CASE NO: SC18-681

In the Supreme Court of Florida

STATE OF FLORIDA,
Petitioner,

v.

VERNSON EDWARD DORTCH,
Respondent.

ON DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL
DCA Nos.: 4D16-2815 & 4D16-2816

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent Vernson Edward Dortch was the defendant in the Circuit Court of the Nineteenth Judicial Circuit, in and for Okeechobee County, and the appellant in the Fourth District Court of Appeal. Petitioner, the State of Florida, was the appellee. In this brief, the parties will be referred to as they appear before this Court. The following symbols will be used:

"R1"	Record on appeal, followed by the appropriate volume and page numbers for Case No. 4D16-2815.
"R2"	Record on appeal, followed by the appropriate volume and page numbers for Case No. 4D16-2816.
"ST"	Supplemental Transcript of change-of-plea hearing in the lower tribunal, which was included as a supplement in both appellate cases. Transcript references are to the page numbers indicated by the court reporter's notation on the upper right corner of each page of the record.
"T."	Transcript of the sentencing hearing in the lower tribunal, which is identical in both appellate cases.
"PDF"	The PDF citation to the accompanying record as filed in the Fourth District Court of Appeal.
"Pet. App"	Petitioner's appendix containing the slip opinion.

INTRODUCTION

This case is before this Court because of an express and direct conflict on the same issue of law: whether a trial court's failure to observe the mandatory procedures in Florida Rules of Criminal Procedure 3.210-3.212—by neither conducting a competency hearing nor making a competency determination—constitutes fundamental error that can be raised on direct appeal from a plea. Proceeding en banc, the Fourth District Court of Appeal unanimously found the error to be fundamental, such that it need not be raised in a motion to withdraw plea. However, the Fourth District certified conflict with *Pressley v. State*, 227 So. 3d 573 (Fla. 1st DCA 2017); *Garcia-Manriquez v. State*, 146 So. 3d 134 (Fla. 3d DCA 2014); and *Hicks v. State*, 915 So. 2d 740 (Fla. 5th DCA 2005).

Because "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of . . . due process," *Drope v. Missouri*, 420 U.S. 162, 172 (1975), Respondent requests that this Court approve the Fourth District's decision below. Holding otherwise would excuse a trial court's failure to follow mandatory rules of procedure—which are designed to safeguard criminal defendant's due process rights—while requiring potentially incompetent defendants to seek postconviction relief without the assistance of counsel. That is not, as the Fourth District recognized, "a remedy designed to do justice." (Pet. App. 3).

STATEMENT OF THE CASE AND FACTS

Respondent Vernson Edward Dortch accepts the statement of the case and facts contained in the Initial Brief subject to any additions, corrections, and/or clarifications contained herein and developed throughout the argument.

Case No. 47-2015-CF-000526A (4D16-2815)

Respondent was charged in Case No. 47-2015-CF-00526A with (I-V) five counts of possession of a firearm or ammunition by a convicted felon; (VI-IX) four counts of dealing in stolen property; and (X-XIII) four counts of giving false information to a pawnbroker (less than $300). (R1. 14-16; PDF. 22-24).

On October 30, 2015, Respondent's assistant public defender—Stanley Glenn—filed a written motion under Florida Rule of Criminal Procedure 3.210(b), requesting the appointment of an expert to examine Respondent's competency. (R1. 20-25; PDF. 28-33). In the motion, Mr. Glenn asserted he had "reasonable grounds to believe [Respondent wa]s incompetent to proceed," though defense counsel did not delve into the specifics. (R1. 20; PDF. 28). The motion also stated that Respondent "waive[d] the required 20 day hearing" under Florida Rule of Criminal Procedure 3.210(b). (R1. 20; PDF. 28).

Three days later, the trial court entered an order requiring the examination of Respondent's competency and an assessment of recommended treatment. (R1. 26-29; PDF. 34-37). The order appointed an expert and provided as follows:

> If the Doctor is appointed for the purpose of determining competency, pursuant to Fla. R. Crim. P. 3.210(b), a hearing shall [be] held within 20 days of the filing of this motion. **The Defendant hereby waives this provision and shall schedule a competency hearing pursuant to the Florida Rules of Criminal Procedure should it become necessary, with notice to the State and Court.**

(R1. 27; PDF. 35) (Emphasis in original).

Mr. Glenn never scheduled a competency hearing nor was one conducted. The trial court did not enter an order finding Respondent competent or incompetent. The appointed expert's reports and findings are not included in the appellate record. Rather, according to the docket, the parties' next court appearance was a docket call on January 6, 2016—far more than 20 days after the competency evaluation order's issuance. (PDF. 7).[1]

Case No. 47-2016-CF000140 (4D16-2816)

Months later, on March 29, 2016, the State filed an information in Case No. 47-2016-CF000140, charging Respondent with (I) aggravated assault by a detainee with a deadly weapon and (II) introducing contraband into a county detention facility. (R2. 10-11; PDF. 15-16). By that point, Respondent was being represented in both of his pending cases by the same assistant public defender—Armand Murach. (R1. 35; R2. 9). Mr. Murach did not move for a competency evaluation in Respondent's latter case.

[1] The PDF citation refers to the progress docket in 4D16-2815.

The Joint Plea

On August 3, 2016, Respondent entered an open plea to resolve both cases. (R1. 44-47; R2. 23-26). For Case No. 47-2015-CF000526A, Respondent pled no contest to Count I (possession of a firearm by a convicted felon) and Count VI (dealing in stolen property), with the understanding that the State would enter a nolle prosse on the case's remaining charges. (R1. 44; ST. 3-4, 7-8). For Case 47-2016-CF000140, Respondent pled no contest to both charges alleged in the information. (R1. 44). Respondent's plea form reflected that he entered his plea against the advice of his assistant public defender. (R1. 44; R2. 23; ST. 6-7).

The trial court conducted a change-of-plea hearing in open court. (ST.). At the hearing, the trial court informed Respondent that it was "required to impose a three-year minimum mandatory sentence on the possession of firearm by a convicted felon count." (ST. 3-4). Though Respondent indicated he understood, Respondent asked for mercy and requested that "whatever charge the time carry to have it placed on probation" such that he would "serve no time." (ST. 4). The trial court informed Respondent that there would be no guarantee regarding the sentence he would receive, (ST. 8), but that the three-year minimum mandatory sentence was required. (ST. 12). Respondent again indicated he understood. Thereafter, the trial court conducted a colloquy, accepted Respondent plea as free and voluntary, and set the matter for a sentencing hearing. (ST. 17).

The trial court conducted a joint sentencing hearing for both cases on August 15, 2016. (T.). After considering the testimony and arguments, the trial court sentenced Respondent to concurrent sentences in both cases. (R2. 46). For Case No. 47-2015-CF000526A, the trial court sentenced Respondent on Count I (possession of a firearm by a convicted felon) to 10 years imprisonment with a 3 year minimum mandatory and Count VI (Dealing in Stolen Property) to 10 years imprisonment, with both counts running concurrently. (R1. 68-69). For Case 47-2016-CF000140, the trial court sentenced Respondent on Count I (aggravated assault by a detainee with a deadly weapon) to 10 years imprisonment and on Count II (introducing contraband into a county detention facility) to 5 years imprisonment, with both counts running concurrently. (R2. 46-47).

The Fourth District Court of Appeal's Decision

On direct appeal, the Fourth District Court of Appeal *sua sponte* proceeded en banc and unanimously agreed with Respondent that the trial court fundamentally erred by failing to hold a competency hearing or make a competency determination. (Pet. App. 1). The Fourth District explained that "[o]nce a trial court has reasonable grounds to believe the defendant is incompetent and orders an examination, it must hold a hearing, and it must enter a written order on the issue." (Pet. App. 2). "Failure to do so is fundamental error [that] requires reversal." (Pet. App. 2).

Receding from its prior decisions,[2] the Fourth District held that "it is not necessary that a defendant first file a motion to withdraw plea under Florida Rule of Appellate procedure 9.140(2)(A) in cases where the trial court has reasonable grounds to believe the defendant is incompetent and has ordered an examination." (Pet. App. 3). That is because the rules of criminal procedure "mandate a hearing and order under such circumstances," regardless "of whether the defendant has previously been declared incompetent." (Pet. App. 3). As the Fourth District explained, holding otherwise would lead to unjust results (Pet. App. 3):

> To require a criminal defendant, who may be incompetent, to file a motion to withdraw a plea before raising the issue on appeal is unwarranted. If a defendant is incompetent, confining him to post-conviction relief, without the assistance of counsel, is not a remedy designed to do justice.

The Fourth District certified that its decision was in conflict with *Pressley v. State*, 227 So. 3d 573 (Fla. 1st DCA 2017); *Garcia-Manriquez v.* State, 146 So. 3d 134 (Fla. 3d DCA 2014); and *Hicks v. State*, 915 So. 2d 740 (Fla. 5th DCA 2005). Thereafter, this Court accepted jurisdiction to resolve the conflict.

[2] The Fourth District receded from *Burns v. State*, 884 So. 2d 1010 (Fla. 4th DCA 2004); *Williams v. State*, 178 So. 3d 531 (Fla. 4th DCA 2015); and *R.C. v. State*, 157 So. 3d 458 (Fla. 4th DCA 2015). (Pet. App. 3).

SUMMARY OF THE ARGUMENT

Because a trial court's failure to observe the procedures outlined by Florida Rules of Criminal Procedure 3.210–3.212 deprives a defendant of due process, the Fourth District Court of Appeal correctly held that fundamental error occurred in this case and that no motion to withdraw plea was necessary to preserve the issue for direct appeal. When Florida Rule of Criminal Procedure 3.210(b) is invoked, the accompanying competency hearing and competency cannot be waived nor stipulated to. This is because written reports from experts are only advisory to the trial court, which itself retains the responsibility of the competency decision.

The nature of competency goes to the heart of whether a defendant has the capacity to make a legally binding decision. By failing to conduct a competency hearing or make a competency determination, as required by law, the trial court denied Respondent due process. "[H]armful due process violations are fundamental error, which need not be preserved for review." *Del Valle v. State*, 80 So. 3d 999, 1004 (Fla. 2011). The Fourth District Court of Appeal correctly intervened. The alternative would result in potentially incompetent defendants being required to seek post-conviction relief without the assistance of counsel, which "is not a remedy designed to do justice." (Pet. App. 3).

ARGUMENT

THIS COURT SHOULD APPROVE THE FOURTH DISTRICT COURT OF APPEAL'S DECISION BELOW AND HOLD THAT A TRIAL COURT'S FAILURE TO OBSERVE THE MANDATORY REQUIREMENTS SET FORTH BY FLORIDA RULES OF CRIMINAL PROCEDURE 3.210-3.212 CONSTITUTES FUNDAMENTAL ERROR THAT CAN BE RAISED FOR THE FIRST TIME ON DIRECT APPEAL FROM A PLEA

This Court should approve the Fourth District Court of Appeal's en banc decision and hold that fundamental error occurs when a trial court fails to observe the procedures required by Florida Rules of Criminal Procedure 3.210-3.212 prior to accepting a criminal defendant's plea. Because a trial court's failure to observe the procedures outlined by Rules 3.210–3.212 deprives a defendant of due process, *see Dougherty v. State*, 149 So. 3d 672, 679 (Fla. 2014), the Fourth District correctly held that the error is fundamental, such that it may be raised for the first time on appeal. *See F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003) ("[A]n error is deemed fundamental when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process." (quotation omitted)).

Contrary to the State's assertions, Respondent's situation is different "than that of a typical defendant filing a motion to withdraw plea on grounds the plea was involuntary and unintelligent." (IB. 12). That is because "[t]he nature of competency goes to the heart of whether a defendant has the capacity to make a

cogent, legally binding decision." *Sheheane v. State*, 228 So. 3d 1178, 1181 (Fla. 1st DCA 2017). Furthermore, defendants "ha[ve] a procedural due process right to an independent finding of competency once a competency hearing is required." *Carrion v. State*, 235 So. 3d 1051, 1053 (Fla. 2d DCA 2018) (quotation omitted).

"To find, as the trial court did here, there were reasonable grounds to believe a defendant may be incompetent, and then allow that same potentially incompetent individual to waive his right to determine competency, does not comport with due process." *Sheheane*, 228 So. 3d at 1181. Accordingly, appellate courts must be able to immediately intervene, as the Fourth District did below. Otherwise, incompetent defendants will be forced to seek post-conviction relief without the assistance of counsel, which "is not a remedy designed to do justice." (Pet. App. 3).

Standard of Review

"Whether the circuit court fundamentally erred in failing to hold a competency hearing presents a pure question of law subject to *de novo* review." *A.L.Y. v. State*, 212 So. 3d 399, 402 (Fla. 4th DCA 2017) (citation omitted); *see also State v. Smith*, 241 So. 3d 53, 55 (Fla. 2018) (recognizing that fundamental error claims are reviewed de novo); *Cromartie v. State*, 70 So. 3d 559, 563 (Fla. 2011) (standard of review for pure questions of law is de novo).

Analysis

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits states from trying and convicting mentally incompetent defendants." *Barnes v. State*, 124 So. 3d 904, 915 (Fla. 2013). Because competency implicates a constitutional right, the United States Supreme Court has recognized that "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope v. Missouri*, 420 U.S. 162, 172 (1975); *see also Pate v. Robinson*, 383 U.S. 375, 378 (1966) ("[T]he conviction of an accused person while he is legally incompetent violates due process . . . . ").

In Florida, "a criminal prosecution may not move forward at any material stage of a criminal proceeding against a defendant who is incompetent to proceed." *Caraballo v. State*, 39 So. 3d 1234, 1252 (Fla. 2010). The entry of a plea is a material stage.[3] *See* Fla. R. Crim. P. 3.210(a)(1). "The test used to determine the defendant's competency is whether the defendant has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and

[3] A "material stage" of a criminal prosecution includes the trial, pretrial hearings on factual issues where the defendant might testify, entry of a plea, contempt hearings, violation of probation hearings, sentencing, and other matters where the mental competence of the defendant is necessary for a just resolution of the issues being considered. *See Bynum v. State*, 247 So. 3d 601, 603 (Fla. 5th DCA 2018).

whether he has a rational as well as factual understanding of the proceedings against him." *Maxwell v. State*, 974 So. 2d 505, 509 (Fla. 5th DCA 2008) (q.o.).

"Florida Rules of Criminal Procedure 3.210–3.212 were enacted to set forth the required competency hearing procedures for determining whether a defendant is competent to proceed or has been restored to competency."[4] *Dougherty v. State*, 149 So. 3d 672, 677 (Fla. 2014). If a trial court has "reasonable ground to believe that the defendant is not mentally competent to proceed," Rule 3.210(b) requires the court to conduct a competency hearing. *See Boggs v. State*, 575 So. 2d 1274, 1275 (Fla. 1991). The procedures set forth by Rule 3.210(b) are as follows:

> (b) Motion for Examination. If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and may order the defendant to be examined by no more than 3 experts, as needed, prior to the date of the hearing. Attorneys for the state and the defendant may be present at any examination ordered by the court.

By incorporating the terms "shall" and "immediately," Rule 3.210(b) imparts that the competency hearing is mandatory. *See Dougherty*, 149 So. 3d at

[4] The framework created by these rules (1) allows for the appointment of experts to evaluate a defendant that may be incompetent, Fla. R. Crim. P. 3.211; (2) lists the factors that experts must consider when determining the defendant's competency, Fla. R. Crim. P. 3.211(b); (3) compels experts to provide written findings, Fla. R. Crim. P. 3.211(c); and (4) provides for a hearing after which the defendant will be adjudged competent or incompetent to proceed, Fla. R. Crim. P. 3.212 (b)-(c).

677. Because "defendant[s] ha[ve] a procedural due process right to an independent finding of competency once a competency hearing is required," *Carrion v. State*, 235 So. 3d 1051, 1053 (Fla. 2d DCA 2018) (quotation omitted), "a defendant may not waive his or her right to a competency hearing." *Williams v. State*, 169 So. 3d 221, 223 (Fla. 2d DCA 2015). "[E]ven an *express* waiver of a hearing does not comport with [Rules 3.210-3.212]." *Deferrell v. State*, 199 So. 3d 1056, 1061 (Fla. 4th DCA 2016); *Williams*, 169 So. 3d at 222.

After an evaluation of the defendant is ordered, the trial court's competency determination "must be 'an independent legal' one 'after considering the expert testimony or reports and other relevant factors.'" *Moreno v. State*, 232 So. 3d 1133, 1136 (Fla. 3d DCA 2017) (citing *Shakes v. State*, 185 So.3d 679, 681 (Fla. 2d DCA 2016)). While the court may appoint experts, their "reports are advisory to the trial court, which itself retains the responsibility of the [competency] decision." *Deferrell*, 199 So. 3d at 1061. Finally, the trial court must enter a written order determining the defendant's competency. *See* Fla. R. Crim. P. 3.212(b).

There is no dispute that, in the instant case, the trial court failed in its obligations under Rules 3.210-3.212 by ordering an evaluation of Respondent's competency but then accepting his plea without conducting a competency hearing or making a competency determination. Had Respondent proceeded to trial, every district court of appeal would agree that the trial court's procedural missteps

comprised fundamental error. *See, e.g.*, *Sheheane*, 228 So. 3d at 1181; *Carrion v. State*, 235 So. 3d 1051, 1053 (Fla. 2d DCA 2018); *Hernandez v. State*, 250 So. 3d 183, 187 (Fla. 3d DCA 2018); *Baker v. State*, 221 So. 3d 637 (Fla. 4th DCA 2017); *Lewinson v. State*, 230 So. 3d 901 (Fla. 5th DCA 2017).

The wrinkle in this case is that Respondent entered into an open plea. Because Respondent—who may have been and may still be incompetent—did not move to withdraw his plea below, the State seeks to have his conviction affirmed. (IB. 12). Alternatively, the State argues that a finding "of fundamental error is premature before a retroactive determination of competency is completed," (IB. 16), and that the proper remedy for the instant error is for "appellate courts to relinquish jurisdiction for the trial court to conduct a competency hearing." (IB. 19). Respondent will respond to these three arguments in that order.

1. Criminal Defendants Can Raise Fundamental Error Claims on Direct Appeal from an Open Plea of Guilty or No Contest

"As with defendants who went to trial, defendants who plead guilty have a constitutional right to appeal, although the issues that they can raise on appeal are limited." *Leonard v. State*, 760 So. 2d 114, 116 (Fla. 2000). In *Robinson v. State*, 373 So. 2d 898, 902 (Fla. 1979), this Court held that, "[o]nce a defendant enters a plea of guilty, the only points available for an appeal concern actions which took place contemporaneously with the plea." This Court then enumerated four

circumstances that, "[t]o [the court's] knowledge," would be the proper subject of an appeal from a plea: "(1) the subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea." *Id.*

In conformity with *Robinson*, Florida Rule of Criminal Procedure 9.140(b)(2)(A)(ii) provides that a defendant who pleads guilty or no contest "may otherwise directly appeal[5] only (a) the lower tribunal's lack of subject matter jurisdiction; (b) a violation of the plea agreement, if preserved by motion to withdraw; (c) an involuntary plea, if preserved by a motion to withdraw plea; (d) a sentencing error, if preserved; or (e) as otherwise provided by law." *Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103, 1105 (Fla. 1996).

The last exception—"as otherwise provided by law"—is a catchall provision that "leaves open the possibility that there may be a statutory or constitutional right to appeal in circumstances not specifically listed in the rule." Phillip J. Padavano, 2 *Florida Appellate Practice* § 27:16 (2017 ed.). Typically, this exception has been applied in situations of fundamental error such as where an open plea violates

[5] A defendant who pleads guilty or no contest may expressly reserve the right to appeal a prior dispositive order of the trial court. *See* Fla. R. Crim. P. 9.140(b)(2)(A)(i). However, a competency determination is not dispositive. *See, e.g., Delisa v. State*, 910 So. 2d 418, 421 (Fla. 4th DCA 2005) ("[C]ompetency is not a dispositive issue since it only precludes the trial from immediately proceeding."); *Williams v. State*, 134 So. 3d 975, 976 (Fla. 1st DCA 2012).

double jeopardy,[6] where the trial court fails to inquire as to whether there is a factual basis for a plea,[7] or where the record affirmatively demonstrates the crime to which the defendant pled guilty could not have occurred.[8]

In several instances, this Court has recognized unpreserved errors—other than the four enumerated in *Robinson*—that are cognizable on direct appeal from a plea. For example, in *Novaton v. State*, 634 So. 2d 607 (Fla. 1994), this Court held that a defendant on direct appeal from a plea may challenge convictions based upon double jeopardy grounds "when (a) the plea is a general plea as distinguished from a plea bargain; (b) the double jeopardy violation is apparent from the record; and (c) there is nothing in the record to indicate a waiver of the double jeopardy violation."[9] *Id.* at 609. Notably, this Court did not require that the double jeopardy

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[6] *See Kilmartin v. State*, 848 So. 2d 1222, 1224 (Fla. 1st DCA 2003); *Griffith v. State*, 208 So. 3d 1208 (Fla. 5th DCA 2017); *Holubek v. State*, 173 So. 3d 1114, 1116 (Fla. 5th DCA 2015); *Hernandez v. State*, 112 So. 3d 572 (Fla. 4th DCA 2013); *Bailey v. State*, 21 So. 3d 147 (Fla. 5th DCA 2009); *Sibley v. State*, 955 So. 2d 1222, 1225 (Fla. 5th DCA 2007).

[7] *See Otero v. State*, 696 So. 2d 442, 442 (Fla. 4th DCA 1997); *Dydek v. State*, 400 So. 2d 1255 (Fla. 2d DCA 1981).

[8] *See Miller v. State*, 988 So. 2d 138 (Fla. 1st DCA 2008); *Bruce v. State*, 993 So. 2d 155, 156 (Fla. 1st DCA 2008).

[9] This Court approved the result reached in two cases—*Kurtz v. State*, 564 So. 2d 519 (Fla. 2d DCA 1990), and *Arnold v. State*, 578 So. 2d 515 (Fla. 4th DCA 1991)—where defendants entered open pleas and successfully challenged their convictions on direct appeal based on double jeopardy. *Novaton*, 634 So. 2d at 609.

violation be preserved through a motion to withdraw plea, presumably because double jeopardy violations constitute fundamental error.[10]

More analogous to the instant case is *State v. T.G.*, 800 So. 2d 204 (Fla. 2001). In that case, a juvenile defendant pled no contest to felony charges and violating community control. *Id.* at 206. The defendant was without counsel at both the plea and disposition hearings. *Id.* At the plea hearing, the trial court asked the defendant "if he wished to have an attorney appointed for him." *Id.* When the defendant "replied in the negative, . . . no further inquiry was made." *Id.* Later at the disposition hearing, the trial court made no inquiry at all regarding counsel. *Id.*

On direct appeal, the defendant argued the trial court violated his constitutional right to counsel by failing to comply with the procedures set forth by Florida Rule of Juvenile Procedure 8.165.[11] *Id.* This Court accepted jurisdiction to resolve whether "a juvenile's failure to preserve error with a motion to withdraw plea precludes appellate review of the plea." *Id.* To that end, this Court held that *Robinson* applies to juvenile proceedings "and, therefore, juveniles pleading guilty

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[10] *See Lippman v. State*, 633 So. 2d 1061, 1064 (Fla. 1994) ("The prohibition against double jeopardy is 'fundamental.'"); *Grant v. State*, 770 So. 2d 655, 657 n.4 (Fla. 2000) ("[A]n alleged double jeopardy violation . . . would constitute fundamental error which need not be preserved to be considered on appeal.").

[11] Rule 8.165 "provide[d] that counsel is required at each stage of the proceedings, a juvenile defendant must be advised of his right to counsel, and if he chooses to waive counsel, the court must conduct a thorough inquiry to determine if the waiver was freely and intelligently made." *T.G.*, 800 So. 2d at 210-11.

or nolo contendere may directly appeal an involuntary plea only if it is preserved by a motion to withdraw plea in the trial court." *T.G.*, 800 So. 2d at 210.

Although the defendant did not move to withdraw the plea, this Court held "fundamental error occurred in the . . . case because [the] defendant was denied his right to counsel." *Id.* Rejecting the State's argument that "what occurred in the . . . case was not denial of the right to counsel, but merely noncompliance with a procedural rule," this Court explained that "Rule 8.165 is not merely procedural in nature, but contains guidelines to ensure that the substantive right to counsel is protected." *Id.* at 211. Accordingly, the trial court's error was fundamental because "the policy underlying *Robinson* that requires a motion to withdraw the plea to be filed before challenging the validity of the plea [would not be] served where a juvenile enters into a guilty plea without the benefit of counsel and the juvenile has not knowingly and intelligently waived the right to counsel." *Id.* at 212.

The instant case should be resolved similarly to *T.G.* Florida Rules of Criminal Procedure 3.210-3.212 are not mere procedural rules—they provide mandatory guidelines for courts to follow to protect criminal defendants' due process rights not to be tried or convicted while incompetent to proceed. As this Court previously held, "a trial court's failure to observe the procedures outlined in Florida Rules of Criminal Procedure 3.210–3.212 . . . deprives a defendant of his due process right to a fair trial." *Dougherty*, 149 So. 3d at 679. The same is true

whether a defendant enters into a plea or proceeds to trial. *See Godinez v. Moran*, 509 U.S. 389 (1993) (same competency standard applies whether the defendant goes to trial or pleads guilty).

The First District recently reached that conclusion in *Sheheane v. State*, 228 So. 3d 1178 (Fla. 1st DCA 2017). There, defense counsel requested a competency evaluation during violation of probation proceedings. *Id.* at 1179. The trial court ordered a competency evaluation, but failed to conduct a hearing. *Id.* Thereafter, the defendant entered an open plea to the probation violations. *Id.* During the plea colloquy, defense counsel stated his belief that the defendant was competent based upon the evaluations and agreed to waive a hearing and judicial determination of competency. *Id.* "[T]here [wa]s no indication that the trial judge had the competency evaluations; and the evaluators were not present." *Id.*

Although the defendant never moved to withdraw his plea, the First District held the trial court committed fundamental error since neither the procedures of Rule 3.210 nor the adjudication of the defendant's competency could be waived. *Id.* at 1180. Because "[t]he nature of competency goes to the heart of whether a defendant has the capacity to make a cogent, legally binding decision," the First District held that the case presented "a denial of due process, resulting in a fundamental error that require[d the appellate court's] intervention despite [the defendant's] failure to preserve it below." *Id.* at 1181.

Similarly, in *Carrion v. State*, 235 So. 3d 1051, 1052 (Fla. 2d DCA 2018), a trial court entered an order appointing experts to evaluate the defendant's competency but never made oral or written findings as to competency. *Id.* at 1053. The defendant then entered into a negotiated plea. *Id.* Although the defendant did not move to withdraw his plea, the Second District held that the trial court "erred in failing to make an independent competency finding and in failing to enter a written order of competency." *Id.* at 1053-52; *see also Moulton v. State*, 230 So. 3d 934, 936 (Fla. 2d DCA 2017) ("As an initial matter, this issue is properly before this court in this appeal even though Moulton did not file a motion seeking to withdraw her plea. The supreme court has held that a trial court's failure to comply with the requirements of Florida Rules of Criminal Procedure 3.210–3.212 regarding competency procedures constitutes a violation of due process.").

Notwithstanding the above, the State suggests in its Initial Brief that "Respondent's circumstance is no different than that of a typical defendant filing a motion to withdraw plea on grounds the plea was involuntary." (IB. 12). According to the State, "if Respondent alleged he was coerced, pressured, or unknowing of the penalty for his crime[,] he would be left with the normal avenue of filing a motion to withdraw his plea and entitled to representation while doing so." (IB 12). However, this assessment should be rejected for four reasons.

First, aside from the due process violation already explained, criminal defendants have no federal or state constitutional right to the assistance of counsel in postconviction proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 407 (Fla. 1998). Thus, adopting the State's position would, as the Fourth District recognized, lead to unjust consequences (Pet. App. 3):

> To require a criminal defendant, who may be incompetent, to file a motion to withdraw a plea before raising the issue on appeal is unwarranted. If a defendant is incompetent, confining him to post-conviction relief, without the assistance of counsel, is not a remedy designed to do justice.

A rule that competency issues not preserved by a motion to withdraw a guilty plea should be raised in a Florida Rule of Criminal Procedure 3.850 motion, rather than during a direct appeal, would effectively require a possibly incompetent criminal defendant to file a *pro se* motion raising his own incompetency, a set of procedural hoops that itself likely violates due process. *See Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003) (noting that due process requires not only an opportunity to be heard, but also an opportunity to be heard "in a meaningful manner" (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)).

Second, unlike most challenges to the voluntariness of a plea, trial courts are responsible for the underlying error. *See Lane v. State*, 388 So. 2d 1022, 1025 (Fla. 1980) ("[T]he trial court has the responsibility to conduct a hearing for competency

to stand trial whenever it reasonably appears necessary . . . to ensure that a defendant meets the standard of competency . . . . "). "[O]nce a trial court has reasonable grounds to believe that a criminal defendant is not competent to proceed, it has **no choice** but to conduct a competency hearing." *Monte v. State*, 51 So. 3d 1196, 1202 (Fla. 4th DCA 2011) (emphasis added). Here, the court's affirmative failure to follow the mandatory procedures set forth in Rules 3.210-3.212 caused the constitutional due process violation to occur. [12]

Third, a defendant's competency is distinct from the issue of voluntariness, where a motion to withdraw plea is necessary to develop the record. To be incompetent means that the defendant lacks a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." *Hill v. State*, 473 So. 2d 1253, 1257 (Fla. 1985). Where there is reason to believe a defendant is incompetent, the trial court must observe the requirements of Rules 3.210-3.212 before allowing the defendant to enter a plea. There is no discretion.

[12] Ethically, the responsibility to ensure that proper procedural steps are followed is shared by the judge, the prosecutor, and the defense attorney. *Cf. Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992); *Hall v. State*, 316 So. 2d 279, 280 (Fla. 1975).

Since the procedural missteps below are apparent from the face of the record, there is nothing for a motion to withdraw plea to illuminate.[13]

Fourth, even in the context of a plea's voluntariness, this Court has held that "[d]ue process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary." *Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992) (citations omitted). Accordingly, where a trial court performs an inadequate or superficial plea colloquy, the remedy is to reverse the plea even if the defendant did not move to withdraw the plea. *See, e.g., id.* at 258; *Haug v. State*, 151 So. 3d 560, 561 (Fla. 1st DCA 2014). The instant case is analogous, as the trial court's failure to follow Rules 3.210-3.212 violated due process.

[13] The State suggests the "Fourth District Court . . . assum[ed] there was no resolution to the competency hearing" and posits "the trial court may have held a competency hearing and failed to properly docket the hearing." (IB. 15-16). However, aside from the fact that this argument was not raised below, Florida Rules of Appellate Procedure 9.200(a)(1) and (d)(1)(A) require the clerk to "include a progress docket" in the record for every criminal direct appeal. The progress docket in the appellate record does not show that a competency hearing was conducted and State has presented no reason to question the accuracy of the docket or the clerk's satisfaction of the above rules. (PDF 7).

2. The Error is Fundamental Because Respondent Was Denied His Constitutional Right to Due Process

To support requiring that competency issues be preserved in a motion to withdraw plea, the State asserts the failure to conduct a competency hearing and make a competency determination "cannot be fundamental error when a retrospective competency hearing is possible." (IB. 18). Because "the trial court can determine competency retrospectively," the State argues the asserted error is not "fundamental" until a trial court determines that a retroactive competency hearing cannot be conducted. (IB. 16-18). This argument should be rejected, because if the asserted error is not fundamental then appellate courts will have no choice but to affirm potentially incompetent defendants' convictions, despite the existence of a due process violation on the face of the record.

"Generally, to raise an error on appeal, a contemporaneous objection must be made at the trial level when the alleged error occurred." *J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1998) (citing *Davis v. State*, 661 So. 2d 1193, 1197 (Fla. 1995)). "Errors that have not been preserved by contemporaneous objection can be considered on direct appeal only if the error is fundamental." *Jackson v. State*, 983 So. 2d 562, 568 (Fla. 2008) (emphasis added). Because the issue in this case was not challenged below, it would only be cognizable on direct appeal if the error is fundamental. *See F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003) ("The sole

exception to the contemporaneous objection rule applies where the error is fundamental.") (citation omitted and emphasis added).

"[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993) (citing *D'Oleo–Valdez v. State*, 531 So. 2d 1347 (Fla. 1988); *Ray v. State*, 403 So. 2d 956 (Fla. 1981)). "[H]armful due process violations are fundamental error, which need not be preserved for review." *Del Valle v. State*, 80 So. 3d 999, 1004 (Fla. 2011); *see also Calloway v. State*, 210 So. 3d 1160, 1191 (Fla. 2017) ("Fundamental error must amount to a denial of due process, and consequently, should be found to apply where prejudice follows.").

Because "[t]he nature of competency goes to the heart of whether a defendant has the capacity to make a cogent, legally binding decision," the failure to conduct a competency hearing constitutes "a denial of due process, resulting in a fundamental error." *Sheheane*, 228 So. 3d at 1181; *see also Golloman v. State*, 226 So. 3d 332, 335 (Fla. 2d DCA 2017); *Hernandez v. State*, 250 So. 3d 183, 187 (Fla. 3d DCA 2018); *Alexander v. State*, 5D17-1977, 2018 WL 4259364, at *1 (Fla. 5th DCA Sept. 7, 2018). Indeed, this Court has held in no uncertain terms that:

> a trial court's failure to observe the procedures outlined in Florida Rules of Criminal Procedure 3.210–3.212—procedures determined to be adequate to protect a defendant's right not to be tried or convicted

> while incompetent to stand trial—**deprives a defendant of his due process right to a fair trial**.

Dougherty, 149 So. 3d at 679 (emphasis added).

To hold that competency issues are not cognizable on appeal unless a motion to withdraw the plea was filed by trial counsel risks violating due process, as it may result in the illegal conviction of an incompetent defendant. *See Pate*, 383 U.S. at 378; *Harris v. Kuhlmann*, 346 F.3d 330, 349 (2d Cir. 2003) ("The constitutional right to due process is violated when a person who is incompetent is convicted of a crime, whether the conviction follows a trial or a plea of guilty.").

Further, a finding of fundamental error in this context does not necessarily mean the Respondent will receive a new trial. "Generally, the remedy for a trial court's failure to conduct a proper competency hearing is for the defendant to receive a new trial, if deemed competent to proceed on remand." *Dougherty*, 149 So. 3d at 678-79; *see also Tingle v. State*, 536 So. 2d 202, 204 (Fla. 1988) (noting that such violation generally results in a new trial because "a hearing to determine whether a defendant was competent at the time he was tried generally cannot be held retroactively"). However, "[a] new trial is not always necessary where the issue of competency was inadequately determined prior to trial; a retroactive determination of competency is possible." *Dougherty*, 149 So. 3d at 679.

The recognition that the error is fundamental simply allows criminal defendants to raise the issue for the first time on appeal, even in the absence of a

motion to withdraw plea. The deprivation of due process derives not from the defendant actually being incompetent, but from the trial court's failure to follow the mandatory procedures necessary to assure that the defendant is competent. *Drope*, 420 U.S. at 183; *Pate*, 383 U.S. at 387.

Nonetheless, Respondent notes that retroactive, or nunc pro tunc, competency hearings and determinations are theoretically "possible," but only in the rare circumstances where "there are a sufficient number of expert and lay witnesses who have examined or observed the defendant contemporaneous with trial [or the plea] available to offer pertinent evidence at a retrospective hearing." *Dougherty*, 149 So. 3d at 679 (quoting *Mason v. State*, 489 So. 2d 734, 737 (Fla. 1986)). "The United States Supreme Court has cautioned that determining competency to stand trial retrospectively is inherently difficult, even under the most favorable circumstances." *Jones v. State*, 740 So. 2d 520, 523 (1999) (citing *Drope*, 420 U.S. at 183; *Pate*, 383 U.S. at 387).

A nunc pro tunc evaluation is permitted only when "there are a sufficient number of expert and lay witnesses" who can opine on a defendant's competency; here, there appears to have been only one evaluation. *Dougherty*, 149 So. 3d at 679; *see also Frye v. State*, 219 So. 3d 1011 (Fla. 2d DCA 2017) (holding trial court had insufficient evidence to make a retroactive competency determination, even though the defendant had been evaluated by two mental health experts).

Furthermore, it is unclear when, if at all, the evaluation took place. Retroactive competency determinations require evaluations that were "contemporaneous" to the trial or plea. *Dougherty*, 149 So. 3d at 679. Therefore, it appears unlikely that the trial court will be able to faithfully engage such a procedure.

3. The Proper Remedy Is For the Appellate Court to Reverse and Remand for the Trial Court to Conduct a Nunc Pro Tunc Competency Hearing

Although not argued below, the State contends that the sole remedy for a trial court's failure to follow Rules 3.210-3.212 should be for the appellate court to relinquish jurisdiction for the trial court to hold a *nunc pro tunc* competency hearing—as is the practice in the Second District Court of Appeal. (IB. 20). In essence, the State asserts this Court should adopt a procedure "requiring [defendants] to file a motion to withdraw plea or in the alternative requiring the district court to relinquish jurisdiction for the trial court to determine [the] defendant's competency." (IB. 21). This argument should be rejected, since it is legally unnecessary and would place undue delays upon the disposition of appeals.

The practice of relinquishing jurisdiction employed by the Second District derives from this Court's decision in *Fowler v. State*, 255 So. 2d 513 (Fla. 1971),[14]

[14] *Fowler* was cited by the Second District for this proposition in *Carrion*, 235 So. 3d at 1055; *Moulton*, 230 So. 3d at 938; and *Cramer v. State*, 213 So. 3d 1028 (Fla. 2d DCA 2017).

which was a direct appeal from a defendant's first-degree murder conviction and death sentence. There, the trial court unequivocally erred by determining the defendant's competency without conducting a hearing, even though the defense had requested a hearing. *Id.* at 515. As a remedy, this Court temporarily remanded the case to the trial court "with directions that the claim of insanity at the time of trial be determined in a full hearing." *Id.* In tandem, this Court "decline[d] to adjudicate [the defendant's] remaining contentions at th[at] time because a finding of insanity at the time of trial would invalidate the entire proceeding and hereby render the defendant's remaining arguments moot." *Id.*

While relinquishment of jurisdiction was the appropriate remedy in *Fowler*, it cannot be forgotten that "death is different." *Asay v. State*, 210 So. 3d 1, 18 (Fla. 2016). Death penalty cases deal in mortality and are often voluminous, requiring that this Court issue a lengthy opinion addressing numerous issues. It makes sense that this Court would relinquish jurisdiction in *Fowler*, to determine at the earliest stage whether the competency issue was dispositive. However, the same equities do not apply to every direct appeal filed in Florida's appellate courts.

In analogous circumstances, this Court has expressed its disfavor of piecemeal review of a cause. *See S. L. T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974); *Sax Enter., Inc. v. David & Dash, Inc.*, 107 So. 2d 612, 613 (Fla. 1958) (stating that "piecemeal review of cases is not favored by an appellate court,

and care should be exercised by trial judges to avoid, so far as possible, the necessity for successive appeals"). As presented, the State's argument would essentially transform every retroactive determination of competency into a piecemeal appeal.

The State's cited example of this procedure—*Carrion v. State*, 235 So. 3d 1051 (Fla. 2d DCA 2018)—demonstrates the problem. The Second District issued its opinion relinquishing jurisdiction on January 19, 2018. *See id.* According to the Second District's docket, briefing had already been completed in the case months earlier. However, because of the relinquishment of jurisdiction and the need to supplement the appellate record, the remainder of the defendant's claims were not decided until August 29, 2018—a delay of more than seven months. *See Carrion v. State*, 2D14-2151, 2018 WL 4100197 (Fla. 2d DCA Aug. 29, 2018).

Permitting appeals to proceed in this fashion will unnecessarily extend the time necessary for appellate courts to decide criminal appeals.[15] Moreover, the extended relinquishment may also force defendants to forego considering meritorious claims challenging competency for the sake of judicial expediency, as the other claims may be mooted by an extended relinquishment of jurisdiction.

[15] This Court, as well as each Florida District Court of Appeal, maintains caseload statistics to demonstrate the efficiency of the judiciary.

In addition, requiring appellate courts to relinquish jurisdiction raises logistical questions regarding how appellate briefing for competency issues will commence. Must the defendant raise competency issues in a motion to relinquish jurisdiction? If so, direct appeals will often become a piecemeal process. On the other hand, if the defendant must raise the competency issue in an initial brief, the defendant's remaining claims—which may be meritorious and warrant a new trial or discharge—will be placed on hold, despite being fully briefed.

Although the State asserts relinquishment of jurisdiction to conduct a competency hearing would "ensure the correction of the error within one appeal," (IB. 21), the same rationale could apply to numerous appellate issues. If a trial court commits a sentencing error, the appellate court could conceivably relinquish jurisdiction for the trial court to conduct a resentencing rather than reversing and remanding for a resentencing. But that is not how our judiciary has ever proceeded. The proper remedy, as was employed in this case, is to reverse and remand for further proceedings. If further errors occur during the *nunc pro tunc* competency determination, then another appeal may be taken. However, there is no reason to believe such appeals would be commonplace.

CONCLUSION

Because a trial court's failure to observe the procedures outlined by Rules 3.210–3.212 deprives a defendant of due process, the Fourth District correctly held

that the error is fundamental and that no motion to withdraw plea is required. Accordingly, Respondent respectfully requests that this Court approve the Fourth District's decision below and disapprove of *Pressley v. State*, 227 So. 3d 573 (Fla. 1st DCA 2017); *Garcia-Manriquez v.* State, 146 So. 3d 134 (Fla. 3d DCA 2014); and *Hicks v. State*, 915 So. 2d 740 (Fla. 5th DCA 2005).

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I certify that this brief was electronically filed with the Court and a copy of it was served to Joseph Coronato, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com this 25th day of October, 2018.

/s/ BENJAMIN EISENBERG
BENJAMIN EISENBERG

CERTIFICATE OF FONT

I certify that this brief was prepared with 14 point Times New Roman type in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ BENJAMIN EISENBERG
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