IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-888

HUGO MIRANDA,
Petitioner,
vs.

STATE OF FLORIDA,
Respondent.

* *
ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL
* *

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The Respondent, the State of Florida (hereinafter "the State"), was the appellant in the Third District Court of Appeal and the prosecution in the trial court of the Eleventh Judicial Circuit, in and for Miami-Dade County. The Petitioner was the appellee in the Third District Court of Appeal, and the defendant in the trial court. In this brief, Petitioner will be referred to as he appears before this Court.

The letters "R." and "SR." refer to the record on appeal and supplemental record, respectively, which have been forwarded to this Court by the clerk of the Third District Court of Appeal. "PB" refers to Petitioner's brief on the merits. Unless otherwise indicated, all emphasis has been supplied by Respondent.

STATEMENT OF THE CASE AND FACTS

The State is unable to accept the Petitioner's Statement of the Case and Facts due to its argumentative nature, and sets forth the following facts:

The Petitioner, Hugo Miranda, was arrested on April 19, 2011 for alleged aggravated stalking of two minor female victims, for which Petitioner was subsequently charged in case number F11-10299. (R. 6-8). He was brought to first appearance hearing on April 20, 2011. At that time bond was set at $5,000 and a stay-away-order in favor of the alleged victims was issued. Petitioner posted bond and was released on April 26, 2011. On April 27, 2011, only one day after his release, Petitioner allegedly approached these same victims again, in violation of his pretrial release orders. This incident resulted in the Petitioner being arrested and charged, again, with aggravated stalking on May 1, 2011, in case number F11-11433. (R. 196-199). While Petitioner was in custody, he was arrested on a third case involving these same victims, i.e., case number F11-11510, which incident occurred on April 29, 2011. (R. 206-209). Pursuant to the State's motion to revoke bond, the trial determined that Petitioner violated his pretrial release conditions as to the initial case (F11-10299) and was held in jail on no bond. (R. 1-2).

Thereafter, on October 19, 2011, the defense filed with the trial court an *ex parte* competency evaluation conducted by Dr. Gustavo Fonte, who opined that Petitioner was incompetent to proceed. (R. 74). Dr. Fonte did not believe Petitioner

to suffer from a mental illness or mental retardation; rather, his incompetence was due to intellectual, emotional, and educational deficits. (R. 75). Upon receipt of this evaluation, the trial court appointed two additional doctors to evaluate Petitioner, Dr. Elsa Marban and Dr. Marie DeFeo. (R. 74). Dr. Marban opined that Petitioner was incompetent to proceed. Her opinion was that the Petitioner was incompetent due to his concrete thinking style and deficits in his cognitive abilities. Dr. Marban also deduced from her interview with Petitioner that he had no formal education either in the United States or Guatemala (his country of origin). Dr. Marban concurred that Petitioner did not suffer from a mental illness. (R. 14-19). Dr. DeFeo's opinion was also that Petitioner was incompetent to proceed due to a provisional diagnosis of Adjustment Disorder and Borderline Intellectual Functioning. (R. 20). According to Dr. DeFeo, the Petitioner completed the third grade in Guatemala and never learned to read or write. Again, according to Dr. DeFeo, Petitioner never went to school in the United States, even though he entered the country when he was 15 years old. (R. 20-24).

On December 13, 2011, a hearing was conducted wherein both the State and defense stipulated that Petitioner was incompetent. (R. 3, 192). The trial court accepted the stipulations and accordingly found Petitioner to be incompetent to proceed. (R. 25, 183). The issue then became placement. (R. 183-84, 186).

At hearings held before the trial court on January 5 and January10, 2012, the State argued *ore tenus* that Petitioner was being properly held in jail for violation of his pretrial release conditions, and that the trial court should order treatment in jail pursuant to Graham v. Jenne, 837 So. 2d 554, 559 (Fla. 4th DCA 2003). (R. 95-99, 103-104). At the January 5th hearing, a correctional officer advised the trial court that the jail had an educational program for adults and juveniles. (R. 98-99). Thereafter, on January 10, 2012, the trial court granted the State's request to require Petitioner's competency restoration treatment at the jail, orally ruling:

> THE COURT: …We obviously have to bring this issue to a conclusion. I find that [the] case of Graham v. Jenning (sic), 833 So. 2d 55, 4th DCA decision of 2003, where the facts of that case deal with a deaf mute defendant, an underlying issue is that that defendant was not mentally ill or retarded, which is the same as Mr. Miranda who has not been found to be mentally ill or mentally retarded. However, the case and that 4th DCA says that the defendant incompetent to proceed on those grounds, where he's not mentally ill, mentally retarded. He may be still incompetent to proceed, but then the Court also has the authority to order treatment at a custodial facility, a custodial facility in this case being obviously the county jail.
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> Now, Mr. Miranda, as I understand it, he understands what's going on, he just doesn't want the judicial process. He may not be able to read, he may not be able to write, but I think, I think many of the defendants who appear before the Court really don't have a college education or even a high school education; some of them, their writing is very deficient, even the reading is very, very deficient. And in this particular case, we have three different cases of aggravated stalking. Now, whether stalking or just an inconvenience to the young women involved, but the charges are aggravated stalking and I really can't take the risk that I will release Mr. Miranda and then he's upset, he's

> angry, the situation escalates, and there is some serious harm coming to these young women. So **my ruling is that I'm going to order him detained, and that he would be given whatever treatment is necessary in the custodial facility so that he can understand the process that he's going through. And when he's restored to competency on that level, then we'll proceed**. …
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> * * *
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> THE COURT: Because I don't want to take the risk of these young women being assaulted, being attacked. And then it turns out that this type of situation many times escalates, and I don't know what's going to happen if I let him out. He's the one being charged. The women are the victims. I don't want to put the victims in further danger. So based on that holding of Graham versus Jenning (sic), I am saying **I'm ordering treatment for the Defendant at the custodial facility, treatment being so that he can understand the process that he's involved in**.
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> * * *
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> **So I will find that the Defendant is incompetent, even though he's not mentally retarded, he's not mentally ill. Based on this particular case I'm still ordering him to be treated at the custodial facility**.

(R. 107-108, 110-111) (emphasis added).

On January 19, 2012, Petitioner filed a motion for reconsideration of the trial court's oral ruling and a motion for release. (R. 26-33). Miami- Dade County also filed a written motion for reconsideration of the trial court's oral ruling. (R. 34-46). The State filed a response to the County's motion. (SR. 1-6). At the hearing held on this motion, the trial court, over the prosecutor's "strenuous" objection, announced that it had "no choice" but to release Petitioner based on the Supreme Court's decision in Jackson v. Indiana, 406 U.S. 715 (1972). (R. 167-168, 172).

Subsequently, on January 23, 2013, the trial court entered its Order Granting Reconsideration and Petitioner's Motion for Release, and Denying State's Motion for Treatment in Jail. (R. 47-52). In this order the trial court reiterated that the "only available lawful option left to the Court [was] to release" Petitioner pursuant to Fla. R. Crim. P. 3.212(d). (R. 51). Accordingly, although it was "definitely reluctant" to do so, the court released Petitioner on his own recognizance with orders to: (1) return to court with contact information regarding his residence; (2) stay away from the victims; and (3) enroll in literacy classes within 30 days in an effort to restore his competency. (R. 51-52, 167-168). The State strongly objected to this ruling because it was based on experts' reports to which the State had only stipulated for purposes of Petitioner's present competency, not future competency. (R. 167-172). Subsequent to Petitioner's release, an alias capias issued for Petitioner's arrest based on his failure to appear in court on April 15, 2013, which capias is currently outstanding as to each of Petitioner's three cases.[1]

On the State's appeal of the trial court's order, the Third District Court of Appeal held that the trial court erred by finding Petitioner incompetent to proceed without holding an evidentiary hearing to determine whether Petitioner was competent to proceed; if Petitioner was incompetent to proceed, whether he met

[1] In light of Petitioner's fugitive status, the State is filing simultaneously with this merits brief a Motion to Dismiss Review or, In the Alternative, to Relinquish Jurisdiction to the

the criteria for involuntary commitment; what treatment or training, if any, Petitioner needed to attain a level of competency to proceed; how long the treatment or training would take; and what facilities were available to provide the necessary treatment or training. Additionally, contrary to the trial court's finding, the district court ruled that there is no requirement that a defendant must be released if he/she is incompetent to proceed but does not meet the criteria for involuntary commitment under Chapter 916, since Florida Rule of Criminal Procedure 3.212(c) provides a trial court with other options. The district court consequently reversed the trial court's orders and remanded for an evidentiary hearing. State v. Miranda, 137 So. 3d 1133, 1143 (Fla. 3d DCA 2014). Specifically, the district court instructed that, prior to this hearing, the trial court was to order evaluating experts to perform appropriate testing and/or evaluation of Petitioner to determine the nature and extent of Petitioner's intellectual and cognitive deficits. Id. at 1143. The district court further ordered that the experts' reports or their testimony at the evidentiary hearing address the criteria for involuntary pretrial commitment. If the trial court finds that Petitioner does not meet the criteria for involuntary commitment, the district court instructed that the trial court must consider: the type of treatment/training being recommended to enable Petitioner to attain competency; how long such treatment/training would

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Trial Court.

take; the availability of the appropriate treatment/training in and out of custody; and whether, with the appropriate treatment, Petitioner is likely to attain competency in the reasonably foreseeable future. Id. at 1143. After making these findings, the trial court may commit the Petitioner or order that he receive treatment or training. Id.

Thereafter, Petitioner filed his notice to invoke the discretionary jurisdiction of this Court based on alleged express and direct conflict between the Third District's decision and the district court decisions in Dept. of Children & Families v. Gilliland, 947 So. 2d 1262 (Fla. 5th DCA 2007); Oren v. Judd, 940 So. 2d 1271 (Fla. 2nd DCA 2006); Douse v. State, 930 So. 2d 838 (Fla. 4th DCA 2006); and Mosher v. State, 876 So. 2d 1230 (Fla. 1st DCA 2004). Petitioner also sought to invoke this Court's discretionary jurisdiction on the ground that the district court's decision expressly affected a class of constitutional officers, namely county sheriffs.

Upon this Court's acceptance of jurisdiction of this case by order dated December 17, 2014, and the filing of Petitioner's initial brief on the merits, this answer brief followed.

SUMMARY OF THE ARGUMENT

In view of the options provided for in Florida Rule of Criminal Procedure 3.212(c), the district court properly held that there is no requirement that a defendant, who is being lawfully detained in jail for violating his conditions of his pretrial release conditions, must be released where he is incompetent to proceed but does not meet the criteria for involuntary commitment under chapter 916. Regardless of whether Petitioner met the criteria for commitment under subsection (d) of rule 3.212, the trial court was not required to release Petitioner given the applicability of the option in subsection (c)(2) and the indisputable fact that Petitioner was being lawfully detained in jail due to violating his pretrial release conditions. In light of this lawful basis for pretrial detention and the interests of both the State and Petitioner, the State maintains that the as-applied constitutional claims raised by Petitioner are inapposite.

ARGUMENT

I. IN VIEW OF THE OPTIONS PROVIDED FOR IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.212(c), THE DISTRICT COURT PROPERLY HELD THAT THERE IS NO REQUIREMENT THAT A DEFENDANT, WHO IS BEING LAWFULLY DETAINED IN JAIL FOR VIOLATING HIS PRETRIAL RELEASE CONDITIONS, MUST BE RELEASED WHERE HE IS INCOMPETENT TO PROCEED BUT DOES NOT MEET THE CRITERIA FOR INVOLUNTARY COMMITMENT UNDER CHAPTER 916.

Jurisdiction

The State initially maintains that there exists no legitimate basis for this Court to exercise discretionary review of this case. The Third District's decision below does not expressly and directly conflict with the district court decisions in Dept. of Children & Families v. Gilliland, 947 So. 2d 1262 (Fla. 5th DCA 2007); Oren v. Judd, 940 So. 2d 1271 (Fla. 2nd DCA 2006); Douse v. State, 930 So. 2d 838 (Fla. 4th DCA 2006); and Mosher v. State, 876 So. 2d 1230 (Fla. 1st DCA 2004). In stark contrast to the facts here, i.e., where *no* evidentiary hearing took place to address the question of whether Miranda was likely to attain competency from treatment, it is clear that evidentiary hearings *were* conducted in Mosher, Oren, and Gilliland showing that there existed no substantial probability those defendants would regain competency to proceed in the reasonably foreseeable future and, therefore, that they did not meet the criteria for involuntary commitment required by § 916.13(1)(c), Fla. Stat. And, in Douse, the Fourth

District addressed *only* the options available to a trial court under § 916.17(2), Fla. Stat., and did not even mention, much less apply, the options provided in Florida Rule of Criminal Procedure 3.212 that were addressed in the Third District's instant decision. Furthermore, the Third District's decision does not expressly affect county sheriffs, as Petitioner alleges. As such, this Court is properly without discretionary jurisdiction to review this case.

While not challenging the district court's ruling with regard to the need for an evidentiary hearing, Petitioner asserts in his initial brief on the merits that the Third District incorrectly interpreted rule 3.212 as providing a third option to the trial court, to-wit: that the trial court could have ordered Petitioner to receive treatment at the jail since he was incarcerated there due to violating his initial pretrial release conditions. (PB. 19-20). Petitioner's argument is premised on the rules of construction as well as three constitutional grounds. For the following reasons, the State maintains that the district court's decision should not be disturbed.

Competency Treatment for Incarcerated Defendants

Petitioner mischaracterizes Florida case law as mandating a "commitment or release" rule. (PB 22-23). However, he fails to recognize that no such rule applies to a criminal defendant, like Petitioner here, who is already being validly detained in jail and who has been found to be incompetent but not yet subject to attempts at

restoration. Indeed, Petitioner's argument appears to hinge entirely on the erroneous belief that no valid reason existed for his incarceration in jail. Petitioner concedes that competency treatment in jail can be reasonable to avoid a person's decompensation, and that subsection (c) of rule 3.212 should be construed to require that the defendant is being legally held in jail for some reason other than treatment. (PB. 27-28).

Here, based on the State's motion to revoke bond filed pursuant to Fla. R. Crim. P. 3.131(f) due to Petitioner's violation of the conditions of his pretrial release, the trial court necessarily had good cause to detain Petitioner in jail without bond pending the disposition of his criminal charges. (R. 1-2). In light of the trial court's order revoking his bond, Petitioner *was* being legally held in jail for some reason other than treatment – specifically, for violating his initial pretrial release conditions by committing a new stalking offense. See § 903.0471, Fla. Stat. (2011); Williams v. Spears, 814 So. 2d 1167, 1169 (Fla. 3d DCA 2002) (if a defendant is at liberty on pretrial release for first crime, and he commits a new crime, the court may revoke the pretrial release for first crime, and may refuse any further pretrial release in first crime), rev. denied, 888 So. 2d 20 (Fla. 2004). Furthermore, whether or not Petitioner met the criteria for commitment under subsection (d) of rule 3.212, the trial court was not required to release Petitioner given the applicability of the option in subsection (c)(2) and the indisputable fact

that Petitioner was already being lawfully detained in jail due to violating his pretrial release conditions.

Not to be forgotten in this analysis is the State's substantial interest in restoring an individual accused of a serious crime so that he may be brought to trial. In Sell v. United States, 539 U.S. 166 (2003), the U.S. Supreme Court held that the government may involuntary administer antipsychotic drugs for restoration so long as treatment is medically appropriate, substantially unlikely to have side effects that undermine fairness of trial, and is necessary to further the State's substantial interest, taking into account less intrusive alternatives. Id., 539 U.S. at 179-80. The court in Sell recognized that the government's interest in bringing an individual accused of a serious crime is so "important" that, under some circumstances, it may outweigh even an individual's fundamental constitutional right against the highly intrusive forced medication of antipsychotic drugs. Id., 539 U.S. at 180-81.

Unlike Sell, the State does not seek to forcibly medicate the Petitioner against his will in order to restore him to competency. Rather, the State seeks to pursue this substantial interest by teaching Petitioner basic literacy skills, including the ability to read and write, which will serve him in life even after the conclusion of his case and sentence. This "treatment" for restoration could not be any less intrusive where there are clearly no negative side effects on the physical and

mental well-being of the Petitioner – only positive ones which will drastically improve the nature and quality of Petitioner's life in the long term – and where we impose the very same requirement on our own children every day, § 1003.21, Fla. Stat. (2011) (requiring attendance at school for children ages 6 through 16). Where the intrusiveness of this "treatment" on Petitioner is next to none, the State's prosecutorial interests far outweigh Petitioner's interest in being free from such "treatment"[2].

Lastly, the Third District clearly did not suggest that the trial court should order that the Petitioner returned to jail for treatment. Rather, it concluded:

> Based on the trial court's findings after reviewing these reports, it may commit the defendant or order that he receive treatment or training. As the defendant has been released by the trial court on pretrial release, albeit under the mistaken impression that it was required to do so pursuant to statute, **we do not suggest that his pretrial release be revoked** unless the defendant fails to submit himself for any further evaluations ordered by the trial court or if he again violates the conditions of his release.

[2] To the extent that counsel for Petitioner may find it advantageous to argue that under no circumstances should Petitioner receive remedial education in an effort to delay proceedings until discharge is ultimately achieved, the Court should consider whether appointment of a guardian advocate is necessary. §§ 744.1012; 744.3085; 744.3215, Fla. Stat. (2011). Though counsel's position may be beneficial to Petitioner in the short run by avoiding a lengthy sentence, such a position is contrary the best interests of Petitioner in the long run who would undoubtedly benefit from learning how to read and write.

Miranda, 137 So. 3d at 1143 (emphasis added). As such, whether Rule 3.212 permits an individual to receive treatment for restoration in jail is no longer at issue in this case and may only become an issue in the event that Petitioner fails to submit for evaluations or violates conditions of his release.

In short, in light of the lawful basis for Petitioner's pretrial detention and the interests of both the State and Petitioner, the State maintains that the as-applied constitutional claims raised by Petitioner are essentially academic. Nevertheless, the State will address each claim in turn.

Rules of Construction

Petitioner's argument fails to demonstrate how application of the rules of construction require reversal of the district court's holding. It is clear from the plain language of rule 3.212(c)(2) that if a defendant is incarcerated, as Petitioner was here due to his violation of the initial pretrial release conditions, the trial court may order that he be treated "at the custodial facility," i.e., jail.[3] Given the plain

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[3] Fla. R. Crim. P. 3.212(c)(2), provides:

> **(c) Commitment on Finding of Incompetence.** If the court finds the defendant is incompetent to proceed, or that the defendant is competent to proceed but that the defendant's competence depends on the continuation of appropriate treatment for a mental illness or mental retardation, the court shall consider issues relating to treatment necessary to restore or maintain the defendant's competence to proceed.
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> * * *

and ordinary meaning of the language contained in this subsection of the rule, there exists no need to resort to the rules of construction. See Capers v. State, 678 So. 2d 330, 332 (Fla. 1996) (plain meaning of statutory language is first consideration of statutory construction).

In its order granting the Petitioner's motion for reconsideration of the trial court's oral ruling of January 10, 2012, the trial court ultimately determined that

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> **(2)** If the defendant is incarcerated, the court may order treatment to be administered at the custodial facility or may order the defendant transferred to another facility for treatment or may commit the defendant as provided in subdivision (3).
>
> (3) A defendant may be committed for treatment to restore a defendant's competence to proceed if the court finds that:
>
> (A) the defendant meets the criteria for commitment as set forth by statute;
>
> (B) there is a substantial probability that the mental illness or mental retardation causing the defendant's incompetence will respond to treatment and that the defendant will regain competency to proceed in the reasonably foreseeable future;
>
> (C) treatment appropriate for restoration of the defendant's competence to proceed is available; and
>
> (D) no appropriate treatment alternative less restrictive than that involving commitment is available.

(Emphasis added.).

there were "only two options: Civil commitment under the Baker Act [4] or release pursuant to Fla. R. Crim. P. 3.212(d)" for incompetent defendants, like Petitioner, who did not presently meet the criteria for involuntary forensic hospitalization under Chapter 916, Fla. Stat. (R. 51). As the Third District properly held however, this was an incorrect ruling that ignored the plain language contained in rule 3.212(c)(2).

It is evident that the Fourth District in Graham v. Jenne, 837 So. 2d 554, 559 (Fla. 4th DCA 2003), similarly interpreted this subsection of the rule by observing that an incompetent defendant who satisfies the requirements for pretrial detention may be treated at the facility where he is being held prior to trial. That the Fourth District's reference to rule 3.212(c)(2) in Graham may have been *dicta* based on the facts of that case does not mean that its statement that an incompetent defendant who satisfies the requirements for pretrial detention may be treated at his current custodial facility is an incorrect interpretation of rule 3.212. The Fourth District reasonably based this statement on the plain language of rule 3.212(c)(2), which, as quoted *supra* at n. 2, expressly grants the trial court discretion to order treatment for an incarcerated incompetent defendant "to be administered at the custodial facility."

[4] Section 394.467(1), Fla. Stat. (2011).

When the language of rule 3.212(c)(2) is read in *pari materia* with the language of rule 3.212(c)(3), it is clear that there exists distinct options available to the trial court under each subsection. Under subsection (c)(2), the trial court simply may "order treatment" for an incompetent defendant who is already incarcerated in jail, which the trial court initially did in this case. On the other hand, under subsection (c)(3), a trial court may "commit" a defendant for treatment to restore competency under Chapter 916, which did not occur here. Thus, there exists a clear distinction between merely "ordering treatment" of a defendant at his custodial facility and involuntarily "committing" a defendant for treatment under Chapter 916. Contrary to Petitioner's assertions, subsection (c)(2) does not allow a trial court the option to order "commitment to jail for treatment." Nor did the district court's opinion below so hold.

The plain language of rule 3.212(c) does not outline a "commitment or release" rule, as Petitioner suggests. Given that all of the language in rule 3.212(c)(2) is permissive, the trial court is afforded broad discretion to order treatment at either the custodial facility or another facility, or to order commitment. The State submits that this is reasonable, as the trial judge, not the legislature, is in the best position to determine the best course of action based on the opinions provided by the forensic experts and the unique needs of each defendant, including the necessary appropriate treatment.

Petitioner's reading of Fla. R. Crim. P. 3.212 requires conditional release if Petitioner otherwise does not meet the criteria for commitment, **without regard to that unreasonable danger**. (PB. at 24). This interpretation is contrary to the intent of the drafters of the rule. See Fla. R. Crim. P. 3.212(c), Committee Note, 1980 Adoption ("This rule provides for the disposition of the defendant who falls under the third of the alternatives listed above, that is, one who is incompetent to stand trial but does not meet the provisions for involuntary hospitalization. It is meant to provide **as great a flexibility as possible** for the trial judge in handling such defendant." (emphasis added)); Fla. R. Crim. P. 3.212(c)(2), Committee Note, 1988 Amendment ("This provision provides for treatment in a **custodial facility** or other available community residential program." (emphasis added)).

As this case exemplifies, a defendant who is "incarcerated" and later found to be incompetent may not qualify for "commitment" or "release." In that circumstance, rule 3.212(c)(2) applies to permit the trial court to exercise its discretion and order "outpatient treatment" to a defendant who is incarcerated. Where, as here, a defendant poses a risk of physical harm to persons in the community by violating the terms of his pretrial release, the trial court may impose pretrial detention and order appropriate treatment in jail under that rule.

Petitioner's interpretation of rule 3.212 mandating either commitment or release would lead to absurd results. It would require an incompetent but

dangerous criminal defendant who is potentially restorable to be released from custody where commitment was inappropriate, but where treatment/training in jail could achieve restoration. See State v. Atkinson, 831 So. 2d 172, 174 (Fla. 2002) ("A basic tenet of statutory construction compels a court to interpret a statute so as to avoid a construction that would result in unreasonable, harsh, or absurd consequences.").

Separation of Powers

Petitioner next contends that the treatment-in-jail option provided to a trial judge in rule 3.212(c)(2) unduly invades the province of the legislature in violation of the separation of powers doctrine. Petitioner posits that the "level of treatment" an incompetent defendant can receive is a "substantive" issue for the legislature as opposed to a procedural one that is appropriate for this Court. (PB. 30). The State asserts, however, that, rule 3.212(c) merely sets forth the procedure the trial court should follow in dealing with defendants who are incompetent or whose competence depends on the continuation of appropriate treatment. Significantly, the rule does not conflict in any way with the substantive law provided in Chapter 916, which addresses the treatment and training of mentally ill defendants who have been found incompetent to proceed. Indeed, this Court's intent in amending rule 3.212, including new subsection 3.212(c)(2) that provided an option for outpatient treatment with incarceration, was to "conform" the rules to recent

amendments to Chapter 394 (civil commitment statute) and Chapter 916 (forensic commitment statute). See In re Amendments to Florida Rules of Criminal Procedure, 536 So. 2d 992 (Fla. 1988) ("The rule changes proposed by the committee, and approved by the Court are intended, *inter alia,* to conform the Florida Rules of Criminal Procedure to the 1985 enactment of the 'Florida Mental Health Act' amending chapters 394 and 916 of Florida Statutes.").

The substantive law set forth in Chapter 916 does not prohibit competency restoration of defendants incarcerated in jail. To the contrary, a review of § 916.105, Fla. Stat., and § 916.107(1)(a), Fla. Stat. (2011), reflects an intent on the part of the legislature to allow for such treatment of incompetent defendants in jail. § 916.105, Fla. Stat. (2011) provides in pertinent part:

> **916.105 Legislative intent. -**
>
> (1) **It is the intent of the Legislature that the Department of Children and Families and the Agency for Persons with Disabilities, as appropriate, establish, locate, and maintain separate and secure forensic facilities and programs for the treatment or training of defendants who have been charged with a felony and who have been found to be incompetent to proceed due to their mental illness, intellectual disability, or autism, or who have been acquitted of a felony by reason of insanity, and who, while still under the jurisdiction of the committing court, are committed to the department or agency under this chapter.** Such facilities must be sufficient to accommodate the number of defendants committed under the conditions noted above. Except for those defendants found by the department or agency to be appropriate for treatment or training in a civil facility or program pursuant to subsection (3), forensic facilities must be designed and administered

so that ingress and egress, together with other requirements of this chapter, may be strictly controlled by staff responsible for security in order to protect the defendant, facility personnel, other clients, and citizens in adjacent communities.

(2) It is the intent of the Legislature that treatment or training programs for defendants who are found to have mental illness, intellectual disability, or autism and are involuntarily committed to the department or agency, and who are still under the jurisdiction of the committing court, be provided in a manner, subject to security requirements and other mandates of this chapter, which ensures the rights of the defendants as provided in this chapter.

(3) It is the intent of the Legislature that evaluation and services to defendants who have mental illness, intellectual disability, or autism be provided in community settings, in community residential facilities, or in civil facilities, whenever this is a feasible alternative to treatment or training in a state forensic facility.

Additionally, § 916.107(1)(a), Fla. Stat., provides:

In a criminal case involving a client who has been adjudicated incompetent to proceed or not guilty by reason of insanity, a jail may be used as an emergency facility for up to 15 days following the date the department or agency receives a completed copy of the court commitment order containing all documentation required by the applicable Florida Rules of Criminal Procedure. **For a forensic client who is held in a jail awaiting admission to a facility of the department or agency**, **evaluation and treatment or training may be provided in the jail by the local community mental health provider for mental health services, by the developmental disabilities program for persons with intellectual disability or autism, the client's physician or psychologist, or any other appropriate program until the client is transferred to a civil or forensic facility**.

(Emphasis added.)

Here, although a commitment order was not entered due to the trial court's belief that Petitioner did not meet the criteria for commitment under chapter 916 based on the reports it had reviewed, this conclusion was made in the absence of an evidentiary hearing that addressed all of the pertinent criteria, which the district court held was error. Regardless, the foregoing statutory provisions reflect a clear intent on the part of the Florida Legislature to allow for the treatment of incompetent defendants in jail, whether or not they are yet formally "committed" to DCF. Through its enactment of these statutes, the legislature has exercised its legislative function to permit the additional option of restoration treatment in jail. Accordingly, this option, which is provided in rule 3.212(c)(2), does not violate the separation of powers doctrine. See Dept. of Children and Family Services v. Leons, 948 So. 2d 988, 991-92 (Fla. 4th DCA 2007) (trial court order directing DCF to provide mental health treatment of persons found to be incompetent while in jail awaiting placement in a forensic facility did not violate separation of powers; order was in compliance with existing law).

Equal Protection and Due Process

Petitioner additionally challenges the Third District's decision on equal protection and due process grounds, and relies on the Supreme Court's decision in Jackson v. Indiana, 406 U.S. 715 (1972), wherein the High Court held that:

> [A] person who is charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.

406 U.S. at 738 (emphasis added). As the Third District properly held, however, Florida's pretrial treatment of incompetent defendants the does not run afoul of the Supreme Court's holding in Jackson because such defendants, "whether or not they are committed, never run the risk of indefinite custodial restraint based solely on their incompetency." State v. Miranda, 137 So. 3d 1133, 1142 (Fla. 3d DCA 2014). The district court rejected the notion that Jackson supported the blanket proposition that a criminal defendant must be released if he does not meet the criteria for involuntary commitment. Id. at 1141. The district court explained that, under the Florida rules of procedure:

> A defendant who is involuntarily committed for treatment to enable him to obtain competency to proceed must meet the statutory requirements: there must be a substantial probability that the mental illness or retardation (intellectual disability) that is causing his incompetence will respond to treatment or training and the defendant will become competent to proceed in the reasonably foreseeable future; the appropriate treatment or training must be available; and there must be no less restrictive alternative available. Fla. R. Crim. P. 3.121(c)(3). If a mentally ill defendant charged with a felony does not attain competency in five years and there is not a substantial probability that he will become competent to proceed in the foreseeable future, the charges against him must be dismissed without

> prejudice to the State to refile should the defendant be declared competent in the future, and the defendant must either be civilly committed or released. *See* Fla. R. Crim. P. 3.213(a)(1). On the other hand,
>
> > [i]f the incompetency to stand trial or to proceed is due to retardation [intellectual disability] or autism, the court shall dismiss the charges within a reasonable time after such determination, not to exceed 2 years for felony charges ..., unless the court specifies in its order the reasons for believing that the defendant will become competent within the foreseeable future and specifies the time within which the defendant is expected to become competent. The dismissal shall be without prejudice to the state to refile should the defendant be declared competent to proceed in the future.
>
> Fla. R. Crim. P. 3.213(a)(2) (emphasis added).

The district court therefore concluded that, "**Because Florida's rules concerning incompetent defendants do not allow for indefinite detention and provide the requisite constitutional safeguards, a trial court may exercise any of the options in rule 3.212 under appropriate circumstances**." Miranda, 137 So. 3d at 1143. As the district court recognized, Petitioner was not being incarcerated in jail solely on account of his incompetency to proceed. Id. at 1142. Rather, he was being held in jail due to the fact that he had violated his pretrial release conditions in case number F11-10299, where he was charged with aggravated stalking of two teenage girls, by committing new, similar stalking offenses in case numbers F11-11433 and F11-11510. Furthermore, there was no determination made by the trial court that there was not a "substantial probability" Petitioner could be restored to

competency to proceed in the reasonably foreseeable future. No evidentiary hearing was held on this issue. And, the doctors' reports on this issue were conflicting. Although Dr. Marban opined that Petitioner was not restorable to competency, Dr. Fonte stated that he met the criteria for competency training with individuals with similar intellectual limitations, and Dr. DeFeo likewise admitted that such competency restoration was possible by her statement that, "Restoration training should be tailored to meet his (Petitioner's) needs, in that information should be provide[d] in a repetitive and concrete format to facilitate learning." (R. 24, 27). Additionally, the State did not stipulate to the experts' reports as to the issue of future competency. Based on these circumstances, the Third District properly concluded that the trial judge had more than "only two options," i.e., civil commitment or release, as he believed, in that the court, pursuant to rule 3.212(c)(2), additionally had the options of ordering Petitioner to receive treatment either at his current custodial facility, the county jail, or at a different custodial facility. Miranda, 137 So. 3d at 1141-1142.

Moreover, the district court's instant decision countenances no "unequal" commitment, treatment and release standards, as Petitioner alleges. (PB. 35). Unlike the petitioner in Jackson, Petitioner here was not subjected to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to others not charged with an offense. As the Third District

concluded, Florida's rules provide the "requisite constitutional safeguards." Miranda, 137 So. 3d at 1143. Accordingly, the provisions for pretrial treatment of incompetent defendants in the Florida rules are not violative of equal protection or due process of law.

II. PETITIONER'S DUE PROCESS CLAIM CONCERNING THE QUESTION OF WHO WOULD BE RESPONSIBLE FOR PROVIDING TREATMENT TO DEFENDANT IN JAIL IS PREMATURE, SPECULATIVE, AND, IN ANY EVENT, UNPRESERVED SINCE IT WAS NOT ASSERTED BELOW.

Petitioner additionally argues that the Third District's opinion allows for treatment in jail without specifying who would be legally and financially responsible for such treatment, which he submits results in a due process violation. Given that no evidentiary hearing was conducted in the trial court, the State submits that the constitutional issue raised by Petitioner is premature and speculative. Miranda, 137 So. 3d at 1143. Certainly, in light of the conflicting experts' reports, it is entirely unknown what type of competency treatment or training is necessary or appropriate for Petitioner, and what entity could provide such treatment.

It is possible that, on remand, the trial court will determine that Petitioner does qualify for commitment under the supervision of the Department of Children and Families ("DCF"), thereby making this issue moot. Just as likely, the trial court may determine that Petitioner does qualify for continued "conditional release" under Fla. R. Crim. P. 3.212(d) and order Petitioner to participate in outpatient treatment. The issue of treatment during incarceration will be resurrected only if Petitioner does not comply with the terms of his conditional release. Miranda, 137 So. 3d at 1143.

Accordingly, there presently exists no adequate record upon which this Court can determine the alleged due process claim. Further factual development as to the nature and scope of the necessary competency treatment, including the responsible provider, would be needed before a court could appropriately determine this issue. This can be accomplished at the evidentiary hearing ordered by the Third District on remand. See State v. Mozo, 655 So. 2d 1115, 1117 (Fla. 1995) (holding as a "settled principle of constitutional law" that courts should avoid constitutional issues unnecessary to the decision of a case); see also Gonzalez v. State, 982 So. 2d 77, 79 (Fla. 2d DCA 2008) (certain constitutional challenges to a statute or rule permit, and may even require, a level of fact-finding at the trial court level) and cases cited therein.

Depending on how the trial court fashions the appropriate treatment for Petitioner, any number of fiscal sources could be drawn upon to pay for the treatment needed, including DCF, the County, and the court system.

Moreover, this precise constitutional claim made by Petitioner was not put before the trial court, nor was it presented to the district court. See Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court."). While the County raised the issue concerning its financial responsibility to provide competency restoration treatment in jail before the trial court, Petitioner

did not assert any due process violation as to this issue. (R. 26-41). Nor could he properly assert such a claim. Indeed, because Petitioner has no standing to assert a due process claim on behalf of Miami-Dade County, the Department of Children and Families ("DCF"), or any other economically-affected entity, this financial issue is not properly before this Court. Cf. E.M.J. v. Dept. of Children & Families, 124 So. 3d 246 (Fla. 1st DCA 2013) (holding that mother did not have standing to assert due process claim on behalf of non-appealing adoptive parent); Hodge v. State, 629 So. 2d 973, 974 (Fla. 5th DCA 1993) (holding that defendant lacked standing to raise a codefendant's constitutional challenge to suppress evidence against him).

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court to APPROVE the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits was furnished by email to John Eddy Morrison, Asst. Public Defender, Counsel for Petitioner, at appellatedefender@pdmiami.com, on this 20th day of April, 2015.

s/ Douglas J. Glaid
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the 14- point Times New Roman font used in this brief complies with the requirements of Fla. R. App. P. 9.210(a)(2).

s/ Douglas J. Glaid
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