

## RULE 3.190(c)(4): A RULE MEANT TO BE BROKEN?

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### I. INTRODUCTION

In the early 1930s, Alfred Sawyer was charged with using an illegal net to catch fish in Florida waters and was arrested and thrown in jail.<sup>1</sup> Mr. Sawyer did not deny that he was using the net described in the charging document.<sup>2</sup> However, Mr. Sawyer believed that his use of the net occurred outside of Florida waters in the Gulf Stream.<sup>3</sup> If true, then he could not have been guilty of the crime charged.<sup>4</sup> Mr. Sawyer sought relief by filing a petition for a writ of habeas corpus.<sup>5</sup> At the hearing, Mr. Sawyer testified that he was not in Florida waters when he used the net and, in support of his contention, introduced as evidence a marine chart used by the United States Navy.<sup>6</sup> The State did not introduce any evidence to contradict Mr. Sawyer's contention, and the trial judge granted Mr. Sawyer's petition.<sup>7</sup>

On appeal, the Florida Supreme Court reversed.<sup>8</sup> The Court held that defendants may not use a petition for a writ of habeas

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1. *Lehman v. Sawyer*, 143 So. 310, 310 (Fla. 1932).

2. *Id.* at 311.

3. *Id.*

4. *Id.*

5. *Id.* at 310.

6. *Id.* at 311.

7. *Id.*

8. *Id.* at 313.

corpus to test the sufficiency of the evidence against them.<sup>9</sup> So long as the State filed a charging document that was facially valid, which it did, the sheriff was empowered to detain Mr. Sawyer until his trial.<sup>10</sup> It did not matter that, based on the undisputed facts, Mr. Sawyer could not be found guilty of the crime charged.<sup>11</sup> Mr. Sawyer's only recourse was to wait until trial and then, upon the State's failure to prove that Mr. Sawyer used the net in Florida waters, to motion for a directed verdict.<sup>12</sup> Until then, Mr. Sawyer was stuck in jail.<sup>13</sup>

As Mr. Sawyer's case illustrates, in the past criminal defendants lacked a pretrial procedural device to challenge charges that were unsupported by the facts. Defendants could file a motion to quash the information or indictment, but in doing so they were limited to challenging the facial validity of the charging document and were not permitted to introduce extraneous evidence in support of the motion.<sup>14</sup> For example, in *State v. Dixon*,<sup>15</sup> a 1960s case, the defendant was charged with being a felon in possession of a firearm.<sup>16</sup> The defendant successfully moved to quash the information on the grounds that his prior felony conviction was invalid because it was obtained in violation of his Sixth Amendment right to counsel.<sup>17</sup> The Second District Court of Appeal found that the motion was improper, however, because it relied on extraneous facts, and therefore the defendant would have to wait until trial to show the invalidity of his prior conviction.<sup>18</sup> The Second District appreciated the trial judge's attempt to promote judicial efficiency by granting the motion but nevertheless reversed.<sup>19</sup>

The inability of criminal defendants to challenge the evidentiary support of the charges against them was, as the trial judge in *Dixon* apparently understood, unfair to defendants and judi-

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9. *Id.* at 311.

10. *Id.* at 312.

11. *Id.*

12. *Id.* at 313.

13. *Id.*

14. *Whitman v. State*, 122 So. 567, 568 (Fla. 1929).

15. 193 So. 2d 62 (Fla. 2d Dist. App. 1966).

16. *Id.* at 63.

17. *Id.*

18. *Id.* at 65, 67.

19. *Id.*

cially inefficient. Consider another 1930s case, *French v. Turner*,<sup>20</sup> in which the defendant filed a petition for a writ of habeas corpus on the ground that the statute of limitations for the charges against him had run.<sup>21</sup> In affirming the trial court's denial of the petition, the Florida Supreme Court stated the following:

It is sufficient here to say that the indictment appears to be valid on its face, and whether or not the statute of limitations had run so as to bar the prosecution under the facts is a proper matter to be determined, as is any other material matter, on the trial.<sup>22</sup>

So, even though the defendant had an easily verifiable affirmative defense, the court was required to hold a costly token trial. This was a problem the Florida courts needed to address.

On January 1, 1968, the Florida Supreme Court adopted the Florida Rules of Criminal Procedure.<sup>23</sup> Rule 3.190 provided for pretrial motions to dismiss.<sup>24</sup> Under Rule 3.190(c)(4), such a motion could be made on the ground that “[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant.”<sup>25</sup> As pointed out in the committee notes, this Rule provided “a new remedy to an accused which he did not previously have.”<sup>26</sup> It was akin to a civil summary judgment motion in that it would “permit a [pretrial] determination of the law of the case where the facts are not in dispute.”<sup>27</sup> In other words, the new Rule was designed to prevent situations like Mr. Sawyer's case.

Three years after Rule 3.190(c)(4) went into effect, the Florida Supreme Court decided *State v. Davis*,<sup>28</sup> which helped to clarify how the new Rule worked.<sup>29</sup> In *Davis*, the trial judge granted the defendant's Rule 3.190(c)(4) motion to dismiss (“(c)(4) motion”) on

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20. 137 So. 521 (Fla. 1931).

21. *Id.* at 522.

22. *Id.*

23. *In re Fla. R. of Crim. P.*, 196 So. 2d 124 (Fla. 1967).

24. *Id.* at 145. Originally, it was Rule 1.190, not 3.190. *Id.* However, for coherency's sake, this Article will refer to it solely as Rule 3.190.

25. *Id.*

26. *Id.* at 147.

27. *Id.*

28. 243 So. 2d 587 (Fla. 1971).

29. *Id.*

three of four counts.<sup>30</sup> An embezzlement count was dismissed on the ground that the undisputed facts showed that the defendant did not have an official obligation to receive the money at issue, an element of the offense.<sup>31</sup> Additionally, two larceny counts were dismissed on the ground that the statute of limitations had expired.<sup>32</sup> On appeal, the State argued that the trial judge erred by considering facts extraneous to the charging document, namely the State's Bill of Particulars.<sup>33</sup> Instead, the trial judge should have limited his or her consideration to whether the charging document alleged in sufficiently clear terms a crime under the State's laws.<sup>34</sup> The Florida Supreme Court agreed that the charging document was facially sufficient but held that the trial judge may consider extraneous facts and is not limited to considering the charging document's facial sufficiency.<sup>35</sup>

The *Davis* Court also confirmed that, like a civil summary judgment proceeding, the objective of Rule 3.190(c)(4) is "to avoid a trial when all the material facts are not genuinely in issue and could legally support only one judgment."<sup>36</sup> *Davis* therefore made it clear that Rule 3.190(c)(4) was designed to prevent costly and unnecessary trials and unfairness to defendants in cases, like *Sawyer* and *Turner*, where the uncontested facts fail to support the charges against the defendant or clearly establish an affirmative defense.<sup>37</sup>

Although Rule 3.190(c)(4) seems like a useful procedural rule, this Article will show that, in practice, the Rule does not work well and should be changed or abolished.

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30. *Id.* at 588.

31. *Id.*

32. *Id.* at 588–589.

33. *Id.* at 589. A bill of particulars is defined in *Black's Law Dictionary* as "[a] formal, detailed statement of the claims or charges brought by a plaintiff or a prosecutor, [usually] filed in response to the defendant's request for a more specific complaint." *Black's Law Dictionary* 177 (Bryan A. Garner ed., 8th ed., West 2004).

34. *Davis*, 243 So. 2d at 589.

35. *Id.* at 590–591.

36. *Id.* at 591.

37. In *Davis*, the appellate decision that the Florida Supreme Court later affirmed, the Second District Court of Appeal stated that the facts of the case presented an "ideal set of circumstances" for the utilization of the then new Rule 3.190(c)(4) because a trial on the embezzlement and larceny counts would have been a "fruitless and . . . unnecessary expense to the public." 234 So. 2d 713, 714–715 (Fla. 2d Dist. App. 1970).

Part II of this Article will explain how Rule 3.190(c)(4) works—the mechanics of the Rule—including the requirements of filing a (c)(4) motion to dismiss and the State's options in responding to it. Part III of this Article will discuss how caselaw has significantly reduced the efficacy of Rule 3.190(c)(4). Part IV will address the drawbacks defendants and their attorneys face when filing (c)(4) motions. Then, in Part V, this Article will offer potential alternatives to (c)(4) motions available to defendants and their attorneys. Finally, Part VI will consider whether the efficacy of Rule 3.190(c)(4) can be improved or, alternatively, whether the Rule should simply be eliminated.

## II. THE MECHANICS OF RULE 3.190(c)(4)

Rule 3.190(c)(4) motions may be made at any time.<sup>38</sup> The motion must be in writing<sup>39</sup> and

allege that the material facts of the case are undisputed, describe what the undisputed material facts are, and demonstrate that the undisputed facts fail to establish a prima facie case or that they establish a valid defense (either an affirmative defense or negation of an essential element of the charge).<sup>40</sup>

The motion must also set forth the undisputed facts with specificity and be personally sworn to by the defendant.<sup>41</sup> It is not necessary for the defendant to have personal knowledge of the facts set forth in her (c)(4) motion; the defendant need only swear that the facts set forth are the material, undisputed facts of the case.<sup>42</sup> This means, for example, that the defendant can swear to the facts as recounted during a deposition by a witness of the crime even if the defendant did not personally perceive those facts.<sup>43</sup>

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38. Fla. R. Crim. P. 3.190(c).

39. Fla. R. Crim. P. 3.190(a).

40. *State v. Gutierrez*, 649 So. 2d 926, 927 (Fla. 3d Dist. App. 1995).

41. Fla. R. Crim. P. 3.190(c); *see also State v. Upton*, 392 So. 2d 1013, 1015–1016 (Fla. 5th Dist. App. 1981) (holding that a (c)(4) motion sworn to by the defendant's attorney is insufficient; the motion must be sworn to by the defendant).

42. *Devine v. State*, 504 So. 2d 788, 789 (Fla. 3d Dist. App. 1987).

43. *See State v. Palmore*, 510 So. 2d 1152, 1153 (Fla. 3d Dist. App. 1987) (approving the defendant's (c)(4) motion that swore to and accepted as truthful the facts alleged by the crime's victim).

In response to a defendant's Rule 3.190(c)(4) motion, the State must file a "traverse" or "demurrer."<sup>44</sup> A traverse denies the facts alleged in the defendant's (c)(4) motion,<sup>45</sup> while a demurrer admits the facts but disputes that they fail to establish a prima facie case of guilt.<sup>46</sup>

A traverse must specifically deny one or more of the material facts alleged in the (c)(4) motion.<sup>47</sup> The specificity requirement was added to the rule in 1977.<sup>48</sup> In *State v. Kalogeropolous*,<sup>49</sup> the Florida Supreme Court made clear that the State cannot skirt the specificity requirement.<sup>50</sup> There the defendant, charged with vehicular homicide, filed a (c)(4) motion that detailed the material facts and averred they were undisputed.<sup>51</sup> The State filed a traverse in response that denied the facts were undisputed and claimed the defendant's motion omitted additional material facts.<sup>52</sup> However, the traverse failed to specify which facts the State disputed and the additional facts the defendant allegedly omitted.<sup>53</sup> Holding that the State's traverse must "specifically dispute a material fact alleged by the defendant or add additional material facts that meet the minimal requirement of a prima facie case," the Court affirmed the insufficiency of the State's traverse and the consequent order dismissing the charges.<sup>54</sup>

The state attorney signing the traverse must swear that the material facts disputed or alleged therein are done so in good

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44. Fla. R. Crim. P. 3.190(d).

45. *State v. Kalogeropolous*, 758 So. 2d 110, 111 (Fla. 2000).

46. *Bell v. State*, 835 So. 2d 392, 393 (Fla. 2d Dist. App. 2003).

47. Fla. R. Crim. P. 3.190(d). The existence of disputed *immaterial* facts is irrelevant to the determination of a (c)(4) motion. In *Davis*, the Fourth District Court of Appeal affirmed the trial court's order dismissing the grand theft charge against the defendant despite a dispute about whether the defendant committed one or two thefts. 890 So. 2d 1242, 1243 (Fla. 4th Dist. App. 2005). In either case, it was undisputed that the total value of the property stolen did not exceed \$300. *Id.* at 1244. To constitute grand theft, the stolen property's value must equal or exceed \$300. *Id.* Since the defendant undisputedly did not steal \$300 worth of property, the State could not prove a prima facie case of grand theft and the dismissal was warranted. *Id.* The dispute as to whether the defendant committed one or two thefts was immaterial and therefore irrelevant. *Id.*

48. *Fla. Bar re Fla. R. of Crim. P.*, 343 So. 2d 1247, 1255–1256 (Fla. 1977).

49. 758 So. 2d 110.

50. *Id.* at 111–112.

51. *Id.* at 111.

52. *Id.*

53. *Id.*

54. *Id.* at 112.

faith and, in felony cases, after receiving testimony under oath from material witnesses.<sup>55</sup> The State is not required to attach a sworn affidavit by a witness.<sup>56</sup> The Rule further provides that “[t]he demurrer or traverse shall be filed a reasonable time before the hearing on the motion to dismiss.”<sup>57</sup> When the state attorney files a facially sufficient traverse, the trial court must automatically deny the defendant’s (c)(4) motion.<sup>58</sup> A facially insufficient traverse is not fatal, and the trial court may still deny the motion on the merits.<sup>59</sup>

If the State concedes the facts as detailed in the defendant’s Rule 3.190(c)(4) motion but denies that they fail to establish a prima facie case of guilt, then the State may file a demurrer as opposed to a traverse.<sup>60</sup> Unlike a traverse, the Rule does not require automatic denial of the defendant’s (c)(4) motion when the State files a proper demurrer. Instead, the trial court may hold a hearing on the issue of whether the undisputed facts fail to establish a prima facie case of guilt against the defendant.<sup>61</sup> During such a hearing, “[t]he court may receive evidence on any issue of fact necessary to the decision on the motion.”<sup>62</sup>

The foregoing Section describes the mechanics of Rule 3.190(c)(4). The following Section will examine why the Rule has broken down and needs a good mechanic.

### III. HOW THE COURTS HAVE BROKEN RULE 3.190(c)(4)

From the beginning, Florida courts have been extremely wary of Rule 3.190(c)(4) motions to dismiss. This wariness and reluctance stems from the belief that the State should not be denied its

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55. *State v. Zipfel*, 537 So. 2d 1099, 1099 (Fla. 3d Dist. App. 1989).

56. *Id.*

57. Fla. R. Crim. P. 3.190(d).

58. Fla. R. Crim. P. 3.190(d); *State v. Sawyer*, 526 So. 2d 191, 191–192 (Fla. 3rd Dist. App. 1988).

59. *See State v. Armstrong*, 616 So. 2d 510, 511 (Fla. 4th Dist. App. 1993) (stating that “when a traverse is procedurally inadequate the trial court still must examine the motion to dismiss to determine whether said motion demonstrates that the undisputed facts fail to establish a prima facie case of guilt”).

60. *Bell*, 835 So. 2d at 393; *State v. Franchi*, 746 So. 2d 1126, 1127 (Fla. 4th Dist. App. 1999).

61. Fla. R. Crim. P. 3.190(d).

62. *Id.*

day in court.<sup>63</sup> This Section will discuss the caselaw that reflects this wariness and reluctance and the detrimental effect the caselaw has had on the rule's efficacy.

#### A. Rule 3.190(c)(4) Motions Are Reviewed in a Manner That Is Extremely Favorable to the State

Reflecting their wariness, appellate courts have held that when considering Rule 3.190(c)(4) motions to dismiss, trial judges must construe the evidence in the light most favorable to the State, and all inferences must be resolved against the defendant.<sup>64</sup> This favor-the-State principle is somewhat appropriate because (c)(4) motions are akin to civil summary judgment motions, and in reviewing summary judgment motions, trial judges construe the evidence in the light most favorable to the non-movant.<sup>65</sup> Courts have taken the principle much further than it has been taken in the summary judgment context, however, and consequently have made it nearly impossible for a defendant to prevail on a (c)(4) motion.<sup>66</sup> *State v. Fetherolf*<sup>67</sup> illustrates this point.

In *Fetherolf*, the defendant was charged with sexual battery on his minor daughter.<sup>68</sup> In response to an investigation, the daughter stated that the defendant committed the alleged offense.<sup>69</sup> Presumably this testimony was the heart of the State's evidence against the defendant. In a subsequent deposition, however, the daughter disclaimed her original statement, claiming that it was coached by the investigating officers.<sup>70</sup> Because his

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63. As the Fourth District Court of Appeal put it, proceedings under Rule 3.190(c)(4) are "not intended to be a trial by affidavit, nor a dry run of a trial on the merits. Neither is it intended as some type of 'fishing expedition' to force the prosecution to come forward with enough evidence to establish a prima facie case . . ." *State v. Giesy*, 243 So. 2d 635, 636 (Fla. 4th Dist. App. 1971).

64. *State v. Bell*, 882 So. 2d 468, 470 (Fla. 5th Dist. App. 2004).

65. See *State v. Rudolph*, 595 So. 2d 297, 299 (Fla. 5th Dist. App. 1992) (Coward, J., concurring) (citing Fla. R. Civ. P. 1.510).

66. See *id.* (stating that "[t]he result of the State's traverse or demurrer under Rule 3.190(d) in a criminal case is powerful and effective, whereas in a civil case, such a traverse [as the one at issue], not being based on admissible evidence, would not even qualify as an opposing affidavit . . .").

67. 388 So. 2d 38 (Fla. 5th Dist. App. 1980).

68. *Id.* at 38–39.

69. *Id.* at 39.

70. *Id.*

daughter changed her story, the defendant filed a Rule 3.190(c)(4) motion to dismiss the charges against him.<sup>71</sup> Noting that at trial the State could not use the daughter's prior inconsistent statement as substantive evidence of the defendant's guilt, the trial judge granted the defendant's motion.<sup>72</sup> On appeal, however, the Fifth District suggested that the daughter could again flip-flop and testify at trial that the defendant did commit the offense.<sup>73</sup> Noting that the State is entitled to the most favorable construction of the evidence, it reversed the order of dismissal.<sup>74</sup> Essentially, the Fifth District held that the favor-the-State principle requires a trial judge to deny a defendant's (c)(4) motion even when the defendant's version of the facts is disputed solely with inadmissible evidence and there is a mere possibility that a witness will change her story to support the State's case.<sup>75</sup> By having taken the favor-the-State principle to such extremes, the courts have made it nearly impossible for a defendant to prevail on a Rule 3.190(c)(4) motion to dismiss and thereby have stymied the Rule's efficacy.<sup>76</sup>

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71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. See *State v. Pentecost*, 397 So. 2d 711, 712 (Fla. 5th Dist. App. 1981) (holding "[i]t is only when the [S]tate cannot establish even the barest bit of a prima facie case that it should be prevented from prosecuting"). In other words, to rebut the defendant's (c)(4) motion, the State need not offer facts that would be sufficient to obtain a conviction.

76. Some appellate judges would take the favor-the-State principle even further and render it wholly impossible for a defendant to prevail on a (c)(4) motion, as illustrated by the dissenting opinion in *State v. Sacco*, 849 So. 2d 452, 454–455 (Fla. 4th Dist. App. 2003) (Stone, J., dissenting). In *Sacco*, the defendant was charged with murder after he made a drunken confession. *Id.* at 453 (majority). The trial judge suppressed evidence of the body and the murder weapon. *Id.* Furthermore, the defendant's accomplice, the only other witness to the crime, invoked his Fifth Amendment right and refused to testify. *Id.* Recognizing that the State could not rely solely on his own drunken confession, the defendant filed a (c)(4) motion to dismiss on the grounds that the State could not prove the corpus delicti. *Id.* At a hearing on the motion, the prosecutor conceded that the State would be unable to prove the corpus delicti and could not in good faith go forward with the case. *Id.* at 453–454. Consequently, the trial judge dismissed the charges. *Id.* at 454. Two of the three appellate judges reviewing the case affirmed the dismissal. *Id.* The dissenting judge, however, argued that the motion should have been denied because there was a possibility that the defendant's accomplice could change his mind and decide to testify. *Id.* at 454–455 (Stone, J., dissenting). Under this extreme view of the favor-the-State principle, a trial judge should deny a (c)(4) motion, even if the State admits its inability to prove an essential element of the offense, so long as there is the possibility of obtaining the needed evidence prior to trial.

### B. Trial Judges Automatically Deny (c)(4) Motions When the State Files a Facially Sufficient Traverse

Another way that courts have stymied Rule 3.190(c)(4)'s efficacy is by interpreting Rule 3.190(d) to require the automatic denial of (c)(4) motions when the State files a facially sufficient traverse. Rule 3.190(d) provides that “[a] motion to dismiss under subdivision (c)(4) of this [R]ule shall be denied if the [S]tate files a traverse that, with specificity, denies under oath the material fact or facts alleged in the motion to dismiss.”<sup>77</sup> Many courts interpret this provision to require the automatic denial of (c)(4) motions upon the State’s filing of a facially sufficient traverse.<sup>78</sup> Under this four-corners approach, trial courts simply consider whether a traverse is procedurally adequate and do not inquire into its merits.<sup>79</sup> In this respect, a State’s traverse is far more powerful and effective than a non-movant’s response to a summary judgment motion.<sup>80</sup>

For example, in *State v. Bell*,<sup>81</sup> the defendant moved to dismiss the drug charges against him on the ground that, based upon the undisputed facts as set forth by the arresting officers in their depositions, the State could not prove the possession element of the offense.<sup>82</sup> For its traverse, the State relied on an arresting officer’s charging affidavit, which alleged possession.<sup>83</sup> Finding it clear from the arresting officers’ depositions that they could not testify to the truth of the affidavit’s allegation of possession, the trial court granted the motion.<sup>84</sup> However, the Fifth District Court of Appeal reversed after finding that it was improper for the trial court to consider the discrepancies in the arresting officers’ depositions as compared with the allegations in the

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77. Fla. R. Crim. P. 3.190(d).

78. See *State v. Wood*, 299 So. 2d 111, 112 (Fla. 4th Dist. App. 1974) (holding that the issue of whether a (c)(4) motion should be denied “is decided as suggested by the [R]ule by determining if a material fact in the motion is traversed by the [S]tate”).

79. See *Ellis v. State*, 346 So. 2d 1044, 1045 (Fla. 1st Dist. App. 1977) (stating that “[a Rule 3.190(c)(4)] proceeding is designed to create neither a trial by affidavit nor a dry run of a trial on the merits . . .”).

80. *Rudolph*, 595 So. 2d at 299.

81. 882 So. 2d 468.

82. *Id.* at 470.

83. *Id.* at 471–472.

84. *Id.*

charging affidavit.<sup>85</sup> In reaching this conclusion, the Fifth District cited its earlier *Fetherolf* decision, where it stated the following:

The [S]tate here vouched under oath for the veracity of the victim's first statements, and attached them to the traverse. The [S]tate is entitled to the most favorable construction of its traverse and attachment . . . They create material disputed facts. It is not proper at this stage for the court to determine factual issues, consider weight of conflicting evidence, or credibility of witnesses. Because the [S]tate's sworn traverse [in] this case was sufficient it was error to dismiss the information.<sup>86</sup>

This reasoning is echoed in other Rule 3.190(c)(4) cases.<sup>87</sup>

Under this four-corners approach to the State's traverse, a defendant can obtain the trial judge's review of the merits of his (c)(4) motion only if the State demurs, files a procedurally inadequate traverse, or does not respond at all.<sup>88</sup> This makes it extremely easy for the State to defeat a defendant's (c)(4) motion without even a cursory examination of the merits of its case. Because it recalls the days before Rule 3.190(c)(4), when trial courts considered only the facial validity of the charging document when ruling on a defendant's motion to quash,<sup>89</sup> the four-corners approach to the State's traverse stymies the Rule's efficacy. For the same reason, the four-corners approach also contravenes the

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85. *Id.* at 472 (citing *Fetherolf*, 388 So. 2d 38).

86. *Fetherolf*, 388 So. 2d at 39 (citations omitted).

87. See *State v. Huggins*, 368 So. 2d 119, 119 (Fla. 1st Dist. App. 1979) (holding that although it was not ideal due to a lack of support for its allegation, the State's traverse nevertheless specifically denied under oath a material fact alleged in the defendant's (c)(4) motion and, therefore, necessitated automatic denial of the motion).

88. Even if the State demurs, files a procedurally inadequate traverse, or does not respond at all, the trial judge must still determine under the favor-the-State principle whether the motion establishes that the undisputed material facts fail to show a prima facie case of guilt. In *State v. Gutierrez*, a defendant charged with burglary filed a (c)(4) motion on the grounds that the State's witness admitted in his deposition that he did not see the defendant commit the offense, and consequently the State could not prove the defendant's guilt. 649 So. 2d at 927. In response, the State filed a traverse that was procedurally inadequate because it was not sworn to and did not specifically deny the defendant's version of the facts. *Id.* The trial court ordered dismissal. *Id.* at 926. However, the Third District Court of Appeal noted that the witness initially indicated in his deposition that he did see the defendant commit the act. *Id.* at 927. Despite the weakness of this potentially inadmissible evidence, the Third District held that it amounted to a material disputed fact and consequently reversed the trial judge. *Id.* at 928.

89. *Whitman*, 122 So. at 568.

*Davis* holding that trial courts should consider extraneous evidence offered in support of the defendant's (c)(4) motion.<sup>90</sup>

### C. Trial Judges Overlook Seemingly Fatal Deficiencies in the State's Response to a (c)(4) Motion

Further reducing the efficacy of Rule 3.190(c)(4), appellate courts have held that a trial judge may overlook deficiencies in the State's traverse even when those deficiencies would seem fatal under the plain language of the Rule. In *State v. Burnison*,<sup>91</sup> a hearing was held on the defendant's (c)(4) motion two months after it was filed.<sup>92</sup> The State nevertheless waited until the day of the hearing to file its traverse.<sup>93</sup> Finding that the State failed to file its traverse within a reasonable time before the hearing, as expressly required by Rule 3.190(d), the trial judge granted the dismissal.<sup>94</sup> On appeal, the Second District Court of Appeal noted the commentary following the Rule and stated that "the [S]tate must 'take timely action to negate or dispute the motion to dismiss, or else the allegations of the defendant shall be admitted as true.'"<sup>95</sup> The Second District concluded, however, that the dismissal was "too severe" of a sanction for the State's failure to comply with Rule 3.190(d)'s requirement.<sup>96</sup> Consequently, the Second District reversed the order of dismissal.<sup>97</sup>

*Burnison* demonstrates that, due to their reluctance to grant Rule 3.190(c)(4) motions, courts will overlook the State's express violations of the Rule even when the Rule, as interpreted in the commentary following the Rule, would treat the violations as fatal.<sup>98</sup> By refusing to enforce Rule 3.190(c)(4)'s express require-

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90. *Davis*, 243 So. 2d at 592.

91. 438 So. 2d 538 (Fla. 2d Dist. App. 1983).

92. *Id.* at 538.

93. *Id.*

94. *Id.* at 539.

95. *Id.*

96. *Id.* at 540.

97. *Id.*

98. The courts' willingness to overlook deficiencies in the State's traverse starkly contrasts with its unwillingness to overlook even minor deficiencies in the defendant's (c)(4) motion. In *State v. Upton*, the State violated the requirements of Rule 3.190 when it orally traversed the defendant's (c)(4) motion rather than traversing it in writing. 392 So. 2d 1013, 1015 (Fla. 5th Dist. App. 1981). The Fifth District Court of Appeal held that the defendant's failure to object to the form of the traverse constituted a waiver of the writing requirement. *Id.* Then, in a less liberal tone, the Fifth District held that when the defen-

ments of the State, courts have further reduced the Rule's efficacy.

#### D. Some Judges Ignore the Plain Language of Rule 3.190(c)(4)

Rule 3.190(d) expressly provides that “[f]actual matters alleged in a [(c)(4) motion to dismiss] shall be [deemed] admitted unless specifically denied by the [S]tate in the traverse.”<sup>99</sup> Despite this unequivocal language, at least one appellate court decision suggests that the trial judge may reject the defendant's version of the facts even in the absence of a traverse. In *State v. Stewart*,<sup>100</sup> the defendant filed a (c)(4) motion claiming that the stabbing death of his girlfriend was accidental, and, consequently, the State could not prove an essential element of the murder charge against him.<sup>101</sup> After the State failed to traverse the motion, the trial judge ordered the dismissal.<sup>102</sup> On review, however, the Fifth District Court of Appeal found that there was evidence in the record, including the type of wound and direction of the blow, that indicated the defendant's version of the facts as set forth in his (c)(4) motion was false.<sup>103</sup> For this reason, the Fifth District found that the trial judge should not have granted the motion.<sup>104</sup> The Fifth District made no attempt to reconcile its decision with Rule 3.190(d)'s express language.<sup>105</sup> This repeated willingness to skirt Rule 3.190(c)(4)'s requirements has unsurprisingly stymied the Rule's efficacy.

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dant fails personally to swear to the facts alleged in her (c)(4) motion—in this case the defendant's attorney swore to the motion's contents—the trial judge should summarily deny the motion. *Id.* at 1016. Accordingly, Florida courts tend to look past deficiencies on the State's part while viewing deficiencies on the defendant's part as fatal.

99. Fla. R. Crim. P. 3.190(d).

100. 404 So. 2d 185 (Fla. 5th Dist. App. 1981).

101. *Id.*

102. *Id.*

103. *Id.* at 186.

104. *Id.*

105. As will be discussed, courts have held that issues of intent are properly decided by the jury and not by the trial court on a motion to dismiss. *Infra* pt. III(E). The Fifth District probably could have reversed on that ground. However, it did not even address the issue and instead held that “if the circumstances show the defendant's version is false, the defendant's version may be rejected.” *Stewart*, 404 So. 2d at 186.

### E. Caselaw Has Limited the Type of Issues That Can Be Decided on a 3.190(c)(4) Motion

Appellate courts have held that many issues, like state of mind and criminal intent, may not be decided on a Rule 3.190(c)(4) motion.<sup>106</sup> This means, for example, that a defendant charged with murder may not use a (c)(4) motion to show that the undisputed facts fail to support the premeditation element.<sup>107</sup> Likewise, a defendant faced with a murder charge is prohibited from using a (c)(4) motion to establish self-defense, which is an affirmative defense.<sup>108</sup> The rationale behind this prohibition is that intent and state-of-mind issues are for the jury to decide because they involve drawing inferences from the facts and judging the credibility of witnesses.<sup>109</sup>

*State v. Rogers*<sup>110</sup> illustrates the significant restrictions on the types of issues that may be raised in a Rule 3.190(c)(4) motion.<sup>111</sup> In *Rogers*, the defendant, charged with second-degree murder, filed a (c)(4) motion to dismiss on the grounds that the facts clearly showed he lacked the requisite “depraved mind, regardless of human life . . . .”<sup>112</sup> It was undisputed that the deceased approached the defendant while the two were at a bar, flicked his cigarette, striking the defendant’s forehead with it, and then clenched his fists and verbally invited a fight.<sup>113</sup> The defendant responded by striking the deceased with the glass he was holding.<sup>114</sup> The glass shattered upon impact and had the unlikely and

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106. See *In the Interest of S.T.N. v. State*, 474 So. 2d 884, 885 (Fla. 4th Dist. App. 1985) (stating that “[t]his court, as well as other district courts of appeal, have consistently held that intent and knowledge are not proper issues to be decided on a motion to dismiss”).

107. *State v. Milton*, 488 So. 2d 878, 879 (Fla. 1st Dist. App. 1986).

108. *Id.*

109. In *Gutierrez*, the Third District Court of Appeal echoed other appellate decisions in declaring that “it is improper for the trial court to determine factual issues and consider the weight of conflicting evidence or the credibility of witnesses.” 649 So. 2d at 928. There the defendant filed a (c)(4) motion to dismiss on the grounds that the State could not prove a prima facie case because its key witness had recanted. *Id.* at 927. Noting that the witness had given conflicting testimony, the Third District held that the trial judge erred in granting the motion. *Id.* at 928. According to the Third District, the trial judge had no business weighing the conflicting evidence and judging the witness’s credibility. *Id.*

110. 386 So. 2d 278 (Fla. 2d Dist. App. 1980).

111. *Id.*

112. *Id.* at 279.

113. *Id.*

114. *Id.*

fatal effect of severing the deceased's carotid artery.<sup>115</sup> Recognizing that the defendant could not be found guilty of any crime greater than manslaughter, the trial judge granted the defendant's motion.<sup>116</sup> The Second District Court of Appeal reversed, however, stating as follows:

[I]ntent or state of mind is not an issue to be decided on a motion to dismiss under Rule 3.190(c)(4). Instead, it is usually inferred from the circumstances surrounding the defendant's actions. Since the trier of fact [the jury] has the opportunity to weigh the evidence and judge the credibility of the witnesses, it should determine intent or state of mind.

We hold [that] the trial court erred by resolving the issue of whether [the defendant's] actions "evinced a depraved mind regardless of human life" on a motion to dismiss the information.<sup>117</sup>

As *Rogers* illustrates, the appellate courts' refusal to permit trial judges to determine issues like state of mind and intent reduces Rule 3.190(c)(4)'s efficacy.

#### IV. THE DRAWBACKS OF FILING RULE 3.190 (c)(4) MOTIONS TO DISMISS

Although Mr. Sawyer likely would have appreciated the availability of Rule 3.190(c)(4) motions to dismiss when he was charged with using an unlawful fishing net, the reality today is that filing a (c)(4) motion is fraught with drawbacks and usually a waste of time.<sup>118</sup> Worse, it may be detrimental to the defendants' best interests.

Many of the drawbacks of filing a (c)(4) motion stem from the caselaw discussed in Part III. For example, caselaw has imposed on trial judges an extreme version of the favor-the-State principle when reviewing (c)(4) motions.<sup>119</sup> As this makes it almost impos-

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115. *Id.*

116. *Id.* at 280.

117. *Id.*

118. See *State v. Hunwick*, 446 So. 2d 214, 215 (Fla. 4th Dist. App. 1984) (discussing the heavy burden a defendant must carry to prevail in a (c)(4) motion and declaring that courts should hardly ever grant them).

119. *Supra* pt. III(A).

sible for defendants to prevail, the favor-the-State principle is a major drawback.<sup>120</sup> For the same reason, the courts' habit of automatically denying a (c)(4) motion when the State files a facially sufficient traverse constitutes a major drawback.<sup>121</sup> Additionally, the rule prohibiting the determination of state-of-mind and intent issues is a major drawback because it prevents defendants from challenging the State's evidence of *mens rea*, which is an element of most crimes.<sup>122</sup>

In addition to the drawbacks resulting from caselaw and court practices, there are numerous innate drawbacks that would continue to exist even if the courts recede from the caselaw and practices that have rendered Rule 3.190(c)(4) ineffective.

#### A. Anything the Defendant Says Can and Will Be Used against Him

As noted, the defendant must personally swear to the contents of his Rule 3.190(c)(4) motion.<sup>123</sup> The drawback is that the State may use the defendant's statements against him to impeach the defendant or, more seriously, as substantive evidence.<sup>124</sup> Such statements are admissible as substantive evidence under the "admission by party opponent" hearsay exception.<sup>125</sup> The admissibility of the motion's contents for this purpose may nevertheless come as a surprise to defense attorneys because it seems at odds with the well-known rule that a defendant's statements made in support of a motion to suppress evidence on Fourth Amendment grounds may not later be used against him at trial on the issue of guilt.<sup>126</sup> However, for the reasons discussed below, Florida courts have held that the reason justifying the prohibition in the cases of

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120. *Id.*

121. *Supra* pt. III(B).

122. *See Morissette v. U.S.*, 342 U.S. 246, 250–251 (1952) (discussing the "universal" understanding that a guilty mental state is an element of every serious crime).

123. *Supra* n. 43 and accompanying text.

124. *Palmore*, 510 So. 2d at 1153.

125. Fla. Stat. § 90.803(18) (2006).

126. *Simmons v. U.S.*, 390 U.S. 377, 394 (1968); *see also U.S. v. Inmon*, 568 F.2d 326, 333 (3d Cir. 1977) (holding that statements made in support of a pretrial motion on Fifth Amendment grounds, like those made in support of a pretrial motion on Fourth Amendment grounds, may not later be used against the defendant at trial as proof of guilt).

motions to suppress evidence based on the Fourth Amendment does not apply in the case of (c)(4) motions to dismiss.<sup>127</sup>

A defendant has a Fourth Amendment right to be free from unreasonable searches and seizures, and an important mechanism for enforcing that right is to suppress evidence that was the fruit of an unreasonable search or seizure.<sup>128</sup> To establish standing and satisfy other procedural requirements, a defendant motioning to suppress evidence obtained as the result of an unreasonable search or seizure must make statements that are typically incriminating.<sup>129</sup> Nobody forces the defendant to file a motion to suppress.<sup>130</sup> Rather, he or she does it to obtain a benefit—the benefit of having evidence against him or her suppressed.<sup>131</sup> At first glance, this raises no Fifth Amendment, compelled self-incrimination issues.<sup>132</sup> However, the benefit being sought—the suppression of unlawfully seized evidence—is afforded by the United States Constitution.<sup>133</sup> If the State could use the defendant's statements in the motion to suppress against him at trial, then the defendant would have to choose between sacrificing his Fourth Amendment right to have unlawfully seized evidence suppressed and waiving his Fifth Amendment privilege against self-incrimination.<sup>134</sup> In *Simmons*, the United States Supreme Court found “it intolerable that one constitutional right should have to be surrendered in order to assert another”<sup>135</sup> and held

when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.<sup>136</sup>

A defendant has no constitutional right to have the charges against him dropped prior to trial when the undisputed material

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127. *Johnson v. State*, 537 So. 2d 1116, 1117 (Fla. 4th Dist. App. 1989).

128. *Wong Sun v. U.S.*, 371 U.S. 471, 484 (1963).

129. *Simmons*, 390 U.S. at 390–391.

130. *Id.* at 393–394.

131. *Id.*

132. *Id.* at 393.

133. *Id.* at 394.

134. *Id.*

135. *Id.*

136. *Id.*

facts fail to establish a prima facie case of guilt against him.<sup>137</sup> Therefore the *Simmons* rule, which is “limited to cases in which the exercise of a constitutional right conflicts with exercise of another constitutional right,” does not prohibit the use of the defendant’s statements in his (c)(4) motion.<sup>138</sup>

The State’s ability to have admitted at trial as substantive evidence the defendant’s statements in her Rule 3.190(c)(4) motion can be devastating, and defendants and their attorneys should be cautious when filing a (c)(4) motion. This danger and the need for caution is manifest in *State v. Palmore*.<sup>139</sup> There the defendant wished to test the sufficiency of the State’s case against him by filing a (c)(4) motion.<sup>140</sup> To ensure that the Rule’s requirements were met, the defendant averred facts that the State would not dispute—the victim’s version of the story.<sup>141</sup> The defendant, however, promptly withdrew the motion after filing it.<sup>142</sup> Later, at a hearing on other pretrial motions, the State asked the trial judge to admit into evidence the factual statements in the defendant’s (c)(4) motion, which were really the victim’s version of the facts.<sup>143</sup> The trial judge ruled that the State could introduce the statements only to impeach the defendant, not as substantive evidence of the defendant’s guilt.<sup>144</sup> The State appealed this ruling.<sup>145</sup> The Third District Court of Appeal reversed, finding that the statement was admissible as an adopted admission under Florida Statutes Section 90.803(18)(b).<sup>146</sup> That statute provides that “[a] statement that is offered against a party and is . . . [a] statement of which the party has manifested an adoption or belief in its truth . . . [is] not inadmissible as evidence.”<sup>147</sup> The Third District held that by setting forth the victim’s version of the facts

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137. *Palmore*, 510 So. 2d at 1154.

138. *Id.* (citing *Simmons*, 390 U.S. at 394).

139. 510 So. 2d 1152.

140. *Id.* at 1153.

141. *Id.*

142. *Id.*

143. *Id.* The defendant conceded to the admissibility of the factual statements in the (c)(4) motion for impeachment purposes but objected to their admissibility for purposes of the State’s case-in-chief. *Id.*

144. *Id.*

145. *Id.* at 1152.

146. *Id.* at 1153.

147. Fla. Stat. § 90.803(18)(b) (2006).

in his (c)(4) motion, the defendant manifested a belief in those facts, “thereby adopting those statements as his own.”<sup>148</sup> And “[s]ince [those] statements are relevant to the issue of guilt, they are admissible as an adoptive admission and may be admitted in the [S]tate’s case-in-chief.”<sup>149</sup> In summary, the *Palmore* court held that when a defendant files a (c)(4) motion and concedes the victim’s version of the facts, then, even if the defendant promptly withdraws the motion before a hearing on it, the victim’s version of the facts will be treated as the defendant’s own statements, and the State may use this “confession” to prove the defendant’s guilt.<sup>150</sup>

### B. A Successful (c)(4) Motion Is Often One Battle in a Larger War

Even if the defendant’s Rule 3.190(c)(4) motion is granted, it does not assure an end to the prosecution. The State may appeal the order granting the motion.<sup>151</sup> Alternatively, the State may fix the flaws in its case—flaws the defendant pointed out in the (c)(4) motion—and refile the charges against the defendant.<sup>152</sup>

A Rule 3.190(c)(4) motion to dismiss is like a pretrial version of a motion for judgment of acquittal (“motion for JOA”) because both seek dismissal on the grounds that the evidence is insufficient to support the charges against the defendant.<sup>153</sup> When a trial judge grants a motion for JOA, however, double jeopardy principles prevent the subsequent prosecution of the charges.<sup>154</sup> In fact, double jeopardy bars the subsequent prosecution of any factually related charges.<sup>155</sup> This is not the case with orders

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148. *Palmore*, 510 So. 2d at 1153 (citing *Saudi Arabian Airlines Corp. v. Dunn*, 438 So. 2d 116 (Fla. 1st Dist. App. 1983)).

149. *Id.*

150. Recognizing that admission of statements in the (c)(4) motion amounts to admission of a confession, the *Palmore* court held that admission of the statements is contingent upon the State establishing the crime’s corpus delicti. *Id.*

151. See Fla. R. App. P. 9.140(c)(1)(A) (providing that “[t]he [S]tate may appeal an order dismissing an indictment or information or any count thereof . . .”).

152. *Kalogeropolous*, 758 So. 2d at 111; *Sacco*, 849 So. 2d at 454.

153. See *Anderson v. State*, 504 So. 2d 1270, 1271 (Fla. 1st Dist. App. 1986) (stating that the purpose of a motion for JOA is to challenge the sufficiency of the State’s evidence and whether it supports every element of the crime charged).

154. *Caldwell v. State*, 803 So. 2d 839, 841 (Fla. 2d Dist. App. 2001).

155. See *Watson v. State*, 410 So. 2d 207, 208–209 (Fla. 1st Dist. App. 1982) (finding that double jeopardy bars “further proceedings which would be devoted to the resolution of

granting a (c)(4) motion to dismiss, which raise no double jeopardy issues and, as provided in the Florida Rules of Appellate Procedure, do not prevent the State from appealing.<sup>156</sup>

As an alternative to appealing, so long as the statute of limitations has not expired, the State may simply refile the charges against the defendant if the trial judge grants the defendant's Rule 3.190(c)(4) motion.<sup>157</sup> As a result, the State can correct the flaws in its case and refile the charges in a better position to prevail. This point is illustrated in *Sacco*, discussed above.<sup>158</sup> There the defendant filed a (c)(4) motion on the grounds that the State could not prove the corpus delicti of the murder because the body had been suppressed, and the defendant's accomplice, the only other known witness to the crime, invoked his Fifth Amendment right and refused to testify.<sup>159</sup> But if the accomplice ever changed his mind or the State obtained additional evidence of the crime, the State could refile the charges against the defendant and obtain a conviction.<sup>160</sup> Had the defendant refrained from filing the (c)(4) motion, however, and instead allowed the case to proceed to trial, he could have motioned for JOA at the close of the State's case on the grounds that the State failed to prove the corpus delicti.<sup>161</sup> The defendant likely would have prevailed.<sup>162</sup> Then, unlike in the case of a granted (c)(4) motion, double jeopardy would have shielded him from renewed prosecution.<sup>163</sup> Obviously that would have been a preferable outcome for the defendant.

Unlike a successful motion for JOA, a successful (c)(4) motion fails to take advantage of double jeopardy and to protect the defendant from further prosecution. This constitutes yet another drawback.

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factual issues concerning the elements of the offense charged").

156. Fla. R. App. P. 9.140(c)(1)(A).

157. *Sacco*, 849 So. 2d at 454.

158. *Supra* pt. III(A), n. 76.

159. *Sacco*, 849 So. 2d at 453.

160. The trial judge was hesitant to grant the (c)(4) motion based on the possibility that the accomplice would change his mind and decide to testify. *Id.* at 454.

161. See *Brown v. State*, 800 So. 2d 697, 698 (Fla. 1st Dist. App. 2001) (holding that the trial judge erred in failing to grant the defendant's motion for JOA because the State failed to introduce enough evidence, independent of the defendant's own incriminating statements, to establish the corpus delicti).

162. *Id.*

163. *Watson*, 410 So. 2d at 208.

### C. Appellate Courts Are Loathe to Affirm a Granted (c)(4) Motion

A final drawback to filing a (c)(4) motion is the fact that trial courts rarely grant them, and when they do, they are typically reversed.<sup>164</sup> The Fourth District Court of Appeal opined that “Rule 3.190(c)(4) motions should be granted rarely, for in most cases there are factual disputes that are properly to be resolved by the jury.”<sup>165</sup> As noted, when (c)(4) motions are granted, the State may appeal, and the high reversal rate encourages appeal.<sup>166</sup> As one commentator noted, trial court orders granting (c)(4) motions do not receive the presumption of correctness enjoyed by most other trial court orders.<sup>167</sup> Instead, the reviewing courts “seem to seek out any flaws in the process.”<sup>168</sup> The standard of review for orders regarding (c)(4) motions is *de novo*, so appellate courts need not show the trial judge any deference.<sup>169</sup>

### D. As a Consequence of these Drawbacks, the Rule Does Not Work

Because of the numerous drawbacks that discourage defendants from filing (c)(4) motions, Rule 3.190(c)(4) has largely failed to provide defendants and their attorneys with a procedural mechanism by which they can have unsupported charges dropped. The Rule was designed to promote judicial efficiency,<sup>170</sup> but it probably has had the opposite effect. Rule 3.190(c)(4) motions to dismiss are rarely granted.<sup>171</sup> Consequently, (c)(4) motions fail to prevent a significant number of costly and unnecessary trials. Instead, they often waste state and judicial resources. When they

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164. James T. Miller, *Rule 3.190(c)(4) Motions—A Fall from Grace*, 13 Fla. St. U. L. Rev. 257, 257 (1985–1986). Miller notes that in 82% of the many (c)(4) cases he reviewed for his article, the appellate courts reversed the trial courts’ grants of (c)(4) motions. *Id.* This Author’s own survey of (c)(4) cases, including dozens published subsequent to Miller’s article, is consistent with that figure.

165. *Hunwick*, 446 So. 2d at 215.

166. *See* Miller, *supra* n. 164, at 257 (setting forth statistics showing the high reversal rate of orders granting (c)(4) motions).

167. *Id.*

168. *Id.* at 257–258.

169. *Bell*, 835 So. 2d at 394.

170. As one commentator put it, “[t]he operative principle [behind Rule 3.190(c)(4)] is to conserve judicial resources.” Miller, *supra* n. 164, at 257.

171. *Supra* pt. II.

are filed, even though their denial is almost a foregone conclusion, they require a traverse or a demurrer by the State and often a hearing by the court.<sup>172</sup> In the unlikely event that a (c)(4) motion is granted, it will probably result in a costly appellate proceeding because the State is permitted to appeal orders granting (c)(4) motions.<sup>173</sup> An appeal is encouraged by the fact that appellate courts review orders of dismissal de novo and almost always reverse them.<sup>174</sup>

#### V. THE ALTERNATIVES TO FILING A (c)(4) MOTION TO DISMISS

Many criminal defendants and their attorneys may be satisfied with the alternatives to filing a Rule 3.190(c)(4) motion when they feel that they face unsupported charges.<sup>175</sup> One potential alternative involves taking advantage of the speedy-trial rule. The purpose of the speedy-trial rule closely resembles the purpose of Rule 3.190(c)(4)—to promote judicial efficiency and fairness to the defendant.<sup>176</sup> The defendant can file a demand for a speedy trial.<sup>177</sup> A properly filed demand for a speedy trial necessitates that the defendant be brought to trial within sixty-five days.<sup>178</sup> If that does not occur, then the defendant “shall be forever discharged from the crime.”<sup>179</sup> By demanding a speedy trial, the defendant limits the State’s time window to sixty-five days for ob-

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172. *Id.*

173. *Supra* pt. IV(B).

174. Miller, *supra* n. 164, at 257.

175. Jerome C. Latimer, a professor of Florida Criminal Procedure at Stetson University College of Law and a long-time member of the Criminal Procedure Rules Committee of the Florida Bar, expressed his dissatisfaction with the drawbacks of Rule 3.190(c)(4) motions to dismiss and suggested some of the alternative strategies discussed in this Article. Consultation with Jerome C. Latimer, Prof. Stetson U. College L. (Sept. 19, 2006).

176. *See State v. Agee*, 622 So. 2d 473, 475 (Fla. 1993) (stating that the purpose of the speedy-trial “rule is ‘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’” (quoting *Lewis v. State*, 357 So. 2d 725, 727 (Fla. 1978))).

177. Fla. R. Crim. P. 3.191(b). Note that in filing such a motion, however, the defendant warrants that she will be ready for trial within five days, and any conduct indicating that she is not so prepared will result in the invalidity of the demand. *Dickey v. McNeal*, 445 So. 2d 692, 694 (Fla. 5th Dist. App. 1984).

178. Fla. R. Crim. P. 3.191(b)(4) and (p).

179. *Id.* at 3.191(p)(3).

taining evidence to support its case.<sup>180</sup> If the State is unable to acquire evidence to support its case during that time, it may well *nol pros* the charges.<sup>181</sup> If it does so, then, after the expiration of the speedy-trial period, the State is forever forbidden to bring any charges arising from the same conduct against the defendant.<sup>182</sup> Unlike in the case of a granted Rule 3.190(c)(4) motion, the State may not appeal the discharge or refile the charges.<sup>183</sup> Clearly this is to the defendant's advantage.

If the defendant fails to obtain a discharge under the speedy-trial rule, he may still obtain a permanent dismissal of the charges by making a motion for JOA at the close of the State's case-in-chief.<sup>184</sup> A motion for JOA is like a trial version of a pre-trial Rule 3.190(c)(4) motion in many ways.<sup>185</sup> First, it allows the defendant to test the sufficiency of the State's evidence against him.<sup>186</sup> Second, when considering a motion for JOA, the trial judge views the evidence in the light most favorable to the State.<sup>187</sup> Third, much as the facts in a (c)(4) motion must be undisputed, a defendant motioning for JOA "admits . . . the facts stated in the evidence adduced" in the State's case-in-chief.<sup>188</sup> Finally, as with a (c)(4) motion, the defendant motioning for JOA is claiming that, even if everything the State says is true, the evidence remains insufficient to establish a *prima facie* case of guilt.<sup>189</sup>

Despite their similarities, motions for JOA differ from (c)(4) motions in three important ways that benefit defendants. First, to survive a motion for JOA, the State must have provided competent evidence to support every element of the charged crime.<sup>190</sup> As the Fifth District Court of Appeal suggested, this "competent evi-

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180. *Id.*

181. *See Purchase v. State*, 866 So. 2d 208, 208 (Fla. 4th Dist. App. 2004) (defining *nolle prosequi* as a "dismissal or nullification of an indictment or information").

182. *Agee*, 622 So. 2d at 475.

183. *Id.*

184. *Caldwell*, 803 So. 2d at 841.

185. A motion for JOA is essentially the same as a motion for a directed verdict. *Meus v. Eagle Fam. Discount Stores*, 499 So. 2d 840, 841 (Fla. 3d Dist. App. 1986). Courts often use the terms interchangeably, but this Article will use "motion for JOA."

186. *State v. Williams*, 742 So. 2d 509, 511 (Fla. 1st Dist. App. 1999).

187. *Id.* (quoting *Dupree v. State*, 705 So. 2d 90, 93 (Fla. 4th Dist. App. 1998) (en banc)).

188. *Id.* at 511 (quoting *Lynch v. State*, 293 So. 2d 44, 45 (Fla. 1974)).

189. *Id.*

190. *Id.* at 511 (quoting *State v. Law*, 559 So. 2d 187, 189 (Fla. 1989)).

dence” requirement is tougher to satisfy than the State’s “barest bit of evidence” requirement for (c)(4) motions, so theoretically it is easier for the defendant to prevail on a motion for JOA.<sup>191</sup> Second, the trial judge may consider a wider range of issues in a motion for JOA, including issues such as intent and state of mind where the supporting evidence is entirely circumstantial.<sup>192</sup> Third, when a motion for JOA is granted, double jeopardy bars subsequent prosecution, but the State may appeal a granted (c)(4) motion or simply refile the charges.<sup>193</sup>

As the foregoing indicates, a demand for a speedy trial followed, if necessary, by a motion for JOA may accomplish the same result as a successful (c)(4) motion—quick dismissal of the charges—with the added benefit that the charges may not be refiled and, in the case of a judgment of acquittal, the State may not appeal.

#### *VI. RULE 3.190(c)(4) NEEDS TO BE REPAIRED OR SCRAPPED*

Based on the drawbacks of filing a (c)(4) motion and the alternatives outlined above, Rule 3.190(c)(4) is not a substantially helpful procedural device for defendants or the courts and has largely failed to serve its intended purpose.<sup>194</sup> In light of that, the following two issues warrant consideration.

- (1) Whether there are steps the judiciary can take to improve the efficacy of the Rule, and
- (2) Whether the judiciary should simply eliminate the Rule.<sup>195</sup>

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191. *Pentecost*, 397 So. 2d at 712.

192. *Melton v. State*, 824 So. 2d 948, 950–951 (Fla. 1st Dist. App. 2002).

193. *Supra* pt. IV(B).

194. This conclusion was anticipated in Miller’s *Rule 3.190(c)(4) Motions—A Fall from Grace*. *Supra* n. 164.

195. Under Article V, sections 1 and 2 of the Florida Constitution, the judiciary, not the legislature, has the exclusive power to promulgate rules of procedure. Fla. Const. art. V, §§ 1, 2; *see also Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976) (noting that “the [Florida] Constitution establishes judicial power in the court system and vests [the Florida Supreme] Court with the power of administration of the court system, including the establishment of judicial rules of practice and procedure”).

### A. The Rule Can Be Fixed . . . a Little Bit

First, this Section will explore some possible ways in which the efficacy of Rule 3.190(c)(4) could be improved.

#### 1. *Receding from Unnecessarily Restrictive Caselaw*

As noted, caselaw has largely emasculated Rule 3.190(c)(4) by reducing the number of issues that may be decided on a (c)(4) motion.<sup>196</sup> To improve the Rule's efficacy, courts should recede from this restrictive caselaw. For example, the prohibition against deciding state-of-mind and intent issues on a (c)(4) motion unnecessarily reduces the Rule's efficacy and is inconsistent with the fact that trial judges are regularly called upon to decide such issues without a jury's assistance.<sup>197</sup>

*State v. Davis*<sup>198</sup> illustrates how trial judges are permitted and required to decide state-of-mind and intent issues in the context of motions for JOA and suggests that they should also be allowed to decide such issues in the context of a Rule 3.190(c)(4) motion.<sup>199</sup> In *Davis*, the defendant was charged with robbing a clothing store after a police officer discovered stolen jeans and money in a car that the defendant and three others occupied.<sup>200</sup> After the State's case-in-chief at trial, the defendant unsuccessfully motioned for a directed verdict.<sup>201</sup> On appeal, the Fourth District Court of Appeal held that the trial judge erred when he denied the defendant's motion for directed verdict because the State failed to prove the intent element.<sup>202</sup> The defendant claimed that he was merely shopping for jeans and was unaware that the others in the car had robbed the store, and, according to the Fourth District, the State failed to offer sufficient evidence to disprove this "reasonable hypothesis of innocence."<sup>203</sup> According to

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196. *Supra* pt. III(E).

197. *See Conde v. State*, 860 So. 2d 930, 943 (Fla. 2003) (approving the trial judge's determination, pursuant to a motion for JOA, regarding whether the State proved the premeditation element of the murder charge).

198. 436 So. 2d 196 (Fla. 4th Dist. App. 1983).

199. *Id.* at 198, 200–201.

200. *Id.* at 197.

201. *Id.* at 198.

202. *Id.* at 199.

203. *Id.* (quoting *Davis v. State*, 90 So. 2d 629, 631 (Fla. 1956)).

the Fourth District, “the jury should never have been given the case.”<sup>204</sup>

The defendant in *Davis* would not even have been permitted to raise this issue on a Rule 3.190(c)(4) motion because, as noted above, trial judges are barred from determining intent and state-of-mind issues on a (c)(4) motion.<sup>205</sup> Appellate courts justify this prohibition on the grounds that the determination of intent and state-of-mind issues often requires weighing evidence, evaluating witness credibility, and deducing facts from circumstantial evidence, all of which are the jury’s and not the trial judge’s job.<sup>206</sup> This reasoning is unpersuasive, however, because trial judges are permitted and required to do precisely those things in the context of a motion for JOA.<sup>207</sup>

Trial judges have to weigh evidence, judge witness credibility, and infer facts from circumstantial evidence not just in the case of motions for JOA, but also in the case of *Jackson v. Denno*<sup>208</sup> hearings. Trial judges are required to hold a *Jackson v. Denno* hearing when a defendant objects to the admission into evidence of a confession on the ground that it was involuntary.<sup>209</sup> In *Jackson v. Denno* hearings, the trial judge must determine outside of the jury’s presence whether the defendant’s confession was, as a matter of fact, voluntary.<sup>210</sup> This analysis involves a consideration of the factual context in which the confession was given and often of

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204. *Id.* at 198.

205. *Supra* pt. III(E).

206. *Rogers*, 386 So. 2d at 280.

207. *Davis*, 436 So. 2d at 199–200. *State v. Fry* also illustrates the inconsistent position of Florida courts. 422 So. 2d 78 (Fla. 2d Dist. App. 1982). There the defendant was charged with stealing gold from his employer after his thumbprint was discovered at the crime scene. *Id.* at 79. In a Rule 3.190(c)(4) motion, the defendant argued that the case against him was wholly circumstantial and that the State had no evidence showing that the fingerprint was left under incriminating circumstances. *Id.* The trial judge granted the motion, finding that there was “no evidence . . . that the [d]efendant was a knowing participant in the removal of the gold . . . [or that he] was present at the time the crime was committed.” *Id.* (quoting the trial court’s findings). However, the Second District Court of Appeal reversed, stating, “[I]t is not the function of the trial court to determine whether the [S]tate’s evidence excludes all reasonable hypotheses of innocence. . . . The question of whether the [S]tate’s evidence excludes any reasonable hypothesis of [the defendant’s] innocence is for the finder of fact to determine.” *Id.* at 80. Because there does not seem to be any other way to reconcile the holding in *Fry* with the one in *Davis*, the former must be chalked up merely to the courts’ hostility toward (c)(4) motions.

208. 378 U.S. 368 (1964).

209. *Id.* at 392–396.

210. *Id.* at 390–391.

conflicting witness testimony.<sup>211</sup> This Author's survey of cases revealed no explanation for why trial judges are permitted to do these things in the context of a motion for JOA or *Jackson v. Denno* hearing but not on a Rule 3.190(c)(4) motion to dismiss.<sup>212</sup> The fact that judges are capable of determining whether the State has sufficient evidence to warrant sending the case to a jury, even with respect to elements that generally are proven with circumstantial evidence, was acknowledged by the Fifth District Court of Appeal in *State v. Lalor*.<sup>213</sup> There the Fifth District was discussing the power of trial courts to grant motions for JOA, but its following comments are equally applicable in the context of (c)(4) motions:

[Trial judges are] capable of making the legal judgment whether the evidence is legally sufficient to allow the [S]tate's case to go to the jury and support a verdict. Legal sufficiency means that the state has adduced a bundle of evidence that, if believed by the jury, would constitute proof beyond a reasonable doubt on every element of the offense charged. The failure to produce legally sufficient evidence exonerates the defendant and requires his dismissal.<sup>214</sup>

In reality, although the rule prohibiting the determination of intent and state-of-mind issues is oft repeated, there are Rule 3.190(c)(4) cases, such as *Ellis v. State*,<sup>215</sup> where such issues were decided with no apparent ill effects. In *Ellis*, law-enforcement officers executed a search warrant at the defendant's home while the defendant was out of town.<sup>216</sup> Drugs were found in the kitchen.<sup>217</sup> After being charged with drug possession, the defendant filed a (c)(4) motion to dismiss on the ground that the State could not prove actual or constructive possession.<sup>218</sup> On review, the First District Court of Appeal stated the issue as whether the

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211. *Id.*

212. For this Article, the Author examined over 100 Florida appellate court and Supreme Court decisions involving Rule 3.190(c)(4).

213. 842 So. 2d 217, 219 (Fla. 5th Dist. App. 2003).

214. *Id.* at 219 (quoting *State v. Smyly*, 646 So. 2d 238, 241 (Fla. 4th Dist. App. 1994) (citations omitted)).

215. 346 So. 2d 1044.

216. *Id.* at 1046.

217. *Id.* at 1047.

218. *Id.*

defendant “was in constructive possession of the drugs, i.e., whether [the defendant] knew of the presence of the drugs . . . .”<sup>219</sup> The First District noted that this is typically a question for the jury.<sup>220</sup> It went on to state, however, that the trial court “must determine whether the undisputed facts raise a jury question as to the issue of possession in much the same manner as the judge evaluates a motion for directed verdict of acquittal made at trial.”<sup>221</sup> In other words, the trial judge should determine whether the State has enough circumstantial evidence to support the conclusion that the defendant knew of the drugs’ presence, just like the judge would on a motion for JOA. Here, the First District found that the State lacked sufficient evidence because the undisputed facts were that the defendant was out of town at the time of the search; others had been in and out of the home during the defendant’s absence; and the drugs were found in the kitchen, an area easily accessible to all visitors and not within the defendant’s exclusive control.<sup>222</sup> In light of those facts, no jury could reasonably find that the State had established the constructive possession element.<sup>223</sup>

By choosing to ignore the caselaw prohibiting the determination of state-of-mind issues, the *Ellis* court prevented a costly and unnecessary trial and satisfied the purpose of Rule 3.190(c)(4). Because the rationale underlying the caselaw is poor, other courts should follow suit and thereby improve the Rule’s efficacy.

## *2. Let Trial Judges Do Their Jobs*

Allowing trial judges more discretion in granting (c)(4) motions would also improve the efficacy of Rule 3.190(c)(4). In particular, trial judges should be permitted to give more consideration to whether the State’s traverse is meritorious.

Although Rule 3.190(c)(4) was designed to serve as a criminal procedure equivalent to summary judgment,<sup>224</sup> the reality is that exponentially fewer criminal cases are disposed of under Rule

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219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *In re Fla. R. of Crim. P.*, 196 So. 2d at 147.

3.190(c)(4) than are civil cases under summary judgment.<sup>225</sup> As noted, currently trial judges automatically deny a (c)(4) motion when the State files a facially sufficient traverse that specifically disputes an issue of material fact.<sup>226</sup> In this regard, a traverse is far more powerful than a response to a motion for summary judgment in a civil case.<sup>227</sup> In a summary judgment proceeding, once the movant shows no genuine issue of material fact, the burden shifts to the non-movant to come forward with sufficient counterevidence to show one.<sup>228</sup> Unlike a (c)(4) motion, “[i]t is not enough for the opposing party merely to assert that an issue does exist.”<sup>229</sup>

If trial judges deciding Rule 3.190(c)(4) motions were permitted to consider the merit of the State’s traverse rather than merely its facial sufficiency, they could prevent more costly and unnecessary trials and thereby improve Rule 3.190(c)(4)’s efficacy. *Landers v. Milton*,<sup>230</sup> a civil summary judgment case, demonstrates the benefit of allowing the trial judge to inquire into the merits of the non-movant’s response and is instructive in the context of (c)(4) motions because of the similarities between (c)(4) motions and summary judgment motions.<sup>231</sup> In *Landers*, the plaintiff sued the defendants for damages arising from a car accident.<sup>232</sup> The defendants responded with a motion for summary judgment on the ground that the statute of limitations had expired.<sup>233</sup> The plaintiff responded to the motion with affidavits claiming that prior to the expiration of the statute of limitations she and her husband attempted to contact one of the defendants, failed, and consequently assumed that he was absent from the

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225. See Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 Hofstra L. Rev. 91, 103 (2002) (citing a study that concluded that “as many cases are disposed of by summary judgment as go to full trial”).

226. *Supra* pt. III(B).

227. *Supra* n. 58 and accompanying text.

228. *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979).

229. *Id.* (citing *Harvey Bldg., Inc. v Haley*, 175 So. 2d 780 (Fla. 1965)).

230. 370 So. 2d 368.

231. *Id.* at 370.

232. *Id.* at 369. The plaintiff sustained injuries as a result of the automobile accident that occurred on October 3, 1970 in Lake Worth, Florida. *Id.* Her complaint was not filed until October 1, 1975. *Id.*

233. *Id.*

state.<sup>234</sup> They also claimed that this defendant spent only the winter months in Florida.<sup>235</sup> If these claims were true, then the statute of limitations would have been tolled, mandating denial of the summary judgment motion.<sup>236</sup> Accordingly, finding that the plaintiff raised a disputed issue of material fact, the Fourth District Court of Appeal reversed the trial judge's order granting the motion.<sup>237</sup> The Florida Supreme Court reversed the Fourth District, however, holding that the plaintiff had failed to come forward with "competent evidence" to support her claim that the defendant in question had been absent from Florida.<sup>238</sup> As a consequence, the defendants' summary judgment motion was granted and presumably a costly and unnecessary trial was avoided.<sup>239</sup>

Had *Landers* been a Rule 3.190(c)(4) proceeding with the plaintiff in the position of the State, the desirable result would not have occurred because the trial judge would have been obliged automatically to deny the defendants' motion when the plaintiff filed her response claiming that the defendant in question was out of Florida.<sup>240</sup> No inquiry into the merits of the plaintiff's claim would have been permitted.<sup>241</sup> In other words, a trial would have been required even though it was clear the defendants would prevail on the statute-of-limitations issue. This is an unnecessary contravention of Rule 3.190(c)(4)'s purpose and efficacy. The trial judge determining a (c)(4) motion should be permitted to make the same inquiry into the merits of the State's traverse as she is required to make in the case of a non-movant's response to a summary judgment motion.<sup>242</sup>

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234. *Id.*

235. *Id.*

236. *Id.* at 370 (citing Fla. Stat. § 95.07 (1969)).

237. *Id.* at 369–370.

238. *Id.* at 370.

239. *Id.* at 371.

240. *Supra* pt. III(B) (discussing how trial judges automatically deny a Rule 3.190(c)(4) motion when the State files a sufficient traverse).

241. *Id.*

242. Critics may fear that allowing trial judges to inquire into the merits of the State's traverse would result in an extended adversarial proceeding every time a defendant filed a (c)(4) motion. This opposition to an extended adversarial proceeding for every (c)(4) motion is justified because it would be too time consuming in light of speedy-trial requirements, which are not a factor in civil summary judgment cases. *See supra* pt. V (discussing speedy-trial requirements). When the State has a limited time in which to bring the defendant to trial or see the charges forever dropped, it is unreasonable to require the State to spend the interim time dealing with an adversarial proceeding on the defendant's (c)(4)

This Section outlined two ways in which the efficacy of Rule 3.190(c)(4) could be improved. First, allow trial judges to decide a wider range of issues, such as state of mind and intent, on a (c)(4) motion. Second, afford trial judges greater discretion to grant more (c)(4) motions by permitting them to inquire into the merits of the State's traverse. The implementation of these changes has the potential to improve Rule 3.190(c)(4)'s efficacy, but because the changes are limited in scope, the improvement may not be substantial. Because there may not be any way to substantially improve the Rule's efficacy, it is worth asking whether the Rule should simply be eliminated.

### B. Should Rule 3.190(c)(4) Be Eliminated?

In deciding whether Rule 3.190(c)(4) should be eliminated, consideration will be given to the adequacy of the alternatives to the Rule, the potential repercussions if the Rule is eliminated, and whether a similar procedural mechanism is found in other jurisdictions.

#### 1. *The Adequacy of the Alternatives to Rule 3.190(c)(4) and the Potential Repercussions if the Rule Is Eliminated*

The similarities between Rule 3.190(c)(4) motions and motions for JOA have been discussed.<sup>243</sup> These similarities and the availability of judgments of acquittal as an alternative to (c)(4) dismissals have not escaped the notice of courts. In *State v. Hunwick*,<sup>244</sup> the Fourth District Court of Appeal stated that (c)(4) motions should "be granted rarely" and must be denied if the State puts forth the "barest" bit of evidence to support its case.<sup>245</sup> In justifying this stingy approach, the Fourth District stated, "[t]he defendant is protected in that if the [S]tate's case is insufficient at trial, the defendant may obtain a directed verdict of acquittal . . . ."<sup>246</sup> This thinking was echoed in *State v. Ander-*

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motion. To prevent this, trial judges should be instructed simply to limit their inquiry into the merits of the State's traverse to cases where the State's case is conspicuously weak.

243. *Supra* pt. V (discussing how motions for JOA may be an alternative to (c)(4) motions).

244. 446 So. 2d 214.

245. *Id.* at 215.

246. *Id.*

*son*.<sup>247</sup> There the Fifth District Court of Appeal reversed an order granting the defendant's (c)(4) motion, finding that the State supplied sufficient evidence to support its charges for the purposes of traversing the defendant's motion.<sup>248</sup> A concurring judge reiterated that (c)(4) motions should rarely be granted.<sup>249</sup> However, this concurring judge also suggested that if the defendant raised the same grounds on a motion for JOA at trial, the trial judge would have to grant the motion unless the State produced at trial more evidence to support its case than it produced in response to the defendant's (c)(4) motion.<sup>250</sup>

The problem with denying a defendant the option of a (c)(4) motion and instead offering him only the option of a motion for JOA is that the defendant cannot file the latter prior to trial. Instead he must wait until trial and the close of the State's case-in-chief.<sup>251</sup> Arguably, as in Mr. Sawyer's case, it is unfair to require the defendant to endure pending criminal charges and to wait until trial when the State clearly lacks sufficient evidence to prove its case beyond a reasonable doubt.<sup>252</sup> Additionally, even a successful motion for JOA cannot fulfill one of the primary purposes of Rule 3.190(c)(4), which is to eliminate unnecessary trials.<sup>253</sup>

In addition to the availability of judgments of acquittal, there are some other factors that would help to minimize the negative repercussions of eliminating Rule 3.190(c)(4). A prompt discharge under the speedy-trial rule, mentioned above, is one such factor.<sup>254</sup> Another factor is the ethical rules regulating Florida attorneys. The Rules of Professional Conduct, to which all Florida lawyers are subject, expressly states, "The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . . ."<sup>255</sup> Presumably, greater enforcement of that rule would prevent the prosecution of

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247. 569 So. 2d 1369 (Fla. 5th Dist. App. 1990).

248. *Id.* at 1370.

249. *Id.* at 1370–1371 (Cobb, J., concurring specially).

250. *Id.* at 1371.

251. Fla. R. Crim. P. 3.380(a).

252. *Supra* pt. I.

253. *Davis*, 243 So. 2d at 591.

254. *Supra* pt. V.

255. Rules Regulating Fla. B. 4-3.8; Model R. Prof. Conduct 3.8.

many (maybe most) cases where dismissal under Rule 3.190(c)(4) would be appropriate.

In Mr. Sawyer's case, the unavailability of (c)(4) motions to dismiss meant that Mr. Sawyer had to remain in jail until trial even though the existing evidence could not support a conviction.<sup>256</sup> Such unwarranted pretrial confinement is unacceptable because it unjustly restrains the suspect's liberty and "may imperil the suspect's job, interrupt his source of income, and impair his family relationships."<sup>257</sup> If Rule 3.190(c)(4) is eliminated, however, such a result would not be inevitable as it was in Mr. Sawyer's time. This is because Mr. Sawyer's case occurred prior to the United States Supreme Court's decision in *Gerstein v. Pugh*.<sup>258</sup>

In *Gerstein*, two Florida defendants were charged with various offenses.<sup>259</sup> The charges against one of the defendants carried a potential life sentence, so he was denied bail.<sup>260</sup> The other defendant was unable to post bond.<sup>261</sup> Consequently, both remained in jail until their trials.<sup>262</sup> At the time, Florida took the position that where the State filed a charging document, such as an information, no probable-cause determination was required.<sup>263</sup> Unfortunately, this meant that "a person charged by information could be detained for a substantial period solely on the decision of a prosecutor."<sup>264</sup> However, the defendants brought a civil suit claiming a constitutional right to a probable-cause hearing for the purposes of determining whether sufficient evidence justified their pretrial detainment.<sup>265</sup> The case made its way to the United States Supreme Court. The Supreme Court noted that under the Fourth Amendment probable cause was the standard for an arrest.<sup>266</sup> The requirement of probable cause was necessary "to safeguard citizens from rash and unreasonable interferences with

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256. *Supra* pt. I.

257. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

258. 420 U.S. 103 (1975).

259. *Id.* at 105 n. 1.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 106 (citing *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972)).

264. *Id.*

265. *Id.* at 106–107. The defendants requested "declaratory and injunctive relief." *Id.*

266. *Id.* at 111.

privacy and from unfounded charges of crime.”<sup>267</sup> A neutral magistrate should make the probable-cause determination rather than law-enforcement officers, who are engaged in the “competitive enterprise of ferreting out crime” and, therefore, are less objective.<sup>268</sup> Practical considerations require allowing the police to make an on-the-scene probable-cause determination in order to arrest suspects.<sup>269</sup> After the suspect is in custody, however, “the reasons that justify dispensing with the magistrate’s neutral judgment evaporate.”<sup>270</sup> Consequently, the Supreme Court held that “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.”<sup>271</sup>

In theory, the probable-cause determination should serve to ensure that persons like Mr. Sawyer are not kept in custody when the State lacks evidence to support the charges against them. Unfortunately, however, the Supreme Court went on in *Gerstein* to hold that while a probable-cause determination by a neutral and detached magistrate is required, the probable-cause determination does not have to be an adversarial proceeding.<sup>272</sup> That means that at the probable-cause determination the detainee is not entitled to counsel, confrontation, cross-examination, or compulsory process for witnesses.<sup>273</sup> The Supreme Court noted that under the rules of criminal procedure in many states, the detainees are entitled to this sort of adversarial probable-cause hearing.<sup>274</sup> However, such a proceeding is not constitutionally mandated.<sup>275</sup>

When Florida amended its criminal procedure rules to accord with *Gerstein*, it elected not to provide for an adversarial proceeding except in cases where the detainee is detained for more than twenty-one days without the State filing a charging document against him or her.<sup>276</sup> Furthermore, under the Florida rules, the judge can make the probable-cause determination even if the de-

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267. *Id.* at 112 (quoting *Brinegar v. U.S.*, 338 U.S. 160, 176 (1949) (emphasis added)).

268. *Id.* at 113 (quoting *Johnson v. U.S.*, 333 U.S. 10, 13–14 (1948)).

269. *Id.* at 113–114.

270. *Id.* at 114.

271. *Id.*

272. *Id.* at 120.

273. *Id.*

274. *Id.* at 119.

275. *Id.* at 120.

276. Fla. R. Crim. P. 3.133.

fendant is not present.<sup>277</sup> As a consequence, the probable-cause determination is arguably insufficient to prevent pretrial detainment or the burdensome requirements of pretrial release on bail. To illustrate, it is difficult to imagine that Mr. Sawyer would have gained his liberty at a probable-cause determination where he would not have been present and able to introduce the marine chart. Had the probable-cause determination been an adversarial proceeding, however, Mr. Sawyer's chances of gaining his liberty would have been significantly improved. He would have been able to tell his side of the story and draw the court's attention to extraneous evidence to negate an essential element of the charge against him, just as a defendant may do via a (c)(4) motion. For that reason, the availability of a probable-cause determination would substantially minimize any negative repercussions resulting from eliminating Rule 3.190(c)(4), but only if the determination was made adversarial.

## *2. Other Jurisdictions Get Along Just Fine without a Similar Rule*

Finally, in considering the potential repercussions of eliminating Rule 3.190(c)(4), it is worth noting that there is no equivalent rule in the federal system or in most other state systems. The view taken in the federal system and in most other states is expressed in *United States v. Jensen*,<sup>278</sup> a case similar to Mr. Sawyer's case. In *Jensen*, the defendants were charged in the Western District of Washington with the unlawful operation of a ship.<sup>279</sup> The defendants filed a motion to dismiss the indictment on the ground that the conduct at issue occurred in Alaskan waters or on the high seas and, therefore, venue in Washington was improper.<sup>280</sup> In support of their motion, the defendants attached copies of marine reports and affidavits from marine investigators.<sup>281</sup> Persuaded by this extraneous evidence, the trial court granted

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277. Fla. R. Crim. P. 3.133(c).

278. 93 F.3d 667 (9th Cir. 1996).

279. *Id.* at 668–669.

280. *Id.* at 669.

281. *Id.*

the defendants' motion to dismiss.<sup>282</sup> The Ninth Circuit Court of Appeal reversed, however, holding as follows:

“[A] defendant may not properly challenge an indictment, sufficient on its face, on the ground that the allegations are not supported by adequate evidence. . . .”<sup>283</sup> “A motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence. . . . The Court should not consider evidence not appearing on the face of the indictment. . . .”<sup>284</sup> The district court thus erred in considering the documentation provided by the defendants. By basing its decision on evidence that should only have been presented at trial, the district court in effect granted summary judgment for the defendants. This it may not do. . . .<sup>285</sup> (“There is no summary judgment procedure in criminal cases. Nor do the rules provide for a [pretrial] determination of the evidence.”<sup>286</sup>)

The federal system and most other states view the motion to dismiss the charging document in criminal cases as limited to challenging the charging document's facial validity, not the sufficiency of the State's evidence, as was the case in Florida prior to the enactment of Rule 3.190(c)(4).<sup>287</sup> The absence in the federal system and other states of a criminal procedure mechanism akin to Rule 3.190(c)(4) suggests that a state's criminal procedure system can operate effectively and fairly without it.

## VII. CONCLUSION

In the past there was no way to avoid unnecessary and costly trials when the State filed a facially sufficient charging document.<sup>288</sup> Consequently defendants would have to await trial, often in jail, even where the undisputed facts did not support the charges.<sup>289</sup> In response to this undesirable state of affairs, the

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282. *Id.*

283. *Id.* (quoting *U.S. v. Mann*, 517 F.2d 259, 267 (5th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976)).

284. *Id.* (quoting *U.S. v. Marra*, 481 F.2d 1196, 1199–1200 (6th Cir. 1973), *cert. denied*, 414 U.S. 1004 (1973)).

285. *Id.* (citing *U.S. v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992) (per curiam)).

286. *Id.* (quoting *Critzer*, 951 F.2d at 307).

287. *Whitman*, 122 So. at 568.

288. *Id.*

289. *See supra* pt. I (discussing Mr. Sawyer's unfortunate fate).

Florida Supreme Court enacted Rule 3.190(c)(4), which allows defendants to file a pretrial motion to dismiss in cases where the undisputed material facts failed to show a prima facie case of guilt.<sup>290</sup> The Rule may have seemed like a good idea to defendants and their attorneys desiring speedy dismissal of unsupported charges as well as to courts desiring judicial efficiency. As time has passed, however, it has become clear that Rule 3.190(c)(4) is not helpful to defendants and may even be harmful, and it does not prevent a significant number of costly and unnecessary trials.<sup>291</sup> Because the Rule is ineffective, the courts should consider improving it or eliminating it. The efficacy of the Rule could be improved somewhat if appellate courts receded from caselaw that unnecessarily restricts the issues trial courts can decide on (c)(4) motions and allowed trial courts greater discretion to grant (c)(4) motions.<sup>292</sup>

Alternatively, if the Rule were eliminated, it would not be a great loss because there are other procedural devices, such as motions for JOA, the speedy-trial rule, and probable-cause determinations, as well as ethical rules, that help protect defendants faced with unsupported charges.<sup>293</sup> If Florida's current probable-cause determinations were made adversarial, then the repercussions from eliminating Rule 3.190(c)(4) would be especially minimized.<sup>294</sup>

In sum, Rule 3.190(c)(4) was a great idea designed to promote judicial efficiency and protect defendants like Mr. Sawyer who faced unsupported charges. However, the Rule simply does not work well and rarely benefits defendants or the courts.

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290. *See supra* pt. I (discussing the origins of Rule 3.190(c)(4)).

291. *See supra* pt. IV(C) (discussing how trial courts rarely grant (c)(4) motions and when they do appellate courts reverse them most of the time).

292. *See supra* pt. VI (discussing ways of improving Rule 3.190(c)(4)'s efficacy).

293. *See supra* pt. VI (discussing how there are alternatives to Rule 3.190(c)(4) that protect defendants facing unsupported charges).

294. *Id.*