

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. SC18-1208

CARL LEWIS BURNS,

Respondent.

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ON DISCRETIONARY REVIEW  
FROM THE FIRST DISTRICT COURT OF APPEAL

**JURISDICTIONAL BRIEF OF RESPONDENT**

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SECOND JUDICIAL CIRCUIT

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## **PRELIMINARY STATEMENT**

Throughout this Jurisdictional Brief the Petitioner, State of Florida, will be referred to as the State. The Respondent, Carl Lewis Burns, will be referred to by proper name or as the Defendant.

## **STATEMENT OF THE CASE AND FACTS**

Respondent Burns accepts the Petitioner's Statement of the Case and Facts—but emphasizes the sentencing court's improper reliance on his choice to maintain his innocence [to explain the imposition of a 300-year sentence] occurred in a case setting where he had pled not guilty and demanded a jury trial; where his trial testimony both denied the charges and sought to retract a pre-trial confession; and where he continued to maintain his innocence at sentencing.

## SUMMARY OF THE ARGUMENT

Though the First District's certification of a question of great public importance provides a basis for the exercise of discretionary jurisdiction,--this Court should decline to accept jurisdiction due to the absence of any need to resolve a broad legal issue or policy question. Notwithstanding the First District's expressed criticism of the prophylactic rule against basing a sentence on a defendant's lack of remorse or assertion of innocence, this Court should exercise its discretion to decline jurisdiction.

Secondly, the Fifth District's decision in Lincoln v. State, 978 So.2d 246 (Fla. 5th DCA, *rev. denied*, 987 So.2d 80 (Fla. 2008) cannot support a conclusion of express and direct conflict with the First District's decision below given the very cryptic nature of the Lincoln decision.

Lastly, the First District's decision below does not create a destructive policy for Florida. The Burns decision is not the result of the First District announcing some great change in the law. To the contrary, all the First District did was follow long-standing legal precedent under which a sentencing judge is not to factor in a defendant's lack of remorse or his/her assertions of innocence.

## ARGUMENT

### **I. THIS COURT HAS A BASIS FOR THE EXERCISE OF DISCRETIONARY JURISDICTION DUE TO THE CERTIFICATION OF A QUESTION OF GREAT PUBLIC IMPORTANCE. HOWEVER, REVIEW SHOULD BE DECLINED. THE FIRST DISTRICT’S DISSATISFACTION WITH LEGAL PRECEDENT DOES NOT REVEAL OR CREATE THE EXISTENCE OF ANY BROAD LEGAL ISSUE OR POLICY QUESTION THAT NEEDS TO BE RESOLVED.**

Article V, s. 3(b)(4) of the Florida Constitution states that this Court has discretionary jurisdiction to “review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance... .” In Burns v. State, 2018 WL 3371723 (Fla. 1st DCA July 11, 2018), the First District Court of Appeal certified the following question:

MAY A SENTENCING COURT RELY ON A DEFENDANT’S LACK OF REMORSE AFTER THE DEFENDANT HAS GIVEN A POST-MIRANDA, SWORN CONFESSION TO THE CRIME AND HAS OBVIOUSLY LIED UNDER OATH AT TRIAL ABOUT HIS GUILT.

### Jurisdictional Merits

After examining the record facts and concluding the sentencing court had improperly relied on Mr. Burns’ failure to express remorse and refusal to admit guilt in the face of compelling evidence of guilt—the First District reversed his 300-year sentence for ten counts of sexual battery with a child in custodial-familial

care between the ages of 12-17. The ordered appellate relief was correctly limited to a remand for resentencing before a different judge. Florida jurisprudence has long recognized that it violates a defendant's right to due process, as guaranteed by the state and federal constitutions, for a sentencing judge to consider his or her lack of remorse or failure to admit guilt when imposing punishment. See, Holton v. State, 573 So.2d 284, 292 (Fla. 1990); Hayes v. State, 150 So.3d 249, 251 (Fla. 1st DCA 2014), (the resulting due process violation constitutes fundamental error); Macan v. State, 179 So.3d 551, 553 (Fla. 1st DCA 2015). The First District went on to frame the foregoing certified question in the course of reiterating and endorsing what it termed the State's "compelling arguments" for why the prophylactic rule against factoring in a defendant's lack of remorse should be deemed inapplicable if the defendant has given a sworn pre-trial confession (as Mr. Burns had), and/or given "obviously untruthful" testimony at trial about his guilt. The Court referenced Burns' confession-recantation testimony as "blatantly false". Burns, 2018 WL 3371723, at \*3. The First District further offered that perhaps the rule [prohibiting a sentencing judge from relying on a defendant's assertion of innocence] should not apply to Burns since he had not challenged his convictions on appeal "...and therefore no longer maintains his innocence." Burns, 2018 WL 3371723, at \*3.

The First District’s decision below correctly adhered to binding legal precedent in holding that Mr. Burns’ fundamental right to due process was violated when the trial court considered his lack of remorse and assertion of innocence as sentencing considerations before imposing a 300-year sentence. Like any other person accused of a crime—who has subsequently entered a not guilty plea and invoked his right to a jury trial—Burns has a right to maintain his innocence and to not be penalized at sentencing for having exercised that right. This is so even if he initially gave a sworn confession. This remains so even if his confession-recantation testimony was “strikingly weak”—using the First District’s terminology.

The First District Court of Appeal’s dissatisfaction with well-established legal precedent and its prophylactic rule of law neither exposes nor creates any broad legal issue or policy question that warrants this Court’s exercise of its discretionary jurisdiction. Accordingly, this Court should decline to exercise jurisdiction over this case on the basis of the certified question.

**II. THIS COURT LACKS CONFLICT JURISDICTION UNDER ART. V, s. 3(b)(3) OF THE FLORIDA CONSTITUTION BECAUSE THE DECISION BELOW IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE FIFTH DISTRICT’S DECISION IN LINCOLN V. STATE, 978 SO.2D 246 (FLA. 5TH DCA), *REV. DENIED*, 987 SO.2D 80 (FLA. 2008).**

As noted in Petitioner’s Brief, pg. 7, in order for conflict to vest this Court with jurisdiction under Article V, s. 3(b)(3), the conflict to be resolved “must be express and direct” and “appear within the four corners of the” decision below. See, Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Respondent Burns contends express and direct conflict cannot be duly demonstrated given the exceedingly cryptic nature of the Fifth District’s decision in Lincoln v. State, *supra*.

After closely examining the record the First District’s decision below stated the following:

The trial judge’s statement here reflects that he violated the governing law by relying on Appellant’s failure to express remorse and refusal to admit guilt in the face of compelling evidence of guilt.

\* \* \* \* \*

Viewed in context, as it should be, the judge’s statement could not refer to anything other than [Burns’] choice to maintain his innocence.

Burns, 2018 WL 33711723, at \*2. Clearly, the First District found it was constrained to reverse Burns’ 300-year sentence because the trial court had

punished him for maintaining his innocence and failing to show remorse. However, in Lincoln v. State, supra at 247, the Fifth District determined the trial court's comments about Lincoln's lack of remorse did not operate to "...punish[] the defendant for exercising his constitutional right to plead not guilty and maintain his innocence." The Lincoln Court did not set forth the precise lack-of-remorse comments made by the trial court, or their context. Nor did the Lincoln decision set forth the content of Lincoln's testimony and articulate how he was "unable to explain incriminating comments he made on recorded telephone exchanges with the child victim." Nor does the Lincoln decision provide an analysis which purports to explain the circumstances under which the Fifth District concluded that Mr. Lincoln's lack of remorse was properly taken into account in such a way that managed to stop short of punishing him for exercising his right to plead not guilty and maintain his innocence.

In conclusion, the extremely cryptic nature of the Fifth District's Lincoln decision does not provide a sound and adequate basis for concluding there is express and direct conflict between it and the First District's decision below. This Court should decline to exercise discretionary jurisdiction on that basis.

**III. THE MAJORITY DECISION DOES NOT  
CREATE A DESTRUCTIVE POLICY THAT  
HAMSTRINGS TRIAL COURTS ABILITY TO  
CONSIDER A DEFENDANT’S CHARACTER  
WHEN SENTENCING.**

As previously noted, the First District’s decision below cannot be legitimately “dressed up” as if it involved some grand innovation of law. However grudgingly, all the First District did was follow long-standing legal precedent which recognizes that it violates due process for a judge to base a sentence on a defendant’s assertion of innocence or refusal to express remorse for the crime(s) of conviction. This is an instance where continuing to adhere to a prophylactic rule against factoring in a defendant’s lack of remorse or assertion of innocence serves the cause of justice far better than embracing a rule which extends due process protection to some defendants but withholds it from others depending on whether the prosecution or judge thinks the person being sentenced has, or hasn’t, “at all times” maintained his or her innocence. Any defendant who has pled not guilty and invoked his or her right to trial by jury is entitled to not be punished for exercising his/her constitutional right to plead not guilty and maintain his/her innocence—even in the face of compelling evidence of guilt.

## **CONCLUSION**

Based on the foregoing, Respondent Burns requests this Court to decline jurisdiction in this case.

## **CERTIFICATES OF SERVICE AND FONT SIZE**

I hereby certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Jason W. Rodriguez, Assistant Attorney General, at [crimapptlh@myfloridalegal.com](mailto:crimapptlh@myfloridalegal.com), this day of August 22, 2018. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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