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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEAN CLAUDE NOEL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO.
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	
_____	)	

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in the lower tribunal. Respondent, the state of Florida, was the Respondent and the prosecution, respectively. In the brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted after a jury trial of conspiracy to racketeer and first degree grand theft. At sentencing, the trial judge asked Petitioner if he could make "any up front restitution," and Petitioner said that he could provide between $20,000 to $40,000. The trial judge then sentenced Petitioner to ten years in prison followed by ten year probation, with the provision that if Petitioner made restitution of $20,000 within 60 days, the court would mitigate his prison sentence to eight years. Petitioner never was able to provide the restitution.

Relying on the previous decision of the Fourth District Court of Appeal in DeLuise v. State, 72 So.3d 248 (Fla. 4th DCA 2011), Petitioner argued that it was fundamental error for the trial judge to condition the reduction in his sentence on the payment of restitution. On direct appeal, the Fourth District Court of Appeal entered an *en banc* decision in which, by a seven to five vote, it receded from DeLuise but recognized direct and express conflict with the decision of the Fifth District Court of Appeal in Nezi v. State, 119 So.3d 517 (Fla. 5th DCA 2013).

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in the instant case directly and expressly conflicts with the decision of another district court of appeal as to whether reducing a defendant's sentence if he can make immediate substantial restitution amounts to a fundamental denial of his right to equal protection and due process. This Court should exercise its discretion and accept jurisdiction to resolve the conflict on this important issue.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

In the instant case, the trial court offered to reduce Petitioner's ten-year prison sentence to eight years if he provided $20,000 restitution within 60 days of his sentencing. When Petitioner was unable to come up with that amount, his ten-year sentence remained.

In its *en banc* decision on review, the Fourth District Court of Appeal receded from its previous decision in DeLouise v. State, 72 So.3d 248 (Fla. 4th DCA 2011) and held that there was no equal protection or due process violation when the trial court conditioned reduction of Petitioner's sentence on the payment of a substantial portion of restitution. "The Constitution does not preclude a judge from actively using the sentencing process to encourage payment of restitution to victims of crimes. . . ." Noel v. State, 127 So.3d 769, 771 (Fla. 4th DCA 2013).

In Nezi v. State, 119 So.3d 517 (Fla. 5th DCA 2013), the defendant was convicted of organized fraud. The trial judge imposed a ten-year prison sentence followed by twenty years probation on the 52-year-old defendant and ordered her to pay $70,000 restitution. The court then offered to consider mitigation and

modification of the sentence but "I'm going to have to have some money you're going to have to come up with." *Id.* at 521. In ruling on the defendant's motion to correct sentencing error pursuant to R.Crim.P. 3.800(b), the trial court concluded that the equal protection violation could be cured simply by striking the provision of the defendant's sentence which stated, "Court will consider mitigation of sentence upon payment of restitution."

On appeal, the Fifth District Court of Appeal held:

> While a defendant's willingness and capacity to pay restitution can be among the reasons a judge may decide to impose a lower sentence, the equal protection clause prohibits a judge from conditioning a lower sentence on the payment of restitution. *DeLuise v. State*, 72 So.3d 248 (Fla. 4th DCA 2011). Here, the trial court violated Nezi's equal protection rights by imposing a harsher sentence after making it clear that if Nezi, at the time of the sentencing hearing, had the financial means to pay a large part of the agreed-upon restitution, it would have imposed lesser sanctions. . . . A sentencing order that allows a defendant to reduce the length of incarceration if she pays restitution is not materially different from a sentencing order that requires the defendant to serve more time if she does not pay restitution.

Id. at 522.

Thus, on virtually identical facts, the Fourth District and the Fifth District Courts of Appeal arrived at diametrically opposed conclusions. Direct, express, and irreconcilable conflict thus exists between the decisions of the Court in the instant

case and that of the Court in Nezi on the exact same point of law.

This conflict is one which can only be resolved by this Court. Moreover, the issue involved in this case is one which has significant constitutional ramifications and is likely to arise often in sentencing, as evidenced by the three recent appellate decisions written within a comparatively short time span since DeLouise was decided in 2011. The dissenting opinion of Judge Taylor in Noel speaks urgently to the federal constitutional concerns which rise when the courts waver from the principle that "justice be applied equally to all persons." Noel, 127 So.3d at 779, Taylor, J., dissenting. As Judge Taylor notes, the United States Supreme Court has long emphasized that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.*, quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956).

Permitting the conflict between decisions to stand in this case would have the result that, while defendants in the Fifth District would be protected from being treated more harshly because of their indigency, those in the Fourth District would be subject to higher terms of incarceration because they were unable to access financial resources which would permit reduction of their sentences. This discrepancy cannot be allowed to continue. Consequently, this Court should exercise its discretion and accept jurisdiction to review the decision below.

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court exercise its discretion and accept jurisdiction of the instant cause for review.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Tatjana Ostapoff
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Melynda Melear, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by e-mail at CrimAppWPB@myfloridalegal.com this _____ day of FEBRUARY, 2014.

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