IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1983

Lower Tribunal No. 3D10-150

PEDRO GIL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

PAMELA JO BONDI
Attorney General

RICHARD L. POLIN
Bureau Chief, Criminal Appeals
Florida Bar No. 0230987

HEIDI MILAN CABALLERO
Florida Bar No. 0022386
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
Tel.: (305) 377-5441
Fax: (305) 377-5655

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INTRODUCTION

Petitioner, PEDRO GIL, was the Defendant in the trial court and the Appellee in the Third District. Respondent, THE STATE OF FLORIDA, was the Prosecution in the trial court and the Appellant in the Third District. The parties shall be referred to as they stand in this Court. In this brief, all references to the opinion under review will be referred to as they exist in the published opinion, *State v. Gil*, 68 So.3d 999 (Fla. 3d DCA 2011).

STATEMENT OF THE CASE AND FACTS

Petitioner was arrested and issued several citations for driving with a revoked driver's license pursuant to section 322.34(5) (habitual traffic offender revocation), driving with a suspended drivers license pursuant to section 322.34(2), and various other traffic offenses. *Gil*, 68 So.3d at 1000. ON October 27, 2009, Petitioner was formally charged with violating section 322.34(2) in county court and with violating section 322.34(5) in circuit court. *Id*. Petitioner pled guilty in county court and then moved to dismiss the charge in circuit court. *Id*. The trial court granted the Petitioner's motion on double jeopardy grounds. *Id*. The State appealed. *Id*.

The Third District Court of Appeal reversed finding that no double jeopardy violation occurred. *Gil*, 68 So.3d at 1003. The

Third District first found that the violations "do not require identical elements of proof because they include elements not found in the other, and that neither offense is a lesser included offense of the other." *Id.* at 1001. Relying on *Valdes v. State,* 3 So.3d 1067 (Fla. 2009) and § 775.021(4), *Fla. Stat.,* the Third District stated:

> Because suspension or revocation under subsection (2) of section 322.34 is based on entirely different conduct and on a completely different criteria than a revocation under subsection (5), subsection (5) cannot be a degree variant of subsection (2), and therefore convictions for violating subsection (2) and subsection (5) do not constitute double jeopardy. Subsection (2) punishes those who drive while their license is canceled, suspended, or revoked as a result of having committed certain enumerated offenses or by accumulating a certain number of points over a specified period of time. Subsection (5) punishes those who drive while their license is revoked as a result of being convicted of a certain number of the specified offenses. Each time a driver commits a subsection (2) violation, he is assessed moving violation points and the penalty increases. On the other hand, driving on a revoked license under subsection (5) does not result in the award of additional points nor an increased penalty.

Id. at 1003.

Petitioner timely filed a notice to invoke this Court's discretionary jurisdiction and filed a jurisdictional brief. The Respondent's brief on jurisdiction follows.

SUMMARY OF ARGUMENT

There is no basis upon which discretionary review can be granted in this case because the Third District's opinion does not conflict with any case of this Court or of any other district court in Florida. As such, no conflict exists for this Court to exercise discretionary jurisdiction to review the decision below.

ARGUMENT

PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.

Petitioner contends that this Court should invoke its discretionary review power to review the Third District's opinion on the basis that "THE THIRD DISTRICT COURT'S OPINION EXPRESS AND DIRECTLY CONFLICTS WITH *Dees v. State*, 54 So.3d 644 (Fla. 1st DCA 2011), *Franklin v. State*, 816 So.2d 1203 (Fla. 4th DCA 2002, AND *Duff v. State*, 942 So.2d 926 (Fla. 5th DCA 2006)..." (Petitioner's Brief, p. 2). As set forth below, there is clearly no conflict with the decisions in *Dees* or *Franklin*. There is an apparent conflict with the decision in *Duff*. However, as the reasoning behind the holding in *Duff* is no longer valid and the Third District's decision is clearly correct, this Court should, in its discretion, decline review of the instant case.

In *Dees*, the First District found that dual convictions for violations of § 322.34(5), *Fla. Stat.* and § 322.34(2)(c), *Fla. Stat.* were "mutually exclusive" citing *Franklin*. *Dees*, 54 So.3d at 644. In contrast, the First District specifically stated that the dual convictions for violations of § 322.34(5), *Fla. Stat.* and § 322.03(1), *Fla. Stat.* constitute double jeopardy because § 322.03(1) is "a necessarily lesser-included offense" of § 322.34(5). *Id.* Nowhere in its opinion did the First District find that dual convictions for violations of § 322.34(5) and § 322.34(2)(c) violate double jeopardy. *Id.* In the Third District's opinion, the court stated: "[W]e agree with the Fourth District Court's decision in *State v. Cooke*, 767 So.2d 468 (Fla. 4th DCA 1999), that convictions for violations of sections 322.34(2) and (5) do not constitute double jeopardy…." *Gil*, 68 So.3d at 1000. Thus because the First District found that the dual convictions for these offenses were mutually exclusive, not that they constituted double jeopardy, there is no conflict between the Third District's opinion and *Dees*.

In *Franklin*, the Fourth District stated: "Arising out of a singular offense, Anthony Franklin was convicted of the dual offenses of (1) driving after his license had been revoked pursuant to Florida Statutes section 322.264 [habitual offender], in violation of section 322.34(5), and (2) driving while his license was suspended, canceled, or revoked in

violation of section 322.34(2), felony level. By their express terms, these offenses are mutually exclusive…" *Franklin*, 816 So.2d at 1203 – 1204. The Fourth District found that one cannot be convicted of violating § 322.34(2) because it "does not apply" to persons whose licenses have been revoked. *Id.* at 1204. The Fourth District did not find that dual convictions for these offenses constituted double jeopardy. As in *Dees*, the Fourth District merely found that the offenses were mutually exclusive. This is an entirely different issue than the one addressed in the Third District's opinion in the instant case and no conflict exists between the Third District's opinion and *Franklin*.

In *Duff*, the Fifth District found that dual convictions for violations for § 322.34(2) and (5) violated double jeopardy because they were degree variants of one another. *Duff*, 942 So.2d at 932. While this is apparently in conflict with the Third District's opinion, the *Duff* court based its determination on the now defunct "primary evil" test. Thus, the holding in *Duff* is based upon reasoning which is no longer valid. *See Valdes v. State*, 3 So.3d 1067, 1075 (Fla. 2009)("We conclude that the "primary evil" test defies legislative intent because it strays from the plain meaning of the statute.") *Valdes* held that the primary test to determine if dual convictions violate

double jeopardy is the *Blockburger*[1] "same elements" test. In *Duff*, "Duff concedes that under the same elements test, his offenses each contain an element different from the other." *Duff*, 942 So.2d at 928. After *Valdes*, *Duff* is no longer good law. Thus, while there is an apparent conflict between *Duff* and the Third District's opinion, such a conflict should not serve as the basis for discretionary review.

Petitioner also argues that discretionary review should be granted because the Third District's opinion misapplied *Valdes*. (Petitioner's Brief, p. 9). Of note, Petitioner does not allege a conflict between the Third District's opinion and *Valdes*. While Respondent submits that the Third District properly applied *Valdes* to its analysis, whether or not the application of *Valdes* was proper or not is not a basis for discretionary review. The test for discretionary review is whether there is an express and direct conflict. *See Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc.,* 498 So.2d 888, 889 (Fla. 1986). No direct and express conflict has been alleged between the Third District's opinion and *Valdes*. Thus, any alleged misapplication cannot serve as a basis for discretionary review. Article V, Section 3(b)(3), *Fla. Const.*; *Fla. R. App. P.* 9.030(a)(2)(A)(iv).

[1] Blockburger v. United States, 284 U.S. 299 (1932).

As shown above, there is no conflict between the instant case and *Dees* or *Franklin*. Although there is arguably a conflict between the instant case and *Duff*, *Duff* is no longer valid law and the Third District's opinion is a correct decision in light of this Court's decision in *Valdes.* Discretionary jurisdiction entails only a judicial power to review a case, and not an obligation to do so. This court should not exercise its power to review the instant case.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that this Court decline jurisdiction to review this cause.

Respectfully submitted,

PAMELA JO BONDI
Attorney General

_____
RICHARD L. POLIN
Florida Bar No. 0230987
Bureau Chief, Criminal Appeals

_____
HEIDI MILAN CABALLERO
Florida Bar No. 0022386
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
Tel.: (305) 377-5441
Fax: (305) 377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed this 3rd day of November, 2011 to MELISSA DEL VALLE, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

_____
HEIDI MILAN CABALLERO

CERTIFICATE REGARDING FONT SIZE AND TYPE

The foregoing Brief of Respondent on Jurisdiction was typed in Courier New, 12-point font, in accordance with the Florida Rules of Appellate Procedure.

_____
HEIDI MILAN CABALLERO