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THOMAS D. HALL
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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT
BY _____

Case No.: Sc00-562

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF CRIMINAL
PROCEDURE

Comments on Proposed Rule 3.190(h)(4)

The Office of the Public Defender for the Eleventh Judicial Circuit offers the following comments on the proposed Florida Rule of Criminal Procedure

3.190(h)(4):

The proposed phrase "a reasonable time before trial" is too vague. What is "reasonable" will vary from case to case, depending on the facts, and from judge to judge, depending on his or her view of what constitutes a "reasonable time."

The proposed phrase will also greatly add to post-trial litigation. First, it will likely add a new layer of appeals. Because of the fact-specific nature of the "reasonable time" requirement, every case in which the trial judge refuses to hear a motion to suppress because the judge believes it was not timely filed will be appealable. As the refusal to hear a motion is not a final order, the appeal will not come until after the case has been tried. What will happen, then, if the appellate court disagrees with the trial court and finds that the motion was made in a timely

manner? Will the appellate court reverse the entire case and remand for further proceedings? Will the appellate court relinquish jurisdiction for the purpose of allowing the hearing, then affirm if the trial court, after a hearing, denies the motion? If the latter course is taken, how does the defendant appeal the denial of the motion on its merits?

Additional litigation is also inevitable under the proposed revision, even if the appellate court upholds the trial court's decision to not grant a hearing on a motion to suppress because it was not made a "reasonable time before trial." In that case, the defendant's obvious recourse is a claim of ineffective assistance of counsel for failure to timely file the motion. Such a claim, by its nature, cannot be resolved on the basis of the record and so will require an evidentiary hearing in the trial court, and an appeal of an adverse ruling.

More generally, the proposed revision to the rule is at odds with the preference for decisions based on the merits, rather than based on failure to follow procedure. The purposes underlying the proposed changes – to reduce delay caused by motions filed at the last minute and to enable the trial court to better control its calendar – are laudable, but any changes should not come at the expense of decisions on the merits.

It appears to us that a proposal that was rejected by the committee is a better alternative than the "reasonable time" language. That proposal is for a specified time period by which a motion to suppress must be filed, and a suggested form for the rule is as follows:

(4) **Time for Filing.** The motion to suppress shall be made five days before the start of trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court, on good cause shown, may entertain the motion or an appropriate objection at the trial.

A specified time period by which the motion must be filed will provide clear guidance to the parties and the court and will definitively resolve the question of timeliness in the vast majority of motions. It will also provide time before the trial in which the motion can be heard, so that the trial date is not affected. In the rare case where a hearing may be so lengthy that the trial does have to be postponed, the trial witnesses will receive notice of the postponement.

Respectfully submitted

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CERTIFICATE OF FONT SIZE

Undersigned counsel certifies that the type used in this brief is 14 point
proportionately spaced Times New Roman.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Comments was forwarded by mail to Jerome Latimer, 1401 61st Street South, St. Petersburg, Florida 33707, Susan Elsass, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, and John Harkness, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 11th day of May, 2000.


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