IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1983

PEDRO GIL,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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

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INTRODUCTION

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *State v. Gil*, 36 Fla. L. Weekly D1977b (Fla. 3d DCA September 7, 2011), on the grounds of express and direct conflict of decisions. All references are to the attached appendix identified as "A" followed by the page number.

STATEMENT OF THE CASE AND FACTS

Mr. Gil was cited both for driving with a revoked license as a habitual traffic offender, a third degree felony under section 322.34(5), Florida Statutes (2009), and for driving while license suspended or revoked in violation of subsection (2) of the same statute (A. 2). Both offenses arose from the same factual event (A. 2).

Mr. Gil pled guilty in county court to the misdemeanor charge of driving while license suspended (A. 2). The defense moved to dismiss the driving while license revoked as a habitual traffic offender charge on double jeopardy grounds (A. 2). The trial court granted the defense's motion to dismiss finding that convictions under both subsections 322.34(2) and 322.34(5) would constitute double jeopardy (A. 2). On appeal the Third District Court of Appeal reversed, holding that separate convictions for these offenses do not violate double jeopardy because the offenses are not degrees of the same underlying offense (A. 2). The Third District acknowledged that

> [a]t first blush, section 322.34(5), dealing with habitual traffic offenders, appears to be a degree variant of section 322.34(2), dealing with drivers who have had their licenses canceled, suspended, or revoked for a reason other than being a habitual offender, because they are found in the same statute.

(A. 4). But the court determined that the offenses are not degree variants based on differences in the required elements and driving records for offenders (A. 5-8). Those differences include: the fact that subsection (2) punishes driving with a canceled or revoked license, while subsection (5) only punishes driving with a revoked license; only subsection (2) requires proof of guilty knowledge; and subsection (2) provides for different penalties depending upon a point system for past traffic violations, while subsection (5) designates a habitual offender based on past convictions for enumerated offenses (A. 5-8). The Third District concluded that because suspension or revocation under subsection (2) of section 322.34 is based on "entirely different conduct" and "different criteria" than revocation under subsection (5), the offenses cannot be degree variants of one another, and thus dual convictions do not violate double jeopardy (A. 8).

A notice invoking this Court's discretionary jurisdiction based on express and direct conflict was filed on October 7, 2011.

SUMMARY OF ARGUMENT

The Third District Court of Appeal held in this case that dual convictions under sections 322.34(2) and 322.34(5) arising from the same episode do not violate double jeopardy. This holding is in direct conflict 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), all of which reach the opposite conclusion. The Third District's decision in this case also misapplies this Court's holding in *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009). This Court should exercise its discretionary jurisdiction to review the decision of the Third District based on express and direct conflict.

ARGUMENT

THE THIRD DISTRICT COURT'S OPINION EXPRESSLY 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), AND MISAPPLIES THIS COURT'S HOLDING IN *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009).

The Third District Court of Appeal held that a defendant may be prosecuted for both driving with a suspended license under subsection 322.34(2) and driving while license revoked under subsection 322.34(5) because the crimes are not degree variants of the same offense under section 775.021(4), Florida Statutes (2009). The decision of the Third District directly conflicts with three other

district courts of appeal on this point, and misapplies the degree variant test adopted by this Court in *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009).

a. The Third District's decision directly conflicts with decisions from the First, Fourth, and Fifth District Courts of Appeal.

In *Dees v. State*, 54 So. 3d 1203 (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), the First, Fourth, and Fifth district courts of appeal all held that a defendant may not be prosecuted under both subsections 322.34(2) (driving while license suspended) and 322.34(5) (driving while license revoked as a habitual traffic offender) arising from the same factual occurrence. Both *Dees* and *Franklin* look to the express language of 322.34(2), which specifically excludes habitual traffic offenders. Subsection (2) defines that offense as including persons who knowingly drive while their driver's license "has been canceled, suspended or revoked as provided by law, **except persons defined in s. 322.264**" (habitual offender) § 322.34(2), Fla. Stat. (2009) (emphasis added). In turn, subsection (5) of the statute defines that crime as including only "person[s] whose driver's license has been revoked pursuant to s. 322.264 (habitual offender)." § 322.34(5), Fla. Stat. (2009). Based upon this clear mutually exclusive language, both the First and the Fourth District courts concluded that "by definition" a defendant may not be prosecuted for both 322.34(2) and 322.34(5) arising out of a singular offense.

The Fifth District Court of Appeal reached the same conclusion in *Duff v. State*, 942 So. 2d 926 (Fla. 5th DCA 2006). As in this case, in *Duff* the defendant pled guilty to driving while license suspended under subsection 322.34(2). Subsequently, the State sought to prosecute him for driving while his license was revoked as a habitual traffic offender under subsection 322.34(5), arising from the same incident. The Fifth District found that dual prosecution under both of these subsections violates double jeopardy because the offenses are degree variants of one another pursuant to section 775.021(4), Florida Statutes (2009).

The *Duff* case pre-dates this Court's decision in *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009), and thus applies the now invalid ("primary evil") test for determining whether offenses are degree variants of one another. The *Valdes* test focuses on whether the statutes at issue provide for an offense with multiple degrees. Nevertheless, the *Duff* court also relied on two additional factors in determining that the legislature intended to create degree offenses not subject to dual prosecution. These factors include: 1) that the legislature placed both offenses in the same statute, and 2) the plain language of the statute makes the offenses mutually exclusive. *Id*. at 930-31.

In this case, the Third District acknowledged that the two offenses at issue are found in subsections of the same statute, and that subsection (2) "specifically excludes habitual traffic offenders under subsection (5) from its application." (A.

5). But the Third District reached the opposite conclusion that these crimes may be prosecuted simultaneously because they are not aggravated forms of one another. Thus, a defendant who qualifies under both subsections of 322.34 may be subject to dual prosecution and double punishment in the Third District, but not in the First, Fourth or Fifth districts. This Court should accept jurisdiction to resolve this conflict and make uniform the law in Florida as to prosecutions for these offenses.

b. The decision of the Third District misapplies the *Valdes* degree variant test.

In *Valdes*, this Court clarified the degree variant exception to the *Blockburger*[1] test which prohibits separate punishments when two crimes are degree variants of the same underlying offense as provided by statute.[2] This Court explained that an offense is a degree variant of another offense where the statute itself provides for an offense with multiple degrees. In designating degree variants it is not necessary that the magic word "degree" be used. *Valdes*, 3 So. 3d at 1076. Rather, *Valdes* explains that a degree relationship is apparent where both crimes are defined in the same statutory provision, and one offense is an aggravated form

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

[2] In *Valdes*, 3 So. 3d at 1077, this Court held that dual convictions for discharging a firearm from a vehicle within 1000 feet of a person in violation of section 790.15(2), Florida Statutes (2003), and shooting into an occupied vehicle in violation of section 790.19, Florida Statutes (2003), are not degree variants "because the two offenses are found in separate statutory provisions, neither offense is an aggravated form of the other; and they are clearly not degree variants of the same offense."

of the other. *Id*. at 1077. As an example of degree variant offenses, this Court noted that sections 790.15(1), 790.15(2) and 790.15(3),[3] are "explicitly" degree variants of the same offense, although the word "degree" is not used. The three subsections are found in the same statutory provision entitled "Discharging a Firearm in Public," subsection (1) is an aggravated form of subsection (2), and subsection (2) is an aggravated form of subsection (3). *Id*. at 1077-78.

The sections at issue here, 322.34(2) and 322.34(5), clearly meet the *Valdes* test. Both are found in the same statutory provision entitled, "Driving while license suspended, revoked, canceled, or disqualified." § 322.34, Fla. Stat. (2009). Subsection (2) prohibits knowingly driving with a canceled, suspended or revoked license and increases the severity of the punishment based on the number of prior convictions. While subsection (5) also prohibits the same underlying offense of

[3] Section 790.15, Fla. Stat. (2009), provides:

> (1) Except as provided in subsection (2) or subsection (3), any person who knowingly discharges a firearm in any public place or on the right-of-way of any paved public road, highway, or street or whoever knowingly discharges any firearm over the right-of-way of any paved public road, highway, or street or over any occupied premise is guilty of a misdemeanor in the first degree . . .
>
> (2) Any occupant of any vehicle who knowingly and willfully discharges any firearm from the vehicle within 1,000 feet of any person commits a felony of the second degree . . .
>
> (3) Any driver or owner of any vehicle, whether or not the owner of the vehicle is occupying the vehicle, who knowingly directs any other person to discharge any firearm from the vehicle commits a felony of the third degree . . .

driving with a revoked license, it adds, as an aggravator, those with an even more serious driving history who qualify as habitual traffic offenders. Consequently, a violation of subsection (5) constitutes a third degree felony. Thus, section 322.34 establishes a hierarchy of increasingly severe sanctions all punishing the same basic offense of driving with a canceled, suspended or revoked license. As *Valdes* indicates, the plain meaning of the word "degree" is "a level based on the seriousness of an offense." *Valdes*, 3 So. 3d at 1076 (quoting *Black's Law Dictionary* 456 (8th ed. 2004)).

Moreover, the clear statutory language of section 322.34 demonstrates that the Legislature did not intend for dual convictions under subsections (2) and (5) of the statute. Subsection (2) includes

> Any person whose driver's license or driving privilege has been canceled, suspended, or revoked as provided by law, **except persons defined in s. 322.264,** who, knowing of such cancellation, suspension, or revocation, drives any motor vehicle upon the highways of this state . . .

§ 322.34(2), Fla. Stat. (2009) (emphasis added). Subsection (5) states:

> Any person whose driver's license has been revoked pursuant to s. 322.264 (habitual offender) and who drives any motor vehicle upon the highways of this state while such license is revoked is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 322.34(5), Fla. Stat. (2009).

The language in subsection (2) expressly excludes habitual traffic offenders

and applies to those who drive knowing that their license has been canceled, suspended or revoked. Conversely, subsection (5) only applies to habitual traffic offenders who drive while their license is revoked. Such language indicates that these two offenses are degree variants. *See Valdes*, 3 So. 3d at 1077-78 (noting that sections 790.15(1), 790.15(2) and 790.15(3) are clearly degree variants of the same offense where subsection 790.15(1) excludes those who fit into subsections 790.15(2) and 790.15(3), so that a person can only be charged with violation of (1) or (2) and (3)).

The Third District's decision here misapplies *Valdes*. The court acknowledged that "[a]t first blush" section 322.34(5) "appears to be a degree variant of section 322.34(2) . . . [.]" (A. 4). But then the court concluded that differences between the elements and prior record requirements of subsections show that they are not degree variants. Under *Valdes*, such differences between offenses are not determinative. This Court in *Valdes*, 3 So. 3d at 1077-78, found that subsections (1), (2) and (3) of section 790.15, "Discharging a Firearm in Public," are "explicitly degree variants of the same offense," despite the fact that subsections (1), (2) and (3) involve different conduct and provide for different penalties. Subsection (1), a first degree misdemeanor, governs those who shoot a firearm in a public place, subsection (2), a second degree felony, governs passengers of vehicles who shoot a firearm from the vehicle and subsection (3), a

third degree felony, governs drivers or owners of a vehicle who direct any other person to shoot from the vehicle. *See* § 790.15, Fla. Stat. (2009). The different conduct, criteria, and penalties do not impact the degree variant analysis. Instead, the analysis turns on whether the statute creates degree offenses, found in the same section, that are aggravated forms of the same underlying crime. The Third District's misapplication of *Valdes* provides a second independent basis upon which this Court may exercise its conflict jurisdiction in this case. *See Delgado v. State*, 36 Fla. L. Weekly S220 (Fla. May 26, 2011).

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this 14th day of October, 2011.

_____
MELISSA C. DEL VALLE
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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

_____
MELISSA C. DEL VALLE
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