IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,964

THE HONORABLE JOSEPH P. FARINA,
JUDGE OF THE CIRCUIT COURT FOR THE
ELEVENTH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY,

Petitioner,

v.

MIGUEL PEREZ, JR.,

Respondent.

BRIEF OF THE RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

The facts and the course of proceedings below are a matter of record and are not in dispute.

SUMMARY OF ARGUMENT

More than three years after the Respondent's arrest the State filed an information charging the Defendant with numerous criminal offenses. Although the time period pursuant to 3.191, Fla.R.Crim.P. had long expired, the State argues that it is still entitled to a fifteen day "window of recapture" in which to bring the Defendant to trial. In *State v. Agee*, 622 So.2d 473 (Fla. 1993), this Court held that when the State declares a nol pros, it is precluded from refiling an information subsequent to the expiration of the speedy trial time period. This Court refused to accept the Government's argument that the fifteen day "window of recapture" would still permit the refiling of the information.

In the instant case, the State seeks to distinguish *Agee* by arguing that a "no action" is substantively different from a nol pros. Therefore, the State should be entitled to a fifteen day "window of recapture" in which to bring the Defendant to trial. Both the terms "no action" and nol pros stand for the same procedure where the State abandons or terminates its prosecution. The selection of one phrase versus another is dictated simply by the point in time when the decision by the State to abandon or terminate its prosecution is made. Therefore, the affect of a declaration of "no action" versus a declaration of nol pros are the same as they relate to the protections of the Speedy Trial Act.

ARGUMENT

THIS COURT'S OPINION IN *STATE V. AGEE*, AND THE PROSCRIPTIVE EFFECT OF RULE 3.191(h)(2), FLA.R.CRIM.P. APPLY TO CASES WHERE THE PROSECUTION IS TERMINATED VOLUNTARILY BY THE STATE BEFORE AN INDICTMENT OR INFORMATION IS FILED.

Florida Rule of Criminal Procedure 3.191(a) provides:

> . . . every person charged with a crime by indictment or information shall be brought to trial . . . within 175 days if the crime charged is a felony.

In order to secure relief for a violation of this rule, a defendant must file a motion for discharge after the expiration of the 175 days. Rule 3.191(i)(2) Fla.R.Crim.P.[1] Ultimately, the motion for discharge acts as a notice to the State that the Speedy Trial deadline has expired and places the burden on the State to bring a defendant to trial within a 15 day "window of recapture." Fla.R.Crim.P. 3.191(i)(3).

In the instant case, Respondent filed his initial motion for discharge in August, 1990. (R.13). Although more than 175 days had expired, the trial court found that the initial motion for discharge was a nullity because no information had ever been filed.

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[1] Respondent was originally arrested for these offenses on January 31, 1990. Therefore, the Speedy Trial Rule in effect at that time would be applicable. The present rule is substantially the same as it existed in 1990, except for the renumbering of certain subsections and minor changes in terminology (the "Motion for Discharge" has been renamed "Notice of Expiration of Speedy Trial Time"; subsections (h)(2), (i)(2), and (i)(3) have been renumbered as (o), (p)(2), and (p)(3)).

(The trial court relied on the Third District Court of Appeals' decision of *William v. Shapiro*, 575 So.2d 1368 (Fla. 3d DCA 1991)). On August 13, 1993, an information was filed, charging Respondent with criminal offenses arising out of the same episode which had caused his initial arrest on January 31, 1990. On August 31, 1993, Respondent surrendered in open court and was taken into custody. That same day, a second motion for discharge was filed. (R.33-34).

At the hearing on Respondent's second motion for discharge, in the Third District Court of Appeals, and presently in its brief on the merits, the State argued that it may still take advantage of the fifteen (15) day "window of recapture", even though Respondent was charged by information three and one half years after his original arrest. The trial court agreed with the State only after accepting the State's reasoning that a "no action" by the prosecution is different than a "nol pros".

In *State v. Agee*, 622 So.2d 473 (Fla. 1993), this Court underlined its concern for the possible situation similar to where Respondent now finds himself:

> To allow the State to unilaterally toll the running of the speedy trial period by entering a nol pros would eviscerate the rule - a prosecutor with a weak case could simply enter a nol pros while continuing to develop the case and then refile charges based on the same criminal episode months or even years later, thus effectively denying an accused the right to a speedy trial while the State strengthens its case.

Agee, 662 So.2d at 475. This Court went further and offered options to the State when it has inadequate evidence to prosecute:

> The State may either postpone arresting a suspect until it has an adequate case or, if charges have already been filed, seek an extension for good cause.

Id. This Court's suggestion that the State postpone arresting a suspect where the evidence is inadequate belies the State's argument that *Agee* does not apply to cases where the State voluntarily abandons its prosecution before an information is filed.

There is no rational basis to distinguish the circumstances in *Agee* from the circumstances in the instant case. *Agee* prohibits the State from bringing a defendant to trial within the 15 day "window of recapture" when the State previously nol prossed the case and refiled the information after the Speedy Trial time period has already expired. In the present case, the State arrested the Respondent and failed to file an information until years after the Speedy Trial time period had expired. Now the State seeks to bring Respondent to trial within the brief window period, only 15 days after his arraignment, without the defense having had the opportunity to fully prepare for trial.

The State attempts to create a new rule of procedure by focusing on the terminology "no action". The term "no action" appears nowhere in the Criminal Rules of Procedure and is basically a term of art used by the prosecution when the State voluntarily abandons its prosecution before formal charges have been filed. The entire premise of the State's appeal is based upon the

presumption that a voluntary abandonment of its prosecution before an information or indictment has been filed is substantially different than a nol pros afterwards.

Merely because the prosecution chooses to use the term "no action" to differentiate its dismissal of charges before an information is filed does not automatically create a new rule of procedure. When the Rules of Criminal Procedure refer to the term "nolle prosequi" (nol pros), that term applies to any voluntary abandonment of prosecution, regardless of the existence of an indictment or information. A nolle prosequi is defined as:

> A formal entry upon the record, by the plaintiff in a civil suit, or, more commonly, by the prosecuting attorney in a criminal action, by which he declares that he "will no further prosecute" the case, either as to some of the defendants, or altogether. The voluntary withdrawal by the prosecuting attorney of present proceedings on a criminal charge . . . commonly called "nol pros".

Black's Law Dictionary 1048 (6th Ed. 1990). See also *Wilson v. Renfroe*, 91 So.2d 857, 859 (Fla. 1956); *Babun v. State*, 576 So.2d 377 (Fla. 3d DCA 1991); *State v. Campbell*, 452 So.2d 1095 (Fla. 2d DCA 1984); *Gatto v. Publix Supermarket, Inc.*, 387 So.2d 377, 381 (Fla. 3d DCA 1980).

In *Allied Fidelity Insurance Co. v. State*, 408 So.2d 756 (Fla. 3d DCA 1982) the State tried to distinguish a "no action" from a nol pros by claiming that a "no action" was "merely an administrative indication that the State is not proceeding with its case at the time of the announcement." *Allied Fidelity Insurance Co. v. State* , 408 So.2d

at 757. The Third District disagreed with the State's analysis and held that:

> (the) very definition of a "no action" is equally applicable to a nolle prosequi, which, itself, is but a non-final, non-binding indication that the State is not proceeding with its case at the time of the nolle prosequi.

Id. There is no substantive difference between any of the commonly used terminology for the abandonment or termination of the State's prosecution. The selection of one phraseology versus another is dictated simply by the point in time when the decision by the State to abandon or terminate its prosecution is made. *Gatto v. Publix Supermarket, Inc.*, 387 So.2d at 381. Should this Court accept the argument of the State in this case, it will have basically placed Respondent in the unenviable position of having to waive his right to a Speedy Trial in order to preserve his Fourteenth Amendment right to due process. See *State v. Hutley*, 474 So.2d 233 (Fla. 4th DCA 1985); *Mulryan v. Reed*, 350 So.2d 784 (Fla. 1st DCA 1977); *Wright v. Yawn*, 320 So.2d 880 (Fla. 1st DCA 1975). A defendant cannot reasonably be expected to prepare for trial within such a short period of time, especially when the State has had three and a half years to gather evidence and develop its case against the defendant. This would effectively eliminate the reasoning and purpose for the speedy trial rule. For example, a suspect can be arrested and after a period of time the charges are "no actioned". Then, three years later, the State can develop a case involving more than

thirty witnesses, boxes of evidentiary exhibits, and a thousand pages of documents. If the fifteen (15) day window still applies to a defendant who is rearrested three years later, the defendant and his counsel would never be able to properly prepare their case for trial within that time period. In effect, a new trial date would have to be requested and the speedy trial rule would have been rendered impotent.

Furthermore, the existing law in this State requires discovery be furnished to the defendant with sufficient time for the defendant to make use of it without having to forfeit his right to a speedy trial. *Granade v. Ader*, 530 So.2d 1050, 1051 (Fla. 3d DCA 1988); *State v. Williams*, 497 So.2d 730 (Fla. 3d DCA 1986); *Harris v. Moe*, 538 So.2d 145, 146 (Fla. 4th DCA 1989); *George v. Tretis*, 500 So.2d 588, 589 (Fla. 2d DCA 1987). Allowing the State to prosecute the defendant upon his rearrest with only fifteen days in which to prepare for trial, would place the defendant in the position of choosing between his right to due process pursuant to the Fourteenth Amendment, his Sixth Amendment right to effective assistance of counsel, and his right to a speedy trial. See also *State v. Koch*, 605 So.2d 519, 521 (Fla. 3d DCA 1992). The fair and sensible manner in which to apply the rationale of *State v. Agee* is to find no distinction between a "no action" by the prosecution and a nol pros.

CONCLUSION

The Respondent respectfully requests that this Court uphold the decision of the Third District Court of Appeals and order that the Respondent be discharged.

Submitted by,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 17 day of February, 1994 to:

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