest,"** and the exception under the speedy trial rule upon which we base our ruling, Fla. R.Crim. P. 3.191(j)(2), was not decided in Williams.

Id. at 1097-98 (emphasis added).

As the following discussion will reveal, the First District erred in at least four

respects: 1) by concluding that Williams is factually distinguishable and that the assistance agreement satisfied a concern of the Petitioner that formal charges and court appearances would jeopardize his assistance; 2) determining that the supposed lack of an "unarrest" should preclude speedy trial relief; 3) holding that any delay resulting from the substantial assistance agreement is attributable to the Petitioner, as opposed to the State, and that the exception contained in Rule 3.191(j)(2) should apply; and 4) interpreting Rule 3.191(a) in such a way that law enforcement officers, even without a waiver of speedy trial, may unilaterally toll the running of the speedy trial period simply because an arrested suspect agrees to provide substantial assistance with the understanding that booking and the filing of charges will occur at a later time.

1. The Facts of Williams are Indistinguishable

Contrary to the conclusion of the First District, it is clear from the record that the **stipulated** facts of the instant case considered by the trial court are identical to the situation presented in Williams. As in Williams, the Petitioner was arrested, handcuffed, and taken into custody in connection with a drug related offense. (T 3). Further, like the defendant in Williams, the Petitioner signed a cooperation agreement with law enforcement that did not contain a waiver of speedy trial. (T 3). In addition, identical to Williams, the Petitioner was not taken

to the county jail to be booked following his initial arrest, and instead was released from custody with the understanding that the charges would be filed at a later time. (T 3). Finally, as in Williams, the speedy trial period expired prior to the Petitioner's subsequent re-arrest. (T 4). Although the parties below did not use the artificial label "unarrest" to describe the circumstances under which the Petitioner was released from custody, it is clear that the events surrounding the Petitioner's initial arrest and release were identical to what occurred in Williams.

The First District also erred in concluding that the Petitioner's entry into the assistance agreement "satisfied [the Petitioner's] concern that formal charges and court appearances would jeopardize [his] covert assistance." Bulgin, 858 So. 2d at 1097. The only support in the record for that conclusion is an affidavit prepared by Investigator David Odom that was attached to the co-defendant's response to the Petitioner's motion for discharge in the petitioner's case which has been consolidated with this one. (Pelky, R 24-25). The trial court did not consider this affidavit in rendering its decision since it was not in existence at the time the Petitioner's case was argued. Indeed, the trial Court relied only upon the stipulations announced at the outset of the hearing below. (T 2-5).

Furthermore, in the co-defendants' cases the allegation contained in Investigator Odom's affidavit that the Petitioners were concerned about the timing

of the charges was a disputed factual issue that the lower court did not consider relevant and declined to resolve:

> MR. FOSTER: I guess, Judge, the only dispute would be there is a reference in an affidavit from David Odom that we had asked for additional time. Or I don't think he says additional time, but we had inquired about enough time to do the assistance. And that is not my recollection of what happened.
>
> Mr. Conrad is present and he can testify to that. That is also not his recollection of what happened.
>
> *** * ***
>
> MR. FOSTER: And I understand, Judge. It's just the fact that the affidavit has been accepted as part of the record, that's out there and I don't want to leave that as an uncontested issue of fact for appeal purposes.
>
> THE COURT: For purposes here, that fact is contested. How is that?
>
> MR. FOSTER: Can we just proffer Mr. Conrad's testimony?
>
> THE COURT: Mr. Conrad's testimony has been proffered, to the extent that he disagrees with that statement and that he would testify so. **But I'm saying that's not the basis of my decision. Whether or not they specifically asked for time or not with FDLE does not affect the waiver of speedy trial as determined here. That is not a determining factor.**

(Pelky, T 5-6; 14) (emphasis added).

Based on the foregoing, there is no question that the First District incorrectly concluded that the facts of the instant case are distinguishable from Williams, and by further concluding that the Petitioner was concerned that court appearances would jeopardize his assistance.

2. Whether the Petitioner was "Unarrested" is Irrelevant for the Purposes of Rule 3.191.

The First District also erred in holding that the Petitioner's supposed inability to demonstrate that an "unarrest" occurred should in some way preclude speedy trial relief. Again, the First District's opinion reads, in relevant part:

> The Fifth District Court of Appeal held that the initial arrest starts the running of the speedy trial time and that, for the purposes of the rule, there is no such thing as an "unarrest" . . . . We agree with that holding, but that is not the case presented here. **The defendants were not subject to any procedures labeled as an "unarrest."**

Bulgin, 858 So. 2d at 1097 (emphasis added).

Once again, it should be noted that the events surrounding the Petitioner's initial arrest and release are indistinguishable from what occurred in Williams. Even assuming, *arguendo*, that the Petitioner in this case was not immediately released from custody ("unarrested"), it would be the **State**, not the accused, attempting to demonstrate that an "unarrest" occurred, as an "unarrest" would presumably toll the running of speedy trial, whereas an arrest starts the running of the speedy trial period. See Fla. R. Crim. P. 3.191(d).

3. The First District Erred by Concluding that the Exception Contained in Rule 3.191(j)(2) is Applicable.

The First District further erred in holding that the exception contained in Rule

3.191(j)(2) is applicable to the facts of the instant case. In particular, the First District's holding is contrary to the plain language of the rule, which provides that relief should be denied where "the failure to **hold trial** is attributable to the accused." Fla. R. Crim. P. 3.191(j)(2) (emphasis added). Clearly, the application of this exception is limited to actions of the defendant that occur after court proceedings have been initiated. After all, if a suspect has not been booked by law enforcement and no court proceedings have been scheduled (such as an arraignment), it is impossible that the defendant could be responsible for the failure to hold a trial in a court proceeding that does not yet exist. In other words, if there are no court proceedings, then there is no trial to delay.

The Petitioner's reasoning in this regard is supported by the Fifth District's opinion in Williams, in which the state argued the application of the similar exception contained in Rule 3.191(j)(3), which prohibits relief where "the accused was unavailable for trial." Williams, 757 So. 2d at 600. In rejecting this argument, the Fifth District held:

> On appeal, the state seems to concede the Williams was arrested, but argues that he was "unavailable" for trial and thus was not entitled to the protection of the speedy trial rule. Rule 3.191(k) provides that a person who has not been available for trial during the term provided is not entitled to be discharged. A person is deemed "unavailable" for trial if the person or the person's

> counsel fails to attend a proceeding where their presence is required or the person or counsel is not ready for trial on the day trial is scheduled. **Here, no proceedings were every scheduled and the trial was never set. Thus Williams cannot be considered "unavailable."**

Id. at 600 (emphasis added).

Although the First District attempted to support its application of Rule 3.191(j)(2) by citing Collins v. State, 489 So. 2d 133 (Fla. 1st DCA 1986), as well as State v. Rosenfeld, 467 So. 2d 731 (Fla. 3d DCA 1985), it is significant to note that both of those decision involved conduct by the defendant that occurred **after** court proceedings had been scheduled. Indeed, as best counsel for the Petitioner can determine, there are no decisions that have applied the Rule 3.191(j)(2) exception to conduct that occurred prior to a defendant's booking.

Even assuming the exception contained in Rule 3.191(j)(2) can be appropriately applied to conduct that occurs prior to a suspect's booking or the scheduling of court proceedings, the First District erred in holding that the failure to hold trial was attributable to the Petitioner, as opposed to the State. Although it is not clear, it seems from the opinion that the court attributes the delay to the Petitioner because he entered into an agreement that resulted in the postponement of booking and court proceedings until his assistance was complete, which supposedly "satisfied [Petitioner's] concern that formal charges and court

appearances would jeopardize their covert assistance." Bulgin, 858 So. 2d at 1097. As previously noted, the First District's conclusion that the Petitioner was "concerned" about court appearances was based solely on allegations contained in an affidavit prepared by Investigator Odom in a co-defendant's case which was heard by a different trial judge. (Pelky, R 24-25). That affidavit was not even part of the record in this case and indeed it was prepared after Judge Bateman ruled in favor of Mr. Bulgin and against the State.

Further, it is critical to observe that the State, not the Petitioner, had exclusive control over when a rearrest and booking would occur. Indeed, if the Petitioner's cooperation agreements had actually contained a provision to delay the second arrest, clearly it would have been completely unenforceable had the Petitioner sought to prevent the State from taking him in to custody. The First District merely assumed that by entering into the "cooperation agreement," the Petitioner controlled when he would be taken in to custody and when he would be charged. This is not the case. The State, as in all criminal proceedings, retains the sole control and discretion over these two important dates and is limited only by the speedy trial rule. See, e.g., State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986) ("The decision of whether or not to prosecute in any given instance must be left to the discretion of the prosecutor"), quoting United States v. Smith, 523 F.2d 771, 782

(5th Cir. 1975). It was the State alone who decided when the Petitioner's assistance was complete. (T 3). In fact, it was the State who suggested the agreement and its terms in the first instance. (T 3). Any delay was occasioned by the State who knew that speedy trial began to run from the moment they arrested the Petitioner.[3] As such, the First District erred in holding that the failure to hold trial was attributable to the Petitioner.

4. The First District's Holding Permits the State to Unilaterally Toll the Running of Speedy Trial in the Absence of a Waiver from the Defendant.

As discussed above, the First District holds that the speedy trial protections provided by Rule 3.191(a) do not apply, even in the absence of a waiver of speedy trial, where a suspect agrees to assist law enforcement with the understanding that charges will be filed at a later time. See Bulgin, 858 So. 2d at 1057. There is no question that the First District's decision runs afoul of the principle announced by this Court in Agee, Genden, and Williams that the State may not unilaterally toll the running of speedy trial by failing to take action following an arrest. For instance, the practical effect of the First District's holding is that once a suspect agrees to assist law enforcement and is immediately released from custody pursuant to the

[3] The record reflects that the law enforcement officers were aware that a waiver of speedy trial should have been obtained as part of the assistance agreement, yet they neglected to obtain such a waiver due to an oversight. (T 13).

agreement, the suspect unknowingly removes himself from the protection of Rule 3.191(a) and is placed in a situation in which the State is free to wait until the conclusion of the limitations period to effect a rearrest and file formal charges.[4] This holding is particularly problematic in situations such as the instant case where the lack of court proceedings make it impossible for the defendant to file a demand for speedy trial or otherwise reassert his automatic right to speedy trial pursuant to Rule 3.191(a). Simply put, the First District's opinion leads to a result which this Court has repeatedly condemned – permitting the State to hold the sword of Damocles over the head of a defendant for an indefinite period of time where speedy trial was not specifically waived and where the defendant has no ability to assert the rights provided by Rule 3.191. Accordingly, the First District's opinion should be quashed with directions that the trial court's order of discharge be reinstated.

CONCLUSION

The Petitioner respectfully requests that this Court quash the district court decision below, and direct that the trial court's order of discharge be reinstated.

CERTIFICATE OF SERVICE

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[4] The Defendant was charged with Sale of MDMA, a second degree felony. See § 893.13(1)(a)1., Fla. Stat. (2000). The statute of limitations for a second degree felony is three years. See § 775.15(2)(b), Fla. Stat. (2000).

I certify that a copy hereof has been furnished to Robert R. Wheeler, Assistant Attorney General, by hand delivery to Pl-01, The Capitol, Tallahassee, Florida, on April 2, 2004.

Respectfully submitted,

_____

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is proportionally spaced 14 point Times New Roman.

_____

Frederick M. Conrad, Esq.

IN THE SUPREME COURT OF FLORIDA

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APPENDIX

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INDEX TO APPENDIX