

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,659

ROBERTO VASQUEZ,

Petitioner,

-v-

THE STATE OF FLORIDA,

Respondent.

FILED

SID J. WHITE

OCT 2 1965

CLERK, SUPREME COURT

By *[Signature]*
Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW
TO THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF PETITIONER IN SUPPORT OF JURISDICTION

LAW OFFICES OF
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INTRODUCTION

The petitioner, Roberto Vasquez, was the defendant in the trial court and the appellant in the District Court of Appeal of Florida, Third District. The respondent, the State of Florida, was the plaintiff in the trial court and the appellee in the District Court of Appeal. The parties will be referred to as they appeared in the trial court.

The symbol "App." refers to the appendix which accompanies this brief.

SUMMARY OF THE ARGUMENT

This case presents a significant issue of statewide concern. In the decision sought to be reviewed, the Third District held that the petitioner could not seek review of the denial of his motion to dismiss criminal charges based upon his continued mental incompetency for more than five years. The Fourth District has held that such a denial is reviewable by appeal. In a similar case, the First District has held that review by common law certiorari is available. The decisions recognizing that review is available are correct and just. The conflict should be resolved by this Court.

STATEMENT OF THE CASE AND FACTS

The defendant sought dismissal of his criminal charges based upon Rule 3.213 (b), Florida Rules of Criminal Procedure, which provides in pertinent part:

If at any time after five years after determining a person incompetent to stand trial when charged with a felony or one year when charged with a misdemeanor, the

court, after hearing, determines that the defendant remains incompetent to stand trial, that there is no substantial probability that the defendant will become mentally competent to stand trial in the foreseeable future and that the defendant does meet the criteria for involuntary hospitalization set forth by law, the court shall dismiss the charges . . .

In the event of dismissal, the rule goes on to require that the defendant be committed to the Department of Health and Rehabilitative Services for involuntary hospitalization or residential services or outpatient treatment, and that the order of commitment shall require the administrator of the facility to notify the State Attorney no less than 30 days prior to the anticipated release date of the defendant.

The trial court denied the motion to dismiss and the defendant appealed. On August 20, 1985, the Third District entered a written opinion dismissing the appeal. (App. 1-4). The Third District expressly found that its decision directly conflicted with Ricciardelli v. State, 453 So.2d 199 (Fla.4th DCA 1984), which held such orders reviewable by appeal.

A notice to invoke discretionary jurisdiction was timely filed on September 16, 1985.

QUESTION PRESENTED

WHETHER THIS COURT HAS JURISDICTION TO REVIEW THE OPINION OF THE THIRD DISTRICT.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE OPINION OF THE THIRD DISTRICT.

This court has jurisdiction to review the decision of the Third District Court of Appeal because the decision expressly and directly conflicts with Ricciardelli v. State, 453 So.2d 199 (Fla.4th DCA 1984). The conflict was expressed by the Third District in the decision sought to be reviewed as follows:

We fully recognize that our decision directly conflicts with the decision of the Fourth District in Ricciardelli v. State, 453 So.2d 199 (Fla.4th DCA 1984), wherein our sister court entertained a like appeal on the theory that although denials of motions to dismiss are not ordinarily appealable, the possibility that an incompetent defendant may never be brought to trial on the merits effectively would deny such defendant review of the trial court's decision. As we see it, a defendant is no more entitled to review of his Rule 3.213(b) motion to dismiss at this time than he would be after his conviction on the charges.

(App. 3, n.3).

Without regard to the correctness vel non of the reasoning of the Third District, the above-quoted paragraph reflects that the decision sought to be reviewed "expressly and directly conflicts with a decision of another district court of appeal" within the meaning of Article V, Section 3(b)(3) of the Constitution of the State of Florida.

Additionally, in a similar case, the Second District Court of Appeal reviewed by common law certiorari a decision of a trial court releasing a defendant who had been acquitted by reason of insanity. State v. Vigil, 410 So.2d 528 (Fla.2d DCA 1982). The Third District was aware of Vigil as it was cited with approval by the Fourth District

in Ricciardelli. Yet, the Third District, by not even treating the appeal as a request for certiorari relief pursuant to Rule 9.040(c), Florida Rules of Appellate Procedure, ¹ rejected the Vigil holding that review by certiorari is available.

By finding that absolutely no review is available, a class of litigants has been left in virtual limbo. Persons such as the petitioner have improperly been classified as criminal defendants and are incarcerated as such. Absent review of the denials of their motions to dismiss, they will not be removed from the criminal justice system as contemplated by Rule 3.213.

Absent review by this court, the Third District can be expected to dismiss all similar cases without rendering decisions. This case may be the first and last vehicle by which this Court can resolve the conflict.

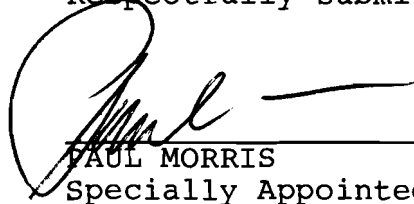
¹ Rule 9.040(c) provides:

If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy.

CONCLUSION

Based upon the foregoing, the petitioner requests that this court grant this petition for review and order that this cause proceed to the merits.

Respectfully submitted,

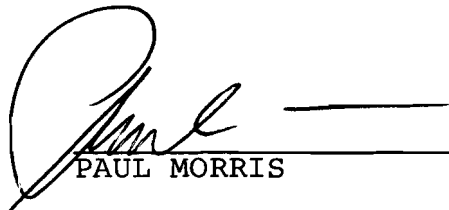


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to G. Bart Billbrough, Counsel for Respondent, Office of the Attorney General, 401 N.W. 2d Avenue, Suite 820, Miami, Florida 33128, this 24th day of September, 1985.



PAUL MORRIS