IN THE SUPREME COURT OF FLORIDA

Case No. 71,760

MARIO D'OLEO-VALDEZ, :

Petitioner, :

vs. :

THE STATE OF FLORIDA, :

Respondent. :

:

DISCRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

Susan S. Lerner, Special
Assistant Public Defender
Counsel for D'Oleo-Valdez
Biscayne Building, Suite 705
19 West Flagler Street
Miami, Florida 33130
(305) 358-5999

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INTRODUCTION

This jurisdictional brief is filed on behalf of the petitioner, Mario D'Oleo-Valdez. A copy of the Third District opinion, the conflicting opinion and the relevant rule are appended.

STATEMENT OF THE CASE AND FACTS

Upon defense counsel's appropriate suggestion that Valdez was incompetent to stand trial, the trial court appointed one expert to examine him. The appointment of only one expert violated Florida Rule of Criminal Procedure 3.210 which provides the court "shall order the defendant to be examined by no more than three nor fewer than two experts prior to the date of said hearing." Defense counsel never told the judge that the Rule required two experts. The expert found Valdez competent.

On appeal from his conviction, Valdez relied upon Graydon v. State, 502 So.2d 25 (Fla. 4th DCA 1987) for the proposition that the trial court committed reversible error by not appointing two experts. The Third District held:

> [T]he failure to bring the deviation from the rule to the trial court's attention effected a waiver of the contention. [citations omitted] We do not read Graydon v. State, 502 So.2d 25 (Fla. 4th DCA 1987), to hold otherwise. If we are wrong about this, we think Graydon is wrong.

The holding establishes the conflict with Graydon v. State necessary to this court's jurisdiction.

SUMMARY OF JURISDICTIONAL ARGUMENT

Florida Rule of Criminal Procedure 3.210 places a duty upon the court, independent of a defense motion, to appoint two experts and conduct a hearing upon finding reasonable grounds to believe the defendant is incompetent to stand trial. Graydon v. State found reversible error in the appointment of only one expert without regard to whether the defendant objected below. The Third District opinion conflicts with Graydon v. State by making the defendant responsible for a trial court's compliance with Rule 3.210.

JURISDICTIONAL ARGUMENT

I.

THE THIRD DISTRICT OPINION CONFLICTS WITH GRAYDON v. STATE, 502 SO.2d 25 (FLA. 4TH DCA 1987).

In Graydon v. State, the Fourth District held the failure to appoint two experts constituted reversible error without any reference to the necessity of a defendant objecting to the appointment of only one expert:

> If after appropriate motion, a trial court concludes that there is reasonable ground to believe a defendant is not competent to stand trial, then the trial court must comply with Rules 3.210 and 3.211 of the Florida Rules of Criminal Procedure. [citation omitted] Rule 3.210 states, inter alia, the trial court shall order the defendant to be examined by no more than three or fewer than two experts prior to the competency hearing. In the instant case, the court set a hearing date to determine the defendant's mental condition but failed to follow the mandatory language of Rule 3.210 by not appointing two experts to examine the defendant on the issue of his competency to stand trial. The failure of the trial court to appoint two experts to examine the defendant constituted reversible error.

[emphasis in original] 502 So.2d at 26.

Under Graydon, once reasonable grounds exist to believe a defendant is not mentally competent to stand trial, the trial court is bound by Rule 3.210 and must appoint two experts. The Third District obligates the defendant to go a step further and request two experts - to ensure the trial judge follows the mandatory rule. This additional burden finds no support in a rule requiring a trial court to sua sponte order a hearing and

appoint at least two experts if it has reasonable grounds to believe a defendant is incompetent. The rule is equally binding upon a trial judge who finds reasonable grounds after a defense suggestion of incompetency. The Fourth District recognizes the absolute nature of Rule 3.210. The Third District does not.

II.

WHY THIS COURT SHOULD EXERCISE ITS DISCRETION AND ENTERTAIN THE CASE ON THE MERITS IF IT FINDS IT HAS JURISDICTION.

Committee notes to Florida Rule of Appellate Procedure 9.120 allow the petitioner to include a short statement of why this court should exercise its discretion and entertain the case if it finds it has jurisdiction.

An informed judicial determination upon the advice of two experts is how Florida protects the due process right not to stand trial while incompetent. Fla.R.Crim.P. 3.210 and 3.211; cf. Harrell v. State, 296 So.2d 585, 586 (Fla. 1st DCA 1974) (mental competency to stand trial is legal question judicially decided after doctors render medical opinions); Poynter v. State, 443 So.2d 219 (Fla. 4th DCA 1983) (reversible error for judge to ignore experts' uncontested testimony that defendant incompetent to stand trial).

Ross v. State, 386 So.2d 1191, 1196 (Fla. 1980) does not resolve the issue here. In Ross, this court accepted the report of one expert under an earlier version of Rule 3.210 providing that the court could appoint only one expert.

Unlike other criminal rules containing mandatory language directed to a trial judge, e.g. Rules 3.172(i) and 3.390(d), Rule 3.210 does not have a harmless error or waiver provision. This court has excused compliance with the rule where the defendant continuously refused to cooperate with the appointed experts. Muhammad v. State, 494 So.2d 969, 972 (Fla. 1986), cert. denied, 107 S.Ct. 1332 (1987). See also Gilliam v. State, 12 F.L.W. 563 (Fla. Nov. 5, 1987) (defendant who thwarts process by refusing to cooperate cannot complain).

Absent a defendant's refusal to submit to examinations, this court should demand strict compliance with Rule 3.210 given what has long been recognized as "a malicious mockery of judicial procedure" to permit the trial of an incompetent. Deeb v. State, 118 Fla. 88, 158 So. 880, 882 (1935); Sanders v. Allen, 100 F.2d 717, 720 (D.C. Cir. 1938) ("The trial and conviction of a person mentally and physically incapable of making a defense violates certain immutable principles of justice which inhere in the very idea of free government."). See also Pait v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 841, 15 L.Ed.2d 815 (1966) ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have a court determine his capacity to stand trial.").

CONCLUSION

This court should accept jurisdiction upon the demonstrated conflict and determine that a defendant's failure to bring the deviation from Rule 3.210 to the trial court's attention does not excuse the trial court from following the rule.

Susan S. Lerner, Special
Assistant Public Defender
Counsel for Valdez
Biscayne Building, Suite 705
19 West Flagler Street
Miami, Florida 33130
(305) 358-8880

By Susan S. Lerner
Susan S. Lerner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction was mailed to: ROBERT A. BUTTERWORTH, Attorney General, RICHARD L. POLIN, Assistant Attorney General, Department of Legal Affairs, Ruth Bryan Owen Rhode Building, 401 Northwest Second Avenue, Suite 820, Miami, Florida 33128, this 22nd day of January, 1988.

Susan S. Lerner, Special
Assistant Public Defender
Counsel for Valdez
Biscayne Building, Suite 705
19 West Flagler Street
Miami, Florida 33130
(305) 358-8880

By Susan S. Lerner
Susan S. Lerner