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RULE 3.190(c)(4) MOTIONS—A FALL FROM GRACE

JAMES T. MILLER*

I. INTRODUCTION

The original justification for a motion under Rule 3.190(c)(4), Florida Rules of Criminal Procedure, ("(c)(4)" motion),[1] was prudently simple—to permit a pretrial determination of whether the state could establish a prima facie case based on undisputed fact.[2] The drafters of the Criminal Rules intended the (c)(4) motion to be the functional equivalent of the civil motion for summary judgment.[3] The operative principle of these motions is to conserve judicial resources; if the facts are not in dispute (i.e., if the trier of fact need not weigh the evidence nor determine its credibility), the trial judge can decide whether the state can prove a prima facie case.

A (c)(4) motion is a potentially resourceful tool used by trial judges to expedite cases. Although the judiciary usually embraces devices to reduce caseloads, Florida courts have resolutely rejected an expansive use of (c)(4) motions.[4] In 82% of the cases reviewed for this Article, appellate courts reversed decisions which granted (c)(4) motions.[5] This is a significantly high number of reversals. Appellate courts generally apply a "presumption of correctness" to the decisions of trial courts. This means that any reversible error must be affirmatively shown upon the record by the party seeking to overturn the lower court's decision.[6] A trial court's granting of a (c)(4) motion, on the other hand, does not automatically receive this presumption of correctness; the reviewing courts instead seem

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1. FLA. R. CRIM. P. 3.190(c)(4) provides the criminal law counterpart to the civil summary judgment procedure. Under this rule, an accused may successfully move for a dismissal if there are "no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant." *See infra* note 33 and accompanying text.

2. State v. Davis, 243 So. 2d 587, 590 (Fla. 1971) (quoting FLA. R. CRIM. P. 1.190(c)(4) committee note (1967)). The former Fla. R. Crim. P. 1.190(c)(4), 196 So. 2d 124 (Fla. 1967) (per curiam), is currently codified at FLA. R. CRIM. P. 3.190(c)(4).

3. *Id.*

4. Panels of each of the five district courts of appeal have expressed concern over the unrestricted use of (c)(4) motions. *See, e.g.*, State v. Patlon, 443 So. 2d 346 (Fla. 2d DCA 1983); State v. Stewart, 404 So. 2d 185 (Fla. 5th DCA 1981); State v. Horne, 399 So. 2d 49 (Fla. 3d DCA 1981); State v. Huggins, 368 So. 2d 119 (Fla. 1st DCA 1979); and State v. Giesy, 243 So. 2d 635 (Fla. 4th DCA 1971).

5. Of the 170 cases reviewed for this Article, appellate courts reversed 140 decisions where the trial courts granted (c)(4) motions.

6. *E.g.*, O'Steen v. State, 111 So. 725, 728 (Fla. 1927).

to seek out any flaws in the process.[7]

In *State v. Moore*,[8] however, the Fourth District Court of Appeal upheld the granting of a (c)(4) motion based upon the presumption of correctness. In a per curiam decision, the court acknowledged that the trial court must resolve all inferences against the accused and view the evidence in a light most favorable to the state. The court noted:

> It is to be presumed that the trial court indulged inferences in that manner. . . . [W]hile we might have permitted the case to go to the jury were that decision ours initially to make, that determination in the present posture of the case would constitute usurpation of the function of the trial court.[9]

The *Moore* case appears to be an anomaly despite the manifest applicability of the presumption of correctness to cases undergoing appellate review.[10] This Article reviews the reasons for antipathy towards (c)(4) motions and the historical development of the purposes and rules of construction and procedure attending (c)(4) motions.

II. Purposes of a (c)(4) Motion

The creators of the (c)(4) motion intended it to be a new remedy for criminal defendants.[11] Prior to the enactment of Rule 1.190(c)(4), the predecessor to Rule 3.190(c)(4), a defendant could move to dismiss an information only on the grounds of improper form or by raising certain specific defenses to prosecution.[12] The Florida Supreme Court first discussed the objectives of the rule in *State v. Davis*.[13] Circuit Judge Ben C. Willis, sitting by designation and writing for a unanimous court, noted that the procedure "would permit "a pre-trial determination of the law of the case when the facts . . . are not in dispute."[14] The *Davis* court further

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7. *See supra* note 4.
8. 425 So. 2d 1172 (Fla. 4th DCA), *petition for review denied*, 434 So. 2d 889 (Fla. 1983).
9. *Id.*
10. O'Steen v. State, 111 So. 725 (Fla. 1927); *see also* Boone v. State, 183 So. 2d 869 (Fla. 1st DCA 1966); Wilson v. State, 164 So. 2d 43 (Fla. 2d DCA 1964).
11. *See supra* note 2.
12. State v. Davis, 243 So. 2d 587 (Fla. 1971); *see also*, Williamson v. Baker, 4 So. 2d 471 (Fla. 1941) (en banc) (defendant could file motion to quash the information because of defects upon its face); State v. Mach, 187 So. 2d 918, 922 (Fla. 2d DCA 1966) (a court considering a motion to quash an information will not consider sufficiency of the evidence).
13. 243 So. 2d at 591.
14. *Id.*

stated that

> [T]his procedure is not a precise counterpart to the summary judgment procedures afforded by the Rules of Civil Procedure. . . . However, there is at least one common objective in the two procedures, namely, to avoid a trial when all the material facts are not genuinely in issue and could legally support only one judgment.[15]

A dismissal under a (c)(4) motion, unlike summary judgment, is not a bar to subsequent prosecution.[16]

The initial justification for (c)(4) motions was to save time and money and avoid unnecessary trials. For example, as the Second District stated in *State v. Davis*,[17] "one could hardly conjure a more ideal set of circumstances for its utilization. . . . [A] trial on the counts dismissed would have been fruitless and an unnecessary expense to the public."[18] However, other courts soon began to limit the scope of (c)(4) motions. The Fourth District Court of Appeal, in *State v. Giesy*,[19] explained that the motion "[was] not intended to be a trial by affidavit, nor a dry run of a trial on the merits. Neither [was] it intended as some type of 'fishing expedition' to force the prosecution to come forward with enough evidence to establish a prima facie case. . . ."[20] These limitations stem from the case law developed in summary judgment proceedings in civil cases.[21] Some courts have stated that a trial judge should rarely grant a (c)(4) motion because there are factual disputes in most cases.[22] In *State v. West*,[23] the Fourth District stated that a trial court should approach any summary judgment proceeding with caution. In expressing antipathy towards the (c)(4) motion, courts have said that the motion is not a substitute for trial,[24] or a mini-

15. *Id.*
16. *See id.*
17. 234 So. 2d 713 (Fla. 2d DCA 1970).
18. *Id.* at 714-15.
19. 243 So. 2d 635 (Fla. 4th DCA 1971).
20. *Id.* at 636.
21. *See, e.g.*, Manucy v. Manucy, 362 So. 2d 478 (Fla. 1st DCA 1978); Unijax, Inc. v. Factory Ins. Assn., 328 So. 2d 448 (Fla. 1st DCA), *cert. denied*, 341 So. 2d 1086 (Fla. 1976); Weinstein v. General Accident Fire & Life Assurance Co., 141 So. 2d 318 (Fla. 1st DCA 1962).
22. State v. Hunwick, 446 So. 2d 214 (Fla. 4th DCA 1984); State v. Carroll, 404 So. 2d 844 (Fla. 5th DCA 1981).
23. 262 So. 2d 457 (Fla. 4th DCA 1972).
24. State v. Stewart, 404 So. 2d 185, 186 (Fla. 5th DCA 1981).

trial on the merits,[25] or a "battle of affidavits."[26]

The granting of (c)(4) motions which were obviously not in compliance with the criminal rules soon frustrated appellate courts. For instance, in *State v. Horne*,[27] the trial court committed "egregious error" by dismissing charges of armed robbery and burglary.[28] The state filed a traverse which unquestionably placed material facts in dispute. The Third District reversed the dismissal and stated that "[w]hile it is indeed regrettable that it is appropriate so to characterize the rulings below, they may thus be regarded only as embodying inexplicable and totally unjustified failures or refusals to follow the law."[29] The Third District later stated in *State v. Terrell*[30]:

> We had thought that our countless recent reversals of orders granting "(c)(4)" motions would have impressed—upon trial counsel and trial courts alike—the very limited extent to which these motions are appropriate. Apparently that view was much too sanguine. Therefore we are once again required to and do reverse the order under review. . . .[31]

The *Terrell* court also admonished appellate counsel to recognize the requirements of the case law and to candidly confess error when appropriate. This author has found only two reported examples of confessed error by defendant's counsel.[32]

Recent decisions have continued to limit the scope of (c)(4) motions. In *State v. Hunwick*,[33] the Fourth District stated that a trial judge should rarely grant a (c)(4) motion.[34] The *Hunwick* court then suggested that a "defendant is protected [from the denial of the motion] in that if the state's case is insufficient at trial, the defendant may obtain a directed verdict of acquittal, or the jury will find [him] not guilty."[35] Some courts have developed the theory that a (c)(4) motion should not prevent the state from having

25. State v. Wood, 299 So. 2d 111 (Fla. 4th DCA 1974).
26. Wale v. State, 397 So. 2d 738, 740 (Fla. 4th DCA 1981).
27. 399 So. 2d 49 (Fla. 3d DCA 1981).
28. *Id.* at 50.
29. *Id.*
30. 406 So. 2d 1215 (Fla. 3d DCA 1981) (footnote omitted).
31. *Id.* at 1215.
32. State v. Love, 415 So. 2d 113 (Fla. 3d DCA 1982); State v. Williams, 410 So. 2d 1380 (Fla. 3d DCA 1982).
33. 446 So. 2d 214 (Fla. 4th DCA 1984).
34. *Id.* at 215.
35. *Id.*

its day in court.[36] In *State v. Farrugia*[37], the First District opined, "[i]t is not the purpose of Rule 3.190(c)(4) to preclude prosecution and consideration by the jury of factual inferences bearing on the ultimate guilt or innocence of the accused."[38] The Fifth District has developed the rule that if the state produces the "barest bit" of evidence of a prima facie case, the trial court should deny a (c)(4) motion.[39] That court, in *State v. Pentecost*, further ruled that this "bare evidence" standard is appropriate because if the prosecution is allowed to proceed and it is discovered that the accused is entitled to either a directed verdict at trial or an acquittal, "each party has been given its due."[40]

Although the early cases indicated that the purpose of a (c)(4) motion was to avoid costly and unnecessary trials, recent cases state the purpose of these motions in terms of why a trial court *should not* grant the motion. The animosity towards the granting of (c)(4) motions is probably derived from instances when the trial courts have improvidently taken factual issues away from the jury, such as: (1) when the facts were in dispute; (2) when the trial court erroneously believed that the state, as a matter of law, failed to establish a prima facie case; or (3) when the issues of the case were, for policy reasons, questions for a jury and not for a judge.[41] The appellate courts appear to be sending trial courts a message, reaffirming that except in certain rare instances, the jury should decide the factual and attendant legal matters of a case.

III. Rules of Procedure and Construction

The rules of procedure and construction developed by appellate courts reflect their reluctance to uphold the granting of (c)(4) motions. Rules 3.190(c)(4) and (d) outline the basic procedures for the accused and the state.[42] Rule 3.190(c)(4) provides that a motion to dismiss is proper where:

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36. *E.g.*, State v. Pentecost, 397 So. 2d 711 (Fla. 5th DCA 1981).
37. 419 So. 2d 1118 (Fla. 1st DCA 1982).
38. *Id.* at 1120.
39. *Pentecost*, 397 So. 2d at 712.
40. *Id.* at 712.
41. Certain issues appear by definition to be jury questions. *See, e.g.*, State v. Martinez, 422 So. 2d 1090 (Fla. 3d DCA 1982) (whether a gun is concealed from ordinary sight); State v. Sheppard, 401 So. 2d 944 (Fla. 5th DCA 1981) (recklessness); State v. Hudson, 397 So. 2d 426 (Fla. 2d DCA 1981) (consent in a sexual battery). All require an *ad hoc* determination of what is reasonable and appropriate, judged by community customs, in a certain set of circumstances.
42. Fla. R. Crim. P. 3.190(c)(4), (d).

> [t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant. The facts on which such motion is based should be specifically alleged and the motion sworn to.

Rule 3.190(d) provides:

> The State may traverse or demur to a motion to dismiss which alleges factual matters. Factual matters alleged in a motion to dismiss shall be deemed admitted unless specifically denied by the state in such traverse. The court may receive evidence on any issue of fact necessary to the decision on the motion. A motion to dismiss under paragraph (c)(4) of this rule shall be denied if the State files a traverse which with specificity denies under oath the material fact or facts alleged in the motion to dismiss. Such demurrer or traverse shall be filed a reasonable time before the hearing on the motion to dismiss.

The accused must strictly comply with the provisions of Rule 3.190(c)(4). In support of its holding in *State v. Maycock*[43], the Third District said that the "procedure set out in [a (c)(4) motion] is a distinct remedy and in order to avoid results which are not supported by the record, the rule must be followed in particularity."[44] Whenever the accused has failed to follow specifically each of the provisions of Rule 3.190(c)(4), district courts of appeal have not hesitated to summarily reverse a granting of the motion.[45] Several decisions have held, however, that the state waived objections to noncompliance with the rules by not raising this issue in the trial court.[46] This waiver doctrine applies equally to the accused.[47] For example, Rule 3.190(d) unequivocally requires a written trav-

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43. 361 So. 2d 218 (Fla. 3d DCA 1978).

44. *Id.* at 219.

45. *See, e.g.*, State v. Gower, 422 So. 2d 320 (Fla. 1st DCA 1982) (defendant did not swear to motion), *petition for review denied*, 430 So. 2d 451 (Fla. 1983); State v. Terrell, 406 So. 2d 1215 (Fla. 3d DCA 1981) (did not establish how facts failed to show a prima facie case); State v. Pena-Salazar, 405 So. 2d 254 (Fla. 3d DCA 1981) (a legally insufficient (c)(4) motion should be summarily denied without regard to the state's traverse or demurrer); State v. Huggins, 368 So. 2d 119 (Fla. 1st DCA 1979) (motion not sworn to; did not allege that the material facts were undisputed and did not demonstrate a lack of a prima facie case); State v. Church, 353 So. 2d 219 (Fla. 2d DCA 1977) (no specific allegations of material fact).

46. State v. Martin, 422 So. 2d 12 (Fla. 2d DCA 1982); State v. Mayle, 406 So. 2d 108 (Fla. 5th DCA 1981); *petition for review denied*, 419 So. 2d 1200 (Fla. 1982); State v. Kemp, 305 So. 2d 833 (Fla. 3d DCA 1974).

47. State v. Upton, 392 So. 2d 1013 (Fla. 5th DCA 1981); State v. Cramer, 383 So. 2d 254 (Fla. 2d DCA 1980).

erse. In *State v. Upton*, the court ruled an oral traverse permissible because the defendant did not object to it.[48] Some courts have reversed dismissals pursuant to (c)(4) motions because of noncompliance with the rule even though the state did not object at the trial level.[49]

The First District Court of Appeal first discussed the respective burdens of proof for the accused and the state in *Ellis v. State*.[50] According to the court, the burden of going forward is with the accused and he must (1) allege under oath, that the material facts are undisputed; (2) describe what the material facts are; and (3) demonstrate that the undisputed facts fail to establish a prima facie case or establish a valid defense.[51] In *Ritter v. State*,[52] the Fifth District explained this burden: "As a procedural matter on a motion under this rule, the accused must verify facts so inconsistent with his guilt that if untraversed their resulting acceptance as truth will establish his innocence."[53] The *Ritter* court also noted that the types of facts necessary to a (c)(4) motion are facts that establish the "classic" affirmative defenses such as self-defense, insanity, or entrapment. The motion could also relate to any facts which are mutually exclusive to those facts essential to the state's case, such as alibi or the defendant's possessory right to property allegedly stolen. The facts may also show an exception as defined in the statutory definition of an offense.[54] If the accused fails to fulfill these requirements, the trial judge must automatically deny the motion.[55]

The defendant's motion must specifically list the material undisputed facts. An allegation that the "undisputed facts do not establish a prima facie case of guilt" is insufficient.[56] One court criticized the drafting of a motion because of the ambiguity and evasiveness of the fact statement.[57] Facts that constitute implied inferences or suppositions are not sufficient.[58] For example, in

48. 392 So. 2d at 1013.
49. *See supra* note 41.
50. 346 So. 2d 1044 (Fla. 1st DCA), *cert. denied*, 352 So. 2d 175 (Fla. 1977).
51. *Id.* at 1045.
52. 390 So. 2d 168 (Fla. 5th DCA 1980).
53. *Id.* at 169.
54. *Id.* at 169-70.
55. State v. Pena-Salazar, 405 So. 2d 254 (Fla. 3d DCA 1981).
56. State v. Holder, 400 So. 2d 162, 164 (Fla. 3d DCA 1981).
57. State v. Lawler, 384 So. 2d 1290 (Fla. 5th DCA 1980).
58. State v. Graney, 380 So. 2d 500 (Fla. 2d DCA 1980).

State v. Green,[59] the trial court dismissed a charge of resisting arrest with violence. The defendant alleged he "wiggled and struggled" with the officers attempting to arrest him.[60] The state did not traverse the motion. The *Green* court stated that "[t]he ambiguity of this description prevents a determination [of whether defendant's] resistance was or was not, as a matter of law, with violence."[61] If the facts are ambiguous and susceptible to multiple meanings, then a trial court should deny a (c)(4) motion because the facts, on their face, present a jury question. As the Second District stated in *State v. Patlon*,[62] "[e]vėn where the facts are undisputed, they may be subject to differing interpretations."[63]

The courts have disapproved of substituting deposition testimony for specific allegations in a motion.[64] Although it is proper to attach a deposition to a motion and incorporate it by reference, deposition testimony is not a substitute for allegations in the motion.[65] Deposition testimony may also create inconsistencies and issues of credibility that are manifestly jury questions.[66] Some courts have given similar treatment to references to arrest reports. An arrest report can support specific facts in the motion, but it is not a substitute for such allegations.[67]

The accused must specifically demonstrate how the undisputed material facts do not establish a prima facie case or establish a valid defense. An assertion, without more, that the undisputed facts do not establish a prima facie case is legally insufficient.[68] Conclusory statements of law masked as statements of fact are also insufficient.[69] In *Kassel v. State*,[70] the defendant filed a (c)(4) motion to dismiss a charge of possession of a controlled substance. She alleged that she legally possessed the drug. The *Kassel* court stated that it found "fault in compliance with the rule on both

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59. 400 So. 2d 1322 (Fla. 5th DCA 1981).
60. *Id.* at 1323.
61. *Id.* (footnote omitted).
62. 443 So. 2d at 346 (Fla. 2d DCA 1983).
63. *Id.* at 348.
64. *E.g.*, State v. McIntyre, 303 So. 2d 675, 676 (Fla. 4th DCA 1974).
65. *Id.*
66. *See* State v. Power, 369 So. 2d 96, 96 n.1 (Fla. 2d DCA 1979).
67. State v. Martinez, 422 So. 2d 1090 (Fla. 3d DCA 1982); *see also* State v. Torres, 375 So. 2d 889 (Fla. 3d DCA 1979); State v. DeJerinett, 283 So. 2d 126 (Fla. 2d DCA), *cert. denied*, 287 So. 2d 689 (Fla. 1973).
68. State v. Holder, 400 So. 2d 162, 164 (Fla. 3d DCA 1981); State v. Butler, 325 So. 2d 55 (Fla. 3d DCA 1976).
69. *See* State v. Sedlmayer, 375 So. 2d 887 (Fla. 3d DCA 1979).
70. 382 So. 2d 1354 (Fla. 4th DCA 1980).

sides in that both the motion and traverse were conclusory in nature and not factually explicit."[71] In a case involving the charge of false imprisonment, the court disapproved of the statement that "the defendant did not "touch [or] make any threatening gestures or remarks,"[72] because this allegation was a legal conclusion and not a statement of fact. A (c)(4) motion based on a statutory exemption must illustrate how the facts unequivocally fall within the exception.[73] It follows logically that if the defendant relies upon an affirmative defense, he must then demonstrate how the undisputed facts comprise all elements of that defense.[74] If any element of a defense is missing or the facts constituting an affirmative defense are ambiguous, then the trial court must deny the motion.[75]

Another issue of the legal sufficiency of a (c)(4) motion is whether the defendant's attorney can swear to the motion. Rule 3.190(c)(4) merely provides that "the motion [be] sworn to." Every court that has addressed this issue has held that the defendant, and not his attorney, must swear to the motion.[76] The accused must swear to the motion because the attorney does not have personal knowledge of the facts.[77] A defendant must also swear to the motion because "by taking the oath, [he] thus subjects himself to the penalties of perjury if his recitation of 'undisputed facts' is false."[78] A declaration that the facts are true and correct to the best of the defendant's knowledge and belief is insufficient.[79] This rule probably exists to discourage perjury and to prevent a defendant's attorney from stating certain facts within a (c)(4) motion when his client will testify to other facts at trial.

Although Rule 3.190(d) requires a sworn traverse, the state attorney need not have personal knowledge of the facts.[80] The Fourth District expressed this view in *State v. Moore*,[81] and stated that "[w]e see a distinction between a defendant's oath and that of an assistant state attorney who can traverse only in good faith on

71. *Id.* at 1355.
72. State v. Horton, 442 So. 2d 408, 409 (Fla. 2d DCA 1983).
73. State v. Miller, 413 So. 2d 1295 (Fla. 5th DCA 1982).
74. *See, e.g.*, State v. Williams, 400 So. 2d 1326 (Fla. 4th DCA 1981).
75. *See supra* notes 65-71 and accompanying text.
76. *See, e.g.*, State v. Moore, 423 So. 2d 1010 (Fla. 4th DCA 1982); State v. Bethea, 409 So. 2d 1139 (Fla. 2d DCA 1982); State v. Holder, 400 So. 2d 162 (Fla. 3d DCA 1981); State v. Upton, 392 So. 2d 1013 (Fla. 5th DCA 1981).
77. *Holder*, 400 So. 2d at 162.
78. *Upton*, 392 So. 2d at 1016.
79. *Moore*, 423 So. 2d at 1011.
80. State v. Hamlin, 306 So. 2d 150 (Fla. 4th DCA 1975).
81. 423 So. 2d at 1010 (Fla. 4th DCA 1982).

the basis of the contents of his file, not what he knows of his own knowledge."[82] One court optimistically said that a state attorney is a public official who takes an oath of office, an attorney at law and an officer of the court who would not demean his office and ignore his obligation by filing spurious and bad faith traverses.[83] In order for a traverse by the state to be effective, it must constitute a good faith dispute of the material facts, and it should not be based on speculation, conjecture, presumption, or assumption.[84]

Rule 3.190(d) provides that factual matters alleged in a motion to dismiss shall be deemed admitted unless specifically denied by the state in its traverse. A traverse which does not specifically deny all the material facts in the motion to dismiss is legally insufficient.[85] A pleading of "lack of knowledge" of a fact in a traverse is not a denial of that fact.[86] The First District's decision in *Ellis v. State* is a rare example of a court's discussing the exact requirements of a traverse.[87] In *Ellis*, the state merely denied that the undisputed facts did not establish a prima facie case. Judge Boyer noted that Rule 3.190(c)(4) is silent as to whether the state, in its traverse, must list those material facts, either disputed or undisputed, upon which it will rely at the hearing on the motion and which were not contained in the defendant's motion.[88] The better practice, according to the *Ellis* court,

> would be for all such factual matters to be contained or alluded to in the State's traverse and that the State should not be permitted (absent an amendment to the traverse) to present evidence at the hearing on the motion to dismiss concerning facts which were not contained or alluded to within the motion to traverse. . . .[89]

If the state simply avers in the traverse that "it specifically denies the facts," then the possibility of such denials merely to prevent consideration of the motion is potentially significant. The position that the state satisfies the requirements of denying with specificity by stating that "it specifically denies" is a tautological argument contrary to the provisions and intent of Rules 3.190(c)(4) and (d).

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82. *Id.* at 1011.
83. *Hamlin*, 306 So. 2d at 152.
84. Ellis v. State, 346 So. 2d 1044, 1045-46 (Fla. 1st DCA 1977).
85. State v. Kemp, 305 So. 2d 833 (Fla. 3d DCA 1975).
86. *Patlon*, 443 So. 2d at 348.
87. 346 So. 2d at 1044.
88. *Id.* at 1046.
89. *Id.*

There are abundant examples of traverses which specifically deny and deal directly with the facts in the motion to dismiss.[90] These cases illustrate the efficacy of specific traverses; such traverses facilitate meaningful review by both the trial and appellate courts.

Rule 3.190(d) requires a written traverse. The state must file within a "reasonable time" before the hearing on the motion to dismiss. Although all courts have adhered to the written traverse requirement, some courts have upheld oral traverses if the defendant did not object at the trial level.[91] In *State v. Burnison*,[92] the Second District considered the timeliness of a traverse filed moments before the hearing on the motion.[93] The defendant objected to the traverse as untimely. The trial judge disregarded the traverse because of the late filing and granted the motion to dismiss. The *Burnison* court stated that the language of Rule 3.190(d) implied a flexible definition of "a reasonable time."[94] The comment to Rules 3.190(d) and 3.060 (time for service of motions) suggest that judgment and common sense should control application of the rules. Although the court stated it could not condone the state's action, the violation was not a willful and substantial violation of the rule. In addition, the trial court could have ordered a continuance and the defendant did not demonstrate any undue prejudice because of the tardy filing of the traverse.[95]

In addition to the requirements for the accused and the state, appellate courts have developed a set of rules of procedure and construction for trial judges. The determinative issue in a (c)(4) motion is whether the state can establish a prima facie case. The First District, in *State v. Snowden*,[96] said that "it [is] sufficient if prima facie proof of the corpus delicti is made. Corpus delicti is a latin phrase generally meaning 'the body of the crime' and . . . is generally used in legal writings to mean the elements legally necessary to show that a crime has been committed."[97] Proof for a motion to dismiss is not proof beyond a reasonable doubt but *some* proof that tends to show the commission of a crime. The courts have explicitly defined prima facie as "any evidence" upon which a

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90. *See, e.g., Patlon*, 443 So. 2d at 346; *Horton*, 442 So. 2d at 408; *Holder*, 400 So. 2d at 162; *see also* State v. Rogers, 386 So. 2d 278 (Fla. 2d DCA 1980).
91. *See Pentecost*, 397 So. 2d at 712.
92. 438 So. 2d 538 (Fla. 2d DCA 1983).
93. *Id.* at 539.
94. *Id.*
95. *Id.*
96. 345 So. 2d 856 (Fla. 1st DCA 1977) (footnote omitted).
97. *Id.* at 858.

jury of reasonable persons could find guilt.[98] The Fifth District has developed the "barest bit of a prima facie case" standard.[99] "It is only when the state cannot establish even the barest bit of a prima facie case that it should be prevented from prosecuting."[100]

The cardinal rule of construction is that the trial court must construe the facts in a light most favorable to the state.[101] A trial court should grant a (c)(4) motion only if the most favorable construction of the facts would not establish a prima facie case of guilt.[102] "[I]n determining whether the State has shown a *prima facie* case so as to successfully resist a '(c)(4)' Motion, all inferences are resolved against the defendant."[103]

The second most important rule of construction is that the trial judge cannot weigh the evidence or determine credibility.[104] For example, in several cases where witnesses recanted or changed their testimony, trial judges granted motions to dismiss because of the inherent inconsistencies in the testimony.[105] These cases were subsequently reversed on appeal because a prior inconsistent statement is not a matter for resolution on a (c)(4) motion.[106] Also, a trial judge cannot weigh the testimony supporting a (c)(4) motion, that is, the judge cannot decide whether one witness' testimony is more credible than that of another witness, nor can he determine that a witness' testimony rebuts other testimony to the extent that the state cannot establish a prima facie case.

Rule 3.190(d) states that if the state traverses the motion, then the trial judge must automatically deny the motion. In spite of this unequivocal directive, several cases demonstrate that some trial judges still consider whether the state has established a prima facie case notwithstanding the traverse.[107] If *any* material facts are in

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98. *See, e.g.*, State v. McQuay, 403 So. 2d 566 (Fla. 3d DCA 1981); State v. Hires, 372 So. 2d 183 (Fla. 2d DCA 1979); State v. DeJerinett, 283 So. 2d 126 (Fla. 2d DCA), *cert. denied*, 287 So. 2d 689 (Fla. 1973).

99. *See Pentecost*, 397 So. 2d at 712.

100. *Id.*

101. *Moore*, 425 So. 2d at 1173; State v. McQuay, 403 So. 2d 566, 567 (Fla. 3d DCA 1981).

102. State v. Sedlmayer, 375 So. 2d 887 (Fla. 3d DCA 1979); State v. Smith, 348 So. 2d 637 (Fla. 2d DCA 1977).

103. State v. Pettis, 397 So. 2d 1150, 1152 (Fla. 5th DCA 1981) (citations omitted).

104. State v. Alexander, 406 So. 2d 1192 (Fla. 4th DCA 1981); State v. Fort, 380 So. 2d 534 (Fla. 5th DCA 1980); State v. Bryant, 373 So. 2d 708 (Fla. 3d DCA 1979).

105. *See, e.g.*, State v. Moore, 424 So. 2d 920 (Fla. 4th DCA 1982), *aff'd*, 452 So. 2d 559 (Fla. 1984); State v. Fetherolf, 388 So. 2d 38 (Fla. 5th DCA 1980); State v. Sanders, 380 So. 2d 1126 (Fla. 2d DCA 1980).

106. *Fetherolf*, 388 So. 2d at 38.

107. State v. Stewart, 404 So. 2d 185 (Fla. 5th DCA 1981); Wale v. State, 397 So. 2d 738

dispute, the trial judge cannot excise those facts and determine whether a prima facie case exists;[108] instead, the judge must deny the motion and present the case to the trier of fact.

Although the rule and case law have not defined the word "material," a material fact should be a fact which tends to prove an essential element of the state's case or establishes an element of an affirmative defense. Several motions to dismiss and traverses in reported decisions have contained immaterial or superfluous facts.[109] In some cases, the dismissal was improper because the facts stated in the motion to dismiss were immaterial to the state's case.[110] To date, however, the district courts of appeal and the supreme court have not stricken traverses or demurrers because they denied or added immaterial facts. The requirement of *material* facts in (c)(4) motions, traverses, and demurrers is another compelling reason to require specific delineations in a traverse or demurrer. A reviewing court cannot always adequately determine the materiality of a fact without a specific motion to dismiss, traverse, or demurrer.

Rule 3.190(d) states that a court may receive evidence on any issue of fact necessary to the decision on the motion.[111] This is a curious section; unless the facts presented are not in dispute, the trial judge must still deny the motion to dismiss. Parties can stipulate to additional facts presented at the hearing,[112] but either party can refuse to accept a stipulation.[113] If either side wishes to present additional evidence at the hearing, the question arises as to why the parties did not include these facts in their pleadings. The Second District has held that a trial judge need not limit his inquiry to the "four corners of the charging instrument but may also consider the allegations presented by the motion."[114] The trial court cannot, however, go outside the record before it to make a decision on the motion.[115] This position implies the use of a hearing to determine whether the facts are actually in dispute or to clarify ambiguous or misleading facts contained in the motion or a traverse. If a trial judge goes beyond the facts and allegations in the mo-

(Fla. 4th DCA 1981); State v. Wood, 299 So. 2d 111 (Fla. 4th DCA 1974).

108. State v. Alvarez, 403 So. 2d 1143 (Fla. 2d DCA 1981).

109. State v. Carroll, 404 So. 2d 844 (Fla. 5th DCA 1981); State v. Holder, 400 So. 2d 162 (Fla. 3d DCA 1981).

110. *Fetherolf*, 388 So. 2d at 38.

111. FLA. R. CRIM. P. 3.190(d).

112. State v. Church, 353 So. 2d 219 (Fla. 2d DCA 1977).

113. *Id.*

114. State v. Bower, 341 So. 2d 216, 217 (Fla. 2d DCA 1976).

115. State v. Clark, 301 So. 2d 492 (Fla. 2d DCA 1974).

tions, traverses, or demurrers, the proceeding will become the "mini-trial on the merits" which is so loathed by the appellate courts.

Demurrers have presented few problems to appellate judges. The effect of a demurrer is to test the legal sufficiency of the defendant's motion.[116] The state, by demurrer, can challenge the form of the motion (i.e., the motion is not sworn to, fails to specifically list material facts, or fails to allege how the facts do not establish a prima facie case), or it may challenge the legal effect of the facts. In some cases, the state will agree that the facts are not in dispute but will disagree that those facts do not establish a prima facie case. Instances such as this produce the most common use of the demurrer.[117]

These rules of procedure and construction have led courts to routinely deny (c)(4) motions in certain situations. Circumstantial evidence cases have presented special problems of interpretation for reviewing courts. If the state's case is entirely circumstantial, the state's evidence at trial must exclude every reasonable hypothesis of innocence.[118] Most courts have decided that the trial judge should not determine this matter in a (c)(4) motion, even though he doubts the sufficiency of the state's evidence.[119] Indeed, several courts, after reversing the granting of a (c)(4) motion, have candidly admitted that they doubted whether the state's evidence could rebut all reasonable hypotheses at trial.[120]

This rule of construction potentially creates a significant waste of judicial resources. At trial on a motion for judgment of acquittal, the trial judge will view the evidence in a light most favorable to the state and decide whether it rebuts all reasonable hypotheses of innocence.[121] In a (c)(4) motion where the facts are not in dispute, the trial judge can easily make the same determination; he will view the undisputed evidence in a light most favorable to the state (including resolving all inferences against the defendant), and determine whether the facts negate all reasonable hypotheses of

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116. State v. Rodriguez, 402 So. 2d 86 (Fla. 3d DCA 1981).

117. State v. Murray, 425 So. 2d 661 (Fla. 2d DCA 1983); State v. Miller, 413 So. 2d 1295 (Fla. 5th DCA 1982); Powell v. State, 369 So. 2d 108 (Fla. 1st DCA 1979).

118. *See, e.g.*, Mayo v. State, 71 So. 2d 899 (Fla. 1954); Woods v. State, 426 So. 2d 69 (Fla. 1st DCA 1983); Tillman v. State, 353 So. 2d 948 (Fla. 1st DCA 1978).

119. *E.g.*, State v. Fry, 422 So. 2d 78 (Fla. 2d DCA 1982); State v. Craig, 413 So. 2d 863 (Fla. 1st DCA 1982); State v. Upton, 392 So. 2d 1013 (Fla. 5th DCA 1981).

120. State v. Hunwick, 446 So. 2d 214 (Fla. 4th DCA 1984); State v. Savarino, 381 So. 2d 734 (Fla. 2d DCA 1980); State v. Smith, 348 So. 2d 637 (Fla. 2d DCA 1977).

121. *Clark*, 301 So. 2d at 492.

innocence. Several courts have done just that. In *State v. Hayes*,[122] the state presented a circumstantial case, based solely on fingerprint evidence of burglary to a residence. The Fourth District upheld the granting of the motion to dismiss because it found at least five reasonable hypotheses of innocence to explain the presence of the fingerprints.[123] In *Mobley v. State*,[124] the Fourth District reached a similar result and in a case substantially similar to *Hayes* and *Mobley*, the First District decided that the trial judge should not decide a circumstantial case on a (c)(4) motion.[125]

The First District had previously decided another circumstantial case in a (c)(4) motion. In *Ellis v. State*, the state attempted to prove a charge of constructive possession of drugs by circumstantial evidence.[126] The *Ellis* court reversed the denial of the motion and acknowledged that the issue of constructive possession is normally a jury question. In this case, however, it held that a jury could not have reasonably decided that the accused had constructive possession of the drugs.[127] In *State v. Oswald*,[128] the First District similarly decided that the state had not proved a prima facie case of constructive possession based upon circumstantial evidence. The Fourth District reached this result in *Camp v. State*[129] and the Third District, in *Kuhn v. State*,[130] also decided a constructive possession case pursuant to a (c)(4) motion.

Despite these cases, most courts have held that constructive possession is an improper issue to be resolved in a (c)(4) motion[131] because the trier of fact must infer knowledge from the surrounding facts and circumstances.[132] The state must prove (1) knowledge of the presence of the contraband; (2) knowledge of the illicit nature of the contraband; and (3) the ability to maintain control and exercise dominion over the contraband.[133] This knowledge is usu-

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122. 333 So. 2d 51 (Fla. 4th DCA 1976).
123. *Id.*
124. 363 So. 2d 170 (Fla. 4th DCA 1978).
125. State v. Mattox, 441 So. 2d 648 (Fla. 1st DCA 1984).
126. 346 So. 2d 1044 (Fla. 1st DCA 1977).
127. *Id.* at 1047.
128. 442 So. 2d 360 (Fla. 1st DCA 1983).
129. 293 So. 2d 114 (Fla. 4th DCA), *cert. denied*, 302 So. 2d 413 (Fla. 1974).
130. 439 So. 2d 291 (Fla. 3d DCA 1983).
131. *E.g.*, State v. Mattox, 441 So. 2d 643 (Fla. 1st DCA 1984); State v. Radandt, 410 So. 2d 665 (Fla. 4th DCA 1982); State v. Alford, 395 So. 2d 201 (Fla. 4th DCA 1981); State v. Savarino, 381 So. 2d 734 (Fla. 2d DCA 1980).
132. State v. Craig, 413 So. 2d 863 (Fla. 1st DCA 1982).
133. *See, e.g.*, Kuhn v. State, 439 So. 2d 291 (Fla. 3d DCA 1983); Hively v. State, 336 So. 2d 127 (Fla. 4th DCA 1976).

ally not susceptible to direct proof; therefore, a trial judge usually cannot decide the issue as a matter of law. Rather, the trier of fact must decide whether the accused had knowledge of the contraband. The Fourth District has decided that knowledge is an "ultimate fact question."[134] Perjury is perhaps the most significant reason for this rule; courts have reacted negatively to obvious self-serving statements of lack of knowledge in (c)(4) motions.[135] The question of knowledge of the possession of stolen property is also an improper issue for (c)(4) motions.[136] Self-serving explanations of possession of stolen property are not dispositive because the trial judge need not believe the defendant's explanation.[137]

The district courts of appeal have treated the issue of intent in a similar fashion.[138] The trier of fact must infer intent, like knowledge, from the surrounding facts and circumstances. The Fourth District formulated the rule in *State v. West*:[139]

> [I]ntent is usually a question of fact to be determined by the trier of fact. The trier of fact has the opportunity to observe the witnesses. From that observation, the trier of fact may determine the believability of that witness and the weight to be given his testimony. The demeanor of the witness, his frankness, . . . his intelligence, his interest in the outcome of the case, and the reasonableness of the testimony presented, in light of all of the evidence . . . are but a few of those factors which may play a part.[140]

Most courts have probably considered intent as an "ultimate fact" question because a trial judge cannot determine factual issues on summary judgment nor consider the weight of conflicting evidence or determine credibility.

In murder cases, all courts have rejected the resolution of the intent issue in (c)(4) motions.[141] The accused is often the only witness to the murder. Consequently, the state can attempt to prove intent from the circumstances of the murder itself. Self-serving

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134. *Alford*, 395 So. 2d at 202.

135. *See, e.g.*, State v. Farrugia, 419 So. 2d 1118 (Fla. 1st DCA 1982); State v. Pastorius, 419 So. 2d 1137 (Fla. 4th DCA 1982); Wale v. State, 397 So. 2d 738 (Fla. 4th DCA 1981).

136. Ridley v. State, 407 So. 2d 1000 (Fla. 5th DCA 1981); State v. Carroll, 404 So. 2d 844 (Fla. 5th DCA 1981).

137. *Ridley*, 407 So. 2d at 1000; *Carroll*, 404 So. 2d at 844.

138. *See, e.g.*, *Farrugia*, 419 So. 2d 1118; State v. Oxx, 417 So. 2d 287 (Fla. 5th DCA 1982).

139. 262 So. 2d 457 (Fla. 4th DCA 1972).

140. *Id.* at 458.

141. *See, e.g.*, State v. Alexander, 406 So. 2d 1192 (Fla. 4th DCA 1981).

declarations of lack of intent (or claim of accident or other affirmative defenses) have not been accepted by reviewing courts.[142]

The rule against deciding intent or state of mind in the context of a (c)(4) motion is not absolute. A trial judge can decide the question of intent pursuant to a (c)(4) motion if the facts do not lead to any reasonable inference of unlawful intent. Examples of such decisions include: a case involving an aggravated battery in an automobile accident where the state alleged only general intent in the information;[143] a case of a stepmother who discussed soliciting a "hit man" to maim her stepson at some unknown future time;[144] and a case of possession of common household items which resulted in a charge of possession of burglary tools.[145] These cases indicate that a (c)(4) motion can be a proper vehicle for deciding the issue of intent. An inflexible rule against deciding intent or state of mind belittles the purpose of Rule 3.190(c)(4). Although the trier of fact must usually *infer* intent or state of mind from the circumstances, these inferences must still be reasonable.[146] A trial judge should be able to determine, as a matter of law, whether a reasonable jury could make rational inferences demonstrating unlawful intent from a set of undisputed facts. If there are any possible logical and rational inferences of unlawful intent, the court should deny the motion. This posture would eliminate the instances of self-serving declarations of lack of intent or knowledge. However, if the undisputed facts do not give rise to *any rational* inferences of intent, judicial economy requires a judge to grant the (c)(4) motion.

The Florida Supreme Court recently considered the propriety of deciding in a (c)(4) motion a defense based upon prosecutorial misconduct in violation of the defendant's constitutional right to due process.[147] In *State v. Glosson*, the defense and the state stipulated to the following facts: (1) Glosson raised an entrapment defense;

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142. State v. Stewart, 404 So. 2d 185 (Fla. 5th DCA 1981); State v. McCray, 387 So. 2d 559 (Fla. 2d DCA 1980).

143. State v. Shorette, 404 So. 2d 816 (Fla. 2d DCA 1981).

144. State v. Gaines, 431 So. 2d 736 (Fla. 4th DCA 1983).

145. Preston v. State, 373 So. 2d 451 (Fla. 2d DCA 1979), *cert. denied*, 383 So. 2d 1203 (Fla. 1980).

146. State v. Fuller, 463 So. 2d 1252 (Fla. 5th DCA 1985). The *Fuller* decision is a rare example of a court's discussing the reasonableness of the inferences from the undisputed facts. *See also* Mayo v. State, 71 So. 2d 899 (Fla. 1954); Woods v. State, 426 So. 2d 69 (Fla. 1st DCA 1983); Tillman v. State, 353 So. 2d 948 (Fla. 1st DCA 1978).

147. State v. Glosson, 462 So. 2d 1082 (Fla. 1985), *aff'g* 441 So. 2d 1178 (Fla. 1st DCA 1983).

(2) Wilson, a vital witness for the state, had an oral agreement with the sheriff to receive 10% of all the income from the civil forfeiture proceedings resulting from criminal investigations of Glosson and others; (3) the state attorney knew of and supervised Wilson's investigations; and (4) the state also knew of the contingent fee paid from the civil forfeiture funds, and that Wilson was obliged to testify and cooperate in the criminal prosecutions resulting from his investigations in order to collect his contingent fees. After finding that the defendant's right to due process had been infringed by prosecutorial misconduct, the information was dismissed by the trial court.[148] The district court affirmed the dismissal because the issue of the denial of the defendant's due process right was one of law which the trial judge could decide in a (c)(4) motion. The supreme court affirmed the First District because the due process issue of the contingent fee in exchange for prosecution testimony did not involve issues of credibility for the jury. Justice McDonald opined that the due process defense of governmental misconduct is an objective test, as opposed to the subjective predisposition defense submitted to a jury in the usual entrapment case. Also, the state agreed to a pretrial disposition of the issue to avoid a possible adverse ruling after a long trial. Consequently, the state could not claim procedural error following a ruling it invited the trial court to make.

In *Cruz v. State*,[149] a case involving the "drunken wino" decoy entrapment defense, the supreme court has recently held that the issue of predisposition in an entrapment case is always for the jury. However, the new threshold objective test for the propriety of police conduct developed by the court in *Cruz* is still appropriate for a (c)(4) motion.

IV. CONCLUSION

The use of Rule 3.190(c)(4) motions began in the early 1970's with the hope that courts could avoid unnecessary and costly trials. Initially, courts viewed the (c)(4) motion as the ideal context for deciding legal issues when the facts were not in dispute. Misuse of Rule 3.190(c)(4) soon led courts to develop restrictive rules about (c)(4) motions. At the present time, Florida appellate courts have restricted the use of (c)(4) motions to a narrow range of cases. Like most legal principles, exceptions exist to the general hostile

148. 462 So. 2d at 1083.
149. 465 So. 2d 516 (Fla. 1985).

view of (c)(4) motions. Attorneys and courts who are familiar with these exceptions can successfully litigate legal issues in (c)(4) motions and avoid costly and time-consuming trials.