THE UNDERUSED MOTION TO DISMISS

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DEBUNKING MYTHS ABOUT THE C4

If an attorney believes the state's evidence is insufficient to establish each element of the charges, he can file a motion to dismiss under Rule 3.190(c)(4), Florida Rules of Criminal Procedure. However, this is rarely done due to two myths about the C4 motion to dismiss. The first myth is that the defendant must swear to the facts in the motion, and the second is that if the state files a traverse the motion must be denied.

Myth #1: THE DEFENDANT MUST SWEAR TO THE MOTION

Most attorneys believe that the defendant must swear to the facts in the motion and therefore admit to those facts in order to file a motion to dismiss. This, however, is not the case. The rule only says that the motion must be sworn to. It does not say that the motion must be sworn to by the defendant. This issue was addressed in *State v. Betancourt*, 616 So.2d 82 (Fla 3rd DCA 1993), where the court stated the purpose of the rule that the motion be sworn to is to subject those with personal knowledge to penalties of perjury. The court goes on to say that this objective is met if the affiant is merely a witness rather than the defendant himself. *Id.*

While the purpose of the rule is to subject witnesses with knowledge to penalties of perjury, prosecutors frequently try to use the rule to get a confession out of the defendant. In fact, if you file a motion to dismiss that is not sworn to by the defendant, the state will likely try to claim the motion is insufficient citing *State v. Upton*, 392 So.2d 1013, 1016 (Fla. 5th DCA 1991). However, *Betancourt* cites to *Upton*, and rejects the state's position that the motion must be sworn to by the defendant.

Myth #2: IF THE STATE FILES A TRAVERSE THE MOTION MUST BE DENIED

The second myth that frequently prevents defendants from filing a motion to dismiss under rule 3.190(c)(4) is that if the state files a traverse the judge must deny the motion. This, too, is not the case. In *State v. Kalogeropolous*, 758 So.2d 110 (Fla. 2000), the Florida Supreme Court stated that in order to overcome a motion to dismiss the state must meet the minimal requirements of a prima facie case. *Id.*

CONCLUSION

If the defense believes the evidence is insufficient it is often a good idea to file a C4 motion to dismiss. Under *Betancourt* and *Kalogeropolous* the defendant should be able to test the sufficiency of the evidence without the threat of admitting to the facts, or facing a harsher sentence if convicted at trial. Also, being able to file a motion to dismiss without admitting the facts often results in a better resolution for the client.

"Sometimes I feel like I'm just going through the motions."

Finally I think it is important to note that the purpose of the rule that the motion be sworn to is to subject those with personal knowledge to penalties of perjury. Therefore, the defendant should be able to file a motion to dismiss based on any testimony that is sworn to including arrest affidavits, transcripts, codefendant's trials, or any other sworn document.

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