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 DISTRICT COURT OF APPEAL, THIRD DISTRICT

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

The state's answer brief repeatedly raises two defenses of the Third DCA's opinion. First, the state assumes that, even though Mr. Miranda could not be tried because he was incompetent to stand trial, he was nevertheless being held pending trial and that the right to pretrial release, and exceptions thereto, still applied. Case law from both the Fourth and Fifth DCAs is to the contrary. Moreover, if this Court were to rule that the right to pretrial release applies even after a finding of incompetency, defendants would be able to bond out of state forensic hospitals.

Second, the state's brief repeatedly refers to the trial court refusing to hold a necessary hearing. In reality, the trial court refused to grant a continuance. Additionally, a hearing on restorability would have been purposeless. Forensic commitment requires the two criteria for civil commitment—mental illness and danger to self or others—plus a showing of restorability. The state had already stipulated to experts' reports that Mr. Miranda did not meet the first two criteria. Whether or not he met the third criteria of restorability would have been meaningless. Finally, as this is an appeal from an interlocutory order, the trial court still has jurisdiction, and the state could have had any evidentiary hearing it wanted at any time by simply putting it on calendar.

The state's point-by-point arguments all depend on these two claims. In the midst of this repetitious argument, however, this Court should note that lack of any

no real response to the Equal Protection claim.

Finally, the state's non-response to the lack any agency responsible for treatment in jail is telling. The state attempts to avoid the issue by claiming a lack of preservation, but preservation requirements apply only to the appellant, here the state. The state also unhelpfully suggests that this Court not look at this issue until a later date. Whether treatment in jails can actually exist is a fact this Court needs to consider in deciding if the rules of procedure allow such an order.

ARGUMENT

I.

THE TRIAL COURT FOLLOWED THE CORRECT LAW. IF A DEFENDANT CANNOT BE COMMITTED TO A HOSPITAL FOR TREATMENT, THAT DEFENDANT CANNOT COMMITTED TO JAIL FOR TREATMENT.

A. The State's Two Main Arguments Do Not Withstand Scrutiny.

1. Because an Incompetent Defendant is not being held pending trial, the right to pretrial release, and exceptions thereto, do not apply.

Much of the state's answer brief centers on the assertion that holding Mr. Miranda in jail was legal because he violated a condition of pretrial release by allegedly committing a new crime. The unexamined assumption is that the right to pretrial release, and the exceptions allowing revocation of bond, still apply even after a finding of incompetence. This assumption is wrong, as the Fourth DCA explained in *Douse*:

> In response the State argued that "regardless of chapter 916" the court had the authority under section 903.0471 to revoke an incompetent defendant's release upon the commission of a new offense. The trial court said: "Just because he's under [chapter] 916 and has been released pursuant to that doesn't mean that it's ... sort of a get out of jail card free for any subsequent crimes." The defense responded that with the finding that he is incompetent, the trial court has but two options: either impose modified conditions of release or involuntarily commit defendant for treatment.
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> . . . .
>
> We must disagree with the trial judge and the State. The finding of incompetency places this defendant into a different statutory category. For *competent* defendants, section 903.0471 does indeed authorize revocation of release and the imposition of pretrial detention upon the commission of a new offense while on pretrial release from a pending charge. But where, as here, a defendant has been found incompetent to proceed and is then released upon conditions and commits a new offense, section 916.17(2) leaves the trial judge with only two options: modify the conditions of release or involuntarily commit the defendant to DCFS for treatment.

Douse v. State, 930 So. 2d 838, 839 (Fla. 4th DCA 2006) (emphasis in original).

The Fourth DCA in *Douse* was right, and that decision directly conflicts with the Third DCA decision in this case.[1] "It is a well-established principle of law that 'a person whose mental condition is such that he lacks the capacity to

[1] The state claims there is no conflict because *Douse* cites the statutes and the opinion in the Third DCA below cites the rule. (State's brf. at 11). Conflict is not based on what authorities an opinion cites for a holding, but the irreconcilable holdings. *Crossley v. State*, 596 So. 2d 447, 449 (Fla. 1992) ("Because the court below in the instant case reached the opposite result on controlling facts which, if not virtually identical, more strongly dictated a [result], we concluded that a conflict of decisions existed that warranted accepting jurisdiction.").

understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.'" *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997) (quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975)); *see also* Fla. R. Crim. P. 3.210(a) ("A person accused of an offense . . . who is mentally incompetent to proceed at any material stage of a criminal proceeding shall not be proceeded against while incompetent."). Accordingly, an incompetent defendant is not being held for trial—no trial is possible. An incompetent defendant is being held for restoration to competency.

The constitutional right to pretrial release, and the exceptions allowing detention, apply only if the person is pretrial or pending trial. Art. I. § 14, Fla. Const. ("every person charged with a crime . . . shall be entitled to pretrial release on reasonable conditions."); § 903.0471, Fla. Stat. (2014) (" . . . a court may, on its own motion, revoke pretrial relase and order pretrial detention . . . ."); § 907.041, Fla. Stat. (2014) (titled "Pretrial detention and release" and providing that "[t]he court may order pretrial detention if it finds . . . ."); *State v. Arthur*, 390 So. 2d 717, 720 (Fla. 1980) ("[B]efore release on bail pending trial can ever be denied, the state must come forward with a showing that the proof of guilt is evident . . . .").

The primary obligation of someone on pretrial release, and the guarantee made by the surety, is "that the person will appear to answer the charges before the court in which he or she may be prosecuted and submit to the orders and process of

the court and will not depart without leave." Fla. R. Crim. P. 3.131(e)(2). If no trial is pending or possible due to incompetency, a defendant cannot "appear to answer the charges." Therefore, the constitutional right to reasonable conditions of release, and the exceptions to that right, do not apply to an incompetent defendant. In recognition of that fact, trial courts routinely vacate the conditions of pretrial release and discharge any surities after a finding of incompetency, reinstating bond only if a defendant is restored to competency. *See Cameron v. State*, 127 So. 3d 549, 549 (Fla. 4th DCA 2012) (trial court did not have authority to *sua sponte* modify pretrial release conditions in the process of reinstating them after restoration to competency).

In another case where an incompetent defendant was accused of committing new crimes while on release, the Fifth DCA agreed with *Douse*:

> [It] is a violation of essential fairness to detain an accused in a jail indefinitely when he is incompetent to proceed. While so detained he cannot be tried precisely because he is incompetent to proceed, yet jailhouse treatment for his incompetency is unlikely. It is illogical to hold that an incompetent defendant who commits a new offense thereby loses the protection afforded to those who are incapable of defending themselves. If that were the case, such persons could be detained indefinitely without any finding of guilt.

Paolercio v. State, 129 So. 3d 1174, 1176 (Fla. 5th DCA 2014) (quoting *Douse*, 930 So. 2d at 840). That case also points out that: "In such cases, the defendant, by virtue of his incompetence, would not be afforded the protections of the speedy

trial rule, nor would he be able to enter a plea to resolve the charges. Indeed, he would have fewer protections than a competent defendant and would remain suspended in custodial limbo until the State dismissed the charges." *Id*. at 1176.

The Fifth DCA is also correct. Pretrial detention is not punishment for violating the conditions of pretrial release; punishment happens only after trial and conviction. *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979) ("For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). Pretrial detention under section 903.0471, Florida Statues, requires nothing more than a probable cause affidavit. No adversarial hearing, no evidence, and the relying entirely on hearsay is permissible. *See Simeus v. Rombosk*, 100 So. 3d 2, 4 (Fla. 2d DCA 2011).

For competent defendants, pretrial detention does not become punishment because of the right to speedy trial. A defendant who is incompetent, or even one whose competency is being determined, is "unavailable" for trial. *Zirkle v. State*, 410 So. 2d 948, 949 (Fla. 3d DCA 1982); *Isley v. State*, 354 So. 2d 457, 457 (Fla. 1st DCA 1978); *Flicker v. State*, 352 So. 2d 165, 166 (Fla. 1st DCA 1977). The state cannot have it both ways. If an incompetent defendant is unavailable for trial under the speedy trial rule, that same incompetent defendant is not being held pending trial under the exceptions allowing pretrial detention.

The state disagrees, but it has not thought through the consequences of its position. The vast majority of incompetent defendants have their rights to pretrial release intact. If the right to pretrial release, with all of its exceptions, still applies after a finding of incompetence, then a defendant (or more likely, the defendant's family) could post bond to have an incompetent defendant released from a state psychiatric hospital—an illogical result at best. Again, the state cannot have it both ways. Either *Douse* is right and the rules of pretrial release and detention do not apply after a finding of competency, or those rules do apply and most defendants would have a constitutional right to reasonable conditions of release.

2. The trial court refused to grant the state a continuance for a meaningless hearing that the state could still calendar any time is wishes.

The state's second claim is that the trial court denied it an important hearing and that would have revealed some important information. The state's claims are not supported by the facts. First, the trial court did not deny the state any hearing—it denied the state a continuance. Specifically, the state asked the trial court "for this case to be rescheduled for the doctors to come in and testify" and "for time to bring the doctors in so they can testify as to whether or not he's restorable." (R. 142, 145; *see also* R. 143). As the trial judge's order noted, "the State could have had the doctors present at the January 19, 2012 hearing to testify if necessary." (R. 50). The difference between denying a hearing and denying a continuance is an important difference in law, albeit one that eluded the DCA

below: "The denial of a motion for continuance should not be reversed unless there has been a palpable abuse of discretion; this abuse must clearly and affirmatively appear in the record." *Geralds v. State*, 674 So. 2d 96, 99 (Fla. 1996). The trial court had already experienced the state's practice of asking for hearings solely as a delaying tactic. (R. 177-83). If the state had wanted an evidentiary hearing, it would have subpoenaed the doctors for the Jan. 19 hearing.

Second, the issue of restorability is a red herring in this case. Suppose for the sake of argument that the trial court had granted the continuance and the state later proved that Mr. Miranda was restorable to competency in jail, contrary to the experts' opinions. (SR. 5, 6; R. 18, 24). Even with these assumptions, the state has still stipulated that Mr. Miranda does not meet the other critera for ordinary, civil commitment. By statute, restorability is the third element required for a forensic commitment to a hospital. § 916.13(1)(c), Fla. Stat.(2014). None of the experts thought that Mr. Miranda met the first two criteria for commitment. (R. 18, 24; SR. 4). The state stipulated to their reports. (R. 183). Therefore, if the trial court held a hearing, and the state somehow demonstrated that Mr. Miranda were restorable, nothing would change—he would still not be committable.

Making all assumptions in favor of the state only highlights the Equal Protection issue: the trial court would be committing a criminal defendant to jail for treatment when that defendant does not meet the criteria for civil commitment,

as the trial court did before it relented. (R. 107-08). These assumptions also highlight the Separation of Powers issue of whether a procedural rule can create such a substantive option resulting in loss of liberty. The state quibbles with whether that is "commiting" a defendant to jail for treatment or "ordering treatment" in jail. (State's brf. at 18). Semantics aside, the order deprives a person of liberty to provide mental healthcare.

Third, this case is an appeal from an interlocutory order and the trial court still has jurisdiction. The state could have an hearing on restorability any time it wanted—it just has to place it on calendar. This fact is why Mr. Miranda is unconcerned about the Third DCA's order for a hearing. The state accomplished with an appeal what it could be done by calling the judge's judicial assistant.[2]

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[2] The state's motion to dismiss suggests that Mr. Miranda has absconded and that no such hearing would be possible. Absconding is different than failing to appear. *Z.B. v. Department of Juvenile Justice*, 938 So. 2d 584, 585-86 (Fla. 1st DCA 2006). Here, the state presents no evidence that Mr. Miranda has left Florida, is hiding from police, or even that any efforts have been made to look for him.

This issue is not just capable of repetition yet evading review, it is an issue that continually repeats itself. In undersigned counsel's personal experience, two such cases, *State v. Lopez*, F03-31836 (Fla. 11th Cir.), *State v. Francois*, F06-41951 (Fla. 11th Cir.), involved deaf clients who, because they never really learned language (they were not raised in the United States), had no understanding of the abstract concepts necessary to understand the justice system. Mr. Lopez was in the Dade County Jail for at least two years, and Mr. Francois spent four years there. In another case, *State v. Homero Perez*, F10-31747, an incompetent defendant was held in jail for about two months because his benefits, needed to pay for an assisted living facility, had been suspended. More recently, a trial judge, citing the *Miranda* opinion, committed an incompetent defendant to jail "for treatment" not because of the mental health issues, but simply because the State Attorney had

B. The balance of the state's answer brief depends on the above two arguments.

The argument that there is no conflict relies on the "lack of a hearing" argument. (State's brief at 10-11). The next section, "Competency Treatment for Incarcerated Defendants," relies on the assumption that pretrial release still applies to incompetent defendants. (State's brief at 11- 15). The state's assertions about helping Mr. Miranda with basic literacy skills (State's brief at 13) assumes both that it is otherwise legal to detain him pending trial, and that education would be beneficial for someone with Mr. Miranda's limited cognitive abilities. As the trial

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disqualified herself and, without any prosecutor appearing before the court, the trial judge was unwilling to commit the defendant to DCF. *State v. Garganelly*, F14-6023, F15-3170 (Fla. 11th Cir.).

The biggest impact of this Court's decision, however, will be on the county courts. Many chronically mentally ill citizens are arrested for misdemeanors arising out of their disease and resulting homelessness. Finding mental health programs for such treatment-resistant individuals is very difficult. Pursuant to this Court's decision in *Onwu v. State*, 692 So. 2d 881 (Fla. 1997), county court judges do not have authority under Chapter 916 to commit defendants to the Department of Children and Families. *Id*. at 882-83. In one test case in Miami-Dade County, a county court judge ordered such a defendant treated in jail.[2] In that case, *G.H. v. State*, F12-27132 (Fla. 11th Jud. Cir. Nov. 9, 2012), the Circuit Court granted a petition for habeas corpus. Had the DCA opinion in this been in existence at that time, the outcome would have gone the other way. Given the number of such cases, at least once a day a Miami-Dade County Court judge would be committing defendants to jail for "treatment" under Rule 3.212(c), circumventing *Onwu*.

The state understands the importance of this issue in other cases, as demonstrated by its own actions. The alias capias warrant was issued on April 15, 2013, almost a year before the Third DCA's opinion in this case, during which the state did not dismiss its appeal as moot. Only after securing a favorable opinion that it can use in other cases did the state suggest mootness.

court observed below, none of the experts suggested that was true. (R. 135).

Under the section labled "Rules of Construction," the state again relies on an assumption that the scheme for pretrial release and detention still applies to an incompetent defendant. (State's brf. at 15-20). The legislature has already addressed the state's concerns about public safety. (State's brf. at 19). The legislature established the criteria for when a person can lose their liberty because of public safety concerns: proof of mental illness plus danger to self or others. § 394.467(1), Fla. Stat. (2014) (a/k/a the "Baker Act"). Those are the same criteria, plus restorability, necessary for a forensic commitment. § 916.13((1), Fla. Stat. (2014). If someone is mentally ill and dangerous, even if they are not forensically commitable because they are non-restorable, they can be civilly commited if they meet the other criteria. *Mosher v. State*, 876 So. 2d 1230, 1232 n.2 (Fla. 1st DCA 2004) ("The Baker Act contemplates involuntary placement while criminal charges are pending."). This procedure is not hypothetical—the State Attorney in the Eleventh Judicial Circuit routinely files Baker Act petitions against criminal defendants. That was not done in this case only because the experts agreed Mr. Miranda did not meet the criteria for commitment (civil or forensic), including danger to self or others, and the state stipulated to those reports. (SR. 4; R. 18, 20, 24, 183).

In the section labeled "Seperation of Powers" the state returns to the

"absence of an evidentiary hearing" argument. (State's brf. at 23). The state's own quotations of the legislative intent make clear the the Department of Children and Families ("DCF") and the Agency for Persons with Disabilities ("ADP") are to "establish, locate, and maintain separeat and secure forensic facilities and programs for the treatment and training treatment of defendants," not county sheriffs and not county jails. § 916.105(1), Fla. Stat. (2014). Additionally, that language makes clear that such in-patient treatment is only for defendants who "are committed to the department or agency under this chapter." *Id*. Mr. Miranda did not meet commitment criteria. A subsequent subsection of that same statute makes clear the Legislature's preference "that evaluation and services to defendant who have mentall 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." § 916.105(3), Fla. Stat. (2014). Notably absent from that list is "jails."

Additionally, section 916.107(1)(a), Florida Statutes, allows treatment in jails during only the fifteen days after commitment pending transfer to DCF or ADP. The term in that statute "forensic client" "means any defendant who has been committed to the department or agency." § 916.106(9), Fla. Stat. (2014). Because of that commitment, DCF (and presumably APD), not the sheriffs or jails, provide that treatment for those fifteen days. *Department of Children and Family*

Services v. Leons, 948 So. 2d 988, (Fla. 4th DCA 2007).

"The principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another," applies to all of these statutes. *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996). Section 916.105 mentions treatment by DCF and ADP, but not by the country sheriffs in jail and only after commitment. Section 916.107(1)(a), Florida Statutes, refers to treatment in jail by DCF or ADP, but again not by the sheriffs and only if the defendant has been committed. The only conclusion is that the legislature excluded treatment in jails under any other conditions. The Third DCA's opinion would allow courts to order treatment in jails for defendants who cannot be committed. The separation of powers problem is manifest.

The next section of the state's brief conjoins "Equal Protection and Due Process" to divert attention from the fact that its response to the Equal Protection claim is a single, short paragraph that relies on the Third DCA's due process analysis. (State's brf. at 26-27). The state asserts: "Petitioner here was not subjected to a more lenient commitment standard and to a more stringent standard of release than those generally appicalbe to others not charged with an offense." (State's brf. at 26). That statement is true only because the trial court relented and did not commit Mr. Miranda to jail for treatment. But the trial court did that initially (R. 107-08), and the Third DCA would allow it to do so again. The state's

brief contains no analysis why this would not violate Equal Protection.

In its Due Process argument, the state reverts to both the assumption that pretrial release and detention rules apply and the lack of an evidentiary hearing. (State's brf. 25-26).

II.
THERE IS NO TREATMENT IN JAIL, LEADING TO BOTH FISCAL PROBLEMS FOR THE SHERIFFS AND A DUE PROCESS VIOLATION.

The state's response to this issue is both confused and unhelpful. The confusion is that the state would require Mr. Miranda, the appellee, to preserve this issue. (State's brf. 29-30). Here, the state is the appellant seeking to overturn the trial court's order and Mr. Miranda is the appellee. Because a trial court can be right for any reason:

> it follows that an appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below. It stands to reason that the appellee can present any argument supported by the record even if not expressly asserted in the lower court.

Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999). The record in this case supports this issue, especially given Miami-Dade County's objection to providing treatment in jail for Mr. Miranda. (R. 34-45, 129-35).

The state's response is unhelpful because this Court must decide whether its rule of procedure allows judges to order treatment in jail for incompetent

defendants who do not meet the criteria for commitment. An important data point in that decision should be whether any agency is responsible for providing such treatment if it is ordered. At best, the state makes vague assurances that "any number of fiscal sources could be drawn upon to pay for the treatment needed," (State's brf. at 29), without naming a single one. This Court needs to look at the real-world, practical issue of whether treatment actually can be provided in jails before deciding whether trial judges can turn county jails into mental health treatment facilities using those rules of procedure.

CONCLUSION

Jails are not, and should not be used as, mental health treatment facilities.

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered on June 30, 2015, by email to counsel for the State of Florida, the Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, CrimAppMIA@myfloridalegal.com.

I HEREBY CERTIFY that this brief is printed in 14-point Times New Roman.

Respectfully submitted,
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