

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO FLORIDA
RULE OF CRIMINAL PROCEDURE
3.191 AND FLORIDA RULE
OF APPELLATE PROCEDURE 9.140**

SC22-1123

COMMENT OF:

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Judicial Circuit of Florida, and Larry Basford, State Attorney for the Fourteenth Judicial Circuit, file these comments in response to the speedy trial rule proposals published in the *Florida Bar News*. The undersigned support¹ the published proposals.

Introduction

There is a belief among some commenters that the published proposals are a solution in search of a problem. The undersigned disagree. Florida law is replete with opinions where a defendant has been forever discharged from prosecution because of a violation of the speedy trial rule. These opinions do not even cover cases where the State was forced not to file any charge or was forced to offer a defendant a lenient sentence or was forced to go to trial when the State was not fully prepared, usually because of logistical witness problems. The existing rule creates unjust results in too many serious cases. These unjust results cannot be identified by merely reviewing speedy trial rule-related caselaw.

¹The undersigned do, however, suggest a few modest changes. The undersigned's proposals for rules 3.191 and 9.140 are located after the list of people who will be served with this comment via the portal.

Separation of powers/§ 918.015(2), Fla. Stat.

Florida speedy trial rule-related opinions² have long raised the issue of whether the rule creates a separation of powers problem. In response and in opposition to the instant proposals, some commenters contend no separation of powers problem exists because of § 918.015(2), Fla. Stat., which authorizes this Court to create procedures to guarantee a person's state constitutional and statutory rights to a speedy trial.

The undersigned urge this Court to revise rule 3.191 **regardless** of whether the speedy trial rule creates a separation of powers problem.³ If the Court were so inclined, it could satisfy § 918.015(2), Fla. Stat., by promulgating the following rule:

²For example, in *Genden v. Fuller*, 648 So. 2d 1183, 1186 (Fla. 1994), Justice Charles Wells wrote the speedy trial rule should not be applied so broadly that it eviscerates the statute of limitations set by the legislature and in *Brown v. State*, 715 So. 2d 241, 244 (Fla. 1998), he wrote the rule as interpreted by the Court provides a right, not a rule of procedure, and for this reason, is an unconstitutional invasion of legislative authority.

³The Court recently considered other proposals to revise the speedy trial rule. The proposals in those cases (SC19-1592 and SC20-1101), and the proposals in the instant case, are all preferable to the current speedy trial rule.

A defendant's right to a speedy trial as guaranteed by Article 1, Section 16(a) of the state constitution and § 918.015(1), Florida Statutes, shall be construed in conformity with the 6th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

Such a rule would pass constitutional and statutory muster because the procedures required to be created by § 918.015(2), Fla. Stat., would contain the analysis required by *Barker v. Wingo*, 407 U.S. 514 (1972). To determine whether a defendant had been deprived of his or her constitutional right to a speedy trial under *Barker v. Wingo*, judges must engage in a balancing test by assessing the length of the delay, the reason for the delay, whether and when the defendant asserted his or her speedy trial right, and whether the defendant was prejudiced by the delay.

Even if the Court were to reject a speedy trial rule directly anchored to the constitution, such a rule⁴ highlights that the

⁴If the Court promulgates a speedy trial rule tying the rule to the constitution, the Court could also consider putting more teeth into Florida Rule of General Practice and Judicial Administration 2.250(b), by requiring trial judges to explain in writing 1) why a case was not completed within six months after the time periods in rule 2.250(a)(1)(A); and 2) the trial judge's plan to get the case resolved. The reason for an extra six months is that trial judges should be

existence of § 918.015(2), Fla. Stat., does not get opponents of the published proposals very far. § 918.015(2), Fla. Stat., does not require a speedy trial rule to forever preclude prosecution *within months after arrest* when the statute of limitations allows charges to be filed *within years* after commission of the crime.

The undersigned recognize that always giving the State a recapture window and extending that recapture window from 15 days to 30 days does not substantially narrow the divergence between the procedural speedy trial rule and the substantive law. But prosecutors must be realistic and practical. As a practical matter, a speedy trial rule that always gives the State a 30-day recapture window would be sufficient to resolve a large percentage of criminal cases on the merits. However, the remaining and overwhelming concern for prosecutors are cases involving the death of a human being, which will be discussed in more detail below.

given some leeway before being required to write to the chief justice. Even if this idea is rejected, the undersigned highlight the speedy trial rule is not the sole vehicle for the Court to ensure the judicial system processes criminal cases efficiently.

The undersigned further highlight that the Court could satisfy § 918.015(2), Fla. Stat., by promulgating a speedy trial rule that always results in a dismissal for a violation of the rule, but without prejudice for the State to refile.

Alternatively, the Court could satisfy § 918.015(2), Fla. Stat., by promulgating a speedy trial rule that results in dismissals with or without prejudice. In making a with or a without prejudice determination, a judge could consider the seriousness of the charged crime(s), the facts and circumstances that led to the dismissal, and the impact that re-prosecution would have on the administration of justice. This weighing of factors occurs in the federal system. *See* 18 U.S.C.A. § 3162(a)(2).

If a case were dismissed without prejudice, the limitations on the State's ability to refile charges would be the statute of limitations, the due process clauses of the federal and state constitutions, and possibly the right to a speedy trial under the state constitution. Probably because rule 3.191 exists, there is no body of Florida case law addressing how prosecutorial delay could create a speedy trial violation under the state constitution or could prejudice

the defense resulting in a due process violation. Adopting the published proposal could, however, change that in the rare instances where the issue arises. For example, the Florida Bar's Public Interest Law Section comment refers to *United States v. MacDonald*, 456 U.S. 1 (1982), wherein the United States Supreme Court concluded that because the speedy trial clause was designed to protect against pretrial incarceration and anxiety, the right to a speedy trial no longer exists once the government, in good faith, drops the charges. The *MacDonald* opinion highlights the idea that undue delays after charges are dismissed can be scrutinized under due process clauses if the State refiles. Moreover, when interpreting the state constitutional right to a speedy trial, this Court could agree with the *MacDonald* dissenters who wrote that constitutional speedy trial rights are implicated when the government files charges, drops the case, and later reinitiates charges.

The Court should reject the notion that constitutional due process and speedy trial principles are an empty substitute for the current speedy trial rule. Moreover, our speedy trial rule should be designed primarily to guarantee a defendant's constitutional and

statutory speedy trial rights. Instead, our speedy trial jurisprudence deviates from the rule's primary purpose. Rule 3.191 has made the processing of criminal cases paramount. § 918.015(2), Fla. Stat. does not mention the efficient processing of criminal cases; it references only the right to a speedy trial in Article 1, Section 16(a) of the state constitution and § 918.015(1), Fla. Stat.

Proposed Rule 3.191(a)

Under the proposal, the speedy trial clock will continue to start upon arrest or the issuance of a notice to appear. The State will continue to have 90 days to bring the arrestee to trial for a misdemeanor and 175 days for a felony. However, if the State has not filed a formal charge or if trial is not commenced within these time frames, the arrestee would be required to file a notice of expiration of speedy trial time, which would trigger a recapture window. If the defendant were responsible for delaying the trial within the 90/175-day time frame or if the defendant filed a demand for speedy trial, the time periods in subdivision (a) would not apply.

The purpose of this proposal is to give the State - in almost all instances - a final opportunity to resolve the case on the merits if 1) the State did not file within 90/175 days of arrest or 2) the State had timely filed but failed to inform the arrestee about the formal charges. Any arrestee, who had not waived speedy, could file a notice of expiration after 90/175 days from arrest and could obtain a trial within 30 days. But an arrestee would have an obligation to assert his or her speedy trial rights. Such a rule would cure the *Born-Suniaga*⁵ problem and is consistent with the idea that the speedy trial rule is not self-executing; rather, the accused must take affirmative action to avail himself of the remedies available for the State's failure to comply with the requisite time limitations. *State v. Clifton*, 905 So. 2d 172 (Fla. 5th DCA 2005).

The majority of Criminal Procedure Rule Committee (“CPRC”) members commented that this proposal contradicts the Court’s

⁵In *Born-Suniaga v. State*, 256 So. 3d 783 (Fla. 2018), the Court held the defendant was entitled to discharge even though the state had filed a formal felony charge within 175 days of arrest because the defendant had not been notified of the felony charge within those 175 days.

efforts to make the litigation process more streamlined and fairer for *pro se* litigants. However, the criminal court system does not operate like the civil system. In the criminal arena, the Sixth Amendment guarantees indigent defendants a taxpayer-funded attorney. Unlike civil litigation, it is rare – maybe 1 out of every 100 cases - for a defendant to represent himself or herself in a criminal case. The Court should not create a speedy trial rule primarily for the convenience of a miniscule number of defendants.

Some commenters have raised concerns about the difficulties defense attorneys would face in cases where the State has not filed a formal charge within 90/175 days of arrest. In those instances, some commenters claim it would be ethically impossible, or at least difficult, to file a notice of expiration because the defense lawyer would have no idea of what charges might be filed.

The undersigned have a number of responses to that concern. First, the defense attorney would have the benefit of a probable cause affidavit or a notice to appear (and conversations with his or her client) to provide him or her with insight about what charges might conceivably be filed.

Second, in an overwhelming number of cases, the State wants the case to move far more quickly than the defense because justice delayed is justice denied. If the State has not filed a misdemeanor within three months of arrest or a felony within 175 days of arrest, the prosecutor usually has a serious charging problem. If the State has not timely filed (or if the State filed a “No Information”), the proposal gives the defense two options: 1) They can file a notice of expiration of speedy trial time to force the State to make a charging decision and bring the defendant to trial within a month; or 2) they can let sleeping dogs lie. Both options have benefits and costs. The decision of whether to file a notice of expiration in a case where the State has not filed within 90/175 days from arrest (or has filed a “No Information”), would be another issue for attorneys and their clients to consider, such as deciding whether to file a demand for speedy trial, deciding on a defense, deciding whether to call witnesses, deciding whether the client should testify, and deciding whether to plea or go to trial.

Third, it is likely that most defense attorneys will think it wiser to let sleeping dogs lie. But if not, the requirements to file a notice of

expiration of speedy trial time differ from the requirements to file a demand for speedy trial. A demand for speedy trial – which is covered in subdivisions (b) and (g) – binds the accused and requires a good faith desire for a speedy trial because the accused is available and fully prepared for trial. There are no such requirements in the proposed rule for the filing of a notice of expiration. In the circumstance when the defense files a notice of expiration because the State had not timely filed and then an unforeseeable charge is filed, the defense could request to withdraw its notice of expiration on the grounds that the defense was so surprised by the charges and the discovery that it could not be prepared for trial within the next 30 days and that to not allow withdrawal of the notice of expiration would amount to a denial of due process. In those cases, it is highly likely judges will allow withdrawal of the notice of expiration and will grant a continuance upon a minimal showing of good cause.

Fourth, a defense lawyer would not be deemed ineffective for filing or not filing a notice of expiration in cases where the State did not file a formal charge within 90/175 days of arrest or filed a “No

Information” if the defense lawyer considered the benefits and costs of filing/not filing a notice of expiration and made a reasonable decision under the circumstances.

Fifth, if the Court is persuaded by this concern, the entire proposal need not be abandoned. The Court could promulgate a speedy trial rule that mandates dismissals without prejudice – as opposed to permanent discharge – if the State does not file within 90/175 days from arrest. Alternatively, the Court could promulgate a rule that starts a speedy trial clock from when the State files a formal charging document, not from arrest.

The majority of CPRC members raised a hypothetical where an unrepresented defendant asked for more time to hire a lawyer at arraignment. The majority of the CPRC believe that circumstance should not be treated as the defendant being responsible for delaying the trial. The undersigned disagree. Asking for more time to hire a lawyer is the equivalent of asking for a continuance and should be viewed as a waiver of the time frames in subdivision (a). Any defense request to postpone a case, whatever called, constitutes a motion for a continuance waiving speedy trial rule rights.

Blackstock v. Newman, 461 So. 2d 1021, 1022 (Fla. 3d 1985). In such a circumstance, a defendant who either hired a lawyer, ended up with a public defender, or decided to represent himself or herself, can demand a speedy trial under subdivision (b).

Proposed rule 3.191(b)

For the most part, the proposal for subdivision (b) does not change existing law. The only substantive change is a requirement that a demand for speedy trial be provided to the assigned judge. This requirement makes sense to ensure that demands for speedy trial do not fall through the cracks. Thus, under the proposal - and under existing law - a defendant can demand a speedy trial if there is an extant charging document. *State v. Lazarre*, 906 So. 2d 314 (Fla. 4th DCA 2005) (the filing of a demand for speedy trial before a charging document is filed is a nullity).

Once a demand is filed, the judge must hold a calendar call within 5 days and must commence the trial within 45 days. If there is no commencement of trial within 50 days of the filing of a demand, the defendant may file a notice of expiration of speedy trial time, which triggers the recapture window.

Some commenters expressed an ethical concern for a judge who received a copy of a demand for a speedy trial and then contacted the state attorney to advise the State that it needed to set a calendar call. Such a scenario is not contemplated by the proposed rule. Subdivision (b)(1) requires the judge to hold a calendar call with notice to all parties.

The CPRC noted there is a difference between subdivisions (b) and (h) regarding the method of delivery of a demand for speedy trial and a notice of expiration to an assigned judge. The undersigned agree those two provisions should not differ. The discrepancy is corrected in the undersigned's proposal located at the end of this comment.

The CPRC also recognized a drafting error in the proposal for subdivision (b). The CPRC noted that a literal reading of proposed subdivision (b) would mean that once a case had been nolle prossed, a defendant could not subsequently demand a speedy trial if the State refiled. Of course, that scenario was not the intent of the drafters. The intent was to fix subdivision (b), which now refers only

to an information or indictment.⁶ The drafters of the proposal also wanted to retain the current law that allows a demand for speedy trial to be filed only if there is an active charging document. There is an easy fix. The undersigned suggest the main paragraph of subdivision (b) read as follows:

Except as otherwise provided by this rule, if there is an extant formal charging document, a defendant may demand a speedy trial by filing a separate pleading entitled “Demand for Speedy Trial,” providing a copy by electronic mail or hand-delivery, or by mail delivery for pro se defendants, to the assigned judge, and serving a copy on the prosecuting authority.

Proposed rule 3.191(d)

The proposal for subdivision (d) mimics a proposal from the CPRC filed in SC20-1101. The CPRC’s proposal was generated from a Court request to create an amendment to the speedy trial rule in accordance with *Davis v. State*, 286 So. 3d 170 (Fla. 2019). In *Davis*, the Court stated that a lengthy custodial interrogation did not constitute an arrest for purposes of the speedy trial rule. For

⁶Defendants can be prosecuted by charging documents other than indictments or informations. If interpreted strictly, current rule 3.191(b) would not allow a defendant charged by a notice to appear to demand a speedy trial.

purposes of the rule, the Court requires a formal arrest or notice to appear under which the person is held to answer specified charges in court. The undersigned believe the prior CPRC proposal achieved what the Court had requested.

The undersigned refer to “the prior CPRC proposal” because their comment mentions what the CPRC contends is a common scenario. In the CPRC’s common scenario, a defendant becomes aware of a misdemeanor that was filed “at large,” and the defendant’s lawyer files a written plea of not guilty, thereby waiving arraignment. According to the CPRC, the defendant may not have been served with the summons although the case proceeds as if the defendant had been served. The CPRC suggests, in that common circumstance, the speedy trial clock should begin upon the filing of the written plea of not guilty.

The speedy trial rule does not now address that circumstance and the undersigned are not aware of current problems. The undersigned are skeptical that scenario is a common occurrence. Nevertheless, the solution is not for the prior CPRC proposal to be modified. The solution is for the defense attorney in that

circumstance to have the summons served (or he/she can accept service for the client), so that a speedy trial clock starts ticking.

Proposed rule 3.191(e)

The proposal for subdivision (e) is based on what the Criminal Court Steering Committee (“CCSC”) filed in SC19-1592. As the CCSC explained, a prisoner in federal custody or in the custody of another state cannot now receive the benefit of our speedy trial rule. However, a person in Florida state custody can receive the benefit of the speedy trial rule, even if in custody in a different county than the county where a speedy trial is sought.

The CCSC was aware of situations where a person had filed a demand for speedy trial in county X, but was in custody on charges in county Y, and county Y would not release the defendant to county X because of county Y’s pending charges. The CCSC concluded that a state inmate, who had pending charges in two or more counties, should not receive a windfall via the speedy trial rule because of logistical difficulties. The CCSC proposed a rule amendment whereby a person in custody in county Y and facing charges in county Y, would not be entitled to the benefit of the

speedy trial rule in county X until that person is physically in county X and written notice of the person's return is filed with the court and served on the prosecuting attorney. However, if the person in county Y did not have charges pending in county Y, he or she would be entitled to the benefit of the speedy trial rule in county X. The changes proposed by the CCSC were designed to negate the result in cases such as *Mainwaring v. State*, 11 So. 3d 986 (Fla. 5th DCA 2009) (Indian River County declined to release defendant to Orange County where charges were also pending and where defendant had filed a notice of expiration. Court held defendant was not unavailable and was entitled to discharge).

The undersigned support this common-sense proposal. Our criminal justice system should give the State one fair opportunity to resolve the case on its merits.

Two lawyers (Wilson and Peterson) filed a similarly worded comment. They claim the proposal for subdivision (e) is unfair because a state inmate has no control over his or her transportation to another county. However, the same argument can be made for the

victim and the prosecutor, both of whom have no control over an out-of-county judge's transportation decision.

Wilson and Peterson also claim if the State "sees fit to place an individual's liberty in jeopardy," it should be ready to try the case in a short time. That argument ignores the reality that the State of Florida does not operate like the federal system where FBI agents work in the same Department of Justice as the federal prosecutors and the FBI do not arrest until the investigation has been completed. In the state system, the police are most often catching someone during the commission of the crime or in the escape from the scene and the police must immediately arrest for public safety reasons. Moreover, county sheriffs and municipal police officers are not employed by the State of Florida and state prosecutors have only limited control over law enforcement decisions.

The Criminal Law Section of the Florida Bar ("CLS") commented that there are practical problems with the proposal for subdivision (e) regarding the notice that must be given when an out-of-jurisdiction prisoner is returned to the jurisdiction of the court where a speedy trial is requested. However, this notice requirement

exists in the current rule and there does not appear to be any practical problems with the current subdivision (e). There is no reason to conclude the same notice requirement would suddenly present practical problems.

Some commenters raised a concern that the proposal creates a potential for abuse because executive branch officials could transport defendants back and forth between counties to thwart a defendant's speedy trial rights. First, the undersigned do not think that concern is realistic since there are security and cost issues for the transporting sheriffs. Second, under the proposal, once a defendant is located in a county where charges are pending and once written notice is given to the court and the State, the inmate can demand a speedy trial or file a notice of expiration and the speedy trial clock starts ticking. Proposed subdivision (e) should not be interpreted in a way that would toll the running of speedy trial time just because the inmate is transferred out of county after the inmate had legitimately filed a demand for speedy trial or a notice of expiration.

Proposed rules 3.191(f) and (g)

These two proposals merely clean up language and do not substantively change the existing rule. The CPRC commented the use of “shall” in the second sentence of subdivision (g) is problematic in light of AOSC22-78. The CPRC probably meant to refer to the third sentence because the “shall” in the second sentence is stricken-through. In the undersigned’s proposal, “shall” is replaced with “must” in the third sentence.

Proposed rule 3.191(h)

The main substantive change to subdivision (h) is to require a notice of expiration of speedy trial time to be provided to the assigned judge. This idea makes sense for the same reason that a demand for speedy trial should be provided to the assigned judge. The requirement of notice of expiration to the judge makes it less likely that the notice will fall through the cracks, especially a notice of expiration from a *pro se* defendant. The undersigned do not think this scheme creates an ethical problem for the judge. Under current rule 3.191(p)(3), the filing of a notice of expiration requires the court to hold a hearing on the notice within 5 days of its filing. The

undersigned are not aware that anyone has suggested current rule 3.191(p)(3) creates an ethical dilemma for a judge who sets a hearing on his or her own. It is difficult to see how requiring the defense to provide a copy of the notice of the expiration to the assigned judge would alter the current ethical situation.

The proposal also makes explicit what is implicit in the current rule, which is that if the State was not served with the notice of expiration, the notice may be stricken upon motion. Even if that remedy is not implicit in the current rule, such a proposal makes sense because it would not be fair to dismiss a criminal case if the State had never been served with a notice of expiration of speedy trial time.

Proposed rule (i)

The proposal for subdivision (i) is merely clean-up and streamlining, both of which undersigned supports.

Proposed rule (j)

The proposal for subdivision (j) deletes language related to a motion for discharge, which would no longer be the vehicle for a dismissal. The provisions in existing rule 3.191(j) would become

unnecessary because those concepts would be covered by proposed subdivision 3.191(p)(3).

The deleted language in rule 3.191(j) is replaced with language that allows the State to amend a pending charging document even if additional crimes are added after the 90/175-day time periods in subdivision (a). Under the current law, the State is precluded from adding any new charge if 90/175 days from arrest have run without the defense waiving speedy. Amendments should be allowed because the State can amend at any time – even during the trial - unless the defendant is prejudiced by the amendment. Nothing in the language for proposed subdivision (j) would alter settled law that enables a judge to disallow an amendment when the judge concludes the defendant’s rights have been prejudiced. *Thach v. State*, 342 So. 3d 620, 625 (Fla. 2022) (Where, under the facts and circumstances of the individual case, an amendment prejudices a defendant's substantial rights, that amendment would be improper.); *State v. Anderson*, 537 So. 2d 1373, 1375 (Fla. 1989) (holding that “the state may substantively amend an information during trial, even over the

objection of the defendant, unless there is a showing of prejudice to the substantial rights of the defendant.”).

The CLS commented that the State will use this provision to amend its charging document to thwart a defendant’s ability to obtain a speedy trial. But given Florida’s broad discovery provisions, it would be unusual for the defense not to have a good idea of what possible charges could be added and how to defend those charges. And as previously stated, any amendment that prejudices the defense could be disallowed.

Proposed rule 3.191(k)

The proposal for subdivision (k) deletes language that is then added in proposed rule 3.191(p)(3). Because the issue of unavailability will be litigated at a hearing on a motion to dismiss, this topic is best located in subdivision (p). Additionally, the current subdivision (k) states that the accused must establish availability by “competent proof.” That phrase gives no guidance to trial judges. The proposal adds a burden of persuasion (preponderance of the evidence) which will guide judges in making a correct ruling.

Proposed rule 3.191(l)

Much of the proposal cleans-up the language of the “exceptional circumstances” subdivision to make the subdivision easier to understand. The main change is to add a “(l)(7)” that allows a judge to grant additional time to the State to file charges upon a showing that it has a good faith belief additional evidence is forthcoming that would allow the State to file charges. Trial judges do not like cases languishing on their dockets and they are not likely to give the State an unreasonable amount of extra time. Moreover, this proposed provision is not likely to be a common circumstance. Moreover, other provisions of subdivision (l) arguably could be used by the State to ask for an extension of time for exceptional circumstances. Thus, the proposal for (l)(7) is not likely to have much of a practical effect, especially since rule 3.134 requires defendants in custody to be released within 33 days of arrest if no formal charges have been filed. Last, if the proposed (l)(7) becomes a highly litigated issue because the language in (l)(7) is too ambiguous and it turns out the juice is not worth the squeeze, the Court can correct the problem in short order.

Proposed rule 3.191(m)

The proposal for subdivision (m) does not change existing law. The proposal simply makes the rule easier to understand.

Proposed rule 3.191(n)

The proposal for subdivision (n) does not alter existing law for dismissals with prejudice. However, the proposal introduces the concept accepted in federal law of dismissals without prejudice. As will be seen in subdivision (p), the published proposal limits dismissals without prejudice to cases involving murder or any manslaughter. The undersigned suggest a tweak to that language because of the possibility that the crime of arrest involves some other type of homicide, such as vehicular homicide (§ 782.071, Fla. Stat.) The undersigned’s suggestion –to be discussed below – is to change “murder or any manslaughter” to “any felony resulting in the death of a human being.”

Proposed subdivision (n) allows for dismissals without prejudice but there could be bars to refileing such as the statute of limitations, constitutional speedy trial, and due process violations. The published proposal refers only to the bars of the statute of

limitations and constitutional speedy. As a result, the undersigned have inserted a due process violation into the last sentence as another possible bar to refiling.

Proposed rule 3.191(o)

Under existing case, a nolle prosequi does not stop the running of the speedy trial clock. *State v. Agee*, 622 So. 2d 473 (Fla. 1993). The proposal retains that concept but contains a safeguard to ensure the State always gets a recapture window. If the nolle prosequi is filed before the recapture window, the proposed rule requires the defendant to file a notice of expiration when a time period for trial expires, which gives the State one last chance to try the case. If the nolle prosequi is filed in the recapture window, the proposal requires the defendant to file a motion to dismiss after expiration of the recapture window.

Some commenters wrote that the defense cannot file a notice of expiration or a motion to dismiss after entry of a nolle prosequi because such a filing would be a nullity. The proposed rule solves that problem by adding a provision that requires clerks to accept those pleadings and treat them as filed in an active case. Such a

scheme is permissible pursuant to *Reed v. State*, 649 So. 2d 227 (Fla. 1995) (holding that the fact there were no charges pending against the defendant at the time he filed a motion for discharge did not render his motion for discharge a nullity).

Some commenters believe it is unfair and too burdensome to require the defense to file a notice of expiration after a nolle prosequi. However, in the majority of cases, the defense waives speedy and does not demand a speedy trial. Thus, in the usual circumstance, no speedy time period expires, which means the defendant and the court system will not be overburdened because no notice of expiration can be filed, which is exactly what occurs under the existing rule. Furthermore, it is predictable that the usual defense strategy will be to let sleeping dogs lie, which means the court system will not be overburdened. Last, requiring the defense to file a notice of expiration after a nolle prosequi is the best way to guarantee the State always gets a recapture window.⁷

⁷The majority of CPRC members commented that notices of expiration should not be required when a nolle prosequi was filed or announced in a misdemeanor case. The undersigned disagree because the rule should always give the State a recapture window.

The CPRC suggested that subdivision (o) be modified to allow the State to file a nolle prosequi with prejudice thereby waiving any recapture period. The undersigned agree with that common-sense proposal as it will help reduce the complained-about burden on the defense. But any State waiver of the recapture period, simultaneous with or after entry of a nolle prosequi, should be valid only if the State waives in writing and files the waiver. Thus, the undersigned's proposal includes the following new sentence:

With or after the entry of a nolle prosequi, the state may waive its right to the recapture period in subdivision (p), but any waiver of the recapture period is not valid unless the state filed the waiver with the clerk.

The CPRC commented that the proposal should not use the phrase "filed a nolle prosequi" because prosecutors sometimes verbally announce a nol pros on the record without filing any documentation. The undersigned suggest using the phrase "filed or announced a nolle prosequi on the record." Also, the undersigned have replaced "shall" with "must" in the second to last sentence of subdivision (o).

Proposed rule 3.191(p)

There are two major proposed changes to subdivision (p).

First, the recapture window is extended to 30 days. This extension from 15 days to 30 days is important because of the State's heavy caseloads and shortage of prosecutors. Adding an extra 15 days for the recapture window will give the State adequate time for a final opportunity to prosecute an accused in most cases. The undersigned highlight that the CLS support the idea of a 30-day recapture window. Also, contrary to the opinion of a majority of CPRC members, the 30-day recapture window should apply to misdemeanor cases given the large volume of cases in county court.

Second, under the proposal, a violation of the speedy trial rule would result in a dismissal without prejudice for cases involving murder or any manslaughter. Violations of the speedy trial rule for all other crimes would result in a dismissal with prejudice. Some have commented that carving out an exception for murder or manslaughter as being the only cases that could result in a dismissal without prejudice creates a slippery slope and will lead to other crimes later added to the list. Although that is a possibility, it

is not likely because cases where someone died is a clear line of demarcation from non-homicide cases. Attempted murder would not qualify because “murder or any manslaughter” means only murder or any manslaughter, which is why the undersigned recommends “any felony resulting in the death of a human being.”

Still, the Court should not be satisfied with a procedural speedy trial rule that results in a permanent dismissal of criminal charges without having a judge - at a minimum - consider the seriousness of the crime(s), the facts and circumstances that led to the dismissal, and the impact that re-prosecution would have on the administration of justice. In a more perfect world, the Florida speedy trial rule would borrow from the federal law in this area.

If adopting a federal speedy trial concept is incompatible with the Court’s goal of finding a Solomonic solution, the undersigned request this Court to recognize that limiting dismissals without prejudice to murder or any manslaughter is a bit too restrictive. We often hear the phrase “death is different” when someone is justifying a departure from standard law in a death penalty case. But what is sauce for the goose is sauce for the gander. Death is also different

for victims and their loved ones. Dismissals without prejudice for a speedy trial rule violation should be for **any felony that resulted in the death of a human being**. The undersigned's proposal reflects that change.

Some may argue against the idea of dismissals without prejudice in homicide cases because an arrestee would have a cloud hanging over his or her head for a long time. In response, the undersigned note the legislature has determined there is no statute of limitations for a felony resulting in death. Additionally, if the State delays too long, the defendant can argue that his state or federal constitutional speedy trial or due process rights were violated.

Frankly, the undersigned do not understand comments about a person in custody who is facing a murder or manslaughter charge. Once a trial judge grants a dismissal, the arrestee would be released from jail. The undersigned do not agree that the concept of dismissals without prejudice will have a substantial effect on plea negotiations. If the State allows a speedy trial time period to expire, the State is rolling the dice that the case would get stronger with age, which is usually not the case. In the meantime, once a judge

grants a dismissal, an incarcerated defendant would be released and a non-incarcerated defendant would have all conditions of bond lifted. In sum, the speedy trial rule should not result in a permanent discharge on procedural grounds, but especially for crimes involving the death of a human being.

Proposed rule 9.140

The proposal gives the defendant the right to appeal an order granting a dismissal without prejudice. The proposal for rule 9.140 is appropriate, subject to the changes proposed by the Appellate Court Rules Committee (“ACRC”). The undersigned’s proposal reflects the ACRC suggestions.

Other comments

Some commented the proposal will prevent petitions to seal or expunge. The undersigned disagree. Under §§ 943.0585(1)(b) and 943.059, Fla. Stats., a person is eligible to petition a court to expunge or seal a criminal history record in a case that was dismissed or a nolle prosequi was entered.

The CLS commented (on page 19) that an indigent would not be able to secure a dismissal after a nolle prosequi or a “No

Information” because he or she would be without counsel. Yet, on page 17, the same comment stated “...all defense attorneys will now need to file and calendar at least two additional hearings to ensure they are doing their due diligence.” There is no reason why assistant public defenders could not perform the same due diligence as all defense attorneys.

The Florida Bar Public Interest Law section commented on various possibilities if the case involved both a murder and non-homicide counts. The published proposal seems clear: If the case involved an arrest or filed charges of a murder or any manslaughter, a speedy trial rule violation would result in a dismissal without prejudice for any crime based on the same criminal episode as the murder or manslaughter. Thus, the State would be able to prosecute for any non-homicide crime if it occurred during the homicidal criminal episode and if there were no bar due to the statute of limitations or the constitutions.

That same comment refers to the dual purpose of the speedy trial rule. The undersigned agree the rule not only guarantees the defendant’s right to speedy trial but also helps the court system run

efficiently. But the constitutional and statutory right to a speedy trial are the primary reason for the rule. Creating a limited carve out with dismissals without prejudice in homicide cases is not unconstitutional and is not going to wreak havoc with the entire criminal justice system.

Each State Attorney can point to examples of miscarriages of justice caused by the existing speedy trial rule. For instance, undersigned from the 14th Circuit provides the example of a Bay County murder allegedly ordered by a prison inmate. An arrest was made against the advice of the State Attorney's Office and the additional evidence necessary for prosecution could not be developed within the speedy trial period. Approximately three years later, investigators were able to discover additional witnesses and admissible evidence against the suspect, however no prosecution could be brought because speedy trial had run.

The undersigned from the 20th Circuit provides the example where a five-year-old was killed in a drive-by shooting. An arrest was made and a formal charge was filed based on eyewitness testimony. The eyewitness later recanted. The State was forced to file a nolle

prosequi and speedy trial time ran, foreclosing the State from re-filing when more evidence was developed, depriving the victim's family and the citizens of Florida justice.

Another example comes from the 2nd Circuit in which a serial armed robber was arrested in Gadsden County for an armed robbery. While in the Gadsden jail, he was arrested on three Leon County warrants for armed robberies. However, Leon County was not alerted the warrants had been served, the Leon State Attorney's Office was not notified, and the cases were never set on a docket. Hence, speedy trial time ran while the arrestee was awaiting trial in Gadsden County, barring prosecution on the three Leon County robberies. He is now a suspect in a mass shooting and was seen with an assault rifle shooting in a parking lot a few weeks ago.

Opponents to the proposed amendments have described them as a "safety net for State Attorney's Offices" instead of acknowledging that Florida's speedy trial rule was never intended to be a sword to avoid determining a case on its merits or to allow a guilty person to escape justice. As Judge Cope aptly wrote in his special concurrence, "The purpose of the speedy trial rule is to

assure a speedy trial, not a speedy discharge.” *State v. Thomas*, 659 So. 2d. 1322, 1324 (Fla. 3d DCA 1995). The proposed amendments continue to provide for the efficient administration of justice and the proposals are still extremely defense-friendly compared to other states.⁸

⁸A significant minority of CPRC members recognized that one option would be for the speedy trial clock to begin from the day the charging document is filed rather than arrest. This is the approach taken by many other states. Colo. Rev. Stat. Ann. § 18-1-405 (6 months from entry of plea); Kan. Stat. Ann. § 22-3402 (180 days if on bail, 90 days if in custody, both from arraignment); Miss. Code Ann. § 99-17-1 (270 days from arraignment); Nev. Rev. Stat. § 178.556 (60 days from arraignment); N.M.R. 6-506 (182 days after arraignment or the waiver of arraignment); Wash. Sup. Ct. Crim. R. 3.3 (90-days if not in custody, 60 days otherwise, both from arraignment); Wyo. R. Crim. P. 48 (120 days from arraignment).

The significant minority of CPRC members also recognized that another option would be for the Court’s rule to provide for a speedy trial only on demand.

Last, undersigned note that Tennessee Rule of Criminal Procedure 48(b) preserves the accused's right to a speedy trial by providing that the trial court may dismiss an indictment, presentment, information, or complaint if “unnecessary delay” occurs in bringing a defendant to trial. Similarly, Delaware Super. Ct. Crim. R. 48(b) states: If there is “unnecessary delay” in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer in Superior Court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint.

Conclusion

The undersigned urge the Court to adopt the proposals with modest changes. Whenever there is a change in court rules, there are likely to be at least some unintended consequences. Given the importance of the speedy trial rule, the undersigned suggest that shortly after issuing its opinion, the Court appoint a workgroup consisting of judges, prosecutors, defense attorneys, - and perhaps one recently retired justice - to monitor how the new rule is working in practice and to recommend changes if necessary. The workgroup could have an expiration date of five years from the issuance of the opinion. That way, if the new speedy trial rule creates unintended problems, the Court can easily identify and fix them. If the unintended consequences prove insurmountable, the Court could always return to the existing rule or something close to the existing rule. In sum, the proposals are a vast improvement from the current speedy trial rule. The Court should give them a chance.

Respectfully submitted on December 9, 2022.

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CERTIFICATION OF COMPLIANCE

I certify that these comments were prepared in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of these comments have been furnished by e-mail through the portal to the people listed below, this 9th day of December, 2022.

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We suggest the Court adopt the following rules, which have slightly modified the published proposals in rule 3.191(b), (g), (n), (o) and (p), and rule 9.140. The Court Commentary has also been tweaked to conform to the ideas contained in this comment.

RULE 3.191. SPEEDY TRIAL FOR THE ACCUSED

(a) Speedy Trial without Demand. Except as otherwise provided by this rule, and subject to the limitations imposed under subdivisions (e) and (f), every person charged with a crime ~~shall~~must be brought to trial within 90 days of arrest if the crime charged is a misdemeanor, or within 175 days of arrest if the crime charged is a felony. If a formal charge has not been filed or if trial is not commenced within these time periods, the defendant shall be entitled to the appropriate remedy as set forth in subdivision (p) the state is entitled to the recapture period in subdivision (p) once the defendant files a notice of expiration of speedy trial time in accordance with subdivision (h). ~~The time periods established by this subdivision shall commence when the person is taken into custody as defined under subdivision (d). A person charged with a crime is entitled to the benefits of this rule whether the person is in custody in a jail or correctional institution of this state or a political subdivision thereof or is at liberty on bail or recognizance or other pretrial release condition. This subdivision shall cease to~~does not apply whenever a person if the defendant files a valid demand for speedy trial under subdivision (b) or is responsible for delaying the trial within the 90-day or 175-day time periods.

(b) Speedy Trial upon Demand. Except as otherwise provided by this rule, and subject to the limitations imposed under subdivisions (e) and (g), every person charged with a crime by ~~indictment or information shall have the right to~~if there is an extant formal charging document, a defendant may demand a speedy trial within 60 days, by filing with the court a separate pleading entitled "Demand for Speedy Trial," providing a copy by electronic mail or

hand-delivery, or by mail delivery for pro se defendants, to the assigned judge, and serving a copy on the prosecuting authority.

(1) No later than 5 days from the filing of a demand for speedy trial, the court ~~shall~~must 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~~must 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) [No changes]

(4) ~~If the defendant has not been brought to trial~~ is not commenced within 50 days of the filing of the demand, the defendant ~~shall have the right to the appropriate remedy as set forth in subdivision (p)~~ may file a notice of expiration of speedy trial time in accordance with subdivision (h) which entitles the state to the recapture period in subdivision (p).

(c) [No changes]

(d) Custody. ~~For purposes of this rule, a person is taken into custody:~~

~~(1) when the person is arrested as a result of the conduct or criminal episode that gave rise to the crime charged; or~~

~~(2) when the person is served with a notice to appear in lieu of physical arrest.~~ **Arrest.** For purposes of this rule, arrest means:

(1) when a person is taken into custody as a result of the conduct or criminal episode that gave rise to the crime charged, and for the purpose of being held to answer in court from criminal charges arising from that conduct or criminal episode; or

(2) when, in lieu of being taken into custody, the person is served with a notice to appear or summons that requires the defendant to appear in court at a specified date and time.

(e) Prisoners outside Jurisdiction. A person who is in federal custody, or incarcerated in a jail or correctional institution outside the jurisdiction of this state or a subdivision thereof, or in custody in another county in Florida based on actively pending charges in that other county, and who is charged with a crime by indictment or information issued or filed under the laws of this state, is not entitled to the benefit of this rule until:

(1) that person returns or is returned to the jurisdiction of the court county within which the Florida charge is pending; and

(2) and until written notice of the person's return is filed with the court and served on the ~~prosecutor~~ prosecuting authority.

For these persons, the time period under subdivision (a) commences on the date the last act required under this subdivision occurs. ~~For these persons and~~ the time period under subdivision (b) commences when the demand is filed ~~so long as~~ if the acts required under this subdivision occur before the filing of the demand. If the acts required under this subdivision do not precede the filing of the demand, the demand is invalid and ~~shall~~ must be stricken upon motion of the prosecuting attorney. ~~Nothing in this rule shall affect a prisoner's right to speedy trial under law.~~

(f) Consolidation of Felony and Misdemeanor. When a felony and a misdemeanor are consolidated for disposition in circuit court, the misdemeanor ~~shall be~~ is governed by the ~~same~~ time period applicable to the felony.

(g) Demand for Speedy Trial; Accused Is Bound. A demand for speedy trial binds the accused ~~and the state.~~ No demand for speedy trial ~~shall~~ may not be filed or served unless the

accused has a bona fide desire to obtain a trial sooner than otherwise might be provided. A demand for speedy trial ~~shall~~must be considered a pleading that the accused ~~is available for trial~~, has diligently investigated the case, and is available and fully prepared ~~or will be prepared~~ for trial within 5 days. A demand for speedy trial filed by an accused who has not diligently investigated the case or who is not timely prepared for trial ~~shall~~must be stricken as invalid on motion of the prosecuting attorney. A demand for speedy trial may not be withdrawn by the accused except on order of the court, with consent of the state or on good cause shown. Good cause for continuances or delay on behalf of the accused thereafter ~~shall~~do not include non-readiness for trial, except as to matters that may arise after the demand for speedy trial ~~is~~are filed and that reasonably could not have been anticipated by the accused or counsel for the accused. A person who has demanded speedy trial, who thereafter is not prepared for trial, is not entitled to continuance or delay except as provided in this rule.

(h) Notice of Expiration of Time for Speedy Trial; When Timely; Service. A notice of expiration of speedy trial time ~~shall~~be timely if filed ~~and served~~ after the expiration of the periods of time for trial provided in this rule. A notice of expiration of speedy trial time must be served on the prosecuting authority with a copy provided by electronic mail or hand-delivery, or by mail delivery for pro se defendants, to the assigned judge. ~~However, a~~A notice of expiration of speedy trial time filed before expiration of the period of time for trial or that was not served on the prosecuting authority is invalid and ~~shall~~must be stricken on motion of the prosecuting attorney.

(i) When Time May Be Extended. The periods of time established by this rule may be extended, provided the period of time sought to be extended has not expired at the time the extension was procured. An extension may be procured by:

(1)-(3) [No changes]

(4) written or recorded order of the court for a period of reasonable and necessary delay resulting from proceedings including but not limited to an examination and hearing to determine the mental competency or physical ability of the defendant to stand trial, for hearings on pretrial motions, for appeals by the state, for DNA testing ordered on the defendant's behalf upon defendant's motion specifying the physical evidence to be tested pursuant to section 925.12(2), Florida Statutes, and for trial of other pending criminal charges against the accused; or

(5) administrative order issued by the chief justice, under Florida Rule of General Practice and Judicial Administration 2.205(a)(2)(B)(iv) or (v), ~~suspending the speedy trial procedures as stated therein.~~

(j) ~~Delay and Continuances; Effect on Motion.~~ ~~If trial of the accused does not commence within the periods of time established by this rule, a pending motion for discharge shall be granted by the court unless it is shown that:~~

~~(1) a time extension has been ordered under subdivision (i) and that extension has not expired;~~

~~(2) the failure to hold trial is attributable to the accused, a codefendant in the same trial, or their counsel;~~

~~(3) the accused was unavailable for trial under subdivision (k); or~~

~~(4) the demand referred to in subdivision (g) is invalid~~

~~If the court finds that discharge is not appropriate for reasons under subdivisions (j)(2), (j)(3), or (j)(4), the pending motion for discharge shall be denied, provided, however, that trial shall be scheduled and commence within 90 days of a written or recorded order of denial.~~**Amendments.** No provision of this rule prohibits an amendment to a pending charging document prior to a dismissal granted under this rule. An amendment may include the addition of

one or more counts, even if those counts were added after the expiration of the time periods in subdivision (a) or during the time periods in subdivisions (b), (m), or (p).

(k) AUnavailability for Trial. A person is unavailable for trial if the person or the person's counsel fails to attend a proceeding at which either's presence is required by these rules, or the person or counsel is not ready for trial on the date trial is scheduled. ~~A person who has not been available for trial during the term provided for in this rule is not entitled to be discharged. No presumption of nonavailability attaches, but if the state objects to discharge and presents any evidence tending to show nonavailability, the accused must establish, by competent proof, availability during the term.~~

(l) Exceptional Circumstances. As permitted by ~~subdivision (i) of this rule,~~ the court may order an extension of any of the time periods provided under this rule when exceptional circumstances are shown to exist. Exceptional circumstances may not include general congestion of the court's docket, lack of diligent preparation, failure to obtain available witnesses, or other avoidable or foreseeable delays. Exceptional circumstances are those that, as a matter of substantial justice to the accused or the state or both, require an order by the court. These circumstances include but are not limited to:

(1) [No changes]

(2) a showing by the state that the case is so unusual and/or so complex, ~~because of the number of defendants or the nature of the prosecution or otherwise,~~ that it is unreasonable to expect adequate investigation or preparation within the periods of time established by this rule;

(3)-(6) [No changes]

(7) a showing by the state that it has a good faith belief additional evidence is forthcoming that would allow the state to file charges.

(m) Effect of Mistrial; Appeal; Order of New Trial. A person who is to be tried again or whose trial has been delayed by an appeal by the state or the defendant ~~shall~~must be brought to trial within 90 days from the date of declaration of a mistrial by the trial court, the date of an order by the trial court granting a new trial, the date of an order by the trial court granting a motion in arrest of judgment, or the date of receipt by the trial court of a mandate, order, or notice of whatever form from a reviewing court that makes possible a new trial for the defendant, whichever is last in time. If a defendant is not brought to trial within the prescribed time periods, ~~the defendant shall be entitled to the appropriate remedy as set forth in subdivision (p)~~may file a notice of expiration of speedy trial time in accordance with subdivision (h) which entitles the state to the recapture period in subdivision (p).

(n) Discharge from Crime; Dismissal With and Without Prejudice; Effect. ~~Discharge~~A dismissal with prejudice from a crime under subdivision (p)(4) this rule shall operate to bars prosecution of the crime charged and of all other crimes on which trial has not commenced nor conviction obtained nor adjudication withheld and that were or might have been charged as a result of the same conduct or criminal episode as a lesser degree or lesser included offense. Absent a bar such as the statute of limitations or a constitutional speedy trial or due process violation, a dismissal without prejudice under subdivision (p)(4) does not bar later prosecution for any crime that was charged or that might have been charged as a result of the same conduct or criminal episode in the case dismissed.

(o) Nolle Prosequi; Effect. ~~The intent and effect of this rule shall not be avoided by the state entering a nolle prosequi to a crime charged and by prosecuting a new crime grounded on the same conduct or criminal episode or otherwise by prosecuting new and different charges based on the same conduct or criminal~~

~~episode, whether or not the pending charge is suspended, continued, or is the subject of entry of a nolle prosequi. If the state filed or announced a nolle prosequi on the record before the start of the recapture period in subdivision (p), a defendant who seeks an order of dismissal under this rule must first file a notice of expiration of speedy trial time in accordance with subdivision (h) and seek the remedy provided in subdivision (p)(2). If the state filed or announced a nolle prosequi on the record after the start of the recapture period, a defendant who seeks an order of dismissal under this rule must file a motion to dismiss after expiration of the recapture period, unless the state agreed to an order of dismissal before the recapture period expired. The clerk must accept and treat such pleadings as filed in an active case. With or after the entry of a nolle prosequi, the state may waive its right to the recapture period in subdivision (p), but any waiver of the recapture period is not valid unless the state filed the waiver with the clerk. This subdivision does not authorize the defendant to any remedy other than the remedy in subdivision (p).~~

~~(p) Remedy for Failure to Try Defendant within the Specified Time; Recapture Window Period After Notice of Expiration Filed; Motion to Dismiss; Remedy for Failure to Commence Trial Within Recapture Window Period.~~

~~(1) No remedy shall be granted to any defendant under this rule until the court has made the required inquiry under subdivision (j).~~

~~(2) At any time after the expiration of the prescribed time period, the defendant may file a separate pleading entitled “Notice of Expiration of Speedy Trial Time,” and serve a copy on the prosecuting authority.~~

~~(3) No later than 5 days from the date of the filing of a notice of expiration of speedy trial time, the court shall must hold a hearing on the notice and set the trial no later than 30 days from the date of the hearing unless the court finds that one of the~~

reasons set forth in subdivision (j) exists, shall order that the defendant be brought to trial within 10 days~~strikes the notice or the prosecuting authority and the defendant stipulate otherwise and the court agrees to the stipulation. The court must consider the availability of the witnesses and the attorneys when determining the date for commencement of trial.~~

(2) A defendant not brought to trial within the 1030-day period in subdivision (p)(1) through no fault of the defendant, on motion of the defendant or the court, shall be forever discharged from the crime~~may file a motion to dismiss. The motion to dismiss must be served on the prosecuting authority the same day the motion is filed. The state must file a response to the defendant's motion within 5 days. Absent a stipulation, the court must hold a hearing on the defendant's motion within 10 days of the state's response.~~

(3) A motion to dismiss filed pursuant to subdivision (p)(2) must be granted unless:

(A) the period of time for commencement of trial, including any extension of time granted pursuant to subsection (l), did not expire;

(B) the failure to hold trial was attributable to the accused, a codefendant in the same trial, or their counsel;

(C) the accused was unavailable for trial under subdivision (k). If the state presents evidence showing the defendant's nonavailability, the defendant must prove availability by a preponderance of the evidence; or

(D) the notice of expiration of speedy trial time was invalid.

(4) If the defendant had been arrested for or charged with any felony that resulted in the death of a human being, an order of dismissal for failure to commence trial within the recapture

period for any crime based on the same conduct or criminal episode must be without prejudice. All other orders of dismissal issued pursuant to subdivision (p) must be with prejudice.

Committee Notes

[NO CHANGE]

Court Commentary

2023 Amendment. The amendments were intended to always give the state an opportunity to bring an accused to trial during a recapture period. The amendments also provide for a dismissal of the case without prejudice if the defendant was not brought to trial within a 30-day recapture period in the circumstance where a defendant was arrested for or charged with any felony resulting in the death of a human being.

(a) The amendment required a defendant who seeks a dismissal to file a notice of expiration of speedy trial time if the state did not file a formal charging document 90 days (misdemeanor) or 175 days (felony) after arrest. Instead of automatic discharge, as discussed in *State v. Williams*, 791 So. 2d 1088 (Fla. 2001), defendants must file a notice of expiration which provides the state with a recapture period. Also, if the state failed to notify a defendant within 90 or 175 days of arrest that charges had been filed, such as what had occurred in *Born-Suniaga v. State*, 256 So. 3d 783 (Fla. 2018), the amendment required the defendant to file a notice of expiration, which provides the state with a recapture period. “Misdemeanor” as used in this rule is intended to include traffic and ordinance violations that are prosecuted criminally in county court.

(b) The amendment corrected a technical error by allowing defendants who are charged by a document other than an indictment or information to file a demand for speedy trial. Also, the amendment required a copy of a demand for speedy trial to be provided to the assigned judge.

(d) The amendment changed the heading of the subdivision from “custody” to “arrest” and defined “arrest” consistent with *Davis v. State*, 286 So. 3d 170 (Fla. 2019).

(e) The amendment limited certain prisoners from asserting rule-based speedy trial rights when they were not readily available for trial because they were located outside of the jurisdiction where a judge could provide them a speedy trial.

(h) The amendment required a notice of expiration to be served on the state with a copy provided to the assigned judge.

(j) The amendment deleted reasons for a motion for discharge to be denied and relocated those reasons to subdivision (p). Instead, subdivision (j) contained language allowing the state to amend a pending charging document at any time before a motion to dismiss was granted. See *State v. Anderson*, 537 So. 2d 1373, 1375 (Fla. 1989) (holding that “the state may substantively amend an information during trial, even over the objection of the defendant, unless there is a showing of prejudice to the substantial rights of the defendant.”).

(k) The amendment relocated the language about a defendant proving availability to subdivision (p).

(l) A new exception was added to cover the circumstance where the state had a good-faith belief that additional evidence was forthcoming that would allow the state to file charges.

(m) The amendment made it explicit that if trial did not commence within 90 days of the defendant obtaining a new trial, the defendant had to file a notice of expiration of speedy trial time, which would trigger the state’s recapture period.

(n) The amendment made it explicit that not bringing the defendant to trial within the recapture period would lead to a dismissal upon motion. However, the court's dismissal could be with or without prejudice for the state to file or refile depending on whether the defendant had been arrested for or charged with a felony that resulted in the death of a human being.

(o) The amendment explained the steps to be taken by a defendant who seeks dismissal under this rule in cases where the state filed a nolle prosequi. Subdivision (o), in combination with the amendment to subdivision (p), made it clear that if the state filed a nolle prosequi before the recapture period began, a defendant who seeks an order of dismissal under the rule must take affirmative action by filing a notice of expiration of speedy trial time, thereby giving the state an opportunity to refile charges before the recapture period expired. If the nolle prosequi was filed during the recapture period, a defendant who seeks an order of dismissal under this rule must file a motion to dismiss after expiration of the recapture period, unless the state agreed to the dismissal before the recapture period expired. The direction to the clerk to accept certain pleadings after the filing of a nolle prosequi is based on *Reed v. State*, 649 So. 2d 227 (Fla. 1995).

(p) The amendment changed the length of the recapture period from 10 days to 30 days. It also allowed a defendant to move for dismissal if not brought to trial during the recapture period. The amendment required the judge to dismiss the case without prejudice for the state to file or refile in the limited circumstance where the defendant had been arrested for or charged with any felony that resulted in the death of a human being. Otherwise, the dismissal of the case is required to be with prejudice.

RULE 9.140. APPEAL PROCEEDINGS IN CRIMINAL CASES

(a) Applicability. [NO CHANGE]

(b) Appeals by Defendant.

(1) *Appeals Permitted.* A defendant may appeal:

(A)-(F) [NO CHANGE]

(G) ~~as otherwise provided by general law~~ an order granting a dismissal without prejudice under Florida Rule of Criminal Procedure 3.191(p);

(H) as otherwise provided by general law.

(2) *Guilty or Nolo Contendere Pleas.* [NO CHANGE]

(3) *Commencement.* The defendant ~~shall~~must file the notice prescribed by rule 9.110(d) with the clerk of the lower tribunal at any time between rendition of a final judgment and 30 days following rendition of a written order imposing sentence or within 30 days of rendition of a written order granting a dismissal without prejudice under Florida Rule of Criminal Procedure 3.191(p). Copies ~~shall~~must be served on the state attorney and attorney general.

(4) *Cross-Appeal.* [NO CHANGE]

(c) Appeals by the State.

(1) *Appeals Permitted.* The state may appeal an order:

(A)-(E) [NO CHANGE]

(F) ~~discharging a defendant~~dismissing a case under Florida Rule of Criminal Procedure 3.191;

(G)-(P) [NO CHANGE]

(d)-(i) [NO CHANGE]

Committee Notes

[NO CHANGE]

Court Commentary

1996. [No change]

2023. Rules 9.140(b)(1)(G) and 9.140(c)(1)(F) were amended to allow both the state and defendant to appeal a trial judge's decision on a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.191.