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IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,030

THE HONORABLE MICHAEL A. GENDEN,
Judge of the Circuit Court of
the Eleventh Judicial Circuit,
in and for Dade County, Florida

Petitioner,

-vs-

WILLIAM FULLER,

Respondent.

FILED
SID J. WHITE
MAR 16 [illegible]
CLERK, SUPREME COURT
By
Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, WILLIAM FULLER, was the defendant in the trial court and the petitioner in the Third District Court of Appeal. The Petitioner, the State, was the prosecution in the trial court and represented the respondent in the Third District Court of Appeal. The parties will be referred to in this brief as they stood before the trial court. The designation "R." will refer to the record supplied to this Court, consisting of the Petition for Writ of Prohibition, Response, Reply, and Appendices below, and the decision of the Third District Court of Appeal which granted the writ.

STATEMENT OF THE CASE AND FACTS

The defendant, William Fuller, was arrested on November 24, 1992 on a third-degree felony charge of grand theft. (R. 14, 20, 25-29) (Circuit Court Case No. 92-39831).

On December 24, 1992, the State announced that it would not be filing an information, an announcement which is informally referred to as a "no action," and the case was closed by the Clerk of the Circuit Court. (R. 14, 20, 25-29).

The defendant disputes the State's assertion that the reason for the "no action" was that "the State was unable to proceed(.)" (Br. of Pet'r at 2). The record is utterly silent as to inability as distinct from unpreparedness[1] being the reason for the "no action;" the State did not present any evidence at the hearing on the motion for discharge of the reason (R. 22-97), nor is the transcript of the "no action" itself enlightening. (R. 140). Nor, as the State argued in the trial court (R. 49-50), did it "no action" at the earliest opportunity; on a prior date it had requested and obtained a continuance of the case. (R. 14, 27-29). The defendant agrees with the State's acknowledgement that "it "chose" to "no action." (Br. of Pet'r at 2).

The 190-day period for trial [i.e., the 175 day period provided under subdivision (a) of rule 3.191[2] plus the fifteen-

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It is most likely that the State was simply not diligent and was not prepared to proceed, e.g., had not sought to timely conduct a prefile conference and obtain sworn testimony. <u>See</u> Fla. R. Crim. P. 3.140(g).

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Florida Rule of Criminal Procedure 3.191. The rule as referenced herein is the form effective January 1, 1993.

day "window-period" provided under subdivision (p) of the rule] elapsed on June 2, 1992.

On June 28, 1993, the State filed[3] an information under the same case number for third-degree felony grand theft, and, pursuant to Florida Rule of Criminal Procedure 3.131(j), obtained the issuance of a warrant for the defendant's arrest. (R. 17, 25-29).

The defendant was arrested upon the warrant on August 3, 1993. (R. 18, 25-29).

At no time did the State obtain or seek any extension of the speedy trial time under Florida Rule of Criminal Procedure 3.191. (R. 20, 25-29).

At no pertinent time was there any unavailability, delay, continuance, or waiver of the speedy trial rule by the defendant. (R. 20, 25-29).[4]

On August 19, 1993, after hearing argument from the parties (R. 22-96), the trial court denied the defendant's timely motion for discharge, reasoning that under the speedy trial rule a "no action" is legally distinct from a nol pros. (R. 100-01, 95).

On petition for writ of prohibition, the Third District Court of Appeal held the defendant entitled to discharge under rule 3.191 and <u>State v. Agee</u>, 622 So. 2d 473 (Fla. 1993), and certified the

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The lower left corner of the information contains the typed description "Refile(,)" (R. 17, 25-26), however, the information was in fact an initial filing. (R. 25-26).

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The only delay or deferral of trial sought by the defendant was that requested upon the trial court's denial of the motion for discharge, in order to pursue prohibition in the district court of appeal. (R. 16, 102-104).

following question as one of great public importance:

> Whether the Holding of State v. Agee Applies When the Prosecution Is Terminated by a Voluntary Dismissal Before an Indictment or Information Rather Than a "Nolle Prosse" Filed After an Information or Indictment?

Fuller v. Genden, ___ So. 2d ___, 18 Fla. L. Weekly D2516 (Fla. 3d DCA Nov. 30, 1993).

Notice to invoke this Court's discretionary review jurisdiction was timely filed by the Petitioner on December 7, 1993. By order dated January 18, 1994, this Court withheld decision on jurisdiction and ordered briefing on the merits.

SUMMARY OF ARGUMENT

The speedy trial rule has long provided and long been construed to provide that, as has been recently reaffirmed by this Court in State v. Agee, 622 So. 2d 473 (Fla. 1993), the State cannot unilaterally exempt itself from the rule's time periods by nol prossing a case and reinstituting charges after the time period has run. Neither the text nor the structure of the rule, nor the jurisprudence thereunder or applicable policy considerations, support the State's argument herein that a post-arrest, pre-information declination to prosecute (a so-called "no action") tolls the time or "does not count" under the rule.

The meaning of the term "nolle prosequi" in Rule 3.191(o) is not, as urged by the State, limited to post-information declinations to prosecute. The subdivision (o) provision that "[t]he intent and effect of this rule shall not be avoided by the state by entering a nolle prosequi" and reprosecuting applies in all post-arrest (or post-speedy trial period commencement) situations, whether or not an information or indictment has been filed, as long as the speedy trial rule has not been waived. The State is entitled to the underlying speedy trial period and a single window period, and not, where it nol prosses within that time, to a second or open-ended window period beyond the 190 days (175+15) for trial provided for felony cases by the rule.

In this case, the defendant was arrested which commenced the time period, and without explanation, the State discontinued prosecution approximately a month later, and reinstituted prosecution after the speedy trial time had expired. Because the

State did not obtain an extension of time, nor was there any defense unavailability, delay, continuance, or waiver of the speedy trial time, the district court of appeal properly held the defendant entitled to discharge and granted prohibition. The certified question should be rephrased to reflect the proper meaning of "nolle prosequi" under rule 3.191 to include all post-rule-period-commencement declinations to prosecute and, as rephrased, answered in the affirmative.

ARGUMENT

THE SPEEDY TRIAL RULE (FLA. R. CRIM. P. 3.191) DOES NOT ALLOW THE STATE TO UNILATERALLY EXEMPT ITSELF FROM THE APPLICABLE TIME PERIODS BY VOLITIONALLY DECLINING TO PROSECUTE (NOL PROSSING) AND LATER (AND UNTIMELY) REDECIDING TO PROSECUTE.

The speedy trial rule, Florida Rule of Criminal Procedure 3.191, has always provided, and has always been construed to provide, that once the time period for speedy trial has been initiated by arrest, that period continues to run unless either, on the one hand, the State has timely obtained an extension for exceptional circumstances, or, on the other hand, the defendant has waived the provisions of the rule by waiver, continuance, unavailability, or delay. Recognizing the symmetrical structure of the rule, and consistent with a long line of antecedent caselaw,[5] in State v. Agee, 622 So. 2d 473 (Fla. 1993), this Court

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See, e.g., State v. McDonald, 538 So. 2d 1352, 1353 (Fla. 2d DCA 1989) ("The State cannot avoid the intent and effect of [Fla.R.Crim.P. 3.191(h)(1)], and engineer its own extension of speedy trial time limits, by dropping one set of charges and later refiling different charges arising from the same criminal episode. . . . In the present case, revitalization of the misdemeanor resisting arrest charge is foreclosed notwithstanding the fact the state's election to file its so called "no bill" precluded the county court from entering a formal order of discharge."); Jay v. State, 443 So. 2d 187 (Fla. 3d DCA 1983) ("[T]he State may not use its prosecuting procedure to unlawfully extend a speedy trial period."); State ex rel. Green v. Patterson, 279 So. 2d 362, 363-64 (Fla. 2d DCA 1973) ("Under the Speedy Trial Rule the time within which a person must be tried cannot be extended by the State entering a nolle prosequi to a crime charged and then prosecuting new or different charges based on the same conduct or criminal episode(.)"); Richardson v. State, 340 So. 2d 1998 (Fla. 4th DCA 1976) (same); Fyman v. State, 450 So. 2d 1250 (Fla. 2d DCA 1984) (same); Robinson v. Lasher, 368 So. 2d 83 (Fla. 4th DCA 1979) (state could not enlarge time for speedy trial by nolle prosse of charge and later, untimely filing of charges based on same incident); State v. Thaddies, 364 So. 2d 819, 820 (Fla. 4th DCA 1978) ("[A]lthough earlier charges arising from the same incident

rejected the proposition that the State could unilaterally exempt itself from the provisions of the rule by nol prossing a case and reinstituting charges after the time period [in a felony case, the 175 days under subdivision (a) plus the fifteen-day window period provided under subdivision (p) of the rule] has run.

As Agee squarely held, subdivision (o) of the rule[6] "makes clear that the State cannot circumvent the intent of the rule by suspending or continuing the charge or by entering a nol pros and later refiling charges(.)" Id. at 475. "[W]hen the State enters a nol pros, the speedy trial period continues to run and the State

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are dropped, speedy trial time on charges later filed, but based on the same incident, is still measured from the date of arrest on the earlier charges."); Thigpen v. State, 350 So. 2d 1078 (Fla. 4th DCA 1977) (reversal of second-degree murder conviction; where defendant was arrested for murder, grand jury initially returned a "no true bill" and defendant was released, indictment was subsequently returned within the speedy trial period but defendant was not arrested on it until after the speedy trial period ran, defendant entitled to discharge), cert. dismissed, 354 So. 2d 986 (Fla. 1978).

See also State ex rel. Bird v. Stedman, 223 So. 2d 85, 86 (Fla. 3d DCA 1969) (under statutory predecessor to speedy trial rule, the State could not avoid effect of speedy trial requirements by dismissing prosecution and then subsequently refiling; "A holding that the statute applies to the information filed and not the crime for which the accused is prosecuted would make possible the indefinite postponement of prosecution for a crime by the simple expedient of a continuous entry of nol prosequis and a continuous refiling of informations charging the same crime. This would violate the right of one accused of a crime to a speedy trial(.)").

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In Agee, the subdivision was referenced to by its former designation, (h)(2). Subdivision (o), substantively unchanged, provides: **"Nolle Prosequi; Effect.** The intent and effect of this rule shall not be avoided by the state by 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."

may not refile charges based on the same conduct after the period has expired." (Id.).

When the defendant was arrested on the subject charges on November 24, 1992, the speedy trial period was unquestionably commenced. "The time periods established by this subdivision shall commence when the person is taken into custody as defined under subdivision (d)." Fla. R. Crim. P. 3.191(a). In turn, subdivision (d) provides: "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." See Weed v. State, 411 So. 2d 863, 865 (Fla. 1982) ("[T]he date of the original arrest is the focal point for speedy trial considerations, irrespective of changes made in charges.").

When the State discontinued prosecution on December 24, 1992, the speedy trial period continued to run. State v. Agee, id. (when volitionally declining to prosecute within the speedy trial period, the State is not entitled to a second or open-ended window period once the rule period [175+15 days] has run); Williams v. State, 622 So. 2d 477 (Fla. 1993) (quashing decision of district court -- which had held state entitled to benefit of window period where state had entered a nol pros, recharged the defendant, and failed to bring him to trial within 190 days of arrest (see 597 So. 2d 960) -- and holding case controlled by Agee).

There were no State extensions, nor was there any defense unavailability, delay, continuance or waiver of the speedy trial

rule (R. 20, 25-29), and the 190th day for trial under the rule [the 175-day period provided by subdivision (a) of rule 3.191 plus the fifteen-day "window-period" provided under subdivision (p)] elapsed on June 2, 1993. The State's re-institution of prosecution on August 3, 1993,[7] came long after the speedy trial time, including the window period, had run and the State could not again claim the benefit of the window period. See State v. Agee; Williams v. State, supra.

While the State does not dispute, as it cannot, that the speedy trial rule period commences upon arrest, it argues at least implicitly that when the State elects not to go forward with an information within the speedy trial period, but long after-the-fact (i.e., after the lapse of the speedy trial period) seeks to proceed with prosecution, the intervening period between that declination to prosecute and redecision to proceed with prosecution is utterly excludable, i.e., either tolls or "does not count," under the rule. While it cannot be doubted that the decision to

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While the State filed an information on June 28, 1993, which was itself beyond the 190-day speedy trial period, the defendant was not arrested under that information until August 3, 1993. (R. 17, 18, 25-29). When the State discontinues prosecution, a defendant is released from the jurisdiction of, and any obligation to, the court, Allied Fidelity Ins. Co. v. State, 408 So. 2d 756 (Fla. 3d DCA 1982); Datema v. Barad, 372 So. 2d 193 (Fla. 3d DCA 1979). The relevant event, for purposes of assessing the timeliness under rule 3.191 of a state re-institution of prosecution, is not the mere filing or refiling of a charging document but the defendant's arrest thereupon. Datema v. Barad, supra; State ex rel. Smith v. Nesbitt, 355 So. 2d 202 (Fla. 3d DCA 1978); Thigpen v. State, 350 So. 2d 1078 (Fla. 4th DCA 1977), cert. dismissed, 354 So. 2d 986 (Fla. 1978). Thus, in this case, the State's re-institution of prosecution occurred two months after the speedy trial period ran.

proceed or not with prosecution is solely that of the State,[8] precisely what subdivision (o) was intended and implemented to preclude was unilateral State exemption from the speedy trial period by exercise of that sole prerogative. As this court stated in Agee, "requiring the State to petition the Court for an extension achieves the intended result of ensuring judicial control over deviations from the rule."[9] Id. at 475.

Proceeding with not even a remote resemblance to the circumstances presented in State v. Agee,[10] and in the absence of

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See Allied Fidelity Ins. Co. v. State, supra; State v. Kahmke, 468 So. 2d 284 (Fla. 1st DCA 1985); State v. Jackson, 420 So. 2d 320 (Fla. 4th DCA 1982); State v. Braden, 375 So. 2d 49 (Fla. 2d DCA 1979); State v. Wells, 277 So. 2d 543 (Fla. 3d DCA 1973) and State v. Sokol, 208 So. 2d 156 (Fla. 3d DCA 1968), all recognizing that a trial court is without authority to interfere with the sole prerogative of the State to decide whether, and when, to nol pros.

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See also, e.g., State v. Jenkins, 389 So. 2d 971, 975 (Fla. 1980) (recognizing that it is important under the speedy trial rule for "both sides [to] clearly know the period in which the case must be tried"); Esperti v. State, 276 So. 2d 58, 64 (Fla. 2d DCA 1973) (under the rule, "extensions are to be actually granted or denied by the court and should not be presumed. It is the order and not the circumstances which should toll the rule."), cert. denied, 285 So. 2d 614 (Fla. 1973).

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In Agee, a case of attempted murder, the State in "good faith" had discontinued prosecution because the victim was comatose and there were no eyewitnesses. 622 So. 2d at 474. After the speedy trial period elapsed, eyewitnesses were discovered and the victim emerged from the coma. Id. The defendant was held entitled to discharge on the basis, inter alia, that "[t]he speedy trial rule contains no 'good faith' exception. But it does provide for extensions of the speedy trial period upon stipulation of the parties or order of the court." State v. Agee, 588 So. 2d 600, 604 (Fla. 1st DCA 1991), approved, State v. Agee, supra.

In sharp contrast, the record herein is utterly deficient in suggesting either the reason for the declination to prosecute or, most tellingly, any justification at all for the six-month delay in the State's decision to reconsider and proceed with prosecution

either rule textual support,[11] authority,[12] or policy,[13] the State

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after the time for speedy trial had run. Thus, even if a "good faith" exception were theoretically available to the State, which it is not under Agee, there would be no factual basis whatsoever for its application in this case. As observed by this Court in Stuart v. State, 360 So. 2d 406, 412-13 (Fla. 1978), "[t]he delay in this proceeding . . . [was] not the fault of [the defendant]. . . . [W]here exceptional circumstances or complexities involved in the preparation of a case for trial were occasioned by delay on the part of the state, they will not be deemed to justify a delay of the trial and an extension of the rule period. . . . Because such an extension for exceptional circumstances must be by order of the court . . . , and will not be automatic or presumed from the circumstances, . . . the question of whether the circumstances were such as would justify an extension of the rule time period is a moot point. As there was no order of the court, there cannot have been an extension of the speedy trial rule time period."

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It should be emphasized that the term "no action" is an informal one, used in some circuits to denote a State declination to prosecute which is manifested before an information is filed. To reason on the basis of that colloquialism that the term "nolle prosequi" within Rule 3.191 is limited to post-information declinations to prosecute is a non sequitur. To the contrary, the term "no action" does not appear in the Rules of Criminal Procedure, and, it is doubtful that the term even existed or was utilized at all at the time the speedy trial rule was implemented in 1971. It therefore provides no basis upon which to construe or, more specifically, to constrict the clear, as will be shortly seen, intended scope of the placement of the term "nolle prosequi" within the rule from its inception.

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It is equally revealing that with more than two decades of jurisprudence under the speedy trial rule and its operation well understood, the State cannot cite to a single case that supports its position, and indeed can cite to virtually no authority at all other than that which supports the District Court's issuance of prohibition.

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Lacking text and authority, the State has gone to significant length to attempt to assert a policy basis for differentiating police activity from prosecutorial activity, i.e., for insulating the state attorney's office from speedy trial consequences of a police arrest made without "input or supervision" from the prosecutor. (Br. of Pet'r at 10-15). The State's argument is purely a speculative one, for, as previously mentioned, the record herein is evidentially barren on the part of the State. Moreover, in any event the argument proves too much, because it necessarily (and sub silentio) requests this Court to disregard longstanding

argues that the subdivision (o) preclusion of unilateral State exemption from the speedy trial rule does not apply to pre-information declinations to prosecute.

As a textual matter, there is nothing in the rule to support that position. To the contrary, as this Court observed prior to inception of the speedy trial rule, an observation which authoritatively infuses the meaning of the term within subdivision (o) of the rule, "[t]he words 'nolle prosequi' are a Latin expression which translated literally mean 'to be unwilling to prosecute.'" Wilson v. Renfroe, 91 So. 2d 857, 859 (Fla. 1956).

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jurisprudence under the rule and to redraft the rule itself. The rule has always placed the burden on the State to, in the absence of waiver, bring the defendant to a speedy trial, and this is where the burden is properly placed. The defendant has no control over state prosecutorial processes, or over the circumstance of whether or not the state attorney and police have a cooperative or an efficient relationship. The state can no more remove itself under the speedy trial rule from responsibility for timely acting once the rule period has been commenced by arrest, than it can avoid responsibility for delay in convening a grand jury, see Allen v. State, 275 So. 2d 238, 241 (Fla. 1973) ("[The defendant] was not responsible for these delays and he should have been afforded a speedy trial"), or for general congestion of the court's docket. See Fla. R. Crim. P. 3.191(f); Stuart v. State, 360 So. 2d 406, 412 (Fla. 1978); State v. Allen, id. at 241 (We can only surmise that the delayed trial date was the result of congestion in the court's docket or a lack of preparation and diligent prosecution by the State."). Even where, as was not shown herein, the State is "blameless" in a "no action," that does not support the State's urged conclusion that the ensuing time period no matter how long or unjustified is excluded from computation under the rule. The purpose of the speedy trial rule "is to ensure (1) the effective implementation of a defendant's constitutional right to a speedy trial, and (2) the effective and expeditious prosecution of criminal offenses." State v. Jenkins, 389 So. 2d 971, 974 (Fla. 1980). The State's urged approach is clearly incompatible with these interests, as it would remove an important incentive for both timely prosecutorial action and prosecutorial-police cooperation, as well as generate open-ended "anxiety and concern of the accused," Singletary v. State, 322 So. 2d 551, 555 (Fla. 1975), upon temporally unbounded State ability to reinstitute charges long-before dropped.

There is, obviously, neither a textual nor a functional differentiation between a post-information and a pre-information declination to prosecute under the speedy trial rule. See also Allied Fidelity Ins. Co. v. State, 408 So. 2d 756 (Fla. 3d DCA 1982):

> It is far from convincing for the State to attempt to distinguish a nolle prosequi by calling a no action "merely an administrative indication that the State is not proceeding with its case at the time of the announcement." That 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. at 757.

See also 66 C.J.S. Nolle Prosequi ("Literally, 'will not prosecute.'"); Black's Law Dictionary 1048 (6th ed. 1990) ("nolle prosequi" is "A formal entry upon the record . . . 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.").

The extensive jurisprudence under the speedy trial rule lends no support whatsoever to the State's sought interpretation. To the contrary, it was long ago recognized that whatever a discontinuance of prosecution is labeled, and whether or not a charging document has been filed, if the speedy trial time commenced and was not waived, it continued to run upon the discontinuance of prosecution.

See, e.g., Allen v. State, 275 So. 2d 238 (Fla. 1973) (under

rule 3.191, the period within which trial is required begins to run from the time a defendant is taken into custody and not from the time he is formally charged by indictment or information); State v. McDonald, 538 So. 2d 1352, 1353 (Fla. 2d DCA 1989) (State's election to file so-called "no bill", which precluded county court from entering formal order of discharge, had effect under speedy trial rule of foreclosing subsequent revitalization of charge); Thigpen v. State, 350 So. 2d 1078 (Fla. 4th DCA 1977) (defendant was arrested for murder, and grand jury initially returned a "no true bill;" speedy trial time continued to run and where defendant not arrested on indictment, which was subsequently returned within speedy trial period, until after the period ran, defendant entitled to discharge), cert. dismissed, 538 So. 2d 986 (Fla. 1978); Crain v. State, 302 So. 2d 433, 434 (Fla. 2d DCA 1974) (holding that a defendant's position under the speedy trial rule is the same whether or not the State has filed an information; while the nolle prosequi of a misdemeanor narcotics possession charge within the misdemeanor speedy trial period did not preclude the filing, beyond the misdemeanor speedy trial period, of a new information charging felony possession, where defendant not brought to trial within 180 days from original arrest, defendant entitled to discharge).

Finally, while the Petitioner correctly observes (Br. of Pet'r at 16) that the original panel decision in Diaz v. State, 18 Fla. L. Weekly D2080 (Fla. 5th DCA Sept. 24, 1993), extant at the time of issuance of, and cited by, the decision below, has since been modified by the Fifth District upon a recomprehension of fact, not of law, there is nothing in the ultimate disposition of that case

which is inconsistent with the decision below. To the contrary, both the original Diaz decision, and the decision entered on motion for rehearing, Diaz v. State, 627 So. 2d 125 (Fla. 5th DCA 1993), are entirely consistent with and supportive of the defendant's position herein.

Originally, on the defendant's appeal, the Diaz panel summarily reversed and remanded with directions to grant the defendant's motion for speedy trial discharge under authority of State v. Agee. The panel opinion did not contain any recitation of facts. 18 Fla. L. Weekly at D2080. In a concurring opinion, Judge Dauksch observed the facts to be that the defendant was arrested on an unspecified date in January 1992; the state attorney declined to prosecute (referred to therein as a "no information"); and in April 1992 the state attorney proceeded with an information. Id. at D2081. Judge Dauksch recited that Diaz was arrested on an unspecified date in June 1992, and moved for discharge in August 1992. It could not be gleaned from that concurring opinion how many days separated the date of original arrest and the date of rearrest on the information. Judge Dauksch stated, a view which appears to have been necessarily accepted by the panel, that a "no bill" is the same as a nolle prosequi under the speedy trial rule:

> Once the state has chosen to arrest, take into custody, rule 3.191(d), then it must timely proceed to have the accused brought to trial. Just as it cannot file an information (and arrest on the capias), wait until the last minute to nol pros and then restart the clock, it cannot decline to prosecute an arrestee, release him, and wait until later to file an information to start the speedy trial clock running anew.

Id.

Insofar as the facts were stated in the concurring opinion, the statement of law by Judge Dauksch was entirely correct. However, on rehearing, the unanimous panel clarified a fact not apparent in the original opinion or concurrence, i.e., that after the State's "no bill," an information was filed and Diaz was rearrested within the 175-day speedy trial period.[14] 627 So. 2d at 125.

Therefore, the Agee holding, which was correctly observed by the Diaz court to be "predicated upon the rationale that where the speedy trial period expired prior to the refiling of the charge, the defendant was deprived by the state of his right to seek discharge at the end of the prescribed period . . . hence . . . and was thereafter entitled to automatic discharge upon the refiling of the charge," was inapplicable to Diaz because "at the end of the 175-day period the case was in court and the procedural remedy of filing a motion for discharge was available to Diaz at that time." Id. at 125-26.[15] There is nothing in the rehearing decision in Diaz which either conflicts with the decision below, or which supports the State in its argument herein. To the contrary, both Diaz opinions, albeit the first one resting on an incorrect view of the facts and the second one stopping short of expressly reaching the definition of "nol pros," are fully consistent with the decision below and the defendant's position herein.

14

This was clearly a timely recommencement of prosecution under the rule. See supra note 7 at p.7.

15

In contrast, the 175-day period plus the fifteen-day window in this case had elapsed before the State recommenced prosecution.

Under the clear text and scope of the speedy trial rule and longstanding jurisprudence thereunder, the defendant was entitled to discharge and the District Court of Appeal properly granted prohibition.

CONCLUSION

Based on the foregoing argument and authorities cited, the decision of the District Court of Appeal is correct and should be affirmed. The certified question should be appropriately rephrased to reflect the meaning of "nolle prosequi" within rule 3.191 as applying to all post-rule-commencement State declinations to prosecute, and, as rephrased, answered in the affirmative.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 Northwest 14th Street
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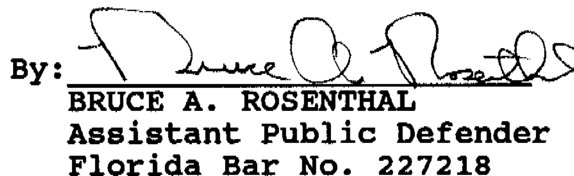

By: ______________________
BRUCE A. ROSENTHAL
Assistant Public Defender
Florida Bar No. 227218

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered to Judge Michael A. Genden, Circuit Judge, The Richard E. Gerstein Building, 1351 Northwest 12th Street, Miami, Florida 33125, and a copy hand-delivered to Lisa Berlow-Lehner, Assistant State Attorney, Office of the State Attorney, E.R. Graham Building, 1350 Northwest 12th Avenue, Miami, Florida 33136-2111, this 17th day of March, 1994.

BRUCE A. ROSENTHAL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,030

THE HONORABLE MICHAEL A. GENDEN,
Judge of the Circuit Court of
the Eleventh Judicial Circuit,
in and for Dade County, Florida,

Petitioner,

vs.

APPENDIX

WILLIAM FULLER,

Respondent.

_______________________________/

PAGE

Fuller v. Genden, ___ So. 2d ___,
18 Fla. L. Weekly D2516
(Fla. 3d DCA Nov. 30, 1993) 1-2

State v. Agee, 622 So. 2d 473 (Fla. 1993) . . . 3-7

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

WILLIAM FULLER,	**	
Petitioner,	**	
vs.	**	CASE NO. 93-2219
THE HONORABLE MICHAEL A. GENDEN, etc.,	**	
Respondent.	**	

Opinion filed November 30, 1993.

A Case of Original Jurisdiction - Prohibition.

Bennett H. Brummer, Public Defender and Bruce A. Rosenthal, Assistant Public Defender, for petitioner.

Robert A. Butterworth, Attorney General and Katherine Fernandez Rundle and Lisa Berlow-Lehner, for respondent.

Before SCHWARTZ, C.J., and NESBITT and GODERICH, JJ.

SCHWARTZ, Chief Judge.

We reject the state's contention that the holding of State v. Agee, 622 So. 2d 473 (Fla. 1993) does not apply because the state voluntarily terminated the prosecution of the defendant after he had been arrested by a so-called "no action" taken before an information was filed, rather than, as in Agee, through a "nolle prosse" filed after an information. In the light of the policy underlying the supreme court's interpretation of the speedy trial

rule, this is a distinction without a legally cognizable difference. See Allied Fidelity Ins. Co. v. State ex rel. Dade County, 408 So. 2d 756 (Fla. 3d DCA 1982). Diaz v. State, ___ So. 2d ___ (Fla. 5th DCA Case no. 92-3022, opinion filed, September 24, 1993)[18 FLW D2080](majority opinion and Dauksch, J., specially concurring) directly so holds. Although our earlier decision of Williams v. Shapiro, 575 So. 2d 1368 (Fla. 3d DCA 1991) is to the contrary, we believe that it has been effectively overruled by <u>Agee</u>. Accordingly, on the authority of <u>Agee</u>, the petition for writ of prohibition is granted.

We certify to the supreme court that this decision involves the following question of great public importance:

> Whether the Holding of State v. Agee Applies When the Prosecution Is Terminated by a Voluntary Dismissal Before an Indictment or Information Rather Than a "Nolle Prosse" Filed After an Information or Indictment?

Prohibition granted, question certified.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,030

THE HONORABLE MICHAEL A. GENDEN,
Judge of the Circuit Court of
the Eleventh Judicial Circuit,
in and for Dade County, Florida,

Petitioner,

vs.

WILLIAM FULLER,

Respondent.

_________________________________/

APPENDIX

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State v. Agee, 622 So. 2d 473 (Fla. 1993) . . . 3-7

him fall. Some form of bodily injury must have been expected or intended to result under those circumstances, and "[t]he fact that an unintended *serious* injury resulted from the fall is irrelevant to the issue of coverage." *Id.* at 1195 (emphasis supplied).

For the reasons stated above, we agree with the Second District that if the finder of fact concludes that the gun was accidentally discharged, the intentional injury exclusion in Castellano's policy does not exclude coverage because the insured would not have expected or intended bodily injury to result. However, should the jury find that Castellano intentionally fired his gun at Swindal intending to injure him, the exclusion would apply.

Accordingly, we answer the certified question as rephrased in the negative and we approve the decision below. This cause is remanded for proceedings consistent with this opinion.

It is so ordered.

McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

OVERTON, J., dissents.

STATE of Florida, Petitioner,

v.

Ronald T. AGEE, Respondent.

No. 78950.

Supreme Court of Florida.

July 1, 1993.

Rehearing Denied Aug. 20, 1993.

State filed information charging defendant with attempted murder. The Circuit Court, Duval County, Michael R. Weatherby, J., entered order discharging defendant. State appealed. The District Court of Appeal, 588 So.2d 600, Allen, J., affirmed and certified question. The Supreme Court, Shaw, J., held that state could not refile charges once state had nol prossed and speedy trial period had run.

Decision of District Court of Appeal approved.

Overton, J., filed dissenting opinion.

1. Criminal Law ⚷577.14

When state enters nolle prosequi, speedy trial period continues to run and state may not refile charges based on same conduct after period has expired. West's F.S.A. RCrP Rule 3.191 (1991).

2. Criminal Law ⚷577.14

Speedy trial rule barred trial where prosecutor filed information charging defendant with attempted first-degree murder almost two years after prosecutor had entered nolle prosequi under information charging defendant with attempted second-degree murder; new charge of attempted first-degree murder was based on same occurrence as original charge and was filed long after initial speedy trial period had run. West's F.S.A. RCrP Rule 3.191 (1991).

Robert A. Butterworth, Atty. Gen., and Carolyn J. Mosley, Asst. Atty. Gen., and James W. Rogers, Bureau Chief–Criminal Appeals, Tallahassee, for petitioner.

Louis O. Frost, Jr., Public Defender and James T. Miller, Asst. Public Defender, Fourth Judicial Circuit, Jacksonville, for respondent.

SHAW, Justice.

We have for review *State v. Agee*, 588 So.2d 600 (Fla. 1st DCA 1991), wherein the court certified conflict with *State v. Dorian*, 16 Fla.L.Weekly D2370, 1991 WL 174585 (Fla. 3d DCA 1991), *superseded on rehearing*, 619 So.2d 311 (Fla. 3d DCA 1993). We have jurisdiction. Art. V,

§ 3(b)(4), Fla. Const. We approve the decision in *Agee*.

Donald Vandyk was shot on February 8, 1988, and rendered comatose. Agee was charged with attempted second-degree murder, arrested in Illinois, and extradited to Florida on March 30, 1988. Pursuant to Florida Rule of Criminal Procedure 3.191, Agee made a written demand for speedy trial on July 22, 1988. Thirty-three days before expiration of the speedy trial period, the State entered a *nolle prosequi*, noting that the victim was comatose and there were no eyewitnesses. Agee was then transported to Tennessee and imprisoned for escape. Later, Florida authorities located two eyewitnesses to the Florida crime, the victim emerged from his coma, and the State filed an information charging Agee with the premeditated attempted first-degree murder of Vandyk. The trial court dismissed the charges, ruling that section (h)(2) of the speedy trial rule—which provides that a nol pros shall not be used to avoid the intent of the rule—precludes refiling of charges once the State has nol prossed and the speedy trial time has run.

The district court affirmed, holding that where the speedy trial period has run and the defendant could have secured a discharge but for entry of a nol pros the defendant is entitled to automatic dismissal if charges are refiled. The court concluded that the State is not entitled to the fifteen-day "window of recapture" provided by section (i), and certified conflict with *Dorian*, wherein the district court indicated the window applies.

The State argues that the speedy trial rule is inapplicable during the period after entry of a nol pros and before charges are refiled. A nol pros removes a defendant from the "accused" category, the State insists, and places him or her in the same position as any other suspect in a criminal investigation. In the alternative, the State argues, the defendant must file a motion for discharge after the State has refiled charges and this activates the "window of recapture," which gives the State an extra fifteen days to begin trial.

Florida's speedy trial rule is contained in Florida Rule of Criminal Procedure 3.191[1] and requires the State to bring a defendant to trial within a time certain:

> (a)(1) *Speedy Trial Without Demand.* Except as otherwise provided by this Rule, and subject to the limitations imposed under (b)(1) and (b)(2), every person charged with a crime by indictment or information shall be brought to trial within 90 days if the crime charged be a misdemeanor, or within 175 days if the crime charged is a felony. If trial is not commenced within these time periods, the defendant shall be entitled to the appropriate remedy as set forth in section (i) below. The time periods established by this section shall commence when such person is taken into custody....
>
> (2) *Speedy Trial Upon Demand.* Except as otherwise provided by this Rule and subject to the limitations imposed under (b)(1) and (c), every person charged with a crime by indictment or information shall have the right to demand a trial within 60 days, by filing with the court having jurisdiction and serving upon the state attorney a Demand for Speedy Trial.
>
> ....
>
> (4) In the event that the defendant shall not have been brought to trial within 50 days of the filing of the Demand, the defendant shall have the right to the appropriate remedy as set forth in section (i) below
>
> ....
>
> (i) Remedy for Failure to Try Defendant Within the Specified Time.
>
> ....
>
> (2) The defendant may, at any time after the expiration of the prescribed time period, file a motion for discharge.

1. We cite the 1990 version of Florida Rule of Criminal Procedure 3.191 above. Agee's present motion for discharge under the rule was filed August 24, 1990. The rule has since been amended technically.

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

Fla.R.Crim.P. 3.191. The purpose of the rule is "to promote the efficient operation of the court system and to act as a stimulus to prosecutors to bring defendants to trial as soon as practicable, thus minimizing the hardships placed upon accused persons awaiting trial." *Lewis v. State,* 357 So.2d 725, 727 (Fla.1978).

Section (h)(2) makes clear that the State cannot circumvent the intent of the rule by suspending or continuing the charge or by entering a nol pros and later refiling charges:

> [h](2) *Nolle Prosequi; Effect.* The intent and effect of this Rule shall not be avoided by the State by 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.*

Fla.R.Crim.P. 3.191(h)(2). 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.

When faced with a missing witness or unconscious victim, as in the instant case, a prosecutor is not without options. The State may always seek a delay under section (f), which allows judicial extensions for good cause:

> (f) Exceptional Circumstances. As permitted by (d)(2) of this Rule, the court may order an extension of the time periods provided under this Rule where exceptional circumstances are shown to exist. Exceptional circumstances shall not include general congestion of the court's docket, lack of diligent preparation or failure to obtain available witnesses, or other avoidable or foreseeable delays.
>
> Exceptional circumstances are those which as a matter of substantial justice to the accused or the State or both require an order by the court: Such circumstances include (1) unexpected illness or unexpected incapacity or unforeseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and adequate trial ... (3) a showing by the State that specific evidence or testimony is not available despite diligent efforts to secure it, but will become available at a later time; (4) a showing by the accused or the State of necessity for delay grounded on developments which could not have been anticipated and which will materially affect the trial....

Fla.R.Crim.P. 3.191(f). 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. We note that requiring the State to petition the court for an extension achieves the intended result of ensuring judicial control over deviations from the rule.

[1] Based on the foregoing, we hold that when the State enters a nol pros, the speedy trial period continues to run and the State may not refile charges based on the same conduct after the period has expired.

[2] In the instant case, the State concedes that the new charge of attempted first-degree murder was based on the same occurrence as the original charge and was filed long after the initial speedy trial period had run. We note that Agee was presumably prepared for trial when he filed his demand, but now, more than two years later, may or may not be, due to state

action over which he had no control. While Agee has been in Tennessee prison, his witnesses may have relocated and their memories faded, and other evidence may have grown stale or disappeared. To allow the State to prosecute under these circumstances would violate the intent of the rule.

We approve the decision of the district court below, disapprove *Dorian,* and recede from *Zabrani v. Cowart,* 506 So.2d 1035 (Fla.1987) and *Bloom v. McKnight,* 502 So.2d 422 (Fla.1987), to the extent they suggest the fifteen-day window of recapture applies in such cases.

It is so ordered.

BARKETT, C.J., and McDONALD, GRIMES, KOGAN and HARDING, JJ., concur.

OVERTON, J., dissents with an opinion.

OVERTON, Justice, dissenting.

I dissent. In this case, the State has done nothing wrong. It has acted properly and ethically, the statute of limitations has not run, and Agee has not shown that he has been prejudiced or that his constitutional right to a speedy trial has been violated. Even so, the majority has construed a procedural rule of this Court to allow the serious crime of attempted murder for which Agee has been charged to be totally discharged, principally because, when the time under our speedy trial rule expired in this case, Agee's victim was still comatose—comatose allegedly because of Agee's violent conduct.

In this case, sufficient evidence existed to establish probable cause necessary to support a valid arrest. Unfortunately, however, because Agee's victim remained in a coma, the victim could not testify concerning the circumstances of the crime. Moreover, the State had no medical opinion of when, if ever, the victim would recover, and no eyewitnesses were known to the State. Consequently, once Agee moved for a speedy trial, the State *nol prossed* this case because it believed it lacked sufficient evidence to proceed to trial. The fact that the victim eventually recovered and that two eyewitnesses subsequently became known to the State was not the result of a failure on the State's part to diligently investigate this crime. Regrettably, on these facts, the majority concludes that the State cannot recharge Agee for the offense at issue because the State violated the intent of Florida Rule of Criminal Procedure 3.191(h)(2) (1990) when it refiled the charges subsequent to entering a *nol pros.*

One of the purposes of rule 3.191 is to prevent the State from violating a defendant's right to a speedy trial through tactical maneuvers. Consequently, I agree that the State cannot enter a *nol pros* to avoid the effect of that rule. However, I do not believe that a case should be dismissed under rule 3.191 when the State is able to show that such a *nol pros* was filed in good faith and was not necessitated due to any fault of the State's. This is especially true when, through no fault of the State, the victim is unable to testify, and the prosecutor is unable to determine, when, if ever, that victim will be available to testify to supply sufficient evidence necessary to convict the defendant as charged.

As we have previously determined, rule 3.191 is purely a procedural "triggering mechanism," the violation of which presumptively establishes prejudice. *R.J.A. v. Foster,* 603 So.2d 1167 (Fla.1992). However, that presumption is rebuttable and, for good cause shown, the time in which speedy trial limits will run may be extended. Similarly, I believe the filing of a *nol pros* by the State should also establish a *rebuttable* presumption that the State filed the *nol pros* to avoid the effect of rule 3.191. When, as in the instant case, the unrefuted facts reflect that good cause existed for filing the *nol pros,* I would find that the presumption has been rebutted and that the offense for which the defendant has been charged should not be discharged so long as the defendant is unable to show actual prejudice and is tried within the time remaining between the filing of the *nol pros* and the last day of the speedy trial time period.

The majority concludes that the State should not have filed the *nol pros* because,

even when the State is faced with missing witnesses or an unconscious victim, it has other available options. For example, the majority suggests that the State should either postpone arresting a suspect until it has an adequate case or, when charges have been filed as in the instant case, seek an extension for good cause.

The implementation of the first suggestion would entirely change our criminal justice structure. Clearly, the State need establish only probable cause that a suspect has committed a crime before making an arrest. *Blanco v. State,* 452 So.2d 520 (Fla.1984) (the standard of conclusiveness and probability necessary for a valid arrest is less than that required to support a conviction), *cert. denied,* 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985); *Shriner v. State,* 386 So.2d 525 (Fla.1980) (same), *cert. denied,* 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 829 (1981). Further, situations often arise where the need to make an arrest exists the moment probable cause is established, particularly when the offense is of a violent nature. The option of waiting to arrest until after sufficient evidence to convict has been obtained provides an opportunity for a defendant to leave the jurisdiction as well as to inflict additional harm on others. Consequently, this option is not viable under the circumstances of an attempted murder charge such as the one at issue here.

Neither is the second option viable in this case. When exceptional circumstances exist, the State may, under rule 3.191(f), seek an extension for good cause shown. However, that rule clearly reflects that, when a continuance is sought because of the unavailability of witnesses, the movant must advise the court as to when those witnesses will become available. Under the circumstances of this case, it was impossible for the State to show when, if ever, the victim would have been available to testify.

In this case, I believe the State chose the only ethical and proper course of action available to it when it filed the *nol pros.* The majority fails to recognize the ethical requirements of a prosecutor who finds that, through no fault of the State's, the victim is unable to testify and the prosecutor is unable to advise the court when, if ever, that victim can testify to provide sufficient evidence to support a conviction. Our procedural speedy trial rule should not be used to allow a defendant to escape culpability simply because that defendant injured the victim so badly that the victim is unable to testify during the speedy trial period. For these reasons, I dissent.

Ervin Eugene WILLIAMS, Petitioner,

v.

STATE of Florida, Respondent.

No. 79976.

Supreme Court of Florida.

July 1, 1993.

After state entered nolle prosequi and later recharged defendant, the Circuit Court, Orange County, James C. Hauser, J., discharged defendant on speedy trial grounds. State appealed. The District Court of Appeal, 597 So.2d 960, reversed and remanded. Application for review based on conflict of decisions was granted. The Supreme Court, Shaw, J., held that nolle prosequi did not toll running of speedy trial period.

Decision of District Court of Appeal quashed, and case remanded.

Overton, J., concurred in result.

Criminal Law ⚷577.14

Nolle prosequi did not toll speedy trial period, and, thus, state could not refile identical charges based on same incidents after entry of nolle prosequi and expiration of speedy trial period.