

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ANDREW NELSON,

Respondent.

CASE NO. SC08-2325

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Respondent in the Fourth District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, ANDREW NELSON, the Petitioner in the Fourth District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent.

The record on appeal consists of one volume, which will be referenced as "R," followed by any appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Fourth District Court of Appeal gave the following account of the facts:

[Respondent] was arrested on May 16, 2007, when an officer stopped his vehicle and discovered weapons in the trunk and two pistols in [Respondent]'s pockets. The probable cause affidavit listed the violations as armed burglary and carrying a concealed weapon. On June 6, 2007, the state filed a petition for delinquency, charging [Respondent] with grand theft of the two pistols found on his person and with carrying a concealed firearm. The ninety-day juvenile speedy trial period of Florida Rule of Juvenile Procedure 8.090(a) expired on August 13, 2007. However, the case was called for trial on August 15, 2007, at which time [Respondent]'s counsel requested a continuance-**after** the expiration of the juvenile speedy trial period. The 175-day adult speedy trial period for the charges ran on November 6, 2007. Three days

later, on November 9, 2007, the state direct filed an information in felony court charging [Respondent] with one count of armed burglary of a dwelling and twelve counts of grand theft of various firearms (case no. 07-22153). The information alleged that this occurred on May 5, 2007, although the state contended that this was a typographical error and that the burglary actually occurred on May 15, 2007.

The state filed a nolle prosequi of the juvenile petition on November 27, 2007, and on December 6, 2007, it filed a felony information charging the exact same counts of grand theft and carrying a concealed firearm as were contained in the juvenile petition, alleging the offense date of May 16, 2007 (case no. 07-23487).

On March 3, 2008, [Respondent] filed a motion for discharge in case no. 07-22153, the armed burglary and theft charges, and on March 6, 2008, he filed a similar motion for discharge as to the theft and concealed firearm charges, case no. 07-23487.

The trial court held hearings on both motions and denied them, finding the defense continuance, which had been taken after expiration of the speedy trial time in the juvenile case, waived speedy trial for all charges arising from the same criminal episode. From this order, [Respondent] filed a petition for writ of prohibition in each case, seeking to prohibit his further prosecution. We consolidated both petitions for the purposes of this opinion.

Nelson v. State, 993 So.2d 1072, 1074 (Fla. 4th DCA 2008).

The Fourth District granted the petitions. The court held that “[a] request for a continuance after a speedy trial period has run but before moving for discharge does not affect a defendant’s right to demand his speedy trial rights,” citing State v. Leslie, 699 So.2d 832 (Fla. 3d DCA 1997). The Fourth District also cited Stewart v. State, 491 So.2d 271, 272 (Fla. 1986), for the proposition that “when a defendant requests a continuance *prior to the expiration of the applicable speedy trial time period for the crime with which he is*

charged, the defendant waives his speedy trial right as to all charges which emanate from the same criminal episode." Nelson at 1075 (emphasis in original). Because Respondent did not file the continuance in the juvenile case until *after* the expiration of the basic speedy-trial period, the Fourth District concluded that the continuance did not constitute a waiver of the time limits.

Because the Fourth District found that the continuance did not waive the time limits, the court considered whether the informations in Case Nos. 07-22153 and 07-23487 were permitted. The Fourth District ruled that Respondent was entitled to discharge in Case No. 07-22153 because it constituted an impermissible amendment to the existing charging document, under the authority of State v. D.A., 939 So.2d 149, 151 (Fla. 5th DCA 2006); State v. Clifton, 905 So.2d 172, 178-79 (Fla. 5th DCA 2005); and Pezzo v. State, 903 So.2d 960, 962 (Fla. 1st DCA 2005). Id.

The court ruled that Respondent was entitled to discharge in Case No. 07-23487 because the State could not re-file charges based upon the same conduct as alleged in the nol-prossed juvenile charges after the expiration of the juvenile speedy-trial basic period. Id.

On rehearing, the Fourth District addressed the effect of State v. Naveira, 873 So.2d 300 (Fla. 2004), in which this Court held that a defendant was not entitled to discharge under rule 3.191 when he filed a motion for continuance during the "recapture" period of rule 3.191(p), in spite of his claim that the State's delay in filing the information necessitated the continuance, because the motion for continuance demonstrated that he was "unavailable" for trial. The

State argued that Naveira “stands for the proposition that any post-speedy trial expiration motion for continuance by a defendant waives his or her rights under the rule.” Nelson at 1077. The Fourth District rejected this argument, ruling that Naveira held only that post-expiration continuances waived the time limits only when they were filed after the defendant had filed a notice of expiration. Id. Otherwise, the Fourth District held that the rule of Stewart applied, and any other post-expiration continuance still constitutes a nullity. The court summed up its opinion on rehearing as follows: “a motion for continuance is a nullity when filed after the speedy trial period has expired but before the notice of expiration invokes the right of recapture.” Id.

However, the Fourth District was “sufficiently unsure of the extent of the *Naveira* holding on post-expiration waivers of the speedy trial rule and whether the court would recede in part from its holding in *Stewart* based upon *Naveira*” that it certified a question of great public importance to this Court as follows:

DOES A MOTION FOR CONTINUANCE MADE AFTER THE EXPIRATION OF THE SPEEDY TRIAL PERIOD BUT BEFORE A DEFENDANT FILES A NOTICE OF EXPIRATION UNDER THE RULE, WHICH ACTIVATES THE RIGHT OF RECAPTURE PERIOD, WAIVE A DEFENDANT’S SPEEDY TRIAL RIGHTS UNDER THE RULE?

SUMMARY OF ARGUMENT

A defense-requested continuance waives the speedy-trial rule time limits as to all charges which emanate from the same criminal episode and stands as an ongoing waiver as to any newly filed information arising out of the same incident. Because Respondent waived the rule 8.090 time limits by continuing the juvenile proceedings, the State was permitted to file charges related to the same episode (Case No. 07-22153) after expiration of the basic period without violating the requirements of State v. Williams, 791 So.2d 1088, 1091 (Fla. 2001). Likewise, the waiver permitted the State to re-file the same charges in a criminal information following the nol pros in the juvenile proceeding (Case No. 07-23487), after expiration of the basic period without violating the requirements of State v. Agee, 622 So.2d 473 (Fla. 1993).

The fact that the continuance was filed after the expiration of the basic speedy-trial period does not alter this conclusion. To the extent that this Court's decision in Stewart v. State, or any other case, holds that a continuance filed after the expiration of the basic period does not waive the time limits, the holding no longer constitutes good law. First, the speedy-trial rule has been fundamentally altered since the facts of Stewart arose, which abrogates that statement in Stewart; second, this Court has applied the rule that a continuance waives the time limits in a situation where the continuance was not requested until after the expiration of the basic period; and third, because a rule that permits a defendant to continue the trial after the expiration of the basic period without

waiving his rights under the rule is plainly inconsistent with the purposes of the rule.

Prior to the 1984 amendment that created the recapture period, a post-expiration motion for continuance was a nullity, because the court lost jurisdiction to try the defendant after expiration. As such, the courts properly ruled that a continuance waived rule 3.191 rights only if it was filed prior to expiration of the basic period.

However, this rule of law is inconsistent with the current speedy-trial rules. The State is no longer required to actually try the defendant until the defendant affirmatively requests it by filing a notice of expiration, and then has 15 days to commence trial. Accordingly, without the possibility of automatic discharge based only on the expiration of the basic period (as under the old rule), the court clearly continues to possess jurisdiction over the case after the expiration of the basic period. As such, a defendant who has not been tried in the basic period, but who chooses to continue the trial rather than to file a notice of expiration, has waived the time limits under the rule, in particular, the right to file a notice of expiration and demand trial within 15 days. The reasons underlying the old, contrary rule no longer apply. Under the current structure of the rule, there is no relevant distinction between a pre-expiration continuance and a post-expiration continuance.

The principles underlying the old rule deeming a post-expiration continuance a nullity do have some remaining vitality. However, the nullity rule should be utilized in a manner consistent with the current structure of the rule, rather than the pre-1985 structure.

Again, the underlying principle of the old rule is that when the defendant is entitled to immediate discharge, the proceeding is essentially at an end. As such, a continuance filed after that point should have no effect. There are now only a few limited situations where a defendant is entitled to immediate discharge, and it is only in those situations that the nullity rule should apply. While the defendant is no longer entitled to immediate discharge simply because the basic period has expired, the defendant is entitled to immediate discharge when 1) the State fails to try the defendant within the recapture period, or 2) the State files an information, re-files an information following a nol pros, or attempts to amend the information to add new charges, after expiration of the basic period. In these circumstances, the State contends that the "nullity rule" still applies: because the defendant is entitled to immediate discharge, any continuance after that entitlement arises should be considered a nullity for the same reason that any post-expiration continuance was considered a nullity under the old rule.

Finally, even if the continuance were a nullity, the State contends that Respondent should not have been discharged from charges in Case No. 07-23487, because the State only nol prossed the juvenile petition and re-filed it in criminal court in accordance with statutory requirements.

ARGUMENT
ISSUE

DOES A MOTION FOR CONTINUANCE MADE BEFORE
EXPIRATION OF THE RECAPTURE PERIOD WAIVE THE
TIME LIMITS UNDER RULES 3.191 AND 8.090?

STANDARD OF REVIEW

“A decision construing a rule of procedure presents an issue of law and is therefore review by the de novo standard.” Philip J. Padovano, *Florida Appellate Practice* § 18:4, at 344 n.20 (2009 ed.); see also Saia Motor Freight Line, Inc. v. Reid, 930 So.2d 598, 599 (Fla. 2006).

PRELIMINARY STATEMENT

For greater clarity, and consistent with the State’s position herein, the State will restate the certified question as follows:

DOES A MOTION FOR CONTINUANCE MADE AFTER THE EXPIRATION OF
THE BASIC SPEEDY-TRIAL PERIOD BUT BEFORE EXPIRATION OF THE
RECAPTURE PERIOD WAIVE THE TIME LIMITS UNDER RULES 3.191
AND 8.090 IN THE SAME MANNER THAT A MOTION FOR CONTINUANCE
MADE PRIOR TO THE EXPIRATION OF THE BASIC PERIOD WAIVES THE
TIME LIMITS?

MERITS

- a. The speedy trial rules in general and Respondent’s waiver of those rules’ time limits**

Florida Rules of Criminal Procedure 3.191 provides the “procedural protection” to effectuate the right to speedy trial. State v. Bivona, 496 So.2d 130, 133 (Fla. 1986). Subdivision (a) of the rule provides that a person charged with a crime by indictment or information “shall be brought to trial within 90 days of arrest if the crime charged is a misdemeanor, or within 175 days of arrest if the crime charged is a felony.” The time periods established by

rule 3.191(a) commence when the person is taken into custody as defined in subdivision (d). Subdivision (d) provides that a person is taken into custody "when the person is arrested as a result of the conduct or criminal episode that gave rise to the crime charged."

Unless the defendant is not charged within the period set forth in rule 3.191(a), the expiration of the rule 3.191(a) deadline does not entitle the defendant to discharge. Rather, when the deadline expires, a defendant may invoke the recapture provision of rule 3.191(p). Rule 3.191(p)(2) provides that "[a]t any time after the expiration of the prescribed time period, the defendant may file a separate pleading entitled 'Notice of Expiration of Speedy Trial Time,' and serve a copy on the prosecuting authority." Rule 3.191(p) provides for hearing on the notice and requires that the defendant be brought to trial within ten days of the hearing unless an exception, set forth in subdivision (j), exists.¹ If none of the reasons set forth in subdivision (j) exists, and the defendant is not brought to trial within the recapture period, the defendant "shall be forever discharged from the crime." Fla. R.Crim. P. 3.191(p)(3).

Florida Rules of Juvenile Procedure 8.090 is the juvenile-proceedings counterpart to rule 3.191. A juvenile charged by petition with committing a delinquent act "shall be brought to an adjudicatory hearing without demand within 90 days" of the date the

¹While the rule calls for hearing within five days following the notice of expiration, and then trial within ten days following that hearing, this Court has ruled that any violation of these specific deadlines is harmless as long as the defendant is actually brought to trial within 15 days of filing the notice of expiration. State v. Salzero, 714 So.2d 445 (Fla. 1998).

child was taken into custody, or the date of service of the summons that is issued when the petition is filed, whichever is earlier. Fla. R. Juv. P. 8.090(a). Rule 8.090 also contains a recapture provision, with procedures substantially identical to those in rule 3.191. Fla. R. Juv. P. 8.090(m).

The State is not entitled to the recapture period when it files a *nolle prosequi* of an information and then attempts to re-file the information after the expiration of the basic period.² State v. Agee, 622 So.2d 473 (Fla. 1993). Similarly, the State is not entitled to the recapture period when it fails to file any charging document until after the expiration of the basic period. State v. Williams, 791 So.2d 1088, 1091 (Fla. 2001). In these circumstances, the defendant is entitled to immediate discharge upon filing of such a defective information. The same rule applies when the State attempts to add charges to an existing information by amendment. See State v. Clifton, 905 So.2d 172 (Fla. 5th DCA 2005).

A defense-requested continuance constitutes a waiver of the time limits under rule 3.191. See Fla. R. Crim. P. 3.191(j)(2) ("If trial of the accused does not commence within the periods of time established by this rule, a pending motion for discharge shall be granted by the court unless it is shown that ... the failure to hold trial is attributable to the accused ... or their counsel"); State ex rel. Butler v. Cullen, 253 So.2d 861 (Fla. 1971); State v. Gibson,

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In this brief, the State will refer to the time periods set forth in rules 3.191(a) and 8.090(a) as "the basic period."

783 So.2d 1155, 1158 (Fla. 5th DCA 2001) (“It is axiomatic under Florida law that a trial continuance granted at the request of the accused constitutes a waiver of the right to a speedy trial under rule 3.191”). This rule also applies to juvenile proceedings. See B.W. v. State, 855 So.2d 1266 (Fla. 4th DCA 2003); A.B. v. State, 601 So.2d 1342, 1342 -1343 (Fla. 3d DCA 1992); J.B. v. Korda, 436 So.2d 1109, 1110 (Fla. 4th DCA 1983); State v. W. A. M., 412 So.2d 49, 51 (Fla. 5th DCA 1982). Accordingly, a defense-requested continuance in a juvenile proceeding waives the time limits of rule 8.090.

Moreover, “when a defendant requests a continuance prior to the expiration of the applicable speedy trial time period for the crime with which he is charged, the defendant waives his speedy trial right **as to all charges which emanate from the same criminal episode**”). See Stewart v. State, 491 So.2d 271, 272 (Fla. 1986) (e.s.).

A waiver of rule 3.191 time limits also continues to apply when charges relating to the same offenses are later re-filed. See Atkins v. State, 785 So.2d 1219, 1220 (Fla. 4th DCA 2001):

Because Atkins moved for a defense continuance on November 5, 1998, during the pendency of the earlier-filed information, that continuance constituted a waiver of his speedy trial rights. See Stewart v. State, 491 So.2d 271 (Fla. 1986). Further, **any express waiver of speedy trial, whether by defense motion to continue or otherwise, stands as an ongoing waiver as to any newly filed information arising out of the same incident.** Morris v. State, 715 So.2d 1177 (Fla. 4th DCA 1998). This is true whether the new charges are less serious or more serious than the previously filed charges. Compare Stewart with Morris.

In short, a defense-requested continuance waives the speedy-trial rule time limits "as to all charges which emanate from the same criminal episode" and "stands as an ongoing waiver as to any newly filed information arising out of the same incident."

This is precisely what occurred here. Petitioner's motion for continuance of adjudicatory hearing in the juvenile proceeding waived the rule 8.090 time limits. This waiver stood as an "ongoing waiver as to any newly filed information arising out of the same incident." The information in Case No. 07-22153, charging armed burglary and theft of the remaining firearms, "emanat[ed] from the same criminal episode" as the firearm theft charged in the juvenile proceeding. Stewart. The firearm referenced in the juvenile petition count alleging grand theft of a firearm was stolen in the burglary referenced in the 07-22153 information.³ Likewise, the information in Case No. 07-23487 contained the same charges that the juvenile petition charged; the State had merely re-charged those counts in a criminal information in accordance with the statutory requirement to transfer pending juvenile proceedings to criminal court after a juvenile has been transferred for criminal prosecution. § 985.557(3)(b), Fla. Stat.

Accordingly, because Respondent waived the rule 8.090 time limits by continuing the juvenile proceedings, the State was

³To this end, it is noteworthy that the arresting officer charged Respondent with armed burglary. The arresting officer evidently considered Respondent's possession of a firearm recently stolen in a burglary as probable cause that Respondent committed that burglary. See Fla. Std. Jury Instr. (Crim.) § 13.1.

permitted to file charges related to the same episode (Case No. 07-22153) after expiration of the basic period without violating the requirements of State v. Williams. Likewise, the waiver permitted the State to re-file the same charges in a criminal information following the nol pros in the juvenile proceeding (Case No. 07-23487), after expiration of the basic period without violating the requirements of State v. Agee. See Runyon v. State, 743 So.2d 619 (Fla. 4th DCA 1999).

In Runyon, the defendant waived the rule 3.191 time limits by filing a continuance. Four months later, the State filed a nol pros. Over a year following the nol pros, the State filed a new information based on the same occurrence. The Fourth District affirmed the trial court's denial of the defendant's motion for discharge, ruling that the continuance in the earlier case (nearly one and one-half years earlier) constituted a waiver of the time limits with regard to the new information, on the authority of Stewart v. State, supra. Runyon at 620.

Accordingly, under the authority of Stewart, Atkins, and Runyon, Respondent is not entitled to discharge. Williams and Agee do not alter this conclusion, because they did not involve situations where the defendant waived the rule 3.191 time limits. It should be noted, as always, that Respondent still retained both the right to demand a speedy trial under rule 3.191(b), as well as his rights under the state and Federal constitutions. See Butterworth v. Fluellen, 389 So.2d 968 (Fla. 1980):

Although an order granting a defendant's motion for continuance waives the right to trial within 180 days, the defendant still retains the right to demand a speedy trial within sixty days pursuant to Rule of Criminal Procedure 3.191(a)(2) [now rule 3.191(b)]. This provision, which is always available to a defendant who is ready for trial, not only guarantees the defendant an opportunity for an expeditious trial date, but also avoids the necessity for a court determination of reasonableness for speedy trial purposes. ... [W]e emphasize that a defendant's motion for a continuance does not relinquish all the defendant's rights to a speedy trial. Although the granting of the defendant's motion does waive the 180-day provision, the defendant retains his constitutional guarantee to a speedy trial within a reasonable time

See also Banks v. State, 691 So.2d 490, 492 (Fla. 4th DCA 1997) (en banc) ("[T]here remains the right to demand speedy trial under [rule 3.191] and the defendant retains constitutional rights to a speedy trial"); Atkins v. State, 785 So. 2d 1219, 1220 (Fla. 4th DCA 2001) ("Once a waiver of speedy trial rights has occurred, a defendant may 'start the clock running again' by invoking a demand for speedy trial pursuant to Florida Rule of Criminal Procedure 3.191(b)"). If Respondent had wished to re-invoke his rights under rule 3.191, he was free to file a demand.

b. The effect of the fact that Respondent did not move for continuance until after the expiration of the basic period

The Fourth District did not necessarily disagree with the analysis set forth above. Rather, the Fourth District differed from the State's analysis regarding the effect of Respondent's continuance in the juvenile proceeding. The State argues that Respondent's continuance, filed after the expiration of the basic period, has the same effect on his right to invoke the time limits as a continuance

filed prior to the expiration of the basic period. Conversely, the Fourth District below considered the motion for continuance a "nullity" because it was filed after the expiration of the basic period. The State asserts that the Fourth District's holding misapplies this Court's precedent by failing to apply it to the structure of the speedy-trial rules as they exist today, as opposed to the rule's structure when the precedent was decided.

In Stewart v. State, this Court reasserted the rule regarding the effect of continuances on the speedy-trial rule time limitations as follows: "[W]hen a defendant requests a continuance **prior to the expiration of the applicable speedy trial time period for the crime with which he is charged**, the defendant waives his speedy trial right as to all charges which emanate from the same criminal episode." Stewart at 272 (e.s.). The Fourth District held that this rule required discharge:

The speedy trial time for the crime with which the petitioner was charged was the juvenile speedy trial time period, and petitioner did not request a continuance until after the period had expired. Thus, the continuance had no effect on the running of the speedy trial time for the juvenile proceeding, nor did it waive his speedy trial right as to any other charges emanating from the same criminal episode.

Nelson at 1075. Several decisions have applied this rule of law in the same manner, holding that a post-expiration continuance was a nullity and did not waive the time limits in the manner that a pre-expiration continuance would have. See Llanusa v. Glickstein, 376 So.2d 45 (Fla. 4th DCA 1979); Muller v. State, 387 So.2d 1037, 1039

(Fla. 3d DCA 1980); Ballard v. Kaney, 397 So.2d 1042 (Fla. 5th DCA 1981).

The State contends, to the extent that Stewart or any other case holds that a continuance filed after the expiration of the basic period does not waive the time limits, that this holding no longer constitutes good law, for three reasons: first, the speedy-trial rule has been fundamentally altered since the facts of Stewart arose, which abrogates that statement in Stewart; second, this Court has applied the rule that a continuance waives the time limits in a situation where the continuance was not requested until after the expiration of the basic period; and third, because a rule that permits a defendant to continue the trial after the expiration of the basic period without waiving his rights under the rule is plainly inconsistent with the purposes of the rule.

1. Changes in rule 3.191 since Stewart v. State

The defendant in Stewart was arraigned in June 1983. Stewart at 271. Prior to 1985, the speedy-trial rule was significantly different than today. At that time, the State had 180 days from the date of arrest to try the defendant. Fla. R. Crim. P. 3.191(1)(a) (1983). There was no "recapture period;" once the 180 days expired, the defendant was entitled to discharge, and, as long as the court found that the defendant had been available for trial, was "forever discharged from the crime." Id. Because the 180-day deadline was absolute, some decisions held that the court actually **lost jurisdiction** to try the defendant after the expiration. Ellison v. State, 447 So.2d 261 (Fla. 2d DCA 1983) ("Once the 180-day period

extended by 60 days passed on November 19, 1982, the trial court lost jurisdiction and the defendant was entitled to discharge"). Consequently, under the old rule, courts properly considered a post-expiration continuance a nullity, because the trial court lost jurisdiction to try the defendant as soon as the applicable period expired. See Llanusa v. Glickstein at 46:

We therefore find that it is not necessary to consider the effect of petitioner's motion for continuance filed subsequent to the expiration of the speedy trial period.

Absent a proper extension of time within which a defendant must be brought to trial or a justifiable excuse under the terms of Fla.R.Crim.P. 3.191 why trial was not commenced within 180 days, the trial court lacks jurisdiction to try the petitioner. Having lost jurisdiction, the subsequent motion for continuance would have no effect.

Because a post-expiration motion for continuance was a nullity, it did not waive the time limits and did not affect the defendant's right to discharge. Ballard v. Kaney; Muller v. State.

The State suggests that effective-assistance principles also necessitated the "nullity rule"⁴ under the pre-1985 speedy-trial rule. If defense counsel moved for a continuance in circumstances where the defendant was entitled to discharge, and by that continuance waived that entitlement to discharge, the State suggests that counsel requesting such a continuance would have been *per se* ineffective. The State can imagine no circumstance where counsel could reasonably

⁴The State will refer to the rule of law that a post-expiration continuance is a nullity and does not waive the speedy-trial rule time limits as "the nullity rule."

waive a client's absolute right to discharge of criminal charges. This result is one of the reasons why the courts held that such a post-expiration continuance was a nullity: if it were not, the defendant would simply be entitled to relief in postconviction proceedings alleging ineffective assistance of counsel.

In short, prior to the 1984 amendment that created the recapture period, a post-expiration motion for continuance was a nullity, because the court lost jurisdiction to try the defendant after expiration. As such, the courts properly ruled that a continuance waived rule 3.191 rights only if it was filed prior to expiration of the basic period.

While the "nullity rule" was consistent with the structure of the rule prior to the 1984 amendment, the advent of the recapture period fundamentally altered the structure of the rule. See The Florida Bar Re: Amendment to Rules-Criminal, 462 So.2d 386 (Fla. 1984). After this amendment, which became effective January 1, 1985, a defendant no longer had a self-executing right to compel the State to try him within a certain number of days after arrest. In order to trigger application of the current rule, a defendant had to affirmatively invoke the rule's requirements by filing a notice of expiration⁵ with the trial court. See State v. Gibson, 783 So. 2d 1155, 1158 (5th DCA 2001):

⁵Technically, the term "notice of expiration" did not appear in the rule until the 1992 amendment, In re Amendments to the Florida Rules of Criminal Procedure, 606 So.2d 227 (Fla. 1992), but the procedure between 1985 and 1992 was substantially identical to the current procedure.

The provisions of rule 3.191 make it evident that the rule is not self executing: it requires the defendant to take certain steps to trigger application of rule 3.191(p)(3) which will either ensure a speedy trial or a discharge from the alleged crime. *R.J.A. v. Foster*, 603 So.2d 1167 (Fla. 1992); *State v. Robinson*, 744 So.2d 1151 (Fla. 1st DCA 1999). The filing of the notice of expiration pursuant to rule 3.191(h) is the trigger that invokes the procedural protections afforded by the speedy trial rule.

A defendant can invoke the rule "[a]t any time" after the basic period expired. 3.191(p)(2).

In short, this Court replaced a rule requiring the State to try the defendant within a certain number of days after arrest with a rule permitting the defendant, after a certain number of days after arrest, to force the State to try him or her within 15 days by filing a notice requesting it. The State is no longer required to actually try the defendant until the defendant affirmatively requests it by filing a notice of expiration. Accordingly, without the possibility of automatic discharge based only on the expiration of the basic period (as under the old rule), the court clearly continues to possess jurisdiction over the case after the expiration of the basic period.

Under the current structure of the rule, the expiration of the basic period is essentially meaningless in itself, except that the defendant acquires a right to demand an immediate trial, a right that the defendant may or may not choose to exercise, and may exercise at any time.⁶ Until the defendant exercises that right by filing a

⁶If the defendant does choose to demand immediate trial by filing a notice of expiration, the defendant must be prepared for trial within 15 days. See Naveira. It should also be noted that counsel would no longer be considered ineffective for choosing to continue

notice of expiration, the period following expiration is otherwise identical to the period prior to expiration. For these reasons, there is no longer any reasonable basis for the rule that a post-expiration continuance constitutes a nullity as it did under the old rule.

In summary, since 1985, a defendant who has not been tried in the basic period, but who chooses to continue the trial rather than to file a notice of expiration, has waived the time limits under the rule. In particular, a defendant who files a first continuance after the basic period has expired has waived the right to file a notice of expiration and demand trial within 15 days. The reasons underlying the old, contrary rule no longer apply.

Accordingly, the state asserts that, to the extent that Stewart and other cases hold that any post-expiration continuance does not waive a defendant's rule 3.191 rights, such rule has been abrogated by changes to the speedy-trial rule. Cases asserting the nullity rule were either applying the old rule, or misapplying the new rule by failing to perceive that fundamental changes in the rule that alter the propriety of the nullity rule.⁷ The nullity rule is simply inconsistent with the current structure of the rule.

proceedings after expiration of the basic period. If counsel is not prepared for trial, a continuance may be necessary.

⁷While State v. Leslie, 699 So.2d 832 (Fla. 3d DCA 1997), relied upon by the Fourth District, appears to give continuing viability to the general application of the nullity rule, Leslie in fact involves a specific situation not present in the instant case. The State will discuss Leslie in detail below.

2. State v. Naveira

State v. Naveira, 873 So.2d 300 (Fla. 2004), supports the State's contention that a post-expiration continuance now constitute a waiver of rule 3.191 rights. In Naveira, the State filed an information on the 175th day following arrest, August 19. On August 24, Naveira filed a notice of expiration. Pursuant to the notice, the court set the trial date for August 30. On August 27, Naveira moved for a continuance, which the court granted and "charged to the State" because the "late-filed information implicate[d] the ability to prepare a defense." Naveira at 302-03. The court then discharged Naveira because the State did not try him with the recapture period. Id.

This Court disagreed with the trial court, holding that Naveira was not entitled to discharge because he had filed a continuance, demonstrating that he was not ready for trial on the date scheduled and was accordingly "unavailable" under subdivision (k) of rule 3.191. Naveira at 307. This continuance was not filed until after the basic period expired, and yet this Court ruled that it precluded his discharge even though the State did not try him within the time permitted by the rule. Naveira demonstrates that a post-expiration continuance is not a nullity under the current rule. As such, Naveira shows that cases like Llanusa, Ballard and Muller, which held that any post-expiration continuance did not affect a defendant's right to speedy-trial discharge, are no longer good law.

In the decision below, the Fourth District read Naveira more narrowly. In an effort to "harmonize" the holdings of Stewart and

Naveira, the Fourth District concluded that Naveira abrogates the nullity rule only to the extent that a continuance filed after the defendant files a notice of expiration waives the time limits. Nelson at 1077. In other words, the Fourth District held that a pre-expiration continuance waives the time limits, but a post-expiration continuance is a nullity and does not waive the time limits, until the defendant files a notice of expiration, after which a continuance again waives the time limits.

The State agrees with the Fourth District that Naveira did not explicitly rule that any post-expiration continuance waives the speedy-trial time limits, and did not explicitly overrule cases like Llanusa, Ballard and Muller. In this context, Naveira only demonstrates that the nullity rule is no longer consistent with the structure of the current rule. However, the State disagrees with the Fourth District's attempt to "harmonize" Naveira with Stewart by holding that Naveira creates a narrow exception to nullity rule during the recapture period. The State relies on its argument above for this conclusion: the nullity rule is simply inconsistent with the current structure of the rule. For the reasons stated above, any post-expiration continuance logically has the same effect as a pre-expiration continuance under the current rule. Naveira does not carve out a narrow exception to the nullity rule; it simply recognizes that the nullity rule no longer applies.

3. Consistency with the principles of rule 3.191

As stated above, the old rule of law that a post-expiration continuance did not constitute a waiver of rule 3.191 time limits was

consistent with the structure of the rule prior to the 1984 amendment. Specifically, because the court lost jurisdiction to try the defendant after the applicable period expired, a post-expiration motion was properly considered a nullity.

However, this rule of law is inconsistent with the current structure of the rule. Under the current structure of the rule, a defendant no longer has a free-standing right to a trial within a certain number of days following arrest. The rule is no longer self-executing; the defendant must decide when and if he or she wishes to invoke the requirements of the rule by filing a notice of expiration, which will compel the State to try him within 15 days. And of course, in contrast to the pre-1985 procedure, the court continues to retain jurisdiction after the expiration of the basic period, so a post-expiration motion is not a nullity.

Under these circumstances, the State sees no reasonable basis to distinguish between a pre-expiration continuance and a post-expiration continuance. Either way, the defendant has indicated an intent to abandon the right to file a notice of expiration.

In this case, Respondent chose to file a continuance at a calendar call to prevent the court from scheduling the adjudicatory hearing. A continuance of trial or adjudicatory hearing in this circumstance constitutes a delay of proceedings evincing an intent to dispense with the times limits under the rule just as surely as if the defendant had filed it prior to the expiration of the basic period.

Consider a situation where the State schedules trial for a date three days after the end of the basic period. Practically speaking, the defendant has no remedy for the State's failure to try him within the basic period, because even if the defendant filed a notice of expiration immediately upon expiration of the basic period, the remedy of trial within fifteen days has already been met. However, suppose that on the day before trial (two days after expiration of the basic period), the defendant moves for and receives a continuance, forcing cancellation of the scheduled trial. Suppose the defendant then files several more continuances, all of which are granted, further delaying the trial. Under the reasoning of the opinion below, this defendant, in spite of the multiple continuances of the trial date, retains the right to "speedy trial" under the rule and the right to demand an immediate trial at any time by filing a notice of expiration. The State submits that such a result would be plainly inconsistent with the structure and purpose of rule 3.191, in which it is "axiomatic" that continuances waive the deadlines in the rule. See State v. Gibson.

Conversely, consider the same situation where the trial is scheduled for a date three days after the end of the basic period, but rather than waiting until the day before trial to move to continue trial (after expiration), the defendant files the continuance motion on the last day of the basic period. Unlike the defendant in the first situation, this defendant has waived the time limits under the speedy-trial rule. The State can perceive no reasonable basis for such an arbitrary distinction, especially considering the original

principles underlying the nullity under the pre-1985 version of the speedy-trial rule.

In short, application of the nullity rule is inconsistent with the structure of the current rule and the principles underlying it. Unless the defendant is entitled to immediate discharge, any delay in trial caused by a defendant's continuance waives the time limits under the rule, in particular the right to demand immediate trial by filing a notice of expiration. The fact that such a continuance is filed after the expiration of the basic period does not alter that principle. The State sees no reasonable basis to apply the old nullity rule, based as it was on the court's loss of jurisdiction and the defendant's right to immediate discharge, to the current speedy-trial rule.

c. Current application of the nullity rule

The State asserts that the principles underlying the nullity rule do have some remaining vitality. However, the nullity rule should be utilized in a manner consistent with the current structure of the rule, rather than the pre-1985 structure. Again, the underlying principle of the nullity rule is that when the defendant is entitled to immediate discharge, the proceeding is essentially at an end. As such, a continuance filed after that point should have no effect. The State sees no reason why this principle should not still apply in any situation where the defendant is entitled to immediate discharge. While the defendant is no longer entitled to immediate discharge simply because the basic period has expired, the defendant is entitled to immediate discharge when 1) the State fails

to try the defendant within the recapture period, or 2) the State files an information, re-files an information following a nol pros, or attempts to amend the information to add new charges, after expiration of the basic period. In these circumstances, the State contends that the nullity rule still applies: because the defendant is entitled to immediate discharge, any continuance after that entitlement arises should be considered a nullity for the same reason that any post-expiration continuance was considered a nullity under the old rule.

Neither of these circumstances is present here. The State filed the juvenile petition prior to expiration of the juvenile basic period, and Respondent never filed a notice of expiration. Because Respondent was never entitled to immediate discharge, his continuance was not a nullity and waived the time limits, including the time limits for the later criminal informations.

The second basis for application of the nullity rule stated above was the basis for the court's ruling in State v. Leslie, 699 So.2d 832 (Fla. 3d DCA 1997), cited by the Fourth District below. In Leslie, the State did not file an information until 177 following arrest. Under these circumstances, the State was not entitled to the recapture period and the defendant was entitled to immediate discharge. See State v. Williams.⁸ In such a situation, the parties are in the same position that parties were prior to the 1984 amendment:

⁸Although Leslie preceded State v. Williams, it relied on Genden v. Fuller, 648 So.2d 1183 (Fla. 1994), a direct predecessor to State v. Williams, ruling that a "no action" had the same effect as a nol pros for speedy-trial purposes.

the defendant is entitled to discharge without having to give the State the benefit of the recapture period. Under these circumstances, the pre-1985 rule expressed in Ballard and Muller applies with equal force: because the defendant is entitled to immediate discharge after expiration of the basic period, a post-expiration continuance is properly considered a nullity. Thus, contrary to the opinion below, Leslie did not require granting of the prohibition petition, and did not demonstrate that any post-expiration continuance is still considered a nullity. Only when the defendant is entitled to immediate discharge, as in Leslie, is a continuance considered a nullity. Leslie is perfectly consistent with the State's position herein.

d. The information in Case No. 07-23487

Even if the continuance in the juvenile proceeding constituted a nullity and did not waive the speedy-trial time limits, the State would still argue that the information in Case No. 07-23487 is valid. The Fourth District ruled that the State's nol pros of the juvenile petition, and later re-filing of the same charges in a criminal information after the expiration of the basic period, violated the requirements of State v. Agee. Nelson at 1075 ("Because the state filed the nolle prosequere, and the speedy trial period had already expired, it was not entitled to refile charges based upon the same conduct after the period expired"). The State disagrees.

In State v. Clifton, the Fifth District characterized the rule of Agee (as well as the related rules in Genden v. Fuller and State v. Williams), stand for the proposition that when "the state has

essentially abandoned the prosecution," the recapture provisions of the rule do not apply, and the defendant must be discharged. Clifton, 905 So.2d at 176. Thus, when a nol pros does not evince an intent to "abandon" the prosecution, a subsequent information charging the same offenses (such as an amended information) after expiration of the basic period is not foreclosed by State v. Agee. Id.

This reasoning applies to Case No. 07-23487. The State did not "abandon" its prosecution of the grand theft of a firearm charge and the carry concealed firearm charge when it nol prosed the juvenile petition. Rather, the State re-filed the case in criminal court because it was statutorily *required* to do so. When the State filed the information in Case No. 07-22153, the juvenile petition was still pending. Under section 985.557, the juvenile petition had to be transferred to the criminal court:

(b) When a child is transferred for criminal prosecution as an adult, the court shall immediately transfer and certify to the adult circuit court all felony cases pertaining to the child, for prosecution of the child as an adult, which have not yet resulted in a plea of guilty or nolo contendere or in which a finding of guilt has not been made.

§ 985.557(3) (b), Fla. Stat. While the State nol prosed the juvenile petition and re-filed the charges in a criminal information rather than "transferring" the case to the adult court, it is clear that the nol pros and re-file were meant to comply with the requirements of this statute. Even if Respondent's continuance did not waive the speedy-trial time limits, this situation bears no resemblance to Agee. No reasonable interpretation could suggest that the State

"abandoned" the charges when it complied with its statutory obligation to re-file them in adult court. Accordingly, while the information in Case No. 07-22153 would be invalid if the continuance did not waive the time limits, the State asserts that Case No. 07-23487 should not have been discharged.

For the foregoing reasons, the State asserts that the Fourth District misapplied the speedy-trial rules in granting the writs of prohibition. The Court should quash the decision below and remand to the trial court for further proceedings on the informations.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question, as restated by the State, should be answered in the affirmative, the decision of the District Court of Appeal reported at 993 So.2d 1072 should be disapproved, and the order denying the motions for discharge entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Lorena V. Mastrarrigo, Esq., 7951 SW 6th Street, #200, Plantation, Florida 33324, by MAIL on April 1, 2009.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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