IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1014
Lower Court Case No. 4D15-4853

LUIS BORN-SUNIAGA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent,

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

A. RANDALL HAAS, ESQ.
633 Southeast Third Avenue
Suite 301
Ft. Lauderdale, Florida 33301
Telephone: 954-763-9211
Email: randall@randallhaas.com
Florida Bar No. 655200

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

CASES **PAGE NO.**

Rules

STATEMENT OF THE CASE AND FACTS

Petitioner will be referred to by his last name. Respondent will be referred to as the State. All references to the Appendix will be made using the letter "A" followed by the page number (e.g. A-1). All references to the record will be made using the letter "R" followed by the page number. The underlying facts are not in dispute and are summarized in the opinion issued in 4D15-4853 as follows:

> Following an incident on November 6, 2014, appellee was arrested the same day for misdemeanor battery in attempting to prevent the victim from reporting a noise complaint to law enforcement. Appellee provided his address, posted bond, and was released on November 7, 2014.
>
> On February 6, 2015, ninety-two days after his arrest, the State filed an information charging appellee with tampering with a witness in violation of section 914.22, Florida Statutes (2014), a felony, and misdemeanor battery, on the basis of the November incident. That same day, the State filed instructions for the Clerk to issue a not-in-custody capias as to both counts. On February 11, 2015, the State asked the Broward Sheriff's Office ("BSO") to serve the capias, listing the address appellee had provided upon his initial arrest. A detective was assigned to execute the warrant on March 25, 2015. There is no indication in the record that the detective made any effort to serve the warrant.
>
> On April 15, 2015, the State filed a "no information" sheet on the original misdemeanor battery charge. Appellee was notified that the charge had been dismissed and his bond discharged.
>
> The 175–day speedy trial period expired on April 30, 2015.
>
> Appellee first became aware of the new charges on November 19, 2015, well over 175 days after his arrest, through his co-defendant's counsel. Upon becoming aware of the charges, appellee did not file a notice of expiration of speedy trial time. Rather, on November 25, 2015, appellee

> moved to discharge, arguing that he was entitled to immediate discharge because the State was not allowed a fifteen-day recapture period, as it had not made any effort to notify him of the charges within the speedy trial period. The State responded, arguing that because the information was filed before the expiration of the 175–day period, the State was entitled to a recapture period. The State further argued that reasonable efforts were made to serve appellee with the capias during the speedy trial period, as evidenced by its communications with BSO.
>
> The trial court held an evidentiary hearing on the motion to discharge. Appellee was the only witness to testify. He stated that since his initial arrest, he had moved twice, but had updated his address with the U.S. Postal Service each time and had his mail forwarded from the original address. He did not update his address with the Clerk's office. However, he did not receive any forwarded mail from the Clerk, much less anything suggesting that there were pending charges against him. Nothing in the record indicates that the Clerk's office sent appellee any notice when the information was filed in February 2015.
>
> Appellee testified that he had repeatedly tried to determine whether the State had filed any new charges against him. On February 20, 2015, after his co-defendant was charged, appellee was informed by his attorney that there were no charges against him. He went to the jail later that day when his co-defendant turned himself in. At the jail, appellee was informed by a deputy that there were no charges pending against him. Later that day, appellee encountered other police officers who told him he was free to go and informed him that there were no warrants against him. In April 2015, appellee looked his case up and saw that it was listed as having been "disposed." Based on this, he was led to believe there were no charges against him.
>
> The State presented no evidence. It did not show that anyone had attempted to notify appellee of the charges filed. No clerk's office employee testified that any mailings had been sent to appellee, and no testimony showed that BSO had made any attempt to serve appellee.

A-4-5. The trial court concluded that the State did *nothing* (no notices, no arrest, etc.) and made "no effort" to alert Petitioner that it had filed felony charges against

him. Rather, Petitioner was actually misled about the status of the prosecution. As a result, and pursuant to the Fourth District's binding precedent, the trial court granted Petitioner's motion for discharge.

The State appealed to the Fourth District. R-3-4. According to the State, the trial court erred in granting the motion to discharge because the State is entitled to the recapture window when it timely files charges and the remedy of discharge is only available when a defendant files a notice of expiration of the speedy trial period under Florida Rule of Criminal Procedure 3.191. R-22-23. The Fourth District reversed the trial court's order. A-3. The Court followed *State v. Jimenez*, 44 So. 3d 1230, 1236 (Fla. 5th DCA 2010) which held that the failure to notify the defendant of charges until after the expiration of the speedy trial period did not result in automatic discharge but required the defendant to file a notice of expiration to trigger Rule 3.191. A-13-14.

In doing so, the Fourth District receded from *State v. Morris*, 662 So.2d 378 (Fla. 4th DCA 1995) and *Thompson v. State*, 1 So. 3d 1107 (Fla. 4th DCA 2009). A-14. These cases held that the state is not entitled to the recapture period when the defendant is misled into believing he does not need to file a notice of expiration. The Fourth District Court also certified its decision to be in direct conflict with *Puzio v. State*, 969 So.2d 1197 (Fla. 1st DCA 2007); *State v. McCullers*, 932 So.2d 373 (Fla. 2d DCA 2006); *State v. Drake*, 209 So.3d 650 (Fla. 2d DCA Feb. 1, 2017);

Cordero v. State, 686 So.2d 737 (Fla. 3d DCA 1997); and *State v. Gantt*, 688 So.2d 1012 (Fla. 3d DCA 1997). A-14. This Court accepted jurisdiction to resolve this conflict.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeals ruled that the State's failure to notify the Petitioner of the charges until after the expiration of the speedy trial period did not result in automatic discharge and that the Petitioner was required to file a notice of expiration to trigger Florida Rule of Criminal Procedure 3.191 despite the fact Petitioner was lured into believing there were no pending charges. The Fourth District Court receded from its prior decisions and certified its decision to be in direct conflict with *Puzio v. State*, 969 So.2d 1197 (Fla. 1st DCA 2007); *State v. McCullers*, 932 So.2d 373 (Fla. 2d DCA 2006); *State v. Drake*, 209 So.3d 650 (Fla. 2d DCA Feb. 1, 2017); *Cordero v. State*, 686 So.2d 737 (Fla. 3d DCA 1997); and *State v. Gantt*, 688 So.2d 1012 (Fla. 3d DCA 1997). This Court should quash the Fourth District's decision in this case and approve the decisions of the First, Second and Third districts. The State should not benefit of the recapture period (i.e. receive even more time to try a defendant) when it prevented Petitioner from being able to file a notice of expiration pursuant to Rule 3.191 by misleading him into believing there were no charges pending and then failing to notify him of the charges at any point during the speedy trial period.

ARGUMENT

THIS COURT SHOULD QUASH THE FOURTH DISTRICT'S DECISION IN THIS CASE AND APPROVE *PUZIO V. STATE*, 969 SO.2D 1197 (FLA. 1ST DCA 2007); *STATE V. MCCULLERS*, 932 SO.2D 373 (FLA. 2D DCA 2006); *STATE V. DRAKE*, 209 SO.3D 650 (FLA. 2D DCA FEB. 1, 2017); *CORDERO V. STATE*, 686 SO.2D 737 (FLA. 3D DCA 1997); AND *STATE V. GANTT*, 688 SO.2D 1012 (FLA. 3D DCA 1997) BECAUSE THE STATE IS NOT ENTITLED TO RULE 3.191'S RECAPTURE PERIOD WHEN IT LULLS A DEFENDANT INTO BELIEVING THERE ARE NO CHARGES PENDING AND FAILS TO NOTIFY THE DEFENDANT OF PENDING CHARGES

Florida Rule of Criminal Procedure 3.191(a) reads in full as follows:

> Except as otherwise provided by this rule, and subject to the limitations imposed under subdivisions (e) and (f), every person charged with a crime shall be brought to trial within 90 days of arrest if the crime charged is a misdemeanor, or within 175 days of arrest 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 subdivision (p). The time periods established by this subdivision shall commence when the person is taken into custody as defined under subdivision (d). A person charged with a crime is entitled to the benefits of this rule whether the person is in custody in a jail or correctional institution of this state or a political subdivision thereof or is at liberty on bail or recognizance or other pretrial release condition. This subdivision shall cease to apply whenever a person files a valid demand for speedy trial under subdivision (b).

Fla.R.Crim.Proc. 3.191. While the State has authority to delay its charging decision and/or nolle pros charges and refile, a defendant must be charged within these time periods. *State v. Agee*, 622 So. 2d 473, 475 (Fla. 1993)("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."); *Genden v. Fuller*, 648 So. 2d 1183, 1185 (Fla. 1994)("We agree with the district court below that whether the State voluntarily terminates a prosecution before an information is filed, as was done here and in *Lewis*, rather than after the defendant has been formally charged, as was done in *Agee*, 'is a distinction without a legally cognizable difference'."). Likewise, the State must notify the defendant of the pending charges within the speedy trial period. When it does not, it is not entitled to the recapture period set forth in the Rule. *Puzio v. State*, 969 So. 2d 1197, 1200-01 (Fla. 1st DCA 2007) (Finding "when the State's actions have deprived the defendant of the ability to assert his right to a speedy trial, it would thwart the purpose of the rule to allow the State to pursue charges by means of the recapture period.").

This case raised the very same concerns addressed in *Agee* and its progeny. Here, the State did absolutely nothing to notify Petitioner that he had been charged with a felony. No notice was mailed by the Clerk's office and the court file was *sealed* to prevent anyone from discovering there were charges pending. In the meantime, Petitioner made every effort he knew to make to determine if there were charges pending against him. He was lured - - by the State's filing of a "No

Information" in the misdemeanor, by the Clerk's computer system, by jail employees and by the Sheriff's office - - into believing that the State had abandoned its prosecution. In the meantime, the State filed a felony, the misdemeanor, and issued an arrest warrant but made no effort to execute the warrant. What is more, Petitioner discovered he had been charged with the crimes through his co-defendant's lawyer, not because of any action the State took to notify him. And, that was *a year* after he was initially arrested. Inasmuch as the State's actions/inactions prevented Petitioner from filing a notice of expiration, the trial court properly granted the motion to discharge without affording the State the recapture window.

Nevertheless, the Fourth District interpreted Rule 3.191 to require a defendant file a notice of expiration upon the state's failure to try him within the required time period. The Fourth District held that the failure to do so prohibits the remedy of discharge regardless of the fact the defendant is lulled into believing no charges were filed against him. Siding with the Fifth District's decision in *State v. Jimenez*, 44 So. 3d 1230, 1236 (Fla. 5th DCA 2010) the Court determined its earlier decisions conflicted with this Court's decision in *State v. Naveira*, 873 So. 2d 300 (Fla. 2004) and *State v. Nelson*, 26 So. 3d 570, 579 (Fla. 2010) and receded from its own rulings on this issue.

However, the facts and issues addressed in *Naveira* and *Nelson* are not the same as those raised by this case. In *Naveira* the State filed an Information on the

175th day. The defendant was aware of the filing (he had also demanded discovery to which the state responded on the same date) never having been led to believe the state was not pursuing charges against him. In fact, because he was aware that the state had filed charges, he was able to file a notice of expiration of the speedy trial period just after the period expired (unlike Petitioner who was deprived of the ability to do so). The trial court held a hearing within 5 days and set the case for trial the following week, within the 10 days the required by Rule 3.191(p)(3).

Before the trial commenced, the defendant filed a motion to continue arguing that the continuance should be charged to the State because he did not have sufficient time to review discovery and prepare for trial. The court granted the motion and set the case off for several months. After the 15-day window expired, the defendant moved for a discharge arguing he had not been brought to trial within the recapture period. This Court determined it was the defendant's prerogative to decline to exercise his right to a speedy trial by asking for more time to prepare. As such, this Court found that the defendant was unavailable for trial pursuant to subsection (k) and, thus, not entitled to discharge pursuant to subsection (j)(3).

In *Nelson*, this Court was tasked with determining whether a juvenile's continuance, taken after the expiration of the speedy trial period, was a nullity or waiver. Although this Court explained that Rule 3.191 is "not self-executing" it discussed the Rule in the context of a case in which the defendant was aware of, and

therefore able to, "take affirmative action to avail him- or herself of the remedies afforded under the rule." *Nelson*, 26 So. 3d at 574. Notably, the Court repeatedly discussed the effect of a continuance "when the State is *entitled* to the recapture period." *Nelson*, 26 So. 3d at 580 (emphasis added). At no point did the *Nelson* Court reconsider the cases that decided the State is *not entitled* to the recapture period when it attempts to avoid "the intent and effect" of the Rule. Fla. R. Crim. P. 3.191(o); *State v. Agee*, 622 So. 2d at 475 ("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").

Moreover, the Fourth District's earlier decisions (and the cases with which it certified conflict) correctly extended *Agee* to require immediate discharge when the defendant was misled into believing he did not have to exercise his rights under the speedy trial rule. The Fourth District first articulated this principle in *State v. Morris,* 662 So.2d 378 (Fla. 4th DCA 1995). In that case the state entered a nolle prosequi on the eve of trial and refiled charges within the speedy trial period. The defendant was not rearrested or notified within the demand period that charges had been refiled. The trial court granted the defendant's motion to discharge. On appeal the state

argued it was entitled to the recapture period pursuant to Rule 3.191. The Fourth District disagreed.

> As our supreme court explained in *Agee*, when the state is faced with the problem of a missing witness, there are other options available to the state besides a nol pros. *See* rule 3.191(*l*), Fla.R.Crim.P. In the present case, apart from the rule, the state could also have asked the court for a short continuance and still have been within the speedy trial period. The nol pros while the time for speedy trial was running, however, coupled with the state's failure (so far as this record shows) to do anything which would have put defendant on notice of the refiling of the charges so that he could have moved for discharge fifty days after filing his demand, violates the purpose of the rule and *Agee*. In *Agee* as well as the present case, the nol pros prevented the defendant from having his trial commence within sixty-five days from his demand. Once the period expired, as it did in the present case, defendant was entitled to be discharged.

Morris, 662 So. at 379. Thus, the state may not benefit from the recapture window when its actions prevent a defendant from timely filing a notice of expiration. *Morris*, 662 So. 2d at 379. On at least three occasions since *Morris* the Fourth District reaffirmed its decision. *Thompson v. State*, 1 So. 3d 1107, 1109 (Fla. 4th DCA 2009) (Although the Court found that personal service or rearrest are not required, it also held that "[t]he rule [it] applied in *Morris* continues to be viable in situations where the conduct of the state misleads a defendant into believing that it is not necessary to exercise the right to file a notice of expiration of the speedy trial time."); *State v. Ingraham*, 43 So. 3d 164, 167 (Fla. 4th DCA 2010) (Distinguishing cases like *Morris* where the state "sufficiently attempts to notify a defendant of a refiled charge before the speedy trial period expires."); *Reid v. State*, 114 So. 3d 277,

279 (Fla. 4th DCA 2013) (Finding that *"Morris, Cordero,* and *Puzio,* all remain valid authority to grant the writ sought where no effort is made to timely notify a criminal defendant of re-instituted charges.").

Two years after the Fourth District issued its opinion in *Morris*, the Third District also determined, under facts almost identical to the ones in this case, that the state is not always entitled to the recapture period. *Cordero v. State*, 686 So. 2d 737 (Fla. 3d DCA 1997). In *Cordero,* the state "no actioned" the charge against the defendant and released him from all obligations on June 26, 1993. The state then filed an Information on August 13, 1993, prior to the expiration of the speedy trial period. However, the state did not make any attempt to notify the defendant of the charge. The defendant was not arrested or otherwise informed of the charge until June 7, 1994.

The defendant moved for a discharge which was denied because the trial court believed the state was entitled to the recapture period under Rule 3.191(p). The Third District reversed. Noting that there is really no distinction between a case in which the state filed charges after the expiration of the speedy trial period and a case in which charges are filed but a defendant is never notified within the speedy trial period, the Third District said the following:

> The reason for this rule makes perfect sense. To accept the state's argument in this case would promote the same evils the Supreme Court warned against in *Genden* and *Agee.* An individual could be arrested and the state, for whatever reason, may "no action" the case. The state

> could soon thereafter file charges within the speedy trial period and then, do nothing. The defendant, if he is not rearrested or notified in some manner, has no idea charges have been filed (or refiled in the case of a nolle prosequi) against him. Then, long after the speedy trial time has expired, the state can arrest the defendant and, if he files a motion for discharge, the state still has fifteen days to bring him to trial. Such a result is clearly disapproved of by *Genden* and *Agee.*

Cordero, 686 So. 2d at 738. Two months after *Cordero*, the Third District made a similar ruling in a case in which the defendant was not notified of the filed charges despite being in custody for the entire speedy trial period. *State v. Gantt*, 688 So. 2d 1012, 1013 (Fla. 3d DCA 1997) ("Granting the State more time to bring the defendant to trial would disembowel the speedy trial rule"). The First and Second Districts have come to the same conclusion regarding Rule 3.191. *Puzio v. State*, 969 So. 2d 1197, 1200-01 (Fla. 1st DCA 2007) (Finding "when the State's actions have deprived the defendant of the ability to assert his right to a speedy trial, it would thwart the purpose of the rule to allow the State to pursue charges by means of the recapture period."); *State v. McCullers*, 932 So. 2d 373, 375–76 (Fla. 2d DCA 2006) ("A defendant's right to file a notice of expiration is similarly defeated even where charges are filed before expiration of the speedy trial period if the State has previously acted affirmatively to terminate its prosecutorial efforts but then has filed charges without rearresting or otherwise giving notice to the defendant before expiration of the period."); *State v. Drake*, 209 So. 3d 650, 652 (Fla. 2d DCA 2017) ("Where a defendant could not have known that he needed to file a notice of

expiration because the information was concealed from him, immediate discharge is appropriate.").

These cases were decided more than 20 years after the recapture period was added to Rule 3.191. The District Courts were aware of and acknowledged that the Rule included a recapture window but declined to give the state the benefit of the additional time when it acted to prevent the defendant from exercising his rights under the Rule. These cases properly interpreted Rule 3.191. And, nothing about this Court's decisions in *Naveira* or *Nelson* changes the reasoning for the decisions. Accordingly, Petitioner asks this Court to quash the Fourth District's decision and approve *Puzio*, *McCullers*, *Drake*, *Cordero* and *Gantt*.

CONCLUSION

Based on the foregoing facts and arguments, Petitioner respectfully requests that this Court quash the Fourth District's decision approve the decisions cited above and discharge the Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been filed with this Court electronically and served via email on Assistant Attorney General Kimberly Acuna, Esq., 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, at Kimberly.Acuna@myFloridalegal.com this 6th day of November, 2017.

/s/ *A. Randall Haas*
A. RANDALL HAAS, ESQ.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that the foregoing computer-generated brief is in Times New Roman 14-point font in compliance with Florida Rules of Appellate Procedure 9.100(1).

/s/ *A. Randall Haas*
A. RANDALL HAAS, ESQ.