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FLORIDA'S NEW SPEEDY TRIAL RULE: THE "WINDOW OF RECAPTURE"

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The Florida Supreme Court amended the criminal speedy trial rule, Rule 3.191, Florida Rules of Criminal Procedure, effective January 1, 1985. Under the previous rule, an accused was absolutely discharged from prosecution if the time provisions were vio-

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1. Florida Bar Re: Amendment to Rules—Criminal Procedure, 462 So. 2d 386 (Fla. 1984). Neither the amendment, nor the commentary to it, contains any provision relating to the transitional period. The state may contend that the amendment permits recapture of defendants in any case where the underlying speedy trial time had not expired as of January 1, 1985. There is good authority that the legislature may act to extend a statute of limitations and apply the extension to existing cases, so long as the old statutory period had not expired on the effective date of the new provision. Reino v. State, 352 So. 2d 853, 861 (Fla. 1977); Andrews v. State, 392 So. 2d 270 (Fla. 2d DCA 1980). As these cases make clear, however, it is necessary that the legislature clearly express its intent to achieve this result; otherwise the new limitations period applies only to offenses committed after its effective date. Since there is no express provision in the speedy trial amendment, it should be prospective only.

It will remain to be decided, however, whether the amendment applies only to offenses committed after January 1, 1985, or to cases where the defendant was taken into custody after that date. In State ex rel. Manucy v. Wadsworth, 293 So. 2d 345 (Fla. 1974), the court held that the statute of limitations in force at the time of the offense, not at the time of arrest, governed. The court in Manucy reached this result by concluding that statutes of limitations are "substantive," not "procedural." Whether the speedy trial rule is substantive or procedural is shrouded in ambiguity. Under art. V, § 2(a), of the Florida Constitution, the supreme court has authority to promulgate only rules of procedure. A rule of procedure which is substantive is unconstitutional, Benyard v. Wainwright, 322 So. 2d 473 (Fla. 1975), as is a statute which is procedural, State v. Smith, 260 So. 2d 489 (Fla. 1972). The speedy trial rule was originally promulgated only after the Florida legislature by statute directed the court to do so in 1971. Fla Stat. § 918.015(a) (1983). From 1939 to 1971 speedy trial was governed by a statute, §§ 915.01-.02. Nevertheless, the Florida Supreme Court held the rule was a proper exercise of its procedural powers in State ex rel. Maines v. Baker, 254 So. 2d 207 (Fla. 1971).

Undoubtedly, the question should not be resolved by the more or less arbitrary labeling of "substance" or "procedure," but by considering the nature of the right itself. Statutes of limitations are expressly addressed to the problem of prosecuting stale offenses. The time of the offense is therefore important. Toussie v. United States, 397 U.S. 112, 114-15 (1970), quoted favorably in Reino v. State, 352 So. 2d 853, 860 (Fla. 1977). Speedy trial, on the other hand, is addressed to the concerns of the accused and the public that there not be long delays between accusation or arrest and trial. United States v. Marion, 404 U.S. 307 (1971); Howell v. State, 418 So. 2d 1164 (Fla. 1st DCA 1982).

Delays between the offense and arrest or accusation are not governed by the constitutional right to a speedy trial or, by its terms, the speedy trial rule. It would make sense therefore to apply the amendment to any case where the accused is taken into custody after January 1, 1985.
lated. Some observers thought that this was too severe a penalty to impose against the state for missing the time limit, often by only a few days, particularly where there was no indication that the defendant otherwise desired an early trial. Some judges and courts probably either ignored technically meritorious arguments based on the language of the rule and precedent or resorted to dubious interpretations in order to avoid complete discharge of the accused. The result was confusion and some cynicism regarding the application of the rule.

The new rule abolishes the severe sanction of absolute discharge when, usually by inadvertence or inattention, the state allows the underlying or basic speedy trial time to expire. The state is given a short period of time to bring the accused to trial after the accused files a motion for discharge which notifies the state and the court of the accused’s claim that the basic speedy trial time has expired. The Criminal Procedure Rules Committee, which submitted the amendment to the Florida Supreme Court, referred to this short period as the “window of recapture.” The length of the window was the subject of much debate. The Committee hoped to retain some deterrence against allowing the basic or underlying speedy

2. FLA. R. CRIM. P. 3.191(a)(1) provided prior to the amendment that if the speedy trial times were violated (180 days for felony, 90 days for misdemeanor, and 60 days if there had been a speedy trial demand under subsection (a)(2)), the defendant should “be forever discharged from the crime.”

3. See, e.g. Negron v. State, 306 So. 2d 104 (Fla. 1974), where the court, in a rather surprising interpretation of Rule 3.191(d)(3), held that if the defendant waived speedy trial by requesting a continuance of the new trial date, a new trial date was set, and the state then requested a continuance of the trial, that trial had to commence within 90 days of the last date attributable to the defense. Negron was subsequently abandoned by the court in Butterworth v. Fluellen, 389 So. 2d 968 (Fla. 1980), but in the interim it was occasionally ignored by the district courts of appeal. See State v. Kurtz, 354 So. 2d 890 (Fla. 4th DCA 1978); State ex rel. Gadson v. Tyson, 334 So. 2d 56 (Fla. 4th DCA 1976).

In Deloach v. State, 338 So. 2d 1141 (Fla. 1st DCA 1976), the defendant, who had been in an automobile accident, was taken to the hospital, arrested there solely for purposes of a blood test, and released. The court held the arrest initiated the speedy trial time. In Snead v. State, 346 So. 2d 546 (Fla. 1st DCA 1976), however, the defendant was arrested for questioning on armed robbery and assault to murder charges and then released without booking. Without mentioning Deloach, the court held the speedy trial time had not been initiated.

In State v. Jones, 332 So. 2d 699 (Fla. 1st DCA 1976), the court held that where the last day of the speedy trial time was a federal legal holiday (Veterans Day), but not a state-recognized holiday, the speedy trial time expired on the holiday. In Crane v. Simpson, 352 So. 2d 1248 (Fla. 1st DCA 1977), however, the court held that a customary two week Christmas recess, which was not a recognized legal holiday, justified extension of the speedy trial rule.

trial time to expire by making the grace period short enough so that it could not be easily or routinely satisfied by the state, but long enough so that recapture could be possible in many cases.

This Article discusses the new rule and some problems that may arise in its application.

I. THE WINDOW OF RECAPTURE

The new rule eliminates the language in subsection (a)(1) providing for absolute discharge when the rule is violated, shortens the underlying speedy trial time for felonies from 180 days to 175 days, and refers to a new subsection (i) on remedies which governs if the underlying time is violated. The new subsection (i) provides:

(i) Remedy for Failure to Try Defendant within the Specified Time.

(1) No remedy shall be granted to any defendant under this Rule until the court shall have made the required inquiry under section (d)(3).6

(2) In the case of a defendant charged with a misdemeanor, the defendant shall, upon motion timely made with the court at the expiration of the prescribed time period, be forever discharged from the crime.

(3) In the case of a defendant charged with a felony, the defendant may, at any time after the expiration of the prescribed time period, file a motion for discharge.

(4) No later than 5 days from the date of the filing of a motion for discharge, the court shall hold a hearing on the motion, and unless the court finds that one of the reasons set forth in section (d)(3) exists, shall order that the defendant be brought to trial within 10 days. If the defendant is not brought to trial within the 10 day period through no fault of the defendant, the defendant shall be forever discharged from the crime.

Under subsection (i)(2), speedy trial for misdemeanors, the rule is unchanged when no demand has been made.6 Regarding felonies, however, the state is given an opportunity to “recapture” the accused after the basic time limit, changed to 175 days, has expired.

5. The reference to subsection (d)(3) requires the court to determine that the speedy trial time has in fact expired, that no extensions have been granted, and that the defendant has not otherwise waived or lost the protection of the rule. See, e.g., infra notes 10-11.
6. This is true regarding the basic 90 day speedy trial time for misdemeanors established by FLA. R. CRIM. P. 3.191(a)(1). As discussed infra, however, the 1984 amendment has changed the provision for speedy trial demands and such a demand can be made for a misdemeanor charge as well as a felony.
Under subsection (i)(3), the defendant must file a motion for a discharge. This may occur at any time after the expiration of the time limit, at the defendant’s election. Within 5 days of this filing, the court must hold a hearing and determine whether or not the underlying time limit was violated. If so, the court “shall order that the defendant be brought to trial within ten days.” If the defendant is not brought to trial within this period through no fault of his own, he is “forever discharged from the crime.”

Thus, under the new rule, the time limit within which the state must bring an accused to trial who is enforcing his speedy trial right to the maximum has been extended for felonies from 180 days to at least 191 days. That is, if the defendant filed his motion for discharge on day 176, he would arguably have to be brought to trial within 15 days, or by day 191.° This assumes a point which is perhaps the most controversial issue raised by the new rule, i.e., whether the “window” is 15 days from the filing of the motion for discharge, or 10 days from the order granting the motion. If the latter, the total elapsed period between filing the motion for discharge and trial could be considerably longer than 15 days, because although the rule requires a hearing on the motion within five days, there would be no sanction for delays beyond five days. Further, the actual time limit in any particular case (that is, the time between taking an accused into custody and bringing him to trial) is within the control of the defendant and will depend on when he elects to file the motion for discharge. Finally, since the motion is required to trigger the window, the state will always have the opportunity to avoid absolute discharge.

Regarding speedy trial demands, the new rule has added two new hearings, one at the beginning and one at the end of the demand time period. Subsection (a)(2), as amended, retains “the right to demand a trial within 60 days.” The actual effect of the amendment, however, is to guarantee a trial within 66 days of filing the demand. New subsection (a)(2) provides:

(a)(2). Speedy Trial Upon Demand. Except as otherwise provided by this Rule and subject to the limitations imposed under

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7. All time calculations under the Florida Rules of Criminal Procedure are governed by Rule 3.040. Under this rule, the day from which the time period is to be computed is never included. If the relevant time period is seven days or more, intermediate Saturdays, Sundays, and legal holidays are included, but if the last day falls on a Saturday, Sunday, or legal holiday, the time period is extended to the next day on which legal business may occur. Hence, if the 15th day falls on a Saturday, and the following Monday is a legal holiday, the actual time period would be 18 days, not 15.
(b)(1) and (c), every person charged with a crime by indictment or information shall have the right to demand a trial within 60 days, by filing with the court having jurisdiction and serving upon the state attorney a Demand for Speedy Trial.

(1) No later than 5 days from the filing of a Demand for Speedy Trial, the court shall hold a calendar call, with notice to all parties, for the express purposes of announcing, in open court, receipt of the Demand and of setting the case for trial.

(2) At the calendar call the court shall set the case for trial to commence at a date no less than 5 days nor more than 45 days from the date of the calendar call.

(3) The failure of the court to hold such a calendar call on a Demand which has been properly [filed] and served shall not interrupt the running of any time periods under this section.

(4) In the event that the defendant shall not have been brought to trial within 50 days of the filing of the Demand, the defendant shall have the right to the appropriate remedy as set forth in section (i) below.

The rule requires a calendar call within 5 days of the demand.8 Subsection (a)(2)(4) contemplates a tardy calendar call by providing a 50 day time limit from the date of filing the demand. The remedy provision is triggered only by a violation of this subsection. Thus, although subsection (a)(2)(2) requires the court to set the case for trial between 5 and 45 days after the calendar call,9 it seems clear that if the calendar call is held on the day after the

8. Both the 5 day limit for a calendar call, where a speedy trial demand has been filed, and the 5 day limit for conducting a hearing on the motion for discharge provided by subsection (i)(4) could be extended because of the time provisions of Rule 3.040. Under Rule 3.040, if the relevant time period is less than 7 days, intermediate Saturdays, Sundays and legal holidays are excluded from the computation. Thus, if a motion for discharge or demand for speedy trial were filed on a Friday, and the following Monday was a legal holiday, the 5 day period would not actually expire until a week from that Monday. Consequently, the actual time period would be 10 days. However, as discussed infra, the 5 day requirement for the hearing on the motion to discharge, and for the calendar call, does not of itself trigger the consequence of discharge. Rather, discharge depends upon a failure to comply with a larger time period, within which the 5 day time period is contained. That is, discharge should be granted only if the overall 15 day time period is not complied with. Regarding speedy trial demands, the relevant time period is 50 days following the filing of the demand. Consequently, although the 5 day time limit may be legitimately expanded up to 10 days under Rule 3.040, this would not affect the important larger time period.

9. Fla. R. Crim. P. 3.191(c) continues to provide that “[a] demand for speedy trial shall be deemed a pleading by the accused that he is available for trial, has diligently investigated his case, and that he is prepared or will be prepared for trial within 5 days.” Actually, under the new rule, since the calendar call must now be interposed between the filing of the demand and the actual trial date, the very earliest the defense would have to be prepared for trial would be 6 days (i.e., if the calendar call were held the day after filing the demand).
filing of the demand, for instance, the defendant could be "brought to trial" 49 days from then without triggering the remedy section. It is only when the calendar call is held on the 5th day following the demand, that the 45 day requirement for a trial date under subsection (a)(2)(2) and the 50 day time limit of subsection (a)(2)(4), are congruent.

If the accused is not brought to trial within the 50 days, he is not automatically discharged, but must avail himself of the remedy provisions in new subsection (i). This means that he could file a motion for discharge at the earliest on day 51 from the day of filing the demand and must be brought to trial within 15 days of then, or by day 66. (Once again, this assumes the controversial point that the window is 15 days from filing the motion for discharge.) As with the 175 day felony period, then, the defendant must trigger the window by filing a motion for discharge and the defendant will not be absolutely discharged because of the expiration of the underlying demand time.

II. IS THE WINDOW OF RECAPTURE FIFTEEN DAYS FROM FILING THE MOTION FOR DISCHARGE, OR TEN DAYS FROM THE ORDER ON THE MOTION?

New subsection (i)(4) requires the court to hold a hearing "[n]o later than 5 days from the date of the filing of a motion for discharge . . . ." At this hearing, the court determines that the underlying base period has in fact expired and that the defendant

10. The motion for discharge is timely only after the speedy trial time has expired. Fla. R. Crim. P. 3.191(d)(1) provides:
A motion for discharge shall be timely if filed and served on or after the expiration of the periods of time for trial provided for herein; however, a motion for discharge filed before expiration of the period of time for trial is invalid and shall be stricken upon motion of the prosecuting attorney.

11. This is a relatively simple calculation, except for difficulties encountered in determining just when the accused was taken into custody as a result of the conduct giving rise to the offense charged.

The difficult issue here is to determine just when the time started to run. There is a problem when the defendant is specifically arrested for only one offense, but the police also have probable cause to arrest for other offenses. In State v. Van Winkle, 407 So. 2d 1059 (Fla. 5th DCA 1981), the court held that speedy trial ran on the other offenses only if they arose out of the "same conduct or criminal episode" as the offense for which the defendant was arrested. Id. at 1059 (citing State v. Beasley, 392 So. 2d 980 (Fla. 4th DCA 1981)). In Jones v. State, 450 So. 2d 605 (Fla. 2d DCA 1984), two possessory offenses occurred at the same time (marijuana and cocaine), but the court held there was no probable cause to arrest for cocaine until the lab test was positive. Hence, speedy trial did not run on the cocaine charge until formal arrest for that offense. Cf. Thomas v. State, 374 So. 2d 508 (Fla. 1979) (defendant arrested for receiving stolen property which had been stolen at the time of a
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has not otherwise waived the protection of the rule. 12

murder; police arguably had probable cause to arrest for the murder but speedy trial did not run on that charge until the formal arrest for murder); State v. Brandt, 460 So. 2d 444 (Fla. 5th DCA 1984) (if there are two distinct offenses, even if committed at the same time, speedy trial never runs until the formal arrest for each offense.)

A "detention" without formal arrest does not start speedy trial, State v. Robbins, 359 So. 2d 39 (Fla. 2d DCA 1978); Snead v. State, 346 So. 2d 546 (Fla 1st DCA 1976), whereas a formal arrest without detention apparently does. DeLoach v. State, 338 So. 2d 1141 (Fla. 1st DCA 1976).

Filing a detainer warrant is not an arrest for speedy trial purposes, State v. Bassham, 352 So. 2d 55 (Fla. 1977), but there is a conflict whether custody in a foreign jurisdiction, only because of a Florida detainer, is an arrest for speedy trial purposes. State v. Bivona, 460 So. 2d 469 (Fla. 4th DCA 1984)(yes); Hawkins v. State, 451 So. 2d 903 (Fla. 1st DCA 1984)(no).

12. This is a possibly difficult decision depending on a determination of the facts and an evaluation of pertinent decisions.

The easiest way for the defendant to lose protection of the rule is to move for a continuance. The court so held in State ex rel. Butler v. Cullen, 253 So. 2d 861 (Fla. 1971), which was an interesting decision. The defendants attempted to raise the issue that the state "by a myriad of unexplained delays" had made it impossible to properly prepare for trial within the speedy trial time period. Id. at 862. The defendants argued that they would have been prepared for trial except for the unexcused delays by the state, and therefore they sought to charge the continuance which they were compelled to request to the state. In other words, the defense sought to establish the proposition that the state's obligation to comply with the speedy trial rule included the obligation to discharge its discovery obligations in a timely fashion. The court, however, did not address the argument. It simply held that "[w]hen the continuance was granted, the time limitations in the rule were no longer applicable and the court had the right and authority to set the case for trial within a reasonable time." Id. at 863. The argument has received a more sympathetic ear in the lower courts, however. See State v. Del Gaudio, 445 So. 2d 605 (Fla. 3d DCA 1984); State ex rel. Wright v. Yawn, 320 So. 2d 880 (Fla. 1st DCA 1975).

It is unclear whether defense-requested delays which occur early on in the speedy trial time, which are not motions for continuances of the trial date, and which would not in the ordinary course of events result in a postponement of the trial, constitute a waiver. In Blackstock v. Newman, 461 So. 2d 1021 (Fla. 3d DCA 1985), for instance, the court held that a defendant who was not indigent waived the rule by requesting at arraignment that she be permitted time to obtain counsel. The court stated, "[a]ny defense request to postpone a case for any period of time, whatever called, constitutes a motion for a continuance waiving speedy trial rule rights . . . ." Id. at 1022. In Ehn v. Smith, 426 So. 2d 570 (Fla. 5th DCA 1983), on the other hand, defense counsel's withdrawal early in the speedy trial time did not constitute a waiver. Cf. Hill v. State, 438 So. 2d 971 (Fla. 2d DCA 1983) (defense counsel's withdrawal one week before scheduled trial date was a waiver).

Another way to lose protection of the rule is to still be engaged in discovery when the relevant time period expires. In Rubiera v. Dade County ex rel. Benitez, 305 So. 2d 161 (Fla. 1974), the defense attempted to take depositions prior to the expiration of the speedy trial time, but the subpoenas had not been served since the clerk had not signed them. As a result, the depositions were scheduled beyond the speedy trial time limit. The defense filed a motion for discharge after the speedy trial time expired. The supreme court held that discharge should be denied because the depositions were pending when the time limit expired and the defendant was not "continuously available" for trial as required by Rule 3.191(a)(1) and (e). Addressing the point that the depositions were rescheduled through no fault of the defendant, the court said,

"Assuming arguendo that there had been no error in expediting the original notices of taking depositions and they could have been taken as originally scheduled
What happens, however, if the trial court does not hold the hearing or render its order within the required 5 days? Notice that subsection (i)(4) specifically provides for discharge only if the defendant is not brought to trial within the 10 days ordered by the court after the hearing. Arguably, therefore, the failure to hold the hearing within the 5 day period is irrelevant to discharge. If so, although the trial courts would undoubtedly make an effort to observe the 5 day requirement, there would be no sanction for the failure to do so. Any reasonable request by the state for a continuance of the hearing could be granted without speedy trial consequences.

The argument for the 10 day from order window is strengthened by comparing the language of subsection (a)(2)(3) regarding the court's obligation to hold a calendar call within 5 days of a demand for speedy trial. That section specifically provides that the failure to hold the calendar call "shall not interrupt the running of any time periods under this section." New subsection (i) on remedies has no similar provision regarding the failure to hold the hearing within 5 days. The commentary to subsection (i) states:

The intent of (i)(4) is to provide the state attorney with 15 days within which to bring a defendant to trial from the date of the filing of the motion for discharge. This time begins with the filing of the motion and continues regardless of whether the judge hears the motion.

This language would be dispositive if it were in the rule. The opinion adopting the amendments, however, states: "The notes appended to the various amendments are not adopted by the Court.""13

... (prior to the running of the 90 days) there was hardly sufficient time between November 16th and the end of the 90-day period to allow for copies of the depositions to be delivered to the defense counsel and for him to be ready for trial at the end of the 90-day period."

Id. at 162. Accord Burns v. State, 433 So. 2d 997 (Fla. 2d DCA 1983) (defendant took discovery depositions 8 days prior to the expiration of the rule); State ex rel. Furland v. Conkling, 405 So. 2d 773 (Fla. 5th DCA 1981) (filing notice of taking deposition the same day a demand for speedy trial was made and where deposition was scheduled 11 days later, rendered the demand a nullity).

It appears that pending legal motions (e.g., a motion to suppress) do not have the same effect, State v. Embry, 322 So. 2d 515 (Fla. 1975); Dickey v. McNeal, 445 So. 2d 692 (Fla. 5th DCA 1984); Perry v. State, 436 So. 2d 426 (Fla. 1st DCA 1983); nor does engaging in plea negotiations. Stuart v. State, 360 So. 2d 406 (Fla. 1978); Fulk v. State 417 So. 2d 1121 (Fla. 5th DCA 1982).

13. Florida Bar Re: Amendment to Rules—Criminal Procedure, 462 So. 2d 386 (Fla.
A strict 15 day from filing limit would increase the motivation to observe the underlying time limits. Even under this interpretation, of course, the state is given an expanded opportunity to bring the accused to trial which did not exist under the old rule. The rationale for a strict 15 day limit is stated in the commentary:

The total 15 day period was chosen carefully by the committee, the consensus being that the period was long enough that the system could, in fact, bring to trial a defendant not yet tried, but short enough that the pressure to try defendants within the prescribed time period would remain. In other words, it gives the system a chance to remedy a mistake; it does not permit the system to forget about the time constraints. It was felt that a period of ten days was too short, giving the system insufficient time in which to bring a defendant to trial; the period of 30 days was too long, removing incentive to maintain strict docket control in order to remain within the prescribed time periods.

If the 15 day from filing limit is not imposed, it is fair to predict that delays in the hearing on the motion and the decision on the motion will not be rare occurrences. Many circumstances making it inconvenient to hold a quick hearing can be imagined. First, just as with many prior violations of the rule, there could simply be an oversight in the court's administrative machinery. Second, the court could have other pending business making it extremely difficult to schedule the hearing. Third, the state might be unable to marshal or present facts necessary to rebut the defendant's factual claims or to support the state's argument against the motion. Even if the hearing is timely held, the trial court might occasionally desire additional time to read the pertinent decisions and review the facts before entering its order. With all of these pressures at work, a 10 day from order time limit may often result in a considerably longer hiatus than 15 days between the motion for discharge and trial. Such a result would also deprive the speedy trial rule of its objective of equality of treatment for all defendants who

1984).
14. Id. at 494.
15. Although there is no express provision in the amendments, it is most likely that the defendant's motion for discharge will be construed as a pleading that he is factually prepared for the hearing. Compare Rule 3.191(c), stating that a demand for speedy trial is a pleading that defendant will be prepared for trial within 5 days. Consequently, any delay in the hearing caused by the defendant is likely to be deemed a waiver of the motion for discharge.
seek a speedy trial, \textsuperscript{16} since the actual time limit would then depend upon the circumstances of particular courts and prosecutors.

Finally, the crucial cases will be ones where it appears the state may not be able to muster its evidence for trial within the near future. In these cases, a continuance of the hearing would be an attractive way to expand the window and avoid absolute discharge. This is not a positive situation for the fair and evenhanded application of the speedy trial rule over time.

There are good arguments, therefore, for applying the 15 day from filing limit. The hearing, of course, could be delayed beyond 5 days if necessary, but, under such a rule, the trial would in any case have to commence within 15 days of filing the motion for discharge.

III. \textsc{Should Extension of the Window for Exceptional Circumstances Be Permitted After the Basic Speedy Trial Time Has Been Violated?}

This is an important question irrespective of whether the 15 day from filing or the 10 day from order window is ultimately adopted. In either case, the state may find itself unable to bring the accused to trial within the required time because of a situation which qualifies as an "exceptional circumstance" under Rule 3.191(d)(2) and (f), Florida Rules of Criminal Procedure. However, if the 15 day window is adopted, the exceptional circumstance issue will be more critical, because delays in the hearing and order will not be available as a de facto device to extend the window.

Rule 3.191(d)(2) provides that the "periods of time established by this Rule may be extended . . . [for] exceptional circumstances as hereafter defined in section (f) . . . ." Subsection (f) first states that "[e]xceptional circumstances shall not include general congestion of the court's docket, lack of diligent preparation or failure to obtain available witnesses, or other avoidable or foreseeable delays." The rule then lists six circumstances that could or would be considered to be exceptional:

Exceptional circumstances are those which as a matter of substantial justice to the accused or the State or both require an order by the court: Such circumstances include (1) unexpected ill-

\textsuperscript{16} "The rule was promulgated and its specific time limits established with a view toward expediting the administration of criminal justice." Singletary v. State, 322 So. 2d 551, 554 (Fla. 1975).
ness or unexpected incapacity or unforeseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and adequate trial; (2) a showing by the State that the case is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate investigation and preparation within the periods of time established by this Rule; (3) a showing by the State that specific evidence or testimony is not available despite diligent efforts to secure it, but will become available at a later time; (4) a showing by the accused or the State of necessity for delay grounded on developments which could not have been anticipated and which will materially affect the trial; (5) a showing that a delay is necessary to accommodate a co-defendant, where there is reason not to sever the cases in order to proceed promptly with trial of the defendant; (6) a showing by the State that the accused has caused major delay or disruption of preparation of proceedings, as by preventing the attendance of witnesses or otherwise.17

The first four of these “exceptional” circumstances describe difficulties which the prosecution may routinely encounter with the

17. The decisions have construed Rule 3.191(f) to permit extensions in the following situations: Routly v. State, 440 So. 2d 1257 (Fla. 1983) (unforeseeable unavailability of eyewitness); State v. Carter, 397 So. 2d 679 (Fla. 1981) (multiple trial court rulings declaring a new criminal statute unconstitutional); Allen v. State, 443 So. 2d 435 (Fla. 5th DCA 1984) (delay in receiving crime lab report where state uses due diligence); Porter v. State, 439 So. 2d 298 (Fla. 3d DCA 1983) (detectives scheduled to testify at trial were themselves on trial in federal court); Dedmon v. State, 400 So. 2d 1042 (Fla. 1st DCA 1981) (absence of witness with “uniquely necessary testimony”); Hampton v. Miner, 411 So. 2d 1388 (Fla. 1st DCA 1982) (filing of information on day 162 due to newly discovered evidence gave defendant insufficient time to prepare defense); State v. Rogers, 402 So. 2d 50 (Fla. 3d DCA 1981) (“McDuffie Riots” in Dade County prevented availability of law enforcement witnesses); State v. Wilson, 362 So. 2d 140 (Fla. 2d DCA 1978) (defense counsel’s request for additional time to prepare); Crane v. Simpson, 352 So. 2d 1248 (Fla. 1st DCA 1978) (two week Christmas recess observed by courts in Duval County).

Exceptional circumstances were not found in the following cases: Rico v. State, 463 So. 2d 1172 (Fla. 2d DCA 1985) (accomodating co-defendants and failure of defendant’s witness to include addresses of witnesses); Darby v. State, 463 So. 2d 496 (Fla. 1st DCA 1985) (avoiding extra witness travel); Westlake v. Miner, 460 So. 2d 430 (Fla. 1st DCA 1984) (desire of the state, for reasons of convenience rather than necessity, to try multiple defendants at one time); Machado v. State, 431 So. 2d 337 (Fla. 2d DCA 1983) (state’s desire to consolidate defendant’s case with co-defendant’s case and need for interpreter); Lee v. State, 430 So. 2d 516 (Fla. 2d DCA 1983) (failure of state to transport defendant to court on initially scheduled retrial date and the desire to avoid transporting defendant twice); Ehn v. Smith, 426 So. 2d 570 (Fla. 5th DCA 1983) (withdrawal of defense counsel); State v. McDonald, 425 So. 2d 1380 (Fla. 5th DCA 1983) (inability to locate co-defendant who was sought only as possible witness against defendant); Bembry v. Gable, 372 So. 2d 177 (Fla. 3d DCA 1979) (fact that an appellate decision in another case may be helpful in the disposition of present case is not an “exceptional circumstance”).
window of recapture. Indeed, these four probably cover the gamut of difficulties the state may encounter (except for court congestion which is expressly not an exceptional circumstance). Consequently, if the exceptional circumstances provision is applicable to the window, it becomes more like a sliding glass door which the state can slide open to meet its needs.

If the language of the rule is strictly construed, the exceptional circumstance provision would apply to the window of recapture. Rule 3.191(d)(2) states that “[t]he periods of time established by this Rule may be extended . . . .”18 The 1984 amendment did not exempt the window provision from (d)(2), although the commentary clearly states a rationale which would preclude extensions. The problem is that the extension provisions were placed in the rule when there was no window; the assumption was that the prosecution would recognize the need for an extension before the speedy trial time expired. Extensions could not be used to excuse a failure to comply with the time limits after they had expired. Rule 3.191(d)(2) permits extension only if the “time sought to be extended has not expired at the time the extension was procured.”19 Thus, the rule contemplated a prosecutor who was vigilantly observing the speedy trial constraints but encountered unforeseen circumstances which in the interests of “substantial justice” required the extension of the time limits.

Therefore, both the original rationale for the “exceptional circumstance” provision and the reality that applying it to the window would render that concept more or less meaningless argue strongly against the provision’s applicability.

It is worth repeating that in these cases the basic speedy trial time will have been violated. Rule 3.191(f) specifies that “[e]xceptional circumstances shall not include . . . avoidable or foreseeable delays,” and the fourth exceptional circumstance covers “developments which could not have been anticipated and which will materially affect the trial . . . .”20 The violation of the basic speedy trial time could have been anticipated and avoided. It

19. Accord Rogers v. Keating, 411 So. 2d 231 (Fla. 5th DCA 1982); Durrance v. Rudd, 398 So. 2d 1012 (Fla. 1st DCA 1981).

There is currently a conflict on whether an extension granted under Rule 3.191(d)(2) and (f) must be for a time certain, or whether the order of extensions simply takes the case out of the speedy trial rule. Ferris v. State, 428 So. 2d 743 (Fla. 1st DCA 1983) (extension takes case out of the speedy trial rule); Ehn v. Smith, 426 So. 2d 570 (Fla. 5th DCA 1983) (an order of extension must have specificity as to duration).
20. FLA. R. CRIM. P. 3.191(f) (emphasis added).
is this violation which triggers the window provision. Consequently, Rule 3.191(d)(2) and (f) should not apply.

The timing of the motion for discharge is within the control of the defendant. The prosecution may be quick to point out that the defense really had no desire for a speedy trial because it delayed filing the motion until the exceptional circumstances arose. But this is the risk of not only failing to observe the basic time period, but also of not expeditiously bringing the accused to trial after its expiration. The longer the delay after the expiration of the basic time, the more risk the state runs of not recapturing the accused.

IV. SHOULD THE STATE HAVE INTERLOCUTORY REVIEW OF THE ORDER REQUIRING TRIAL WITHIN THE WINDOW?

The trial court may rule for the defendant on most motions for discharge because a ruling that the basic speedy trial time has been violated will in most cases still permit recapture of the defendant. Indeed, the state should not oppose such a ruling since a certain trial within the window is preferable to a possible appellate reversal of a trial court decision in the state’s favor and discharge of the defendant. The state, therefore, should vigorously contest a motion for discharge and appeal a decision in the defendant’s favor only if it is unable to bring the accused to trial within the window or if the state’s case will be considerably weakened by having to do so.

Here, an important difference arises from appellate practice under the old rule. Formerly, the order of discharge was rendered after the rule, in the trial court’s opinion, had been irrevocably violated. Thus, the state was confronted with only the single option of appeal from the final order of discharge. Now, the trial court will enter an order that the basic speedy trial time has been violated and set trial within ten days. The state’s review of this order before the trial date would be interlocutory in nature. Consequently, the state would undoubtedly seek an extension of the ten day period for interlocutory review. This would preserve the option of an ultimate trial if the appellate court affirms.

Extensions of the speedy trial time period are virtually automatic under existing case law when the state takes a final appeal from a dismissal of the prosecution or an interlocutory appeal from

21. As discussed infra, if the window period expires while the defendant is seeking a writ of prohibition in the appellate court and the appellate court finds that the basic speedy trial time was violated, the defendant should be entitled to discharge.
an order suppressing evidence or a confession. These are the only two interlocutory appeals in criminal cases recognized by the Florida Rules of Appellate Procedure. Here, the state's right to an appellate decision on the admissibility of evidence always outweighs the defendant's right to be brought to trial within the speedy trial time. Indeed, the express provision of interlocutory appeals in these situations is a recognition of the paramount importance of appellate review where crucial, if not dispositive, evidence has been ruled inadmissible. If the state were not permitted an appeal, a verdict of acquittal without the evidence would bar any appellate oversight.

The state occasionally seeks interlocutory review of other trial court orders, however, such as those requiring disclosure of a confidential informant or requiring the state's witnesses to undergo eye examinations. In these cases, the state must seek review by the extraordinary writs of certiorari or prohibition. Rule 3.191(d)(2) specifically provides that extensions may be granted for "appeals by the state," and State v. Jenkins makes them virtually automatic. Arguably, such extensions should not be automatic where the state is seeking appellate review by an extraordinary writ. Here, the state's interest in overturning the trial court may not always be paramount to the defendant's right to a speedy trial. One would expect a balancing of the importance of the order to the state's ability to prosecute and the novelty of the issue, on the one hand, against the defendant's speedy trial right (involving most significantly whether the defendant was incarcerated prior to trial) on the other. The Florida Supreme Court decisions, however, have not developed such a distinction. The lower court decisions at least have recognized that different considerations pertain where the state is seeking extraordinary relief.

22. In State v. Jenkins, 389 So. 2d 971 (Fla. 1980), the court held that appeals by the state in these situations did not automatically suspend the speedy trial rule, but rather an extension had to be ordered by the trial court. The court indicated, however, that such an extension should be granted subject only to the defendant's constitutional speedy trial rights. Id. at 974.

23. Fla. R. App. P. 9.140(c)(1)(B). The state may also appeal an order finding the defendant incompetent to stand trial, but such an order automatically suspends the speedy trial rule. Fla. R. Crim. P. 3.214(d).

24. State v. Murray, 443 So. 2d 461 (Fla. 4th DCA 1984); State v. Perez, 438 So. 2d 436 (Fla. 3d DCA 1983); State v. Montalvo, 428 So. 2d 695 (Fla. 2d DCA 1983).


27. 389 So. 2d 971 (Fla. 1980).

28. The court in Jenkins, for instance, refers throughout simply to "interlocutory ap-
Where the trial court enters an order requiring trial within 10

peals." The court did not recognize the proposition that extraordinary interlocutory relief might involve different speedy trial considerations. This may have been because the narrow issue before the court whether FLA. STAT. § 924.071(2), which provides for an automatic stay of the trial court proceedings where the state takes an interlocutory appeal from an order suppressing evidence or a confession, extended the speedy trial time automatically, without any action by the trial court. The court held that the stay provision did not automatically extend to speedy trial time. Thus, the Jenkins decision arguably does not speak to the question of other extraordinary petitions filed by the state.

In State v. Williams, 350 So. 2d 81 (Fla. 1977), the court stated without discussion that the trial court properly granted an extension for the state to seek review by certiorari of an order excluding state witnesses. The district court of appeal had earlier stated in the same case that "[c]ertiorari proceedings raising questions bearing directly on the trial itself may properly be considered as interlocutory appeals for purposes of this provision." State v. Williams, 344 So. 2d 311, 312 (Fla. 2d DCA 1977) (citing Esperti v. State, 276 So. 2d 58 (Fla. 2d DCA 1973)). Note 4 provides:

As suggested by Esperti, there may be occasions in which the state finds its case seriously jeopardized by what it believes to be an erroneous interlocutory ruling from which there is no right of appeal. Then, the state's only recourse is to file a petition for certiorari because if the case goes to trial jeopardy will attach and the state will have lost its right to have the order reviewed except by cross-appeal. Under these circumstances, there ought to be a way to toll the speedy trial time until after there has been a disposition of the certiorari proceedings.

Williams, 344 So. 2d at 312 n.4.

In Esperti, 276 So. 2d 58, the court indicated that since Rule 3.191(d)(2) refers specifically only to extensions for "interlocutory appeals," it was probable that the supreme court intended that there be no extensions for other extraordinary writs:

Initially, an analogy between certiorari proceedings and interlocutory appeals is somewhat difficult to draw since the extraordinary writs are normally useful only when an interlocutory appeal is not available. Since these writs are in common use it must be assumed that the Supreme Court's failure to include them specifically in Section 3.191(d)(2) was not unintentional. However, with reference to the speedy trial rule there is a great deal of similarity in their effect on trial court proceedings.

Id. at 63. The court stated a possible rationale for the distinction as follows:

Interlocutory appeals are specifically mentioned for grounds for time extensions because issues which are interlocutorily appealable are likely to have a direct bearing on proceedings below. Certiorari proceedings are often only tangentially related to the trial proceedings themselves.

Id. at 64. The court was unwilling to conclude, however, that certiorari proceedings could never be the basis for obtaining an extension in the trial court. The court left the door open as follows:

In view of the diverse types of questions which may be raised through extraordinary writs we do not here hold that no certiorari proceedings may be treated as interlocutory appeals for purposes of speedy trial rules. Some questions so brought may have a direct bearing on the trial itself and would justify a time extension.

Id.

In Nelson v. State, 414 So. 2d 505, 508 (Fla. 1982) the court indicated that extensions for certiorari review by the state should be granted unless the defendant's constitutional right to a speedy trial would be denied:

We interpret the term "for appeals by the State," under criminal rule 3.191(d)(2), to include all appellate applications made by the state, and we find that such an application may constitute an "exceptional circumstance" under rule 3.191(f), de-
days and the state clearly cannot comply, the state has two appellate choices. The first would be to file a petition for certiorari immediately and seek an extension of the window pending interlocutory review.²⁹ The second would be to appeal the final order of discharge. The difference between the two is that under the former, if the state loses the appeal, it would still have the remainder of the window to bring the accused to trial. The state would argue for an extension on the ground that the 10 day order was tantamount to a dismissal of the prosecution, since under the circumstances the state had no chance to comply.³⁰

It is clear, however, that if the “exceptional circumstances” extension under Rule 3.191(d)(2) and (f) should not be available to extend the window, then no extension should be allowed to accommodate a petition for certiorari by the state. A contrary result would simply substitute one extension (to accommodate review) for the other (for exceptional circumstances). If, on the other hand, it is ultimately determined that the window may be extended for exceptional circumstances, the extension for interlocutory review will be unnecessary, since the extension of the window should then be granted for exceptional circumstances.³¹

²⁹. Under State v. Jenkins, 389 So. 2d 971 (Fla. 1980), an appropriate order of extension would be for the time necessary for appellate review and 90 days following the receipt of the appellate mandate. Id. at 974-75. Such an order would, of course, render the 10 day window totally meaningless. Assuming extensions are available, the appropriate order would simply toll the running of the 10 days pending appellate review. The remainder of the 10 day period would then begin to run again once the appellate mandate was received in the trial court. Cf. State v. Barreiro, 460 So. 2d 945 (Fla. 3d DCA 1984) (where trial court granted extension to allow state to seek review by certiorari of order excluding “Williams Rule” evidence, and the extension order did not specify the applicable number of days following receipt of the appellate order, trial had to commence within a “reasonable period of time as that term is constitutionally defined.” Id. at 948.

³⁰. In such a case, the state will presumably have first moved for an extension under Rule 3.191(d)(2) and (f), for exceptional circumstances, which will have been denied.

³¹. The author has discovered only two decisions under the previous rule where the state was seeking interlocutory review of a trial court’s refusal to extend the speedy trial time for exceptional circumstances under Rule 3.191(f): State v. Haynes, 463 So. 2d 1248 (Fla. 5th DCA 1985); and State v. McDonald, 425 So. 2d 1380 (Fla. 5th DCA 1983). See also State v. Burris, 424 So. 2d 128 (Fla. 1st DCA 1982) (prosecution moved for extension, but it was never ruled on by the trial court). It appears, therefore, that such extensions have been
Of course, if the state is able to bring the case to trial within the window of recapture, the issue simply becomes whether the state should be permitted the convenience of testing the trial court's ruling in the appellate court. The argument for an extension in this circumstance is even less persuasive. It is true that this will force the state in most cases to accept the trial court's ruling without appellate remedy. It is further true that in most cases the trial court will tend to rule in favor of the defendant, because recapture is available and a ruling for the state risks complete discharge if reversed on appeal. Nevertheless, a contrary holding would render the window meaningless since the state could always extend it by a petition for extraordinary review. Further, the state is not worse off than under the old rule where, once speedy trial was violated, the defendant was irrevocably discharged. The fact that the amendment has provided an option other than appeal, i.e., to recapture the defendant within a limited period, should not change matters.

It is this author's position that there will be less appellate review of speedy trial issues under the new rule. Trial courts will tend to decide speedy trial issues in the defendant's favor, and the state will recapture, if at all possible, rather than appeal. It may be that appellate review of important speedy trial issues will be restricted to cross-appeals by the state following convictions of recaptured defendants.

V. INTERLOCUTORY REVIEW SOUGHT BY THE DEFENDANT

Suppose the trial court denies the motion for discharge because of some earlier action of the defense deemed to be a waiver. The defense may seek appellate review of this determination prior to readily granted by the trial courts. If such an issue is posed prior to the expiration of the basic speedy trial time, then the considerations outlined in Esperti v. State, 1276 So. 2d 58 (Fla. 2d DCA 1973), should govern the question of whether the trial courts should order an extension under Rule 3.191(d)(2).

32. We may expect, therefore, that much of the decisional law on speedy trial in the future will be made on cross-appeal by the state following a conviction of the defendant. That is, in most cases the trial courts will find that the basic speedy trial time was violated because such a ruling has no serious consequences for the state. The defendant may still be brought to trial within the window. Therefore, there will be few appeals by the defendants. Further, the state will not risk losing the defendant completely by seeking appellate review if it can bring the defendant to trial within the window.

33. See supra note 12 for a discussion of the various ways in which the defendant may lose the protections of the speedy trial rule.
trial by a petition for writ of prohibition. If the window of recapture is ultimately determined to be 10 days from the date of an order of discharge, the strategic considerations facing the defense are no different than under the prior rule. Since the court has not ruled for the defendant, the window has not opened. The defense would therefore file the petition in the appellate court and seek a stay of the trial proceedings pending the decision under Florida Rule of Appellate Procedure 9.310.

If, on the other hand, the window of recapture is ultimately determined to be 15 days from the date of filing the motion for discharge, the defense faces quite different considerations. In this case, the defense would not want to do anything to stay the running of the 15 days because that would arguably give the state at least the remainder of the 15 day window to bring the defendant to trial following a possible reversal on appeal. By the same token, the state should still attempt to comply with the 15 day limit to render any error moot. Under Rule 9.100(f), Florida Rules of Appellate Procedure, for instance, a show cause order issued by the appellate court automatically stays the proceedings below. 34 Sherrod v. Franza, 427 So. 2d 161 (Fla. 1983).

35 In State v. Jenkins, 389 So. 2d 971 (Fla. 1980), the court held that the automatic stay of trial proceedings provided by Fla. Stat. § 924.071(2) for interlocutory appeals by the state did not affect the running of the speedy trial time, and that an express "extension" had to be granted by the trial court under Rule 3.191(d)(2). The defense could argue, therefore, that any stay resulting from its petition for writ of prohibition should not affect the running of the window period. The argument is strengthened by Nelson v. State, 414 So. 2d 505 (Fla. 1982), in which the supreme court held that the trial court had authority to extend the speedy trial time to allow the state to seek review of a district court of appeal decision in the Florida Supreme Court by petition for certiorari. The court reaffirmed its position in Jenkins that a stay operated to stop all proceedings in the trial court, whereas an extension affected only the trial date. The court implied that an actual stay of all proceedings would not affect the speedy trial rule and that only an "extension" granted by the trial court would accomplish this, but at the same time said:

However, if a stay is entered, all proceedings in the cause are effectively terminated. The action by the trial court in extending the speedy trial time under criminal rule 3.191 does not affect the power of either the district court or the Supreme Court to enter a stay of the entire proceedings if either court determines that action is appropriate under appellate rule 9.310(a).

Id. at 507. Arguably, if all proceedings are "effectively terminated" by a stay, the speedy trial time could not continue to run. This view could be squared with Jenkins if the court had held that the automatic stay provisions of § 924.071(2) had been superseded by Rule 3.191(d). But the court in Jenkins appeared to say that the automatic stay was effective but did not stay the speedy trial rule:

It is our view that existing rule 3.191(d)(2) and section 924.071(2) do not contradict each other. They each concern different matters. Section 924.071(2) is confined to the automatic staying of trial court proceedings when the state appeals certain pretrial orders. The staying provisions of this section do not concern or
tainly the defense would not seek a discretionary stay under Rule 9.310, Florida Rules of Appellate Procedure, within the 15 day period.

Even if the defense avoids a stay within the 15 day period, the state would undoubtedly rely upon the following passage from *State v. Jenkins*:

First and foremost, it should be understood that any appeal by a defendant terminates the mandatory speedy trial period set forth in Rule of Criminal Procedure 3.191(a)(1) without the necessity of any action by the state to terminate or extend the speedy trial period.

When a defendant takes an interlocutory appeal, a remand for trial requires only that the state try the defendant within a reasonable time in accordance with constitutional standards.

The situation changes, however, when a defendant is to be retried as a result of a mistrial or the granting of a new trial by either trial court or appellate court action. In these instances, the provisions of the existing Rule of Criminal Procedure 3.191(g) are applicable and require the state to try the defendant within ninety days from the date of the appropriate court order. This is consistent with the new rule 3.191 effective January 1, 1981.36

The court in *Jenkins*, however, was not addressing interlocutory review sought by the defendant on the speedy trial issue. Under the old rule, of course, an appellate decision favorable to the defense operated as a discharge. The *Jenkins* decision on speedy trial, therefore, meant that interlocutory review sought by the defense on *other issues* operated as a waiver of the speedy trial rule. This should not be true where the defendant is seeking to enforce

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36. 389 So. 2d 971, 975 (Fla. 1980).
the speedy trial rule itself. However, even if Jenkins is extended to speedy trial appeals, it would in any case terminate the speedy trial time only as of the date the petition was filed. The defense, in an abundance of caution therefore, should not file the petition until the expiration of the 15 days.

All of the above indicates that the prosecution should be wary of relying on trial court decisions on speedy trial issues that are in its favor. Unless and until the 10 day versus 15 day window issue is resolved, a prosecutor would be well advised to bring the defendant to trial within the 15 day window even though the trial court has denied the motion for discharge. Indeed, if the prosecution is prepared to try a defendant within the 15 days, the trial court should deny any discretionary stay to the defense since the issue is then moot.

37. The court in Esperti v. State, 276 So. 2d 58 (Fla. 2d DCA 1973) held that the filing of a petition for writ of prohibition by the defendant claiming a violation of the speedy trial rule did not waive whatever continuing protection the speedy trial rule might afford:

For instance, in this case, the trial proceedings not having been stayed, the trial was not influenced in any way by the outcome of the certiorari dealing with whether the appellant was denied a speedy trial. Of course, the validity of the trial itself may be in question. If the trial judge has correctly ruled on the accused's motion to be dismissed for lack of a speedy trial he shouldn't fear further certiorari proceedings by the accused on that point of law. If the judge is unsure of his decision this uncertainty should not be visited on the accused by an extension of time for trial while the judge awaits the appellate court's disposition. Certainly an accused may pursue his legal right to be discharged for lack of a speedy trial without forfeiting his speedy trial rights. Such an outcome would be ludicrous.

Id. at 64.

In State ex rel. Simonds v. Hall, 326 So. 2d 443 (Fla. 2d DCA 1976), however, the court receded from Esperti, albeit in a different procedural context. In Hall, the defendant had been convicted and appealed his conviction. The Second District Court of Appeal reversed the conviction on an evidentiary point. The mandate of the Second District issued and, under Rule 3.191(g), trial should have commenced within 90 days of receipt of the mandate by the trial court. The state, having failed to obtain a stay of the mandate (under then applicable Fla. R. App. P. 4.5(c)(6), the state would have received an automatic stay if it had filed a petition for certiorari within 15 days of the Second District's decision), nevertheless filed a petition for certiorari in The Florida Supreme Court. Under this circumstance, the 90 days under 3.191(g) should have been running. However, the defense also filed a cross-petition for certiorari claiming that the first trial had been held in violation of the speedy trial rule. Presumably, the defense had also raised this point in The Second District and lost, although the decision is silent on the matter. The court held that by continuing the appellate process, the defendant did not waive the speedy trial rule, but rather delayed the triggering of Rule 3.191(g) until the supreme court finally decided the defendant's cross-petition. Id. at 444. Thus, under Hall, a defense petition for prohibition would not waive the window, but only stay it during the pendency of the petition.

38. This possibility involves a rather unusual situation. It assumes that the trial court has ruled in favor of the state, but the state, in an abundance of caution, desires to bring the defendant to trial within 15 days of the filing of his motion for discharge. The defendant, on the other hand, would prefer not to go to trial but rather test the trial court's ruling on
VI. Conclusion

The 1984 amendment to the speedy trial rule establishes a window of recapture for the state where it has allowed the 175 day speedy trial time for felonies or the 50 day speedy trial time for speedy trial demands to expire. The exact extent of the window is unclear. There is a conflict between the language of the new rule and the intent of the Criminal Procedure Rules Committee expressed in the commentary, which was not adopted by the Florida Supreme Court when it adopted the rule. The conflict should be resolved to restrict the window to 15 days following the filing of a meritorious motion for discharge by the defendant. Extensions of the window for exceptional circumstances or for interlocutory review by the state should not be permitted. The intent of the amendment was not to abolish the speedy trial rule in Florida by guaranteeing recapture in all cases, but rather to provide a limited and by no means certain opportunity to bring the defendant to trial where the state has violated the rule.

appeal. Should the defendant obtain a stay of the trial proceeding and lose the appeal (i.e., the petition for writ of prohibition would be denied), then presumably the provisions of Rule 3.191(g) would apply and the defendant would have to be brought to trial within 90 days of receiving the mandate in the trial court. However, should the defendant win on appeal, this would mean that the trial court should have set the trial within 10 days of its order. (Since the defendant obtained a stay of the trial proceedings, however, by its own action it deprived the state of the opportunity to render the error moot.) Consequently, in this situation, perhaps the best approach would be for the order of the appellate court to require the trial court to set a trial date within 10 days of the date of receiving the appellate mandate, but also to allow the trial court to extend the time if "exceptional circumstances" arose after the defendant obtained a stay of the trial court proceedings.