

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULE OF
CRIMINAL PROCEDURE 3.191 AND FLORIDA Case No. SC22-1123
RULE OF APPELLATE PROCEDURE 9.140

**COMMENTS OF THE FLORIDA BAR
PUBLIC INTEREST LAW SECTION**

The Florida Bar Public Interest Law Section hereby files the following comments in this cause. These comments are submitted on behalf of the Public Interest Law Section only and do not express the position of The Florida Bar. Further, they have been reviewed pursuant to The Florida Bar's Standing Board Policy 8.20.

A The proposal will render the speedy trial rule ineffective with regard to homicides and with regard to other crimes associated through charges or arrests with homicides.

Proposed Rule 3.191(p)(4) provides that if a defendant has been arrested for or charged with murder or any manslaughter (hereinafter referred to together as homicides), the relief for a violation of this rule is dismissal without prejudice.

Such relief would allow the state to reinstate the charges at any time prior to the expiration of the statute of limitations. Before it does so in any given case, however, it will undoubtedly wait until it is fully prepared for trial. There will be no delays after the case is refiled unless caused by the defendant. So, realistically, for homicide prosecutions, there will never be a

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situation in which a true dismissal that finalizes the case will occur under Rule 3.191.

The existence of the constitutional right to a speedy trial will not lead to such a true dismissal either, because the time while no charges are pending is not included as part of the delay in such an analysis. *United States v. MacDonald*, 458 U.S. 1 (1981).

This result would mean that, with regard to the cases impacted, the rule would fail to comply with the legislative mandate that this court provide procedures through which the right to a speedy trial will be realized.

As this court noted in *State ex rel. Williams v. Baker*, 247 So. 2d 316, 318 (Fla. 1971):

Fla. Stat. (1969) ss 915.01 and 915.02, F.S.A. [which dealt with the bringing of charges before the expiration of certain terms of court], were repealed by Florida Laws, Ch. 71-1(B). This law also provided:

“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 Section 16 of Article I of the state constitution shall be realized.”

The destruction of the speedy trial right under the rule for homicide charges would not be limited to just the homicides themselves because proposed Rule 3.191(p)(4) states that dismissals without prejudice are to be entered not only for those offenses, but also “for any crime based on the same conduct or criminal episode.”¹

The destruction of the right would also occur in some cases in which both the state and the defendant agree that no homicide occurred. This is because the rule calls for dismissals without prejudice to be entered as a remedy not just when a homicide is charged but also when the *arrest* was for such a crime.

The fact is that police officers will sometimes charge a homicide if a death has occurred only to have prosecutors recognize that the appropriate charge is for some other offense. In such situations, prosecutors will appropriately charge the other offense and the case will proceed accordingly. Yet, the proposed rule will treat such cases as homicides for purposes of speedy trial relief. It will have the same effect when prosecutors determine that the death itself does not warrant any charge at all, but that a second offense encompassed by the arrest does.

¹ While it is clear that the proposal destroys speedy trial rights for non-homicide counts when they are associated with homicides, there are other things about this rule that are very unclear. For instance, if a homicide and other charges are refiled after a dismissal without prejudice, and a nolle prosequi later entered as to the homicide, can the lesser charges go forward? Similarly, if a defendant is acquitted of the homicide, can convictions for lesser charges stand? If not, will juries be instructed that they are to consider lesser charges only if they convict of homicide? If a homicide conviction is reversed on appeal, can convictions for lesser charges stand? Does it matter if a reversal of the homicide count is for a new trial or for discharge? Unless matters like these are clarified, adoption of a rule allowing the refiling of non-homicide charges just because they were charged with a homicide will open a Pandora's box of legal issues.

In these cases, the type of dismissal order will depend on the judgment of a non-lawyer police officer, not a trained prosecutor. The fact that the case before the court will not ever expose the defendant to the possibility of a conviction for a homicide will make no difference.²

B The proposal will also render the speedy trial rule ineffective with regard to arrests that lead to the entry of a no-action by the state.

The problems discussed in the immediately preceding section regarding cases in which homicide charges are filed will also exist with regard to any case that is no-actioned by the state.

The proposed changes to Rule 3.191(a) only allow for relief in such situations upon the filing of a notice of expiration of speedy trial, which would trigger a recapture period under proposed Rule 3.191(p).

Yet, when the state does not proceed after an arrest, there exists no case within which an arrestee can file a notice. Thus, an arrestee cannot

² A collateral effect of lumping *arrests* for homicide together with *charges* of homicide will likely be an increase in homicide arrests. Police will know that such an arrest can keep a case from being dismissed with prejudice while arrests for other charges cannot. They certainly won't arrest for homicides when there is no arguable basis to do so, but when there is a death, the operation of the speedy trial rule might very well influence the manner in which they exercise their discretion. In cases in which the evidence could justify a homicide arrest but more strongly suggests a different offense, they currently will most likely arrest for the other offense. But if they know that a homicide arrest insulates the case from true dismissal, they may well arrest for it or for both. Indeed, some departments might even adopt policies requiring that arrests be made for homicide whenever that approach can be legally supported.

trigger the recapture period until the state files. And, as above, the state will only do so when it is ready to proceed. So, it will inherently be prepared for trial should the arrestee thereafter trigger the recapture period. The speedy trial rule will be completely ineffective in these cases and this court will fail to comply with the statutory directive discussed above.

C Effectively eliminating the speedy trial rule, as discussed above, for homicides, crimes associated with homicides, and arrests resulting in no-actions would reduce a system that is functioning well to one that will disserve the public interest.

Florida's speedy trial rule was not created simply for the purpose of providing defendants with a procedural right. The procedural right it does provide is both a means to protect the constitutional right to a speedy trial and an important mechanism to curb abuses and to make the entire system function better.

It serves trial courts by providing a framework for managing their dockets. It serves witnesses and victims by minimizing the time they are subjected to the stresses of pending cases. It serves prosecutors by promoting efficiency, reducing the chances of administrative errors, increasing the likelihood of the presentation of at trial of evidence that is not impacted by the passage of time, and encouraging the prompt disposition of cases through plea agreements. And it serves the public by forcing the system to operate in a manner that best furthers the interests of justice.

The fact that speedy trial rules do much more than provide a procedural right is reflected by the ABA Standards for Criminal Justice: Speedy Trial and Timely Resolution of Criminal Cases, Third Edition (2006), which articulate in Standard 12-1.1(a) three main purposes: “(1) to effectuate the right of the accused to a speedy trial; (2) to further the interests of the public, including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases; and (3) to ensure the effective utilization of resources.”

And the need for a scheme such as the one embodied by our speedy trial rule is recognized by the very title of Standard 12-1.2, “Importance of establishing both speedy trial rules and standards for timely resolution of criminal cases.” In section (b) of that standard, it is stated that “[t]he public, including victims and witnesses[,] has an interest in the timely resolution of criminal cases” and that “[t]he public’s interest should be expressed in formally adopted polices and standards”

Indeed, this court has recognized that Florida’s rule was promulgated not just for the benefit of defendants, but also “to promote efficient operation of the court system and to act as a stimulus to prosecutors to bring defendants to trial as soon as practicable,” *Lewis v. State*, 357 So. 2d 725, 727 (Fla. 1978), as well as “to give the court control of its docket so

that guilt or innocence may be determined in a manner consistent with the proper investigation and preparation of the case by the prosecution.” *State ex rel. Hanks v. Goodman*, 253 So. 2d 129, 129 (Fla. 1971).

Thus, it is clear that the speedy trial rule is a procedural tool that exists to provide the courts with a framework for handling cases in an efficient manner that protects the interests of both defendants and other participants in the criminal justice system, as well as those of the public.

An overhaul that would effectively do away with the speedy trial rule in the cases impacted here would disserve the interests behind the rule.

Courts would no longer have a system in place that would require them to monitor these cases and move them expeditiously. And they will not be able to establish their own substitute frameworks because the timing of prosecutions after no-actions or dismissals without prejudice will be completely in the hands of prosecutors.

Moreover, those prosecutors will have no requirement that they adhere to any timeline. Some prosecutorial offices may adopt self-governing standards, but others may not. Those that are adopted may or may not be reasonable and effective. Inconsistency will prevail. When standards are not adopted, approaches will differ from prosecutor to prosecutor, so there will be inconsistency not just between offices, but

within offices. And inconsistency in determining exceptions to any standards that might be adopted will be almost certain.

. The fact that the proposal will give prosecutors carte blanche to bring or reinstate charges in these cases whenever they choose will have a huge impact on witnesses and victims and will also disserve the public. Criminal cases are not just about the prosecution and the defense. Victims need closure, they need restitution, they need to be able to resolve civil cases that might be held up by the pendency of criminal charges. Witnesses should not be kept on call for any longer than is needed to resolve cases.

Moreover, the lives of witnesses and victims change, and extended delay could result in their not being found when trial is finally held, in additional expense in bringing them back for trial, in traveling to them for investigation or deposition if they have moved, or in their memories fading. These various considerations, which could detrimentally impact either the state or the defendant, certainly do not serve the public interest. Unnecessary delay in achieving justice never does, nor do costs that should be less or avoided entirely. And developments that subvert justice, regardless of which side obtains an advantage, are even more malignant.

Also, increased delays in the disposition of criminal cases will fuel the public's perception that the system is too slow and would thus work to undermine the public's confidence in the system. "[S]olely emphasizing a defendant's right to a speedy trial does not address the backlog and delay that plague many court systems, and which contribute to diminished respect for the justice system and wasteful use of scarce public resources." Commentary to Standard 12-1.1(a), p.28-29.

Instructive are the words of the First District in *State ex rel. Reynolds v. Willis*, 255 So. 2d 287, 290 (Fla. 1st DCA 1971), written shortly after Florida's rule was created:

It is common knowledge that the ... right [to a speedy trial] has been flagrantly ignored by many courts in this country, and strict rules like Rule 3.191 represent the enlightened effort of many courts to implement the constitutionally guaranteed right to a speedy trial.

The problems that existed before the rule, "common knowledge" at the time, will return for these cases if the proposal is adopted. The problems will not generally be the result of deliberate efforts by courts or prosecutors to deny defendants their rights but will arise from the lack of structure and the ensuing consequences. The impact will be not just on defendants, but most assuredly also on victims, on witnesses, on the justice system, and on the public.

“Those who do not remember the past are condemned to repeat it.” George Santayana, *The Life of Reason: Reason in Common Sense*. There is no reason why the state of Florida should repeat the problems that existed before the speedy trial rule addressed them a half century ago even if those problems will only impact homicides, crimes associated with homicides, and arrests resulting in no-actions.

The speedy trial rule has served its purpose. It works. There are few cases in which speedy trial is an issue and those in which it arises usually are resolved without injustice. Constitutional speedy trial issues are virtually nonexistent, thus avoiding federal intervention years later. Cases move. Resolutions are reached in a timely manner. There is simply no need for the extensive changes encompassed by the proposal.

D The proposal creates an unnecessarily unwieldy process following the entry of a nolle prosequi.

The proposed amendments not only require, as discussed above, a notice of expiration after a no-action, but proposed Rule 3.191(o) requires one after a nolle prosequi by the state. Such a notice can be filed because there will be a case established and the proposed rule requires the clerk to accept the notice even though it might be filed in a closed case.

But this proposal brings about a number of practical concerns. Presumably, a lawyer’s professional responsibility would require him or her

to continue with the case after a nolle prosequi to obtain an order of dismissal. This will require completely unnecessary hearings, the corresponding needless expenditure of time, effort, and resources, delays in attorneys being paid (at least in court-appointed cases) and additional billable (to the state) hours in such cases.

If it is felt that there needs to be an order of dismissal in these cases, a better approach would be to develop a form order to be entered by the court when the nolle prosequi occurs stating that, unless the order is vacated upon a motion by the state prior to its effective date, the case will be stand dismissed effective on the date of the expiration of the speedy trial period (or, alternatively, on the date of the expiration of the recapture period, which will be deemed start upon the expiration of the speedy trial time period). In essence, such an order would take the place of the filing of a notice of expiration, a motion to dismiss, and an order on that motion.

E The proposal will allow the police to make investigatory arrests.

In the course of conducting investigations of possible criminal activity, there are times when the police develop sufficient probable cause for an arrest, but do not have sufficient evidence to prove a case beyond a reasonable doubt. Generally, in such situations, often after the consultation with the state attorney's office and/or the department's legal advisor, the police do not make arrests. They continue the investigations if avenues to do so remain open or they wait to see if such avenues will present themselves in the future.

The primary reason for not arresting in such situations is the desire to not start the speedy trial clock running. An arrest would almost certainly lead to a no-action by the state attorney and would create a situation in which prosecution would be precluded should information strengthening the case turn up at some point after the speedy trial time period runs.

Proposed Rule 3.191(d)(1) continues to start the speedy trial clock upon arrest, but it defines arrest as occurring for purposes of the rule only 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.*

Under this proposal, when an arrest is made for a purpose other than holding the arrestee to answer in court, the speedy trial clock will not be triggered. Thus, there will be nothing to deter arrests made for other reasons in cases in which probable cause exists but in which there is no likelihood of charges being filed, much less of conviction. The threat of a civil suit will not do so either because the probable cause will render the arrest legal.

Police will be free to make arrests in the hope that their probable cause will be supplemented by incriminating statements made by arrestees or by evidence found pursuant to searches incident to the arrests. In essence, the police will be given the green light to use arrests as investigatory techniques.³

³ Moreover, police can—and surely will when the situations present themselves—time these types of arrests to coincide with situations in which they suspect that the person under investigation is in possession of evidence of some crime other than the one for which they have probable cause. Such an arrest would of course serve the above purposes and therefore could produce evidence as to the crime for which probable cause exists. But it would also authorize a search that could achieve the police goal of obtaining evidence of the second crime despite a lack of probable cause for either a search or an arrest regarding that crime. What's more, if evidence of a second crime is found, the police could use that evidence as leverage to get the individual to give a statement about the crime under investigation or to cooperate in the investigation of others with regard to that offense.

This tactic will become a standard weapon in law enforcement's arsenal. Arrests will be made that would not be made today. Arrests—of both persons who actually committed the crime under investigation and those who are innocent—will be made in situations in which the arresting officers know that the information and evidence they have at the time of those arrests does not provide a sufficient basis for prosecution. Moreover, arrests could be made simply for the purpose of harassment.

Only after additional information is obtained, perhaps as the result of the investigatory arrest, will arrests be made “for the purpose of being held to answer in court,” as required by the proposed change to the rule in order to trigger the speedy trial time periods. Officers will flatly (and truthfully) admit at hearings on motions for relief under the rule that earlier arrests were made “with probable cause but for investigatory purposes, not for the purpose of being held to answer in court.” The phrase will become a mantra taught at the police academy.

F The addition of a new specified exceptional circumstance for extensions of the time periods established by the rule is unnecessary.

Proposed Rule 3.191(l)(7) would add to the list of exceptional circumstances “a showing by the state that it has a good faith belief additional evidence is forthcoming that would allow the state to file charges.”

It seems that most cases that should receive an extension for this reason would be included within the existing Rule 3.191(l)(3), which allows for one upon “a showing by the state that specific evidence or testimony is not available despite diligent efforts to secure it.”

One of the basic rules of statutory/rule construction is that an enactment is presumed to have some impact on the status quo. Thus, if this provision is adopted, it will be viewed as adding something to the existing list of circumstances. The logical reading of the new provision would be to include cases in which the state did not make the diligent effort required under (l)(3). It will thus provide the prosecution with a remedy for its own failures.

Moreover, to the extent that a case might involve forthcoming evidence when the state has exercised due diligence, the existing rules can deal with it. The listed exceptions are simply examples, not an exclusive list. Indeed, they are preceded by an indication that exceptional circumstances include, but are not limited to, those that follow. The circumstance set forth in the proposal is one that will arise rarely. There is no need for it to be listed. In appropriate cases, the state can make its argument under existing Rule 3.191(l) for an extension based on the

circumstance being one “that, as a matter of substantial justice to the accused or the state or both, require an order by the court.”

G The proposed change to the appellate rule is pointless.

The commentary to the Proposed Rule 9.1340 suggests that the rule would allow both the state and defendants “to appeal a trial judge’s decision on a motion to dismiss pursuant to Fla. R. Crim. P. 3.191.”

Strictly speaking, that is what the proposal does. But it does so in an ineffective manner, allowing the state in proposed Rule 9.140 (c)(1)(F) to appeal all orders of dismissal under Rule 3.191, but allowing defendants in proposed Rule 9.140(b)(1)(G) to appeal only orders “granting a dismissal without prejudice.”

This proposal essentially gives defendants nothing in the way of appellate rights. It will be a very rare case in which a defendant will want to appeal an order *granting* such relief (perhaps only one in which the defendant asserted that dismissal *with* prejudice was the proper remedy).

A defendant will not infrequently want to appeal an order *denying* such relief, but the proposal does not provide that right.

Moreover, even if the word “denying” is substituted for the word “granting,” the proposal would still limit defendants to appealing orders denying a motion to dismiss without prejudice, not orders denying motions to dismiss with prejudice (the only ones that have any measure of finality), despite allowing the state to appeal from the granting of such dismissals.

Thus, this proposal will essentially have no effect. The state can appeal now from dismissals and will continue to be able to do so. Defendants now seek review by prohibition and will continue to do so except in the negligible number of cases in which they will seek review of an order granting a motion to dismiss without prejudice.

If the proposal were to be changed to allow defendants to appeal orders denying all motions to dismiss under the rule, the question that would then arise is whether such an approach is better than the current process of defendants seeking review by prohibition.

As is true with the speedy trial rule itself, the manner things are being done seems to work well. Changing the form of review to appeal would slow cases down, which seems to defeat the purpose of promoting the speed that is the essence of the issue with which Rule 3.191 is concerned.

The proposed change also raises the question of why this particular basis for dismissal should be singled out for pretrial appellate review when motions to dismiss on other grounds are not.

As a practical matter, it probably does not make that much difference which method of review is used but, given the fact that it has been proven that one method works, it seems to make sense to stick with it rather than

to adopt a change without any reason having been expressed for it or any need for the change having been shown.

H Conclusion

The speedy trial rule works. It has worked for half a century. The dramatic overhaul of the rule set forth by the current proposal is a solution in search of a problem. It will succeed in its search if it is adopted because it will become the problem. It should be rejected.

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court on October 29, 2022, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record.

Respectfully submitted,

Anthony C. Musto

ANTHONY C. MUSTO
Florida Bar No. 207535
P. O. Box 2956
Hallandale Beach, FL 33008-2956
amusto@stu.edu
villeanddale@gmail.com