IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC17-1014

LUIS BORN-SUNIAGA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

Page:

TABLE OF CITATIONS

Cases: **Page:**

Other authorities:

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, citations to "A" refer to the appendix attached hereto and citations to "PB" refer to Petitioner's Initial Brief on Jurisdiction.

STATEMENT OF THE CASE AND FACTS

When determining jurisdiction, this Court is limited to the facts apparent on the face of the opinion. Hardee v. State, 534 So. 2d 706, 708 n.1 (Fla. 1998). Respondent presents the facts as they appear in the opinion below:

> Following an incident on November 6, 2014, [Petitioner] was arrested the same day for misdemeanor battery in attempting to prevent the victim from reporting a noise complaint to law enforcement. [Petitioner] 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 [Petitioner] 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 [Petitioner] 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. [Petitioner] was notified that the charge had been dismissed and his bond discharged.
>
> The 175–day speedy trial period expired on April 30, 2015.
>
> [Petitioner] 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, [Petitioner] did not file a notice of expiration of speedy trial time. Rather, on November 25, 2015, [Petitioner] 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 [Petitioner] 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. [Petitioner] 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 [Petitioner] any notice when the information was filed in February 2015.

[Petitioner] 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, [Petitioner] 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, [Petitioner] was informed by a deputy that there were no charges pending against him. Later that day, [Petitioner] 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, [Petitioner] 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 [Petitioner] of the charges filed. No clerk's office employee testified that any mailings had been sent to [Petitioner], and no testimony showed that BSO had made any attempt to serve [Petitioner].

> 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. The court noted that it was bound by Fourth District case law, which conflicts with Jimenez. Based on this, the court granted [Petitioner's] motion for discharge without allowing the State the fifteen-day recapture period. The State timely appealed.

State v. Born-Suniaga, 2017 WL 1718845, at *1-2 (Fla. 4th DCA May 3, 2017) (See A).

The Fourth District Court of Appeal ("Fourth District") reviewed the case *en banc* and receded from its decisions in State v. Morris, 662 So. 2d 378 (Fla. 4th DCA 1995), and Thompson v. State, 1 So. 3d 1107 (Fla. 4th DCA 2009) and other cases relying on the Morris line of reasoning which deprived the State of the recapture period when the State had timely filed a charge. The Fourth District concluded that these cases conflict with this Court's decisions in State v. Naveira, 873 So. 2d 300 (Fla. 2004), and State v. Nelson, 26 So. 3d 570 (Fla. 2010). The Fourth District aligned with the Fifth District's decision in State v. Jimenez, 44 So. 3d 1230 (Fla. 5th DCA 2010) and reversed and remanded for reinstatement of the charge.

As the Fifth District did in Jimenez, the Fourth District certified express conflict with Puzio v. State, 969 So. 2d 1197 (Fla. 1st DCA 2007); State v. McCullers, 932 So. 2d 373 (Fla. 2d DCA 2006); Cordero v. State, 686 So. 2d 737

(Fla. 3d DCA 1997); and State v. Gantt, 688 So. 2d 1012 (Fla. 3d DCA 1997). The Fourth District also certified conflict with a recent decision from the Second District, State v. Drake, 209 So. 3d 650 (Fla. 2d DCA Feb. 1, 2017). Petitioner now seeks review of the decision of the Fourth District.

SUMMARY OF THE ARGUMENT

Jurisdiction exists because the decision of the Fourth District Court of Appeal conflicts with the five decisions certified to be in conflict. This Court should accept review.

ARGUMENT

THIS COURT HAS JURISDICTION TO GRANT REVIEW BASED ON THE CERTIFIED CONFLICT.

Article V, Section 3(b)(4), Fla. Const., provides the basis for the Supreme Court's jurisdiction, stating: "[t]he supreme court . . . [m]ay review any decision of a district court of appeal . . . that is certified by it to be in direct conflict with a decision of another district court of appeal." This provision is the basis for Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi), which states: "The discretionary jurisdiction of the supreme court may be sought to review …. decisions of district courts of appeal that … are certified to be in direct conflict with decisions of other district courts of appeal."

The State agrees with Petitioner that the Fourth District's decision conflicts with the five decisions certified to be in conflict. The Fourth District concluded that, where the State has timely filed charges within the 175-day speedy trial period, a defendant can file a notice of expiration of speedy trial when the period expires, triggering the recapture period for the State set forth in Fla. R. Crim. P. 3.191, regardless of whether the defendant was notified of the filed charge within the speedy trial period. Such conclusion cannot be reconciled with the holdings of the five conflict cases. See 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).

CONCLUSION

This Court should exercise its discretion and accept review of this case.

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 30th day of June, 2017.

/s/ Kimberly T. Acuña
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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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