IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC17-1014

LUIS BORN-SUNIAGA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, LUIS BORN-SUNIAGA, was the defendant in the trial court and the appellee in the Fourth District Court of Appeal, and will be referenced in this brief as Petitioner. Respondent, the State of Florida, was the prosecuting authority in the trial court and the appellant in the Fourth District Court of Appeal ("Fourth District"), and will be referenced in this brief as Respondent or the State.

The record on appeal consists of one volume, which will be referenced as "R" followed by an appropriate page number (R 1-70).

Citations to Petitioner's Initial Brief shall be denoted as "IB" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State generally accepts Petitioner's Statement of the Case and Facts, but makes the following clarifications and additions:

Contrary to the Initial Brief, the record does not support that the trial court found that "Petitioner was actually misled about the status of the prosecution." (IB 3). Rather, the Fourth District's opinion describes the trial court's findings as follows:

> The trial court found that there was no record activity from [Petitioner] in the case file, no notices were ever mailed to him, and the file "pursuant to the clerk's office policy was sealed." The court concluded that there was no way for [Petitioner] to find out that this case existed and no effort to alert him to the fact that charges stemming from the initial incident were still ongoing.

(R 59-60).

SUMMARY OF THE ARGUMENT

This Court should affirm the unanimous *en banc* decision of the Fourth District. The Fourth District properly construed the plain language of Fla. R. Crim. P. 3.191 and this Court's prior decisions in State v. Nelson, 26 So. 3d 570 (Fla. 2010) and State v. Naveira, 873 So. 2d 300 (Fla. 2004) to conclude that the State is entitled to the recapture period under the rule where the State timely files a charge, regardless of whether the defendant was notified of the pending charge within the speedy trial time period.

ARGUMENT

THE FOURTH DISTRICT CORRECTLY CONCLUDED THAT THE STATE IS ENTITLED TO THE RECAPTURE PERIOD UNDER FLA. R. CRIM. P. 3.191 WHERE THE STATE TIMELY FILES A CHARGE, REGARDLESS OF WHETHER THE DEFENDANT WAS NOTIFIED OF THE PENDING CHARGE WITHIN THE SPEEDY TRIAL TIME PERIOD.

A. Standard of review.

Interpretation of the rules of procedure with regard to the right to a speedy trial is a question of law subject to *de novo* review. State v. Nelson, 26 So. 3d 570, 573–74 (Fla. 2010).

B. Discussion.

Based on the plain language of Fla. R. Crim. P. 3.191 ("Rule 3.191") and this Court's prior decisions in State v. Nelson, 26 So. 3d 570 (Fla. 2010) and State v. Naveira, 873 So. 2d 300 (Fla. 2004), where the State has timely filed a charge, then the State is entitled to Rule 3.191's recapture period, regardless of whether the defendant received notice of the pending charge within the speedy trial time period.

1. Plain Language of Rule 3.191

Rule 3.191(a) provides that "every person charged with a crime shall be brought to trial … within 175 days of arrest if the crime charged is a felony." Fla. R.

Crim. P. 3.191(a).[1] If a trial has not been timely commenced under this provision, the rule provides a remedy under subdivision (p), after an inquiry pursuant to subdivision (j) (discussing extensions and availability). The unambiguous language of subdivision (p) states as follows:

> Remedy for Failure to Try Defendant within the Specified Time.
>
> (1) No remedy shall be granted to any defendant under this rule until the court has made the required inquiry under subdivision (j).
>
> (2) At any time after the expiration of the prescribed time period, the defendant may file a separate pleading entitled "Notice of Expiration of Speedy Trial Time," and serve a copy on the prosecuting authority.
>
> (3) No later than 5 days from the date of the filing of a notice of expiration of speedy trial time, the court shall hold a hearing on the notice and, unless the court finds that one of the reasons set forth in subdivision (j) exists, shall order that the defendant be brought to trial within 10 days. A defendant not brought to trial within the 10-day period through no fault of the defendant, on motion of the defendant or the court, shall be forever discharged from the crime.

Fla. R. Crim. P. 3.191(p).

A plain reading of Rule 3.191 reveals no requirement that a defendant either be served, arraigned, or otherwise notified of a pending charge within the 175-day

[1] Under this rule, the State cannot *file charges* after the speedy trial period has run, nor does it receive the benefit of the recapture period when such charges are untimely. State v. Williams, 791 So. 2d 1088, 1091 (Fla. 2001) (emphasis added). The information in the instant case was timely filed.

speedy trial time in order for the State to be entitled to the recapture period under subdivision (p)(3). Instead, the rule requires that upon hearing a motion to discharge, the trial court is compelled to determine whether any of the situations set forth in subdivision (j) of the rule apply. If so, then the motion for discharge should be denied. If not, then the remedy afforded in subparagraph (p)(3) should be imposed, which requires that trial commence within 10 days. See State v. Jimenez, 44 So. 3d 1230, 1236 (Fla. 5th DCA 2010) ("Rule 3.191 does not condition the availability of the recapture provision on the State serving or otherwise notifying the defendant of charges before the speedy trial period expires. **Its plain language grants the State the recapture period unless one of the enumerated exceptions in subsection (j) apply**.") (emphasis added).

Accordingly, imposing a requirement that the State notify the defendant of a pending charge within the speedy trial time period imposes a requirement *not* included in the plain language of the rule. Such a construction conflicts with well-established law of giving effect to rules of procedure as written. See Brown v. State, 715 So. 2d 241, 243 (Fla. 1998) ("Our courts have long recognized that the rules of construction applicable to statutes also apply to the construction of rules. Thus, when the language to be construed is unambiguous, it must be accorded its plain and ordinary meaning.") (internal citations omitted).

2. State v. Nelson

In State v. Nelson, 26 So. 3d 570 (Fla. 2010), this Court explained the procedure under Rule 3.191 and specifically indicated that automatic discharge was not a remedy for violation of the rule:

> Although all defendants are entitled to the benefit of the default rule, **the rule is not self-executing** and requires a defendant to take affirmative action to avail him- or herself of the remedies afforded under the rule based on the State's failure to comply with the time limitations. **When a defendant is charged within the speedy trial period, the remedy for a violation of the rule is not an automatic discharge**. Rather, the remedy for the State's failure to try a defendant within the specified time is provided for in Florida Rule of Procedure 3.191(p).
>
> Specifically, at any time after the expiration of the speedy trial period, the defendant may initiate application of the rule by filing and serving on the State a separate pleading entitled "Notice of Expiration of Speedy Trial Time." **This pleading invokes the defendant's speedy trial rights and triggers the recapture window**, which is an additional ten-day period for the State to bring the defendant to trial after the default speedy trial period expires. The recapture provision requires the trial court to hold a hearing within five days of the filing of the notice to determine whether any of the exceptions enumerated in rule 3.191(j) exist. **A defendant is not entitled to discharge until the trial court conducts the required inquiry under subdivision (j) of rule 3.191**. This provision advances the four exceptions that require a motion for discharge to be denied, which include the unavailability of the defendant and when the failure to hold trial is attributable to the accused. Unavailability includes circumstances where either the defendant or defense counsel is not ready for trial on the date it is scheduled.

> If none of the exceptions exist, the trial court must order that the defendant be brought to trial within the ten-day recapture period. This allows the State an additional opportunity to prosecute the defendant after the expiration of the speedy trial period. If the State fails to bring the defendant to trial within the recapture period and none of the exceptions exists, the defendant 'shall be forever discharged from the crime.'
>
> ***
>
> As demonstrated by these provisions, **a defendant is not automatically entitled to discharge based on the State's failure to meet the mandated time limit, and the State is generally entitled to the recapture period** provided for by rule[] 3.191(p)(3) …

Id. at 574–75 (internal citations and footnotes omitted) (emphasis added).

Noting the history of the rule, which originally did not include a recapture period, this Court quoted from the committee notes to the 1984 amendment, which created the recapture period for the State:

> The intent of [the amendment] is to provide the state attorney with 15 days within which to bring a defendant to trial from the date of the filing of the motion for discharge. ... [I]t gives the system a chance to remedy a mistake; it does not permit the system to forget about the time constraints.

Id. at 575 (quoting Fla. R. Crim. P. 3.191 committee notes (1984)).

Although the issue in Nelson was whether a defendant's request for a continuance before filing a notice of expiration of speedy trial time, but after expiration of the speedy trial period, resulted in a waiver of the defendant's right to speedy trial, the general principles enunciated in Nelson apply equally here. In

addressing the recapture period, the Court discussed how Rule 3.191 was amended in 1984 to repeal the remedy of automatic discharge and to create the recapture period:

> The creation of the recapture period emphasizes the purpose of the rule — "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." In other words, **the recapture period illustrates the principle that a defendant has a right to speedy trial, not a right to speedy discharge without trial.**

Id. at 576. (emphasis added).

The Court also indicated that, because the State filed charges in Nelson within the speedy trial window, the State was entitled to the recapture window. Id. at 578. Accordingly, under Nelson, where the State has filed charges within the speedy trial window, the defendant is required to invoke his speedy trial rights by filing a notice of expiration of speedy trial time as set forth in Rule 3.191(p)(2).

3. State v. Naveira

In Naveira, the State filed its information charging the defendant on the 175th day from his arrest. Id. at 302. The defendant filed a notice of expiration of speedy trial five days later. Id. The court held a hearing as required under the rule and set the trial ten days later. Id. The defendant moved for a continuance and then for discharge, contending that the State's late filing of the information deprived him of

his ability to prepare a defense because he was required to choose between his right to a rule-based speedy trial and his ability to defend. Id. at 302–03. This Court determined that the State was entitled to the recapture period, even where the information was not filed until the last day of the speedy trial period, and thus the defendant was not even notified of the charges before its expiration. Id. at 310.

In concluding that the State was entitled to the recapture period, even where charges were filed on the very last day of the speedy trial period, this Court noted that Rule 3.191 does not provide for automatic discharge if the defendant is not tried within the 175-day period. Id. at 306. "Rather, the defendant may then invoke the rule by filing a notice of expiration of the speedy trial time. At that point, the court must hold a hearing within five days and then schedule a trial within ten days." Id. When Naveira filed his notice of expiration of the speedy trial period but then moved to continue the trial set days later, he waived his rule-based speedy trial rights. Id. at 308.

This Court rejected Naveira's claim that this required him to choose between the right to a speedy trial and the right to be adequately prepared for trial:

> Naveira argues that our conclusion unlawfully forces him to choose between two rights, the right to speedy trial and the right to adequately prepare for trial. We disagree. Naveira had the right to invoke the speedy trial rule and go to trial within ten days. He also had the right to request a continuance because he was not prepared to go to trial in ten

> days. ... The mere fact that Naveira had to elect between a speedy trial under the rule and adequate preparation, however, did not violate his constitutional rights.

Id. at 307–08.

In addition, this Court noted that there is a distinction between the rule-based speedy trial right and the constitutional right to a speedy trial:

> The right to speedy trial provided in rule 3.191 is not coextensive with the broader constitutional right to a speedy trial. No constitutional right exists to a trial within 175 days of arrest. As we have previously noted, "Florida's speedy trial rule is a procedural protection and, except for the right to due process under the rule, does not reach constitutional dimension." State v. Bivona, 496 So. 2d 130, 133 (Fla. 1986). As opposed to the right provided in the rule, "[t]he constitutional speedy trial period is measured by tests of reasonableness and prejudice, not specific numbers of days." Fonte v. State, 515 So. 2d 1036, 1038 n.2 (Fla. 3d DCA 1987).

Id. at 308.

Commenting on the dissenting opinion in Naveira, this Court made it clear that where the speedy trial right is rule-based, the State is entitled to the recapture period, without which the defendant is not entitled to discharge:

> The dissent argues that where the speedy trial period expires through no fault of the defendant, any continuance should be charged to the State. In this case, the dissent proposes that because the State did not file the information until the last day of the speedy trial period, and therefore the defendant was not ready for trial before the period expired, the defendant should be discharged. We disagree. Adopting such an interpretation would contradict the plain language of the applicable subdivisions of rule 3.191 ....

Id. at 309 (internal citation omitted).

The Fourth District aptly construed this Court's decision to mean that "the right to discharge when an information is filed within the speedy trial period is strictly governed by the terms of the rule, and the rule requires that the State be allowed a recapture period." (R 64). Based on its analysis, the Fourth District concluded that this Court "rejected any attempt to engraft onto the rule additional unwritten provisions which would require a case-by-case application." (R 65).

4. Application of Rule 3.191 and Caselaw to the Facts

Here, the facts of this case are not in dispute. Petitioner was arrested on November 6, 2014 (R 58). The State timely filed a felony information following his arrest. The State filed the information on February 6, 2015, which was 92 days after Petitioner's arrest and well within 175 days of Petitioner's arrest (R 58). Petitioner did not become aware of the charges until after the 175 days had run (R 58). Rather than filing a notice of expiration of speedy trial time, Petitioner filed a motion for discharge on November 25, 2015 (R 58). The trial court granted the motion, resulting in Petitioner's immediate discharge and the State was not allowed the 15-day recapture period (R 60).

The Fourth District, based on its analysis of the rule and this Court's precedent, reversed the trial court's decision to grant immediate discharge (R 68). Charges were timely filed against Petitioner, but his trial was not commenced within 175 days of his arrest. As a result, the trial court was required to determine whether any of the circumstances under Rule 3.191(j) applied. If none of the circumstances set forth in subdivision (j) were evident at the hearing, the trial court was required to apply the remedy set forth in subdivision (p) by permitting the State 10 days within which to try Petitioner, as the State specifically requested. If the State had failed to commence trial within 10 days through no fault of Petitioner, then, and only then, would Petitioner be entitled to discharge.

5. Petitioner's Proposed Application of Rule 3.191 and Caselaw Disregards the Plain Language of the Rule and Florida Supreme Court Precedent

Petitioner contends that, in order to be entitled to the recapture period under Rule 3.191, "the State must notify the defendant of the pending charges within the speedy trial period." (IB 6). Clearly, there is no such notification requirement anywhere in Rule 3.191.

Petitioner argues that Nelson and Naveira are factually distinguishable and thus not applicable here. As discussed above, the principles enunciated in Nelson and Naveira regarding the application of Rule 3.191 are equally applicable here.

Petitioner advocates that this Court ignore the general principles set forth in Nelson and Naveira and extend State v. Agee, 622 So. 2d 473 (Fla. 1993) (IB 6, 9). Such an argument is not well taken. In Agee, this Court held that the State is not entitled to the recapture period when it files a *nol pros* of an information and then attempts to re-file the information *after* the expiration of the speedy trial time period. Id. at 475. In such a situation, the defendant is entitled to immediate discharge upon the filing of such a defective information.

Unlike Agee, the instant case addresses the situation where the State has timely filed an information and has not *nol prossed* the information while the time for speedy trial was running. As explained in Nelson, when a defendant is charged within the speedy trial period, the remedy for a violation of the rule is not an automatic discharge. The defendant's remedy is set forth in the rule. The defendant can file a "Notice of Expiration of Speedy Trial Time" which invokes his/her speedy trial rights and triggers the recapture window. The defendant has a right to speedy trial, not a right to speedy discharge without trial. Nelson at 576. To find that the State is *not* entitled to the recapture period where the State has timely filed an information – and never *nol prossed* the information – is to grossly extend the rationale of Agee and disregard the rationale of Nelson and Naveira, as well as disregard the plain language of the rule.

The Fourth District once before was presented with a similar issue and opted to extend the rationale of Agee. In State v. Morris, 662 So. 2d 378 (Fla. 4th DCA 1995), the defendant was arrested, filed a demand for speedy trial over a year later, and trial commenced. Id. at 378. During trial, the State discovered a key witness was unavailable and *nol prossed* the charge. Id. The State refiled charges against the defendant the next day (which was within the speedy trial period), but did not rearrest him or notify him of that fact. Id. After the period expired, the defendant appeared before the court and filed a motion for discharge, which the court granted. Id.

On appeal, the State argued that Agee was distinguishable because the State refiled the charges within the speedy trial period. The Fourth District, although noting this distinguishable fact, rejected the State's argument "because the rationale of Agee" led them to conclude that the defendant must be discharged. Id. at 379.

The Fourth District's decision in Morris appears to have been the genesis for decisions in the Fourth District and other districts approving discharge of a defendant without allowing the State the recapture period of the rule where the State had timely filed a charge but failed to notify the defendant of the charge within the speedy trial period. See Jimenez, 44 So. 3d at 1233 (noting that Morris appeared to be the first case adopting the view that a defendant is entitled to discharge if he/she is not notified of the charges before the speedy trial period expires). See also Cordero v.

State, 686 So. 2d 737 (Fla. 3rd DCA 1997) (holding State not entitled to recapture period even though State timely filed information within the speedy trial period because State originally "no actioned" the case and then filed information but did not notify defendant of the charge within the speedy trial period); State v. Gantt, 688 So. 2d 1012, 1013 (Fla. 3rd DCA 1997) (holding State not entitled to recapture period even though State timely filed information because State originally issued a "no action" following the arrest and did not notify defendant of the refiled charge within the speedy trial period even though defendant was incarcerated); State v. McCullers, 932 So. 2d 373, 376 (Fla. 2d DCA 2006) (holding State was entitled to the recapture period because State never took any action to terminate the prosecution, such as issuing a *nol pros* or "no action," but that defendant was simply released from juvenile detention, and thus State did "nothing to lull" defendant into belief that it was unnecessary for him to exercise his right to file a notice of expiration of speedy trial time); Puzio v. State, 969 So. 2d 1197, 1201 (Fla. 1st DCA 2007) (holding State not entitled to the recapture period even though charges filed before expiration of the speedy trial period because State "forfeited the right to avail itself of the recapture period under the law by failing to subsequently rearrest the defendant or otherwise notify him of the charges before the speedy trial period expired."); State v. Drake, 209 So. 2d 650 (Fla. 2d DCA 2017) (holding State not

entitled to recapture period even though information timely filed because information was inaccessible to defendant during the speedy trial period and defendant was not notified of the charges against him until after the speedy trial period had expired).

The Fourth District has now receded from its prior decisions that extended Agee to require that the defendant must be notified of the charges within the speedy trial period (R 67). The Fourth District explained:

> There is no provision in the rule which requires notice to the defendant within that period, and, as Nelson and Naveira explain, the defendant must follow those procedures. By requiring that the defendant be notified of the charges within the speedy trial period, **our decisions have engrafted on the rule an additional requirement**, which is inconsistent with the reasoning of Nelson and Naveira.

(R 67) (emphasis added).

6. State v. Jimenez

In declining to continue to extend the rationale of Agee, the Fourth District aligned with the Fifth District in Jimenez (R 67-68). In Jimenez, the Fifth District held that a defendant is not entitled to discharge when the State timely files an information within the speedy trial period, even where the State does not notify the defendant of the charges until after the speedy trial period expires. Id. at 1232. After reviewing the rule and the development of the caselaw, the Fifth District concluded

that the remedy of immediate discharge is "not sanctioned by the rule or the controlling caselaw." Id. at 1235.

Jimenez explained that "[b]ecause the State may file its charges on the last day of the speedy trial period, the fact that it notifies the defendant of the charges after the speedy trial period expires simply results in the defendant not being brought to trial within the speedy trial period." Id. at 1236. The remedy for this violation is not an "automatic discharge." Id. Rather, "a defendant must file a notice of expiration to invoke the rules protection and the notice may be filed at any time after the speedy trial period expires." Id. The filing of the notice triggers the protection of the rule and "ensure[s] a speedy trial or a discharge from the alleged crime." Id.

The opinion of the Fourth District in the instant case provides a cogent analysis of Rule 3.191 and this Court's precedent on applying the speedy trial rule (R 57-68). The State urges this Court to adopt the reasoning of the Fourth District and approve its decision, as well as approve the decision of the Fifth District Jimenez, and hold that, where the State has timely filed its charging document, then the State is entitled to Rule 3.191's recapture period, regardless of whether the defendant is notified of the pending charge during the speedy trial time period. Where a charge is timely filed, "the plain terms of the rule simply do not countenance an automatic discharge." Jimenez at 1236.

Finally, the State notes that, independent of the rule-based right to speedy trial, a defendant always retains his/her rights to a speedy trial under the state and federal constitutions. The instant case involves application of a defendant's rule-based right to a speedy trial, rather than his/her constitutional right to a speedy trial. See Naveira at 308 ("The right to speedy trial provided in rule 3.191 is not coextensive with the broader constitutional right to a speedy trial. No constitutional right exists to a trial within 175 days of arrest.").

CONCLUSION

Art. V, § 2 of the Florida Constitution provides that "The supreme court shall adopt rules for the practice and procedure in all courts …" This Court recognized long ago that it had the constitutional authority to adopt speedy trial time periods as a procedural rule. State ex rel. Maines v. Baker, 254 So. 2d 207, 208 (Fla. 1971). Where a defendant, like Petitioner, seeks to exercise his rights under Rule 3.191, then the procedural aspects of the rule, including the recapture period, circumscribe this exercise of his right.

Based on the foregoing arguments and authorities, the State respectfully requests that this Court affirm the *en banc* opinion of the Fourth District, approve the Fifth District's decision in Jimenez, and disapprove of Cordero, Gantt, McCullers, Puzio, and Drake.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to A. Randall Haas, Esq., Counsel for Petitioner, 633 Southeast 3rd Avenue, Suite 301, Fort Lauderdale, Florida 33301 at randall@arandallhaas.com, by e-mail, this 12th day of December, 2017.

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210(a)(2), Appellee hereby certifies that the instant brief has been prepared with Times New Roman 14-point font.

/s/ Kimberly T. Acuña
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