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IN THE SUPREME COURT OF FLORIDA

JAHQUELLE DAVIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	CASE NO.: SC18-1627
STATE OF FLORIDA,	)	Lower Tribunal No(s).:
	)	5D17-745
Respondent.	)	2014-CF-008745-D-O
_____	)	

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

REPLY BRIEF ON THE MERITS

JAMES S. PURDY
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SEVENTH JUDICIAL CIRCUIT

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REPLY

THE DETERMINATION OF WHETHER AN ARREST HAS OCCURRED FOR SPEEDY TRIAL PURPOSES SHOULD BE BASED ON AN OBJECTIVE CONSIDERATIONS AND THE TOTALITY OF THE CIRCUMSTANCES.

Petitioner respectfully submits the following reply to the Answer Brief.

Stare Decisis. Respondent's Answer suggests that this Honorable Court should not recede from the *Melton* case, citing to the considerations in *North Fla. Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612, 637-638 (Fla. 2003). Applying the considerations here, the threshold for receding from *Melton* is met. It would be hard to overestimate the drastic changes in the legal landscape since the 1954 *Melton* decision. The law of arrest has developed over time into an ever changing mish-mash of definitions depending on Constitutional circumstances. Aligning the definitions of arrest would bring more, not less, coherence to the law. As stated in the Initial Brief footnote 9, *Melton* is very infrequently cited and therefore its precedential value is limited. Further, the Respondent does not address the concerns of Petitioner in regards to after-the-fact manipulation by State actors. These are very real, on the ground concerns as laid

out in the Initial Brief. All of these considerations weigh towards receding from *Melton* as discussed in the Initial Brief.

The Respondent's Defense of Subjective Determinations. The Respondent states in the Answer, "[...] trial courts are called upon to determine subjective intent on an almost daily basis, and their expertise in judging the credibility of a witness's factual assertions is so well-recognized by Florida courts as to be unassailable here." (ANS10) Contrary to the common assumption inherent in the Respondent's statement, the detection of truth or falsity is not easily discernable and it is not improved by experience. "Over the years, controlled studies have shown that people are poor intuitive judges of truth and deception (Zuckerman, DePaulo, & Rosenthal, 1981), and that police investigators and other so-called experts who routinely make such judgments are also highly prone to error. (Ekman & O'Sullivan, 1991). Even training may not improve performance in this regard. Although modest gains have been reported (deTurck & Miller, 1990), many researchers have found that judgment accuracy is not appreciably increased by rehearsal, training, or performance feedback (DePaulo, 1994; Zuckerman, Koestner, & Alton, 1984), even among experienced police officers. (Vrij, 1994)."

Kassin and Fong *I'm Innocent!: Effects of Training on Judgments of Truth and Deception in the Interrogation Room Law* and Human Behavior, VoI. 23, No. 5, 1999, available at http://web.williams.edu/Psychology/FacultyfKassinlfiles/kassinfongl 999.pdf.

"[P]eople are not very accurate at detecting deception. This is the consensus among psychologists who arrange for people to judge lies and truths and to assess the percentage of those lies and truths they correctly detect. In a large research literature, overall rates of lie/truth discrimination average less than 55%, when 50% would be expected by chance (Aamodt & Mitchell, 2006). Moreover accuracy rates vary little across studies." Bond Jr. DePaulo *Individual Differences in Judging Deception: Accuracy and Bias* Psychological Bulletin 2008, Vol. 134, No. 4, 477–492, available at http://postcog.ucd.ie/.

Therefore, putting witness credibility determinations at the heart of any Constitutional test is fraught with the dangers inherent in human frailty and imperfection. This is why Petitioner urges this Honorable Court to adopt an objective test as discussed in the Initial Brief.

False distinction between police agencies and prosecutors. The Respondent's Answer attempts to distinguish between prosecutors and police

agencies, arguing that it would be improper to attribute police conduct to prosecutorial decision making. Police agencies and prosecutors are both part of the executive branch. There is no Constitutional distinction between them. Further, police agency actions are regularly attributed to prosecutors. For example, in order to comply with *Brady* disclosure requirements, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in [the] case, including the police." *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999) (*quoting Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)); *Way v. State*, 760 So. 2d 903, 910 (Fla. 2000) Any real world impact could easily be resolved by the executive by simple notification training or minor communication tweaks between prosecutors and police.

Respondent's Dangerous Proposed Test. As anticipated in the Initial Brief, there is no disagreement between Petitioner and the Respondent when a formal arrest is involved. When a citizen is booked, charged and jailed, a formal arrest has occurred. Instead, the focus must be on defining what makes up a "de facto arrest". The Respondent's proposal is just to overlook ALL cases in which does not contain a the formal arrest indica. Thus, Respondent is saying that there is no such thing as

a de facto arrest in the speedy trial context. This is a frightening expansion of government power. Is Respondent really suggesting that the police could handcuff, detain, and restrain a citizen for an indefinite period of time, but so as long as the did not go through the formal booking procedures, the Constitutional Right to speedy trial would not be triggered? This suggestion of incredible State power expansion is as dangerous as it is unnecessary. The Respondent's suggestion would remove any judicial check on police conduct, a dangerous move away from liberty at a time when expansive police powers threaten individual citizens. See *Ham Sandwich Nation: Due Process When Everything Is a Crime* by Glenn Harlan Reynolds Published 3 July, 2014 at http://newjurist.com/ham-sandwich-nation.html; See also Gene Healy's Go Directly To Jail: The Criminalization of Almost Everything, and Harvey Silverglate's Three Felonies A Day.

The Respondent's proposed test is not supported by legislative enactments or Florida Statutes. The Respondent instead replies on a singular dissenting opinion in *Bulgin v. State*, 912 So. 2d 307, 314 (Fla. 2005) for guidance in crafting their new test. Respondent's suggested solution is to entirely eliminate de-facto arrest from speedy trial consideration. This proposed test runs contrary to ordinary checks and balances inherent in our Constitutional system. The Respondent's proposed test

invites governmental abuse by removing checks on improper citizen detentions and ceding complete power to define arrest to a unitary executive decision-maker. Judicial branch oversight is required in the real world. Cf. *State v. Devard*, 178 So. 3d 41 (Fla. 2d DCA 2015); *Griggs v. State*, 994 So. 2d 1198 (Fla. 5th DCA 2008)

In support of its position, Respondent suggests that its proposal is more in line with Federal speedy trial prescriptions (ANS16-17) However, as stated by the majority in *Bulgin*,

> "The United States Supreme Court has repeatedly emphasized the importance and fundamental nature of a citizen's right to a speedy trial as guaranteed by the Sixth Amendment. See e.g., *Klopfer v. North Carolina*, 386 U.S. 213, 226, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967) ("The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution."). Further, the Court has held that it is the individual states' responsibility to provide an accused with clear parameters to assure the protection of the right to a speedy trial. *Klopfer*, 386 U.S. at 225–26, 87 S.Ct. 988; see also *Barker v. Wingo*, 407 U.S. 514, 523, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) ("The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but [the Supreme Court's] approach must be less precise.").

Bulgin v. State, 912 So. 2d 307, 309 (Fla. 2005)

Thus, Federal speedy trial pronouncements are not a ceiling but instead a framework that anticipates additional State parameters (such as Florida's) to flesh out the broad Federal Constitutional standards.

The Respondent's proposal would also have the unintended consequence on the crime of escape. For example, for there to be an escape, there must first be a valid arrest. *Kyser v. State*, 533 So. 2d 285, 287 (Fla. 1988) Respondent's proposal would greatly limit the circumstances in which an escape could be charged. See i.e. *Sweeney v. State*, 633 So. 2d 66, 68 (Fla. 4th DCA 1994) (sustaining an escape conviction in circumstances of a de facto arrest); See also *State v. Ramsey,* 475 So. 2d 671, 673 (Fla. 1985) (sustaining a charge of escape in case of de facto arrest). Applying Respondent's proposal to facts such as the *Sweeney* and *Ramsey* cases would allow a person placed under de facto arrest to run from an officer at any time up until formal booking. This would be a drastic change from present law and would be dangerous to law enforcement and citizens.

Finally, Respondent's proposed test does not simplify or streamline the existing confusion on the definition(s) of arrest in different contexts, which is the whole point of revisiting *Melton*. It simply replaces the existing *Melton* definition standard with another, more expansive definition that is also not congruent with any other definition of arrest in any other circumstance. Thus, the problems

outlined in the Initial Brief would continue. The Respondent's proposed test should be avoided.

Respondent's Incorrect Constitutional Lens. As discussed in the Petition, and assumed throughout the Answer, Respondent views enumerated individual rights as extremely limited in scope. For example, Respondent argues that the interest protected of search and seizure under the Fourth Amendment protects a particular interest, therefore, the definition of arrest is one thing. The interest of Fifth Amendment protects a different citizen interest, therefore the definition of arrest means something else. This is the wrong lens for which to view things. Instead, from the perspective of limited delegated powers of government, the State has the power to detain citizens only insofar as they have specific delegated authority to do so. If they detain beyond a certain point, they are operating extra-Constitutionally, and the detention must be objectively deemed an "arrest" so as to trigger a citizen's constitutional protections against the State intrusion.

Alternative Basis. Finally, the Respondent states, "This Case – An Alternative Basis to Affirm Alternatively, even if this Court concludes a de facto arrest occurred on May 29, 2014, it would not have been for the crimes for which

the Defendant was later charged." (ANS18) Petitioner replies that if this Honorable Court makes this conclusion, that it then remand to the trial court for factual determination and for the Petitioner to make arguments to the trial court in light of the decision of this Court.

CONCLUSION

The decision *Melton v. State*, 75 So. 2d 291 (Fla. 1954) should be receded from and an updated replacement standard announced that addresses the concerns laid out in the Initial Brief. The present case should be remanded to give the parties an opportunity to present evidence contemplating the new standard for a factual determination and for the trial court to apply the replacement standard to the facts after hearing.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14-point proportionally spaced Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically through the Florida Courts E-Filing Portal in the Florida Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925, at www.myflcourtaccess.com; which will email a copy of the filing to the Office of the Attorney General, 444 Seabreeze Boulevard, Fifth floor, Daytona Beach, Florida 32118, at crimappdab@myfloridalegal.com and kristen.davenport@myfloridalegal.com; and a true and correct copy delivered by mail to Mr. Jahquell Marquis Davis, Inmate #X88678, Gulf Correctional Institution, 500 Ike Steele Road, Wewahitchka, Florida 32465-0010, on this 4th day of February, 2019.

/s/ Steven N. Gosney
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