IN THE SUPREME COURT OF FLORIDA

Case No.: SC20-1101

IN RE: AMENDMENTS TO FLORIDA
RULES OF CRIMINAL PROCEDURE
3.134 AND 3.191 AND FLORIDA RULE
OF APPELLATE PROCEDURE 9.140
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COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.

The Florida Public Defender Association, Inc. ("FPDA") respectfully submits the following comments with regards to the proposed amendments under consideration for Florida Rules of Criminal Procedure 3.134 and 3.191, as well as Florida Rule of Appellate Procedure 9.140.

The FPDA consists of nineteen elected public defenders, hundreds of assistant public defenders, and support staff. These attorneys represent indigent clients in criminal proceedings at every level of the Florida court system. As appointed counsel for thousands of indigent criminal defendants each year, FPDA members are deeply interested in the rules of criminal and appellate procedure, and seek to

ensure that such rules are designed to promote fairness and efficiency of the criminal justice system.

The proposed amendments constitute the most significant overhaul of Florida's speedy trial rules since 1984. The FPDA believes the proposed changes not only would result in the unjust treatment of the criminally accused—with a disproportionate impact on indigent defendants—but would make Florida's criminal justice system less efficient and lessen the public's confidence in it. Furthermore, the proposed changes would interject confusion and the potential for abuse into an area of law that Florida courts and practitioners have faithfully followed for decades without a significant problem.

While no procedural speedy trial rule will ever be perfect, the proposed changes take too drastic a departure from Florida's established and functioning speedy trial framework to address perceived issues that rarely occur and can already be addressed under the existing speedy trial rules. For these reasons and others, the FPDA opposes the majority of the proposed changes to Rules 3.191, 3134, and 9140.

1. Significant and Multiple Changes to Rule 3.191 Are Unnecessary Where the Current Speedy Trial Rules Are Consistent with the Florida Supreme Court's Rulemaking Authority and the Legislature's Will

The first problem with the proposed changes to Rule 3.191 is their premise, which is to overturn several Florida Supreme Court decisions—*Born-Suniaga v. State*, 256 So. 3d 783 (Fla. 2018); *Genden v. Fuller*, 648 So. 2d 1183 (Fla. 1994); and *State v. Agee*, 622 So. 2d 473 (Fla. 1993). These decisions collectively hold that a defendant is entitled to a discharge where the speedy trial time periods have expired and the prosecution either does not file formal charges, files a nolle prosequi, or misleads the defendant into believing that it has terminated its prosecutorial efforts when in fact charges have been filed.

To counter these outcomes, the proposed "Alternative A" for Rule 3.191—through its subsections (a) and (h)—provide that a defendant may seek a speedy trial remedy **only** "if a formal charging document is pending." The proposal for "Alternative B" removes the speedy trial without demand time periods completely, mandating that a defendant can only effectuate the right to a speedy trial by filing a demand.

The impetus for these changes derives from the dissenting opinion in *Born-Suniaga*, where Justice Lawson expressed concern that the current speedy trial framework may cause a "separation of powers entanglement that occurs when the judiciary unjustifiably interferes with substantive law or executive discretion under the guise of procedural rulemaking."[1] 256 So. 3d at 792 (Lawson, J., dissenting). However, these concerns run contrary to the genesis of Florida's speedy trial rules and their continued application.

The framework for the current speedy trial rules was first promulgated by the Florida Supreme Court in 1971, *see In re Florida Rules of Criminal Procedure*, 245 So. 2d 33 (Fla. 1971), after the Legislature directed the Court to fashion speedy trial rules on its own.[2] *See* Chapter 71-1(B), § 6, Laws of Fla.

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[1] Both the "Alternative A" and "Alternative B" proposed changes to Rule 3.191 still contain discharge as the remedy for certain speedy trial violations, albeit in more limited circumstances.

[2] Prior to 1971, the Legislature expressed a preference for speedy trial rules that placed time constraints more stringent than the statute of limitations and that the remedy for a speedy trial violation should be a discharge. For example, section 915.01(2), Florida Statutes—which was repealed in 1971—

Specifically, the Legislature amended section 918.015, Florida Statute, to include a subsection (2), which provides: "The Supreme Court shall, by rule of said court, provide procedures through which the right to a speedy trial as guaranteed by subsection (1) and by s. 16, Art I of the State Constitution, shall be realized." § 918.015(2), Fla. Stat.

That same year, the Florida Supreme Court in *State ex rel. Maines v. Baker*, 254 So. 2d 207 (Fla. 1971), unanimously held it had the authority under the Florida Constitution[3] to adopt speedy trial rules because the rules "merely provide[d] the procedures through which the constitutional right to a speedy trial is enforced in this state." *Id.* at 208. Thereafter, the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), "effectively approved [the Florida Supreme Court's] *Baker* decision through an explanation of the constitutional right to a

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permitted a defendant to seek a discharge if not brought to trial within three successive terms of court after filing a demand.

[3] Article V, Section 2 of the Florida Constitution provides that "[t]he supreme court shall adopt rules for the practice and procure in all courts."

speedy trial and the procedural rules necessary to implement that constitutional provision." *R.J.A. v. Foster*, 603 So. 2d 1167, 1169-70 (Fla. 1992). The Court's constitutional authority to promulgate speedy trial rules has not since been challenged.[4]

In the ensuing decades, the Florida Legislature has never altered section 918.015(2)'s directive or otherwise expressed dissatisfaction with the operation of the speedy trial framework. Of course, the Legislature can—and often does—enact legislation to overturn court decisions that it substantively disagrees with. *See, e.g., Love v. State*, 286 So. 3d 177, 180 (Fla. 2019); *Merck v. State*, 260 So. 3d 184, 189 n.3 (Fla. 2018).

Instead, the Legislature has continued to enact legislation consistent with, and in furtherance of, the current speedy trial rule framework, demonstrating its approval. For example, in 2019, the Legislature enacted section 943.0595, Florida

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[4] In fact, the State in its Answer Brief before the Florida Supreme Court in *Born-Suniaga* acknowledged in its conclusion that the Court "had the constitutional authority to adopt speedy trial time periods as a procedural rule." State's Answer Brief in *Born-Suniaga*, p.18, available at: https://efactssc-public.flcourts.org/casedocuments/2017/1014/2017-1014_brief_126988_answer20brief2dmerits.pdf.

Statutes, to provide for the automatic sealing of criminal history records. Subsections (2) and (3)(a) of the statute require the clerk of court for each judicial circuit to send the Florida Department of Law Enforcement ("FDLE") the "disposition" of a case in which a charging document was not filed or where the charging document was dismissed. Thereafter, FDLE must seal the arrest from public inspection.

The construction of section 943.0595 is based on Florida's current speedy trial rules, which cause the prosecution to either file charges within the applicable time periods after arrest or otherwise file a notice of no action or nolle prosequi—the latter two resulting in the case being "disposed."[5]

The proposed speedy trial rules will, however, effectively do away with the uniform practice of having state attorneys file a notice of no action within 175 days from arrest for a felony or 90 days for a misdemeanor—because legally the prosecution

[5] *See Allied Fidelity Ins. Co. v. State for Use and Benefit of Dade County,* 408 So. 2d 756, 756 n. 1 (Fla. 3d DCA 1982) ("A 'no action' is a dismissal of the pending charges before an information or indictment has been filed; a nolle prosequi is the dismissal of a pending information or indictment.").

may not be over. Moreover, criminal cases will not be "disposed" of through the filing of a no action or nolle prosequi—unless the nolle prosequi is filed during the recapture period in the absence of exceptional circumstances—because the state attorney could still revive the case at a later date, so long as the statute of limitations has not expired.

Such a result runs counter to, and interferes with, the Legislature's purpose in enacting statutes like section 943.0595, which is to clear people's names at the earliest stage who have been arrested but not charged or have had charges dropped. This is of particular importance in the age of the Internet, where an arrest means more than merely being taken into custody by law enforcement. Rather, it is a legal event that bears not only significant legal consequences to the person when the arrest occurs, but also a long-lasting social stigma.[6]

[6] To address a growing problem stemming from arrests, the Legislature in 2017 enacted section 901.43, Florida Statutes, to prevent persons or entities from soliciting or accepting a fee or other form of payment to remove booking photos that are publicly accessible in print or electronic medium.

For these reasons, a complete overhaul of the speedy trial system is unnecessary where neither the Legislature nor the Florida Bar's standing committees have expressed a persisting problem with its operation.[7] Moreover, the current time constraints placed by Rule 3.191 are consistent with Florida Rule of General Practice and Judicial Administration 2.250, which recognizes that presumptively reasonable time periods in criminal cases are 180 days from arrest to final disposition for a felony and 90 days for a misdemeanor.

2. The Proposed Changes to Rule 3.191 Would Remove Incentive for Law Enforcement to Exercise Due Diligence Prior to Making Arrests and Permit the Potential for Abuse

The current speedy trial rules provide incentive for law enforcement to investigate cases and present their evidence to

[7] In its petition in SC19-1592, the Florida Supreme Court Criminal Court Steering Committee wrote that it was the committee's "consensus . . . that the speedy trial rule is generally working and therefore a major overhaul was unnecessary." *See* Petition, pg. 2. Likewise, the Criminal Law Section of the Florida Bar—consisting of prosecutors, public defenders, private defense attorneys, and judges—wrote in its March 13, 2020 comments that dismissals based on speedy trial were rare and that there had been no significant complaints regarding the current operation of Florida Rule of Criminal Procedure 3.191. *See* Comments, pg 2 in SC19-1592.

the State Attorney's Office before making an arrest, particularly in complex cases. When investigating potential crime, situations will inevitably arise where police develop sufficient probable cause for an arrest, but do not have sufficient evidence to prove a case at trial beyond a reasonable doubt. *See Von Stein v. Brescher*, 904 F.2d 572, 578 n.9 (11th Cir. 1990) (explaining that "'probable cause' defines a radically different standard than 'beyond a reasonable doubt,' and while an arrest must stand on more than suspicion, the arresting officer need not have in hand evidence sufficient to obtain a conviction").

If the prosecuting authority determines there is enough evidence to prosecute, it will file an information and an arrest warrant will issue. *See* Fla. R. Crim. P. 3.131(j). By starting the time for speedy trial at arrest and imposing the potential remedy of a discharge, the current rules discourage a rush to judgment and encourage police and prosecutors to make sure of their evidence before arrest.

Under the proposed rules, however, the incentives are reversed. By limiting any remedy for a speedy trial violation to circumstances where a formal charging document has been

filed and remains pending against a defendant, the proposed changes to Rule 3.191 remove the incentive for law enforcement and prosecuting authorities to exercise due diligence prior to making arrests. "Given the stigma and emotional trauma attendant to an indictment and arrest, promoting premature indictments and arrests is not a laudable accomplishment." *Buckley v. Fitzsimmons*, 509 U.S. 259, 287 (1993) (Kennedy, J., concurring in part and dissenting in part).

There would be no impediment for police to arrest on bare probable cause, even where there is insufficient evidence to prosecute at trial. Without the remedy of a discharge, these arrests could become a commonplace investigative tactic for law enforcement, used as a means to conduct warrantless searches incident to arrest or to provoke incriminating statements.

Following the arrest, the accused will be forced to either post bond (an expensive proposition for indigent defendants) or wait in jail until eventually being freed by Florida Rule of Criminal Procedure 3.134 when the prosecution does not file charges. Such person will then stand publicly accused of a crime, with no way to clear their name. This purgatory could

continue for months, years, or for the rest of the person's lifetime, waiting for the prosecution to file a charging document, which may never come.

During this time, the defendant would have no civil remedy to vindicate himself or herself because probable cause is a defense to false arrest[8] and prosecutors are shielded by absolute immunity "[i]f the function" challenged "is intimately associated with the role of the prosecutor in acting as an advocate for the State." *Qadri v. Rivera-Mercado*, 303 So. 3d 250, 254 (Fla. 5th DCA 2020).

A statute of limitations may eventually end the State's ability to prosecute some crimes, but that is an unsatisfactory resolution for those who have entered the criminal justice system since it does not clear the person of the public accusation and it keeps the case active indeterminately. During this time, the accused could unjustly face scorn for years in the court of public opinion, stunting employment opportunities and

[8] *See Miami-Dade County v. Asad*, 78 So. 3d 660, 669–70 (Fla. 3d DCA 2012); *Mailly v. Jenne*, 867 So. 2d 1250, 1251 (Fla. 4th DCA 2004).

political aspirations.[9] And there is no statute of limitations for the most serious crimes. *See* § 775.15(1), Fla. Stat. (2020).

Finally, it is worth noting that the decisions the proposed speedy trial rules seek to overturn—*Agee*, *Genden*, and *Born-Suniaga*–each could have been avoided under the existing speedy trial rules through the State's exercise of due diligence. For example, in *Agee*, the prosecution entered a nolle prosequi because its only eyewitness had been rendered comatose; however, a dismissal could have been avoided had the prosecutor sought an extension for good cause under Rule 3.191(i) and (*l*). 622 So. 2d at 475. In *Genden*, the prosecutor filed a notice of no information after the defendant was arrested; but dismissal could have been avoided had law enforcement postponed the decision to arrest the defendant until the State had developed an adequate case for prosecution. 648 So. 2d at 1188. Finally, in *Born-Suniaga*, the State could have avoided

[9] While the FPDA certainly hopes this will not happen, an arrest could be used for abusive purposes—for example, to stunt a political opponent's election chances by interjecting potential charges and investigation after an arrest that remain "pending."

dismissal by ensuring the defendant had been timely notified of the pending charges. 256 So. 3d 783.

In an effort to abrogate *Born-Suniaga* in particular, Rule 3.191(q) of "Alternative A" proposes that "[t]he failure of a defendant to receive notice that the state filed a charging document does not entitle the defendant to discharge under this rule." However, noticeably absent from this prosecution-oriented proposal is any requirement that the prosecution exercise due diligence in notifying the defendant of charges.

One need only look to the facts of *Born-Suniaga* itself to recognize the problems inherent with the proposal. There, the defendant "repeatedly tried to determine whether the State had filed any new charges against him," only to be stymied by a failure of notice. *Born-Suniaga*, 256 So. 3d at 785. For example, the defendant "went to the jail . . . when his co-defendant turned himself in" but "was informed by a deputy that there were no charges pending against him." *Id.* That same day, the defendant "encountered other police officers who told him he was free to go and inform him that there were no warrants against him." *Id.*

Finally, the defendant "looked his case up and saw that it was listed as having been 'disposed.'" *Id.*

On the other hand, the State "did not show that anyone had attempted to notify [the defendant] of the charges filed." *Id.* Further, "[n]o clerk's office employee testified that any mailings had been sent to [the defendant], and no testimony showed that [the sheriff's office] had made any attempt to serve [the defendant]." *Id.* As a result, the trial judge found "there was no way for [the defendant] to find out that his case existed and no effort to alert him to the fact that charges stemming from the initial incident were still ongoing." *Id.*

The FPDA fails to see how Florida's criminal justice system would benefit from the circumstances of *Born-Suniaga* not only being excused, but condoned. Rather than abrogate *Born-Suniaga*, the better solution is to keep the existing rules intact to stave off game playing and promote timely service of filing decisions upon defendants. Should the State be unable to serve the defendant despite due diligence, the State could seek to extend the time periods based on exceptional circumstances.

The solution cannot be to encourage a lack of diligence, which is what the proposed changes to Rule 3.191 will accomplish.

3. The Proposed Requirement in Rule 3.191(g) of "Alternative A" and Rule 3.191(d) of "Alternative B" That a Defendant Complete All Necessary Discovery and Secure All Necessary Rulings Will Unfairly Hinder a Defendant's Ability to Demand Speedy Trial

The FPDA opposes the proposals in Rule 3.191(g) of "Alternative A" and Rule 3.191(d) of "Alternative B," which state that a defendant may only demand a speedy trial if he or she "has completed all necessary discovery, has secured necessary rulings on pretrial motions, and is fully prepared" for trial. The proposal also deletes wording from the existing rule stating that the defendant must be prepared for trial "within five days."

Requiring that a defendant "secure[] necessary rulings on pretrial motions" could effectively block all demands for speedy trial because routine pretrial motions are commonly decided as trial approaches. Practitioners within Florida's circuits—both for the defense and prosecution—file written pretrial motions *in limine* in anticipation of trial. Because of crowded dockets, pretrial motions are often not scheduled until a time near the start of trial. *See, e.g. J.G. v. State*, 114 So. 3d 1078, 1080 (Fla.

2d DCA 2013). This is to avoid unnecessary hearings in cases that may resolve prior to the trial commencing.

Under the proposed changes, any routine pretrial motion would preclude the defendant from demanding a speedy trial because those motions would constitute "necessary rulings." The result would be that in situations where a defendant seeks a speedy trial, defense counsel will be discouraged from filing pretrial motions on evidentiary matters—even though that is widely considered to be the better practice—and will instead raise issues for the first time during the trial.

Equally troubling is that a judge's delay in considering a pretrial motion—based upon reasoning such as mere convenience or scheduling—can unfairly block a defendant from exercising speedy trial rights. For example, an evidentiary hearing such as a motion to suppress or a stand your ground hearing that is heard just before trial at the judge's insistence would preclude the defendant from demanding a speedy trial, since the defense has no means to force the trial court to hold the hearing or to otherwise rule. Therefore, a defendant's speedy trial rights—particularly under "Alternative B"—could be

unilaterally avoided by a trial judge's refusal to hold a hearing in a timely manner or to otherwise rule. This will force defendants and their counsel into making difficult decisions such as whether to forego raising legal issues in order to obtain a speedy trial, because the judge will not set a hearing date.

In addition, the proposed rule does not explain what would happen if the prosecution provides discovery after the defendant has filed a demand for speedy trial.[10] *See Hayden v. State*, 760 So. 2d 1031, 1033 (Fla. 2d DCA 2000) (explaining that the State is not relieved of this continuing duty when the defendant files a demand for speedy trial). Should the defendant need to file discovery or a motion in response to discovery that the State has filed after the demand, then technically the defendant has not secured **all** necessary pretrial rulings or obtained **all** discovery. This would be patently unfair if the defendant had

[10] Although tardy discovery constitutes a discovery violation, these instances do occur. *See, e.g., State v. Evans*, 770 So. 2d 1174 (Fla. 2000); *Scipio*, 928 So. 2d 1138; *Mobley v. State*, 705 So. 2d 609, 611 (Fla. 4th DCA 1997).

satisfied these requirements at the time the demand was filed; yet the rule does not provide an exception for this situation.

Along similar lines, the proposed rule does not explain what occurs if the State files a pretrial motion after the defendant has demanded a speedy trial. At that point, the defendant still has not secured "all necessary pretrial rulings," even though that failure was caused by the prosecution. The rule must be clearer, otherwise it opens up yet another possibility for the prosecution to unilaterally, and perhaps repeatedly, extend the speedy trial timeframes.

Finally, the FPDA opposes removing wording from the existing rule that the defendant must be ready for trial "within 5 days." The defense may need to subpoena witnesses for trial, which can be completed within a five-day window but cannot be completed on the day the demand is made. This requirement, as written, would mean that the defense would need to somehow subpoena witnesses for a trial that has not yet been scheduled, but theoretically could commence at any moment.

4. The Proposed Changes Undermine Discovery Rules and Would Disproportionally Impact Indigent Defendants

Criminal defense lawyers rely on the current procedural speedy trial rules to determine what actions are necessary to comply with the Sixth Amendment guarantee to effective assistance of counsel. Under the current speedy trial framework, state attorneys must make filing decisions in a prompt manner, which permits defense counsel a fair opportunity for investigation and to form a defense.

A defendant's right to participate in reciprocal discovery begins under Florida Rule of Criminal Procedure 3.220(a) "[a]fter the filing of the charging document." *See Pura v.* State, 789 So. 2d 436, 438 (Fla. 5th DCA 2001). The "chief purpose" of Florida's discovery rules is "to assist the truth-finding function of our justice system and to avoid trial by surprise or ambush." *Scipio v. State*, 928 So. 2d 1138, 1144 (Fla. 2007). However, the proposed changes to 3.191 would permit the prosecution to develop its case for years after arrest but before filing a formal charging document—without providing the defendant with discovery—and then file charges at the time it is

ready, unfairly leaving the defendant with only the recapture period to investigate and prepare a defense. Moreover, such delays in discovery are dangerous because memories fade with the passage of time and physical evidence, documents, and witnesses will no longer be available. *Barker*, 407 U.S. at 532.

The adverse effect of the proposed rule changes will particularly be felt by indigent defendants who post bond prior to their first appearance without appearing before a first appearance judge or being appointed counsel. Those indigent defendants may remain without counsel for substantial amounts of time while the State builds its case and awaits filing charges, with little impetus to make a timely charging decision. During that time, exculpatory evidence may be lost or not preserved. In addition, poor people suffer from housing instability, which will make it difficult to notify them when charges have been revived years down the line.

To account for indigent defendants who have been arrested and appointed counsel but not charged, the budget for Public Defender Offices would need to be expanded because, due to employee turnover, lingering cases will need to be started

over by a new lawyer after significant time has passed from the initial appointment. Common practices within these offices would need to be substantially revised to accommodate for prolonged charging delays, since charges could be filed at any moment, at which point the defense would need to be immediately prepared to render effective assistance. Furthermore, conflicts requiring public defenders to withdraw will continue so long as a case remains technically pending, which will result in more costs for court appointed counsel.

5. The Proposed Changes to Rule 3.191(e) in "Alternative A" and Rule 3.191(c) in "Alternative B" Would Permit the Executive Branch to Shuffle Defendants Among Jails to Defeat the Right to a Speedy Trial

The proposed changes to Rule 3.191(e) in "Alternative A" and Rule 3.191(c) in "Alternative B" improperly treat every county and circuit as if they are separate jurisdictions, which is contrary to basic law. "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying

out of state governmental functions." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964). Florida law is similar. *See State v. Coney*, 272 So. 2d 550, 553 (Fla. 1st DCA 1973) ("It should be kept in mind that a defendant in a criminal case is not being charged and prosecuted by the state attorney, but by the sovereign State of Florida. The state attorney is merely the court official charged with the duty of handling the case from its inception to its conclusion.").

When there are charges pending in two or more counties, a citizen has no control over which county holds him or her. That placement is determined by the executive branch. *See Ayala v. Scott*, 224 So. 3d 755, 757-58 (Fla. 2017) (authority of Governor as chief executive officer over criminal prosecutions). Citizens have no legal recourse to challenge such executive-branch decisions. As such, a defendant's right to a speedy trial should not depend on such executive branch decisions.

There have been instances where speedy trial violations have occurred because a defendant was not transferred based "on confusion, miscommunication or administrative convenience." *Mainwaring v. State*, 11 So. 3d 986, 990 (Fla. 5th

DCA 2009) (granting writ of prohibition on speedy trial grounds where although "the Orange County Circuit Court appears to have issued numerous transport orders in this case, none was ever honored"); *Lee v. State*, 430 So. 2d 516, 516 (Fla. 2d DCA 1983) (remanding for discharge where the State failed "to transport [the] defendant to court on the initially scheduled retrial date" in a "desire to avoid transporting [the defendant] twice"). Under the proposed rule, a speedy trial demand could be defeated for such untoward reasons.

The proposal for "Alternative A" also does not address how to count time after a person has been transported and returned. Does the 175-day clock restart at zero or does the clock restart at the number of days the defendant had before he or she was transferred? The language of the current rule provides that "the time period under subdivision (a) commences on the date the last act required under this subdivision occurs." That language made sense when it governed only return of prisoners in the custody of another state or the federal government because such transfers usually happen only once. But defendants can be, and are, routinely transferred between various county jails.

If the time for speedy trial "commences" when the last act is completed, then every time a defendant is returned to the county from another county, the time for speedy trial commences once again. If that reading of the proposed language were to prevail, two prosecutors (or two sheriffs) could deny the right of speedy trial under 3.191(a) by continually bouncing a defendant between their circuits.

6. Requiring A Copy of a Demand For Speedy Trial Be Provided to the "Presiding Judge" is Unclear, Would Require an Amendment to the Florida Rules of General Practice and Judicial Administration, and Could Subject the Judge to Disqualification

The proposal for Rule 3.191(h) of "Alternative A" and Rule 3.191(e) of "Alternative B," which provide that the defendant must provide a copy of a demand to the "presiding judge," will create confusion due to that term being undefined. Judges often send cases to one another for trial, in the form of "backup." After that occurs, who is the presiding judge? The judge assigned the case? The judge who temporarily has the case as "backup"?

This situation worsens through time. After the prosecution announces a nolle prosequi or no action, a judge may change divisions, retire, be elevated to a higher bench, etc. Which leads

to the question: who is the presiding judge in a closed case? The proposed rule change will ensure years of litigation of such esoteric (and unnecessary) questions. Additionally, the proposed language of Rule 3.131(j)(5) permits a trial court to strike a notice of expiration if the notice "was not filed or served in accordance with subdivision (h)." Florida Rule of General Practice and Judicial Administration 2.516, which governs proper service, applies to parties, not judges. The proposal would likely require an amendment to Rule 2.516.

The primary circumstance in Florida law where a judge is served with a pleading is a motion to disqualify a trial judge. See Fla. R. Jud. Admin. 2.330(d). That makes sense for disqualification motions because such motions are personal to the trial judge, who must rule on its legal sufficiency.

Extending service to judges in the speedy trial context is different. Under the current rule, the prosecutor is served with the notice, and it is the prosecutor's duty to bring it to the court's attention. The proposed rule, however, suggests that the judge should assist the prosecution by making sure the notice does not go unnoticed by the state. Any judge who accepts such

an invitation is subject to disqualification. It is hard to imagine a "tip" bigger than warning the prosecutor of an overlooked notice of expiration. *See Chastine v. Broome*, 629 So. 2d 293, 295 (Fla. 4th DCA 1993). [11]

7. The Time for Release Without Conditions Under Rule 3.134 Should be the Same for Defendants In or Out of Custody

Release without conditions should not be so drastically different under Rule 3.134 for defendants who are in custody as against those who are out of custody. Defendants who are not "in custody" for purposes Rule 3.134 can still be subject to onerous conditions. Many bail bonds agencies, for example, charge a weekly or monthly fee for maintaining the bond that allows release. These charges are expensive for indigent clients.

Recent case law establishes that house arrest is not considered the equivalent of custody for Rule 3.134 purposes.

[11] Due process entitles all litigants to "nothing less than the cold neutrality of an impartial judge." *Pistorino v. Ferguson*, 386 So. 2d 65, 67 (Fla. 3d DCA 1980); *see also Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912); U.S. Const. amend. XIV, §1. "A trial court owes a duty of neutrality to the parties and may not favor one side or the other." *M.W. v. State*, 263 So. 3d 214, 215 (Fla. 3d DCA 2019).

See Branch v. Junior, 281 So. 3d 1280, 1281-82 (Fla. 3d DCA 2019); *cf. Whitley v. State*, 273 So. 3d 1, 2 (Fla. 4th DCA 2019). House arrest can include provisions that do not allow a person to leave the house for any reason, including work, school, religious observances, or even to go to the doctor or grocery store. Many Florida circuits have pretrial release programs that limit defendants' liberties—such as requiring defendants to check in, be drug tested, obey curfews, and attend counseling.[12] Furthermore, defendants accused of domestic violence offenses often can be subject to stay away orders that separate families and may require the surrender of firearms.

Given these curtailments on freedom, the proposal should not separate "custody" and "non-custody" defendants by allowing "non-custody" defendants to remain subject to conditions for up to 175 days. Initially, "the rule's underlying purpose . . . is to force the state to formally charge the accused as soon after arrest as practical." *Bowens v. Tyson*, 578 So. 2d 696, 697 (Fla. 1991). A longer time for non-custody defendants

[12] The cost of these programs would increase dramatically the longer they are imposed upon defendants.

undermines that purpose by discouraging prosecutors from timely filing charges for defendants who post bond or are released on house arrest.

In addition, the different time frames will cause needless machinations. Defendants can surrender themselves from pretrial release at any time. § 903.20, Fla. Stat. ("The defendant may surrender himself or herself or a surety may surrender the defendant any time before a breach of the bond."). Accordingly, once the State has failed to file an information by the 33rd or 40th day, non-custody defendants would be well-advised to surrender themselves. At the moment of their surrender, they would become "custody" defendants and have a right to immediate release. Having different time periods would result in calendaring of needless hearings where defendants walk into the courtroom, announce a surrender, and their lawyer then immediately moves for their release, which the trial court would have to grant. The rules of procedure should not encourage or require such a charade.

Finally, the proposal could cause confusion with regards to bail bonds. At present, the State's announcement of "no

action" has the same effect as a nolle prosequi for purposes of releasing the surety from the obligation to produce the defendant. *See Allied Fidelity Insurance Co. v. State*, 408 So. 2d 756 (Fla. 3d DCA 1982). That is because "a 'no action' and a nolle prosequi both signify that the state intends to terminate the prosecution and proceed no further." *State v. Clifton*, 905 So. 2d 172, 177 (Fla. 5th DCA 2005).

Under the proposed changes to Rule 3.191, however, the State may decide to "simply tak[e] no action after taking the defendant into custody,"[13] because the prosecution could be revived years down the line when the State deems itself ready. This would tie up money and property used as collateral[14] for extended periods of time, creating societal difficulties.

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[13] *State v. Jimenez*, 44 So. 3d 1230, 1233 (Fla. 5th DCA 2010), *disapproved of by Born-Suniaga v. State*, 256 So. 3d 783 (Fla. 2018).

[14] For example, Section 903.31(3), Florida Statutes, provides that "[i]f no formal charges are brought against the defendant within 365 days after arrest, the court shall order the bond cancelled unless good cause is shown by the state." Under the current speedy trial rules, the prosecution will file a notice of no action in an expedient manner. However, the proposed rule changes could result in prolonged encumbrances for cars, boats, and real property used as collateral.

8. As Written, the Proposed Amendment to Florida Rule of Appellate Procedure 9.140 Would Lead to Illogical Results

The FPDA opposes the proposed creation of Florida Rule of Appellate Procedure 9.140(b)(1)(G) and (c)(1)(P)—as well as Rules 3.191(o) and (r) in "Alternate A" and Rule 3.191(*l*) and (n) in "Alternative B"—which provide new appellate rights to the defendant and the State where a nolle prosequi is entered during the recapture period. Preliminarily, these rules are procedurally unnecessary for the State, because the State can already appeal the dismissal of an indictment or information under Florida Rule of Appellate Procedure 9.140(c)(1)(A). Furthermore, the proposed rule changes are internally inconsistent with regards to the remedy afforded a defendant should no exceptional circumstances exist to justify the State's entry of a nolle prosequi during the recapture period.

As currently drafted, the proposed rule changes permit the defendant or the State to appeal from an order finding whether a nolle prosequi entered during the recapture period was necessitated by exceptional circumstances. These rules work in conjunction with Rule 3.191(o)(3) of "Alternative A" and Rule

3.191(*l*)(2) of "Alternative B," which provide for the remedy of a discharge where exceptional circumstances are not apparent:

> If the state files a nolle prosequi within the 30-day recapture period . . . , the defendant shall be entitled to discharge . . . unless the court finds, upon a state's motion filed within the recapture period, that the nolle prosequi was necessitated by exceptional circumstances . . . .

That remedy is in conflict, however, with Rule 3.191(r) of "Alternative A" and Rule 3.191(n) of "Alternative B," which provide that "[i]f the defendant prevails on appeal, the trial must commence within 30 days after the issuance of the mandate, unless the defendant agrees to a later trial date."

This would play out as follows: should the State file a nolle prosequi during the recapture period at a time when exceptional circumstances do not exist, the remedy under both alternative proposals is for the defendant to be discharged. However, if the defendant appeals from an adverse ruling and prevails—meaning the appellate court determines the trial judge erred in finding that exceptional circumstances necessitated the nolle prosequi—then the defendant will not be discharged, but instead can be brought to trial within 30 days. These disparate

remedies make no logical sense—if there are no exceptional circumstances to necessitate the State's entry of a nolle prosequi, the remedy should be a discharge, whether the trial court correctly makes that ruling in the first instance or an appellate court reverses an erroneous ruling.

Equally troubling is that the State can use this newly created appellate right as an end-around to obtain extensions of speedy trial where exceptional circumstances do not necessitate a nolle prosequi. Proposed Rule 9.140(c)(1)(P) permits the State to appeal from an order "**finding** that a nolle prosequi entered during the 30-day recapture period in rule 3.191 was not necessitated by exceptional circumstances." Given that the rule permits the State to appeal from the *finding* rather than the dismissal of charges, the defendant likely will remain confined or subject to pretrial conditions during the appeal, despite otherwise being entitled to discharge as a remedy based on the trial court's finding.

Should the defendant prevail on appeal,[15] Rule 3.191(r) of "Alternative A" and Rule 3.191(n) of "Alternative B" provide that "the trial must commence within 30 days after the issuance of the mandate, unless the defendant agrees to a later trial date." This would mean that if the trial court correctly finds exceptional circumstances did not necessitate the entry of the nolle prosequi, the remedy is a discharge; but if the State appeals the trial court's finding (even if the State's argument is tenuous) and the defendant "prevails," speedy trial will be extended for several months while the appeal is pending until *after* the mandate has issued, at which point the State receives an additional 30 days to bring the defendant to trial. Though perhaps unintended, this would permit the State to extend the speedy trial timelines despite no legal justification for doing so.

From a jurisdictional standpoint, the FPDA notes there also is no reason to provide the State with this new appellate right. Florida Rule of Appellate Procedure 9.140(c)(1)(A) already

[15] The proposed rules do not differentiate with regards to whether this subsection applies should the defendant prevail on a state appeal or the defendant's own appeal.

permits the State to appeal from an order dismissing an indictment or information.[16] If the State enters a nolle prosequi during the recapture period and the trial court finds that exceptional circumstances do not exist, the trial court should enter an order dismissing the charges and the State can appeal from that ruling. Adhering to the existing rules would ameliorate the inconsistencies mentioned above because if the defendant prevails on appeal, the case would simply remain dismissed—otherwise the trial court's dismissal order would be reversed and the prosecution may re-commence.

CONCLUSION

The proposed changes to Florida's speedy trial rules would be costly and run counter to societal interests. Along with protecting defendants from the evils caused by prosecutorial delay,[17] the right to a speedy trial serves "a societal interest . . .

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[16] There exists a litany of State appeals from the dismissal of charges based on speedy trial. *See, e.g., State v. Templar-O'Brien*, 173 So. 3d 1129 (Fla. 2d DCA 2015); *State v. Pereira*, 160 So. 3d 944, 945 (Fla. 5th DCA 2015); *State v. Conroy*, 118 So. 3d 305, 306 (Fla. 3d DCA 2013).

[17] These concerns include: (1) "undue and oppressive incarceration prior to trial"; (2) "anxiety and concern

which exists separate from, and at times in opposition to, the interests of the accused." *Barker*, 407 U.S. at 519.

Importantly, the right to a speedy trial "promot[es] the efficient operation of the court system" by providing "a stimulus to prosecutors to bring defendants to trial as soon as practicable." *State v. Agee,* 622 So. 2d 473, 475 (Fla. 1993) (quoting *Lewis v. State,* 357 So. 2d 725, 727 (Fla. 1978)). This increase in courtroom efficiency benefits both the criminal justice system and society by assisting trial courts from becoming overburdened by a backlog of cases, preventing persons released on bond from having the opportunity to commit crime, and reducing the monetary costs associated with lengthy pretrial detention. *Barker*, 407 U.S. at 519.

Furthermore, speedy resolution of cases fosters public confidence in the criminal justice system. *Dickey v. Florida*, 398 U.S. 30, 42 (1970) ("The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of

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accompanying public accusation"; and (3) "the possibilities that long delay will impair the ability of an accused to defend himself." *Smith v. Hooey,* 393 U.S. 374, 378 (1969).

crimes and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case.").

Bringing a timely resolution to cases that have entered the criminal justice system serves the public good by managing court caseloads and permitting persons brought into the system to move on with their lives by obtaining employment, housing, government benefits, etc. Furthermore, persons arrested for serious offenses, for which the statute of limitations do not apply, will never be able to clear their names should the prosecuting authority elect not to prosecute. The proposed amendments would bar these individuals from obtaining timely vindication, because there will always be a prosecution "pending" against them until the statute of limitations has run.

Without a speedy trial stimulus to promote the timely resolution of cases, the criminal justice system will become overburdened with cases that remain "pending" until the statute of limitations has expired.[18] The proposed rules provide

[18] The reality of overburdened courtrooms is being realized at this moment during the novel coronavirus (COVID-19)

no mechanism for determining when a criminal case is over, unless the State enters a nolle prosequi during the recapture period. This, in turn, will lead to a conundrum for the trial courts and clerk's offices around the state, as well as appointed and privately-retained defense counsel.

For example, Florida Rule of Criminal Procedure 3.111(e) requires that appointed counsel remain on a case for thirty days after a case closes—representing the time in which an appeal could be filed. But the proposed amendments provide no mechanism for determining what occurs when the prosecution dismisses charges but has the right to file charges months if not years later. Will attorneys remain appointed to cases for years on end until the statute of limitations has run? Must attorneys appointed to represent indigent clients continue to investigate cases in which the State entered a nolle prosequi in the off chance that the case is later revived?

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pandemic, where trial courts are experiencing significant backlogs. Although much of this backlog is caused by the suspension of jury trials in the various judicial circuits, many criminal cases are not being resolved because the speedy trial rules have been suspended, removing the stimulus to act.

These problems become even more pronounced for pro se litigants. When a defendant is represented by counsel, Florida Rule of Criminal Procedure 3.160(a) allows the attorney to enter a written not guilty plea before arraignment and thereby waive arraignment as well as the defendant's appearance at arraignment. But a pro se defendant may not be able to waive their appearance for an arraignment. In some of Florida's judicial circuits, when the prosecution has not filed a charging document, the trial court will periodically continue the case on the court's arraignment docket until either the prosecution files a charging document or a notice of no action. But without the speedy trial limit of 90 days for a misdemeanor or 175 days for a felony, these continuances will seemingly continue into perpetuity, running the risk of unnecessarily clogging trial court dockets and substantially burdening pro se defendants who have to continually appear in court.

The current speedy trial rules strike a balance between the right of an accused to receive prompt resolution of charges and the right of the state to obtain a fair determination on the merits of its case. With discharge remaining a rare but potential

consequence for lack of diligence, the rules ensure that defendants have the "right to speedy trial, not a right to speedy discharge without trial." *State v. Nelson*, 26 So. 3d 570, 576 (Fla. 2010). Moreover, the current speedy trial framework has proven to be consistent with the Legislature's will.

The proposed changes to Rules 3.134, 3.191, and 9.140 tip that balance too far in favor of the prosecution, with detrimental effects that will be felt not only by the criminally accused but by the criminal justice system and society as a whole. Furthermore, the proposal will raise substantial questions in terms of its costs and its implications for how it would interact with current statutes and rules of procedures. Accordingly, the proposed changes that substantially overhaul the current speedy trial framework should be rejected.

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I certify that a copy of this comment was sent to the following via the Florida Courts e-filing portal, on March 8, 2021. I also certify that this comment was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045(b).

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