

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1517 Criminal Trials  
**SPONSOR(S):** Criminal & Civil Justice Policy Council; Eisnagle and others  
**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal & Civil Justice Policy Council	13 Y, 3 N, As CS	De La Paz	Havlicak
2) Rules & Calendar Council	13 Y, 5 N	Hassell	Birtman
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

### SUMMARY ANALYSIS

Florida Rule of Criminal Procedure 3.191 issued by the Florida Supreme Court provides speedy trial rights to defendants arrested for crimes. Under this rule a defendant arrested or served with a notice to appear must be brought to trial within 175 days for a felony offense and 90 days for a misdemeanor offense.

Under current law, if a defendant has been arrested for any crime pertaining to a particular criminal episode and the speedy trial period on the charge for which he was arrested has expired, a permanent discharge dismissing the charge against the defendant operates to dismiss any and all charges that arose out of the same episode forever.

The United States Supreme Court has expressly stated that there is “no constitutional basis for holding that the speedy trial right can be quantified into a specific number of days or months.” The current rule of procedure is stricter than the state or federal constitutions require. While the rule serves as a procedural mechanism to implement a defendant’s constitutional right to speedy trial, the constitutional right to speedy trial has never been held to compel a permanent dismissal of charges due solely to the passage of a specific number of days.

CS/HB 1517 creates a tiered system of requiring defendants formally charged with a crime to be brought to trial within specific time frames based on the most serious charge filed against the defendant. Unlike the current rule, the mere passage of this time period will not automatically result in a permanent dismissal of all charges. Under the bill, failure to try the defendant within the required time period will result in a dismissal without prejudice, which allows the state to re-file the charges within the applicable statute of limitations periods of s. 775.15, F.S. If, however, the defendant had successfully triggered the compressed time frames provided in the bill, the delay was substantially beyond the required time frames and is able to establish that his or her defense was prejudiced, the court may dismiss the charges with prejudice which would prohibit the state from re-filing charges.

CS/HB 1517 creates a simplified tiered system for speedy trial time periods applicable in juvenile court proceedings. Its provisions are parallel to the provisions the bill creates for handling re-filed charges in the adult court portion of the bill.

CS/HB 1517 repeals Rule of Criminal Procedure 3.191 and Rule of Juvenile Procedure 8.090, relating to the right to speedy trial. These sections of the bill requires a two-thirds vote of the membership of each house of the Legislature in order to pass.

This bill appears to have an indeterminate fiscal impact.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Current Situation**

Florida Rule of Criminal Procedure 3.191 issued by the Florida Supreme Court provides speedy trial rights to defendants arrested for crimes. Under this rule a defendant arrested or served with a notice to appear must be brought to trial within 175 days for a felony offense and 90 days for a misdemeanor offense.<sup>1</sup> A person arrested for a crime is entitled to the benefits of the rule regardless of whether the person is in physical custody or at liberty on some form of pretrial release.<sup>2</sup>

In addition to the above time frames, the defendant may file a “demand” for speedy trial to bring a felony or misdemeanor case to trial within 60 days of the filing of the demand.<sup>3</sup> When a demand for speedy trial is filed, a calendar call is held within five days of the filing of the demand and the court must set the case for trial within five to forty-five days from the calendar call.<sup>4</sup>

Under the rule, if the defendant is not brought to trial within the required time period, the defense files a “Notice of Expiration of Speedy Trial.”<sup>5</sup> Within five days of the filing of the notice the court holds a hearing and, except in limited circumstances,<sup>6</sup> orders the defendant brought to trial within ten days of the hearing.<sup>7</sup> If the defendant is not brought to trial within the ten day period the defendant is “forever discharged” from the crime.<sup>8</sup> This fifteen day period is commonly referred to as the “recapture” period.

The recapture period does not operate to extend the speedy trial period, but is solely a grace period within which to bring a defendant to trial before a court may permanently discharge a defendant for his or her crime.<sup>9</sup> Under current law, the state may not file charges after the speedy trial period has

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<sup>1</sup> Fla. R. Crim. P. 3.191(a).

<sup>2</sup> Id.

<sup>3</sup> Fla. R. Crim. P. 3.191(b).

<sup>4</sup> Fla. R. Crim. P. 3.191(b)(2).

<sup>5</sup> Fla. R. Crim. P. 3.191(h) & (p)(2).

<sup>6</sup> Fla. R. Crim. P. 3.191(j). The limited circumstances where a court would deny a motion are 1) that the court ordered a time extension which has not expired, 2) the failure to hold trial is attributable to the defendant, 3) the accused was unavailable for trial, or 4) a demand for speedy trial is invalid.

<sup>7</sup> Fla. R. Crim. P. 3.191(p)(1),(3) & (j).

<sup>8</sup> Fla. R. Crim. P. 3.191(p)(3).

<sup>9</sup> See, Walden v State, 979 So.2d 1206 (4<sup>th</sup> DCA 2008).

expired regardless of whether the state declined to file charges after the initial arrest or whether the state entered a nolle prosequi dropping existing charges.<sup>10</sup>

Under current law, if a defendant has been arrested for any crime pertaining to a particular criminal episode and the speedy trial period on the charge for which he was arrested has expired, a permanent discharge dismissing the charge against the defendant operates to dismiss any and all charges that arose out of the same episode forever even in circumstances when such crimes were unknown at the time of arrest.<sup>11</sup> One example of this situation occurred in the case of Reed v. State.<sup>12</sup>

In Reed, the defendant was arrested on January 4, 1991, for armed robbery and several traffic offenses. According to the arrest report, Reed and another man robbed a convenience store and in the course of fleeing became involved in an automobile accident. The following is the timeline of events after his arrest:

- January 24, 1991 - the State filed an information charging Reed with two counts of leaving the scene of an accident involving personal injury.
- June 27, 1991 - the State entered a nolle prosequi on the charges.
- July 15, 1991 - 192 days after his arrest, Reed filed a motion for discharge pursuant to the speedy trial rule.
- September 6, 1991 - 245 days after Reed's arrest, the State filed an information charging him with numerous felonies arising out of the convenience store robbery.
- December 13, 1991 - the court denied Reed's motion for discharge.
- May 6, 1992, - the State filed an information adding additional felony charges arising out of the robbery and recharging Reed with the two counts of leaving the scene of an accident involving personal injury.

Following a trial, the defendant was found guilty of two counts of robbery with a firearm, two counts of kidnapping with a firearm, and two counts of leaving the scene of an accident involving personal injury. On review to the Florida Supreme Court the issue was whether Reed was entitled to a discharge for violation of the speedy trial rule. The Court, relying on an earlier case of State v. Agee,<sup>13</sup> granted a discharge on all charges, including the kidnapping charge which he was not arrested for, based on a strict application of the rule and a determination that the speedy trial period under the rule began to run even on a charge he was not arrested for.<sup>14</sup>

Justice Shaw, who wrote the majority opinion in Agee, dissented in Reed saying:

. . . It seems that State v. Agee, (citation omitted), has taken on a Frankenstein-like role I never envisioned or intended when I authored that opinion. As I understand the majority's holdings in (case references omitted), and the present case, once a suspect is arrested and the speedy trial period runs on a particular charge, the suspect gains total immunity from prosecution for any crime arising from that incident, no matter when the collateral crime is discovered or becomes prosecutable.<sup>15</sup> (See, Drafting Issues or Other Comments section for further another example of application of Reed).

Justice Wells also dissented saying in part:

I am concerned that this decision is another substantial evisceration of the statutes of limitation in criminal-law prosecutions . . .

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<sup>10</sup> Fla. R. Crim. P. 3.191(o). See, Genden v. Fuller, 648 So.2d 1183, 1183 (Fla. 1995), and State v. Agee, 622 So.2d 473 (Fla. 1993).

<sup>11</sup> Fla. R. Crim. P. 3.191(n).

<sup>12</sup> Reed v. State, 649 So.2d 227 (Fla. 1995).

<sup>13</sup> State v. Agee, 622 So.2d 473 (Fla. 1993)

<sup>14</sup> Id. at 229.

<sup>15</sup> Shaw dissenting, Reed, *supra* at 230.

The majority's opinion has the effect of ignoring the practical reality that the police and the state attorney are totally different agencies performing different functions.<sup>16</sup>

Juvenile rule of procedure 8.090 is the speedy trial rule applicable to juveniles accused of committing delinquent acts and is virtually identical in its operation to juvenile proceedings except that the speedy trial period begins to run 90 days from the earlier of:

- 1) The date the child was taken into custody, or
- 2) The date of service of the summons that is issued when a delinquency petition is filed.<sup>17</sup>

A demand for speedy trial in juvenile court has a 60 day time period and operates in generally the same manner as the adult rule.<sup>18</sup>

To determine constitutional violations of speedy trial, Florida courts have applied the same four part test articulated by the United States Supreme Court interpreting the right to speedy trial under the federal constitution.<sup>19</sup> The four factors are:

- the length of the delay,
- the reason for the delay,
- the defendant's assertion of his right, and
- the prejudice to the defendant.

The United States Supreme Court has expressly stated that there is “no constitutional basis for holding that the speedy trial right can be quantified into a specific number of days or months.”<sup>20</sup> The current rule of procedure is stricter than the state or federal constitutions require. While the rule serves as a procedural mechanism to implement a defendant’s constitutional right to speedy trial, the constitutional right to speedy trial has never been held to compel a permanent dismissal of charges due solely to the passage of a specific number of days.

### **The Speedy Trial Rule and Statutes of Limitation**

Section 775.15, F.S., provides the statute of limitations for criminal offenses. This section provides, for example, that capital felonies, life felonies and any felony that resulted in a death may be commenced at any time. Felonies of the first degree generally must be commenced within four years, and all other felonies, except in specific circumstances, must be commenced in three years. Misdemeanors must be commenced within two years.<sup>21</sup> The time period to commence a prosecution begins to run from the day after the crime has been committed.<sup>22</sup>

Under the current speedy trial rule, once a person is arrested or served with a notice to appear in court, the statute of limitations periods provided in s. 775.15, F.S., are immediately rendered nullities and every conceivable charge that could arise out of the same course of conduct that was subject of the defendant’s arrest, must be filed within the time periods provided in the speedy trial rule.<sup>23</sup>

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<sup>16</sup> Wells dissenting, Reed *supra* at 230.

<sup>17</sup> Fla. R. Juv. P. 8.090(a).

<sup>18</sup> Fla. R. Juv. P. 8.090(h).

<sup>19</sup> See, State v. Polk, 993 So.2d 581, 583 (1<sup>st</sup> DCA 2008) *citing* Barker v. Wingo, 407 U.S. 514, 530 (1972). See also, C.D. v. State, 865 So.2d 605 (Fla. 4<sup>th</sup> DCA 2004) and Seymour v. State, 738 So.2d 984 (Fla. 2d DCA 1999).

<sup>20</sup> Barker v. Wingo, 407 U.S. 514, 523 (1972).

<sup>21</sup> Section 775.15, F.S., also contains special extended limitations periods for certain specified offenses.

<sup>22</sup> Section 775.15(3), F.S.

<sup>23</sup> Fla. R. Crim. P. 3.191(n), provides: “Discharge from a crime under this rule shall operate to bar prosecution of the crime charged and of all other crimes on which trial has not commenced nor conviction obtained nor adjudication withheld and that were or might have been charged as a result of the same conduct or criminal episode as a lesser degree or lesser included offense.”

## A Sample Timeline

The following time-line comes from the case of Landry v. State and shows some of the potential inequities that may arise from the current rule of procedure.<sup>24</sup>

- May 02, 1992 Armed burglary of a residence and murder of the resident committed.
- May 03, 1992 Landry arrested.
- May 05, 1992 Counsel appointed to represent Landry.
- May 20, 1992 Landry indicted.
- May 22, 1992 Landry files a demand for speedy trial (trial must occur within 50 days of the demand).<sup>25</sup>
- June 25 1992 The trial court denied the demand for speedy trial on the grounds that the defendant could not truly be ready for a capital murder trial and the trial court's belief counsel may have been preparing for an ineffective assistance of counsel claim in the event of Landry's conviction.<sup>26</sup>
- July 17, 1992 Landry files motion to discharge (requires trial within 15 days)
- July 21, 1992 Trial court denies motion for discharge.

Landry was convicted by a jury of first-degree premeditated murder, first-degree felony murder, and armed burglary. The jury recommended the death penalty and the court imposed the death penalty.

- Sept. 21, 1995 The Florida Supreme Court reversed Landry's convictions and ordered him discharged based on a violation of the speedy trial rule.<sup>27</sup>

Landry walked free and cannot be subjected to a new trial. For other murder and attempted murder cases dismissed based on violations of the speedy trial rule see Section III, C, "Drafting Issues and Other Comments."

## CS/HB 1517 Repeals

CS/HB 1517 repeals Florida Rule of Criminal Procedure 3.191 and Rule of Juvenile Procedure 8.090, relating to an accused person's right to speedy trial.

## Effect of CS/HB 1517 on Adult Criminal Trials

### Time Periods

CS/HB 1517 creates a tiered system of requiring defendants formally charged with a crime to be brought to trial within specific time frames based on the most serious charge filed against the defendant. The defendant has the option under the bill of seeking to have a compressed time frame applied to his or her case or the standard time frames attached to the case.

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<sup>24</sup> Landry v. State, 666 So.2d 212 (Fla. 1996).

<sup>25</sup> Fla. R. Crim. P. 3.191(b) provides a defendant with a right to demand a trial within 60 days from filing of a demand, but this provision conflicts with (b)(4) which requires defendants tried within 50 days. In Landry, the court referred to the 50 day provision when discussing the applicable speedy trial period. Landry, supra at 126.

<sup>26</sup> Landry supra at 124 & n. 4. Counsel had not reviewed several hundred pages available for discovery, had not interviewed the sole eye witness, and had not deposed any witnesses. The state was seeking the death penalty in the case. Under subsection (g) of the rule "[a] demand for speedy trial shall be considered a pleading that the accused is available for trial, has diligently investigated the case, and is prepared or will be prepared for trial within 5 days."

<sup>27</sup> Fla. R. Crim. P. 3.191(g) provides in part "[a] demand filed by an accused who has not diligently investigated the case or who is not timely prepared for trial shall be *stricken as invalid on motion of the prosecuting attorney*." The Supreme Court found the trial court erred because it "denied" the defendant's demand for speedy trial on its own motion rather after a motion by the state and because "the mere fact that a defendant charged with first degree murder decides to forgo discovery in exchange for a speedy trial cannot serve as a basis for striking a demand as invalid . . ." With respect to the trial court's concern over the apparent attempt to prepare an ineffective assistance of counsel claim the Supreme Court noted "[r]ule 3.191 makes no provision for denying or striking an invalid a demand for speedy trial based on such concerns." Landry, supra at 126.

Under the standard time frames of the bill, a defendant charged with a crime must be brought to trial as follows:

- 90 days from the filing of a misdemeanor.
- 180 days from the filing of a first, second or third degree felony.<sup>28</sup>
- 275 days from the filing of a first degree felony punishable by life.
- 365 days from the filing of a capital felony.

Under the compressed time frames a defendant must be brought to trial within:

- 60 days from the filing of a misdemeanor.
- 120 days from the filing of a first, second or third degree felony
- 190 days from the filing of a first degree felony punishable by life.
- 275 days from the filing of a capital felony.

In order to activate the compressed time periods the defendant must file a motion requesting application of the speedy trial time periods and have the motion granted. A trial court must grant the motion unless the court finds:

1. No document constituting a formal charge has been filed with the court;
2. The defendant is not or will not be prepared for trial within 20 days after filing the motion;  
or
3. The factual circumstances, seriousness, or complexity of the case are such that the applicable time period provided under this paragraph is insufficient to allow the state or defense adequate time to prepare the case for trial.

Motions requesting application of the speedy trial time periods which are denied may be re-filed after 30 days.

The only exceptions or qualification to the application of standard or compressed time frames are that in the event a defendant is charged with multiple counts, the applicable time period is the one applicable to the highest degree of offense. In addition, the time periods will not begin to run for prisoners charged and held outside of the jurisdiction of the state, or a political subdivision of the state, until the prisoner returns to the jurisdiction where the charges are to be filed or are currently pending.

### Extensions

CS/HB 1517 provides grounds for the state to seek extensions of the speedy trial time periods which are substantially similar to the grounds provided in the current court rule of procedure. The exceptions are largely based on the existence of exceptional circumstances, unexpected illnesses, unavailability of testimony or evidence, unforeseeable developments, or that the defendant has caused delay or disruption, and that the case is so unusual and complex that it is unreasonable to expect adequate investigation or preparation within the prescribed time periods. Other grounds for extension include stipulation of the parties, or to allow time to accommodate appeals and other proceedings. Finally, the bill allows the defendant to seek an extension without waiving his or her right to speedy trial when good cause is shown. Ordinarily, without good cause shown, a defendant's request to delay trial is in the form of a "motion for a continuance" which are considered waivers of a defendant's right to trial within the applicable time frame.

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<sup>28</sup> A first degree felony is punishable by imprisonment of up to 30 years. S. 775.082(3)(b), F.S. A second degree felony is punishable by imprisonment of up to 15 years. S. 775.082(3)(c), F.S. A third degree felony is punishable by imprisonment of up to 5 years. S. 775.082(3)(d), F.S.

## Expiration of Trial Periods and the Motion for Speedy Trial

If the applicable time period expires without the defendant being brought to trial, the defendant may file a “motion for speedy trial.” Once filed, the motion must be heard within 5 days and the case set for trial within 10 days of the hearing if the motion is granted. The court must grant the motion unless it finds that:

1. The failure to hold the trial is attributable to the defendant, a codefendant in the same trial, or their counsel;
2. The defendant was unavailable for trial;
3. The applicable time period or extension granted by the court has not expired; or
4. The defendant is not prepared to proceed to trial within 10 days after the hearing on the motion for speedy trial.

In granting the motion the court has discretion to order a trial of up to 30 days, rather than 10 days, from the hearing.

## Motion for Dismissal

If the state fails to bring the defendant to trial within time frame ordered by the court pursuant to a motion for speedy trial, the defendant may file a motion to dismiss the charges. Unlike the current rule, the mere passage of this time period will not automatically result in a permanent dismissal of all charges. Under the bill, failure to try the defendant within the required time period will result in a dismissal without prejudice, which allows the state to re-file the charges within the applicable statute of limitations periods of s. 775.15, F.S. If, however, the defendant had successfully triggered the compressed time frames, the delay was substantially beyond the required time frames and the defendant is able to establish that his or her defense was prejudiced; the court may dismiss the charges with prejudice which would prohibit the state from re-filing charges. “Prejudice” can be established by showing by clear and convincing evidence that an essential witness has died or become unavailable or that exculpatory evidence has been destroyed, substantially degraded, or become unavailable.

A dismissal with prejudice may also be entered if the delay otherwise constituted a substantive violation of the defendant's constitutional right to a speedy trial.

## Re-filed Charges

In cases where a dismissal has been ordered without prejudice, or where the state has dropped the initial charges by filing a “nolle prosequi” with the court after the expiration of the standard or compressed trial periods, any re-filed charges may not include any added or enhanced charge that was not the subject of the dismissal or the nolle prosequi. The speedy trial periods for charges re-filed under these circumstances are 60 days for a misdemeanor offense and 120 days for any felony offense.

CS/HB 1517 treats situations where the state drops charges before the expiration of the speedy trial time period differently than when the charges are dropped after they expire. For charges dropped before the speedy trial time period expires, the state may include new or enhanced charges against the defendant if they decide to re-file charges. Further, the speedy trial period for re-filed charges is either:

- The balance of days remaining by restarting the time period from where it left off on the charges that were dropped; or,
- 60 days for a misdemeanor and 120 days for a felony,

whichever of these time periods is greater.

If the state fails to bring a defendant to trial within the applicable time period for re-filed charges, the judge must dismiss the charges with prejudice.

## Mistrials

Time periods for mistrials under the bill are subject to a 60 day time period for misdemeanor offenses and a 120 day time period for felony offenses. Failure to bring the defendant to trial under these time periods would enable the defendant to avail himself of remedies under a motion for speedy trial.

## **Effect of CS/HB 1517 on Juvenile Court Proceedings**

CS/HB 1517 creates a simplified tiered system for speedy trial time periods applicable in juvenile court proceedings. Its provisions are parallel to the provisions the bill created for handling re-filed charges in the adult court portion of the bill. The bill created only a standard speedy trial time period in juvenile proceedings and did not create an additional time schedule establishing compressed time periods.

## Time Periods

Speedy trial periods for juvenile proceedings are 90 days from the earlier of:

- The date the juvenile is taken into custody, or
- The date of service of the summons issued when the petition is filed.

## Extensions

CS/HB 1517 provides same grounds for the state to seek extensions of the speedy trial time periods that apply in adult cases.

## Expiration of Trial Periods and the Motion for Speedy Trial

A juvenile has the same remedy available under a motion for speedy trial as discussed previously with the adult court system. In juvenile proceedings, the judge must order the trial commenced within 10 days and has no discretion to order trial to be held up to 30 days from the hearing.

## Motion for Dismissal

If the state fails to bring the defendant to trial within the 10 day time frame, the juvenile may file a motion to dismiss the delinquency petition.<sup>29</sup> At the hearing on the motion the judge may dismiss the petition without prejudice or dismiss the petition with prejudice based on the following factors:

1. The length of the delay.
2. The circumstances and reason for the delay.
3. The seriousness of the charge.
4. The degree of prejudice to the defense.

An order granting a dismissal with prejudice on re-filed charges must be supported by findings that the length of the delay was unreasonable, and that the prejudice to the juvenile diminished his or her defense in a material way.

## Re-filed Charges

In cases where a dismissal has been ordered without prejudice, or where the state has dropped the initial charges by filing a “nolle prosequi” with the court after the expiration speedy trial period, any re-filed charges may not include any added or enhanced charge that was not the subject of the dismissal

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<sup>29</sup> “Delinquency petition” is the name of the charging document in juvenile delinquency proceedings.



or the nolle prosequi. The speedy trial period for charges re-filed under these circumstances is 60 days.

CS/HB 1517 treats situations where the state drops charges against a juvenile before the expiration of the speedy trial time period in the same manner as it does in the adult court provision restarting the time period from the point the case was dropped, and providing a time period consisting of the balance of time remaining from the dropped charges of the original petition or 60 days, whichever is greater.

If the state fails to bring a juvenile to trial within the applicable time period for re-filed charges, the judge must dismiss the petition with prejudice.

### Mistrials

The speedy trial time period for mistrials in juvenile cases is 60 days.

## B. SECTION DIRECTORY:

Section 1. Amends s. 918.015, F.S., relating to the right to speedy trial.

Section 2. Amends s. 985.35, F.S., relating to adjudicatory hearings.

Section 3. Creates s. 985.36, F.S., relating to the juvenile right to speedy trial.

Section 4. Repeals Florida Rule of Criminal Procedure 3.191.

Section 5. Repeals Florida Rule of Juvenile Procedure 8.090.

Section 6. Provides an effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

Indeterminate. See Fiscal Comments.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

Indeterminate. See Fiscal Comments.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

#### D. FISCAL COMMENTS:

Additional state costs associated with this bill would arise to the extent persons who would have been forever discharged for their crime under the current rule of procedure, would be prosecuted under the provisions of this bill.

Local government may expend funds holding persons in the custody of local jails awaiting trial under the bill's longer speedy trial periods in those cases where the accused remains in custody, does not pursue with success a motion requesting application of speedy trial time periods, and who while remaining in custody, would not have waived his or her right to a speedy trial by moving for a continuance of the case under the existing court rule.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

##### 2. Other:

##### **Substantive Rights v. Court Rules of Practice and Procedure**

Section 2(a) of Article V of the Florida Constitution provides in part:

The supreme court shall adopt rules for the practice and procedure in all courts . . .  
Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

Section 2 of Article II of the Florida Constitution provides:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Generally, the Legislature has the power to enact substantive law, while the Supreme Court has the power to enact procedural law.<sup>30</sup> Because this bill substitutes by general law what is currently a court rule of procedure it could be argued that the bill is an unconstitutional encroachment on the Supreme Court's authority to adopt rules of practice and procedure and therefore a violation of the separation of powers provision of the Florida Constitution. The supreme court has described the distinction between *practice and procedure* and *substantive law* as follows:

Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.

Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules

<sup>30</sup> Allen v. Butterworth, 756 So.2d 52, 59 (Fla. 2000) *citing* Justice Adkins concurring In re Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972).

governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.<sup>31</sup>

The Supreme Court has acknowledged that “the distinction between substantive and procedural law is neither simple nor certain. . .”<sup>32</sup> Recently, the Supreme Court has articulated how statutes containing a mixture of substance and procedure are analyzed in order to determine their constitutional validity when measured against the Supreme Court’s procedural rulemaking authority:

Of course, statutes at times may not appear to fall exclusively into either a procedural or substantive classification. We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail (citations omitted). If a statute is clearly substantive and “operates in an area of legitimate legislative concern,” this Court will not hold that it constitutes an unconstitutional encroachment on the judicial branch (citations omitted). However, where a statute does not basically convey substantive rights, the procedural aspects of the statute cannot be deemed “incidental,” and that statute is unconstitutional (emphasis added).<sup>33</sup>

The Supreme Court’s rulemaking power is exclusively procedural and does not authorize adoption of court rules that “abridge, enlarge or modify the substantive rights of any litigant.”<sup>34</sup> Rule 3.191 currently operates to guarantee defendants certain rights that could be considered substantive in nature and beyond those which the United States Supreme Court and the Florida Supreme Court have found to be within a defendant’s constitutional right to speedy trial. For example, the court rule entitles a person arrested (including someone who was merely booked, released and never formally charged) to a permanent discharge for all crimes arising out of the same episode giving rise to the arrest if that person is not brought to trial within a specific number of days without requiring a showing that the defendant was prejudiced by the delay. To grant a permanent dismissal for all such charges forever, irrespective of the fact that a violation of the *speedy trial rule* does not rise to the level of a violation of the *constitutional right to speedy trial*, appears to be a substantive expansion of a right by a court rule of procedure.

CS/HB 1517 provides legislative findings that the court rule is substantive in a number of ways and therefore is the proper subject of a legislative enactment modifying a defendant’s right to speedy trial. Only the Legislature has the constitutional authority to expand or enlarge substantive rights.<sup>35</sup> The constitutionality of CS/HB 1517 will rise and fall on whether, or to what extent, the Supreme Court finds the bill procedural or substantive or a combination of both.

### **Constitutional Requirement to Repeal a Court Rule:**

Sections 4 and 5 of the bill repealing the court rules of procedure requires a two-thirds vote of the membership of each house of the Legislature in order to pass.<sup>36</sup>

### **B. RULE-MAKING AUTHORITY:**

None.

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<sup>31</sup> Id.

<sup>32</sup> Caple v. Tuttle’s Design-Build Inc., 753 So.2d 49, 53 (Fla. 2000).

<sup>33</sup> Massey v. David, 979 So.2d 931, 937 (Fla. 2008).

<sup>34</sup> State v. Furen, 118 So.2d 6, 12 (Fla. 1960).

<sup>35</sup> Section 1, Article III, Fla. Const.

<sup>36</sup> Section 2(a), Article V, Fla. Const.

## C. DRAFTING ISSUES OR OTHER COMMENTS:

### **Examples of murder and attempted murder cases dismissed for violations of the speedy trial rule:**

Walden v. State, first degree murder.<sup>37</sup>

State v. Agee, attempted first degree murder.<sup>38</sup>

Zarifian v. State, attempted second degree murder.<sup>39</sup>

Dorian v. State, first degree murder.<sup>40</sup>

State v. McDonald, first degree murder.<sup>41</sup>

Thigpen v. State, second degree murder.<sup>42</sup>

A Westlaw search of cases dismissed for violation of the speedy trial rule for calendar years 1986 through March 25, 2010, revealed 81 reported cases involving various crimes.<sup>43</sup> This number does not include, however, the unknown number of cases dismissed where the decision of a lower court discharging a defendant was affirmed by a “per curium affirmed” decision of the District Court of Appeal which would be a far more common occurrence than decisions resulting in published opinions.<sup>44</sup> Similarly, this number does not reflect the number of instances where law enforcement or the State Attorney’s Office declined to pursue further investigation or charges due to the expiration of the speedy trial period.

### **A Subsequent Application of Reed v. State:**

In Williams v. State, the defendant was issued a traffic citation for reckless driving and subsequently charged by information with aggravated assault with a deadly weapon arising out of the same episode.<sup>45</sup> The bottom of the citation stated: “Arrest Delivered to ROR.” The following is a timeline for the events:

- March 18, 2003 – Williams was issued a traffic citation for reckless driving.
- March 26, 2003 - two notices to appear ordered her to appear for arraignment on April 8, 2003.
- April 8, 2003 – Williams pled “no contest” to reckless driving and driving with unsafe equipment.
- April 22, 2003 - a bench warrant was issued for her arrest.
- March 21, 2005 – Williams arrested.
- May 24, 2005 – the state filed an information charging her with aggravated assault with a deadly weapon (her automobile).

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<sup>37</sup> Walden v. State, 979 So.2d 1206 (Fla. 4<sup>th</sup> DCA 2008).

<sup>38</sup> State v. Agee, 622 So.2d 473 (Fla. 1993).

<sup>39</sup> Zarifian v. State, 581 So.2d 925 (Fla. 2d DCA 1991).

<sup>40</sup> Dorian v. State, 642 So.2d 1359 (Fla. 1994).

<sup>41</sup> State v. McDonald, 425 So.2d 1380 (Fla. 5th DCA 1983).

<sup>42</sup> Thigpen v. State, 350 So.2d 1078 (Fla. 4th DCA 1977).

<sup>43</sup> The Westlaw search inquiry was: “speedy trial” /p 3.191 /p discharge.

<sup>44</sup> A per curium affirmed decision is issued by a District Court of Appeal when the lower court ruling is affirmed and there is no need to elaborate or develop case law further based on the application of law to the facts of the particular case. In such instances the opinion generally only indicates “affirmed” and may or may not cite a case or a rule of procedure as its authority upholding the ruling of the lower court.

<sup>45</sup> Williams v. State, 946 So.2d 1163 (Fla. 1<sup>st</sup> DCA 2006).

On appeal the state conceded that if Williams was “taken into custody” on the reckless driving charge then she was entitled to a discharge from the aggravated assault with a deadly weapon charge because it arose out of the same criminal episode.<sup>46</sup> First District Court of Appeal held:

Pursuant to Reed v. State, 649 So.2d 227, 229 (Fla.1995), Williams was taken into custody for all crimes arising out of the same criminal conduct or episode, including the charge of aggravated assault with a deadly weapon. The speedy trial rule barred the State from prosecuting Williams for that offense. (citation omitted). Thus, the trial court erred in denying the amended motion for discharge.<sup>47</sup>

#### **IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

On March 22, 2010, the Criminal & Civil Justice Council adopted a strike-all amendment which requires the court to dismiss with prejudice charges against the defendant if the state fails to bring the defendant to trial within the prescribed time periods applicable to re-filed charges. The amendment added a provision to the sections of the bill relating to time periods applicable to re-filed charges after a timely nolle prosequi has been filed to add 60 days for a misdemeanor and 120 days for a felony if these periods are longer than initial time periods provided under the bill as originally filed. Also, the amendment added section 5 to the bill; repealing Rule 8.090 of the Florida Rules of Juvenile Procedure.

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<sup>46</sup> Id. at 1164 and 1165.

<sup>47</sup> Id. at 1165.