

**IN THE SUPREME COURT
OF FLORIDA**

CASE NO. SC-16-645

Lower Court Case No. 3D10-2704

FREDDY D'AGASTINO, et. al.,

Petitioners,

vs.

THE CITY OF MIAMI, et al.,

Respondents.

**On discretionary conflict review of a decision of the
Third District Court of Appeal in a direct civil appeal**

PETITIONERS' AMENDED JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This case is about whether a municipality can create a civilian board that can review, subpoena, investigate, and recommend discipline and policy changes of its police department's law enforcement and corrections officers. In 2007, City of Miami Police Lieutenant Freddy D'Agastino, ("D'Agastino") was investigated by the internal affairs division of the police department for his conduct relating to a traffic stop. *D'Agastino v. City of Miami*, 2016 WL 1051850, 41 Fla. L. Weekly D689 (Fla. 3d DCA Mar. 16, 2016). Internal Affairs ultimately determined the allegations were "inconclusive." *Id.* at n.1. After the police department concluded its investigation, the Civilian Investigative Panel ("CIP") subpoenaed Lieutenant D'Agastino to testify before its complaint committee. *Id.* In response, D'Agastino filed a petition to quash the subpoena and obtain a protective order. *Id.* D'Agastino alleged that Florida Statute Section 112.533(1) granted the police department exclusive authority to investigate police misconduct. *Id.* He and the Fraternal Order of Police (union) argued Section 112.533(1)(a) provides: "Every law enforcement agency ... shall establish and put into operation a system for the ... investigation ... of complaints received by such agency from any person, which shall be the procedure for investigating a complaint against a law enforcement ... officer ... notwithstanding any other law or ordinance to the contrary." *Id.* (emphasis added). The City of Miami intervened and was served separately with a declaratory action

by the Fraternal Order of Police seeking to declare unconstitutional those ordinances empowering the CIP to investigate the City's law enforcement officers. *Id.* at *1. The CIP, in turn, joined that action. *Id.* The two cases were consolidated and each party moved for summary judgment. The trial court granted the City and CIP summary judgment. *Id.* D'Agastino and the Fraternal Order of Police, seek review of the opinion of the Third District Court of Appeal which affirmed the trial court's ruling that a municipality could empower a civilian investigative panel outside of the police department that can compel law enforcement employees to appear before it and provide evidence. *Id.* at *2 (citing City of Miami Charter, § 51).

The City of Miami Charter mandates that the city commission create a civilian investigative panel to oversee the sworn police department and the city commission approved an ordinance creating a CIP to “[a]ct as independent civilian oversight of the sworn police department.” *Id.* at *2 (citing Miami, Fla., Code Art. II, § 11.5–27(1) (2002)). The CIP is authorized by ordinance to “[c]onduct investigations, inquiries and public hearings to make factual determinations, [and] facilitate resolution and propose recommendations to the city manager and police chief regarding allegations of misconduct by any sworn [police] officer.” *Id.* Particularly at issue is the CIP's subpoena power, through which it can compel a sworn police officer and other witnesses to testify before it. *Id.* (citing Miami, Fla.,

Code art. II § 11.5–32).

The original *D’Agastino* opinion was issued on January 23, 2013. 2013 WL 238217 (Fla. 3d DCA 2013) (opinion withdrawn and superseded on denial of rehearing). Three years later, the *D’Agastino* opinion on rehearing was issued. It conflicts with the Fifth District Court of Appeal’s opinion in *Demings v. Orange County Citizens Review Board*, 15 So. 3d 604 (Fla. 5th DCA 2009). *Demings* held that the Law Enforcement and Correctional Officers Bill of Rights, Florida Statute Section 112.533 requires that when a complaint is lodged against a law enforcement officer, the law enforcement agency by which the police officer is employed is the only investigative body that can compel the attendance and testimony from the police officer. The Third District in *D’Agastino*, when reviewing *Demings* stated emphatically: “We simply disagree with the Fifth District on this point.” *D’Agastino*, 2016 WL 1051850 at *5. A split Court (7 to 3) denied rehearing *en banc*.

SUMMARY OF ARGUMENT

Very simply, the Third District’s opinion in this case and the Fifth District’s opinion in *Demings v. Orange County Citizens Review Board*, 15 So. 3d 604 (Fla. 3d DCA 2009), directly and expressly conflict. This direct and express conflict confers jurisdiction upon this Court. *See* Art. V, § 3(b)(3), Fla. Const. The issue of whether local government can enable a civilian review panel to investigate and make

recommendations about police conduct and policy is worthy of review by this Supreme Court. The Law Enforcement and Corrections Officers' Bill of Rights, Section 112.532-.535 lists procedural rights including which agencies can investigate complaints about law enforcement officers and is written in exclusive terms and does not authorize civilian entities to participate. Federal and state agencies, grand juries, and internal affairs units within police departments may serve the investigative, discipline, and prosecutorial functions; but Florida Statutes provide that local governments may not empower civilian agencies to conduct its own investigations.

The majority's opinion in *D'Agastino* recognized the investigative entities in *Demings* and *D'Agastino* have "equivalent" civilian entities investigate law enforcement officers. *D'Agastino* at *5. But the *Demings* Court prohibits civilian review boards and *D'Agastino* allows them. The nonessential difference between the two cases is *Demings* is a sheriff and this case involves a municipal police department. It is a distinction without a difference. The fact that *Demings* is a sheriff was considered by the Fifth District as one of "other problems" with Orange County's Civilian Review Board, but not the only problem. *Demings*, 15 So. 3d at 610-11.

Law enforcement officers are subject to criminal, civil, and administrative review from many government agencies both inside and outside their departments. They are subject to civil suit by private parties and discipline from their employer.

On the other hand, the Legislature has enacted a bill of rights for those very officers when internal investigations are conducted. There are procedural and substantive rights that are enforceable in the internal investigative setting. Chapter 112 does not contemplate a civilian review of police conduct and therefore those civilian entities would not be bound to safeguard those procedural and substantive rights. The conflict between the districts has created uncertainty and undermines the rights once given to law enforcement when their conduct is under formal review. The Court is presented with the opportunity to resolve this conflict so local governments and law enforcement officers understand how they must proceed and the extent or limitations of law enforcement officers' rights in the formal investigative setting.

ARGUMENT

THE THIRD DISTRICT'S DECISION BELOW AND THE DECISION IN *DEMINGS v. ORANGE COUNTY CITIZENS REVIEW BOARD* EXPRESSLY AND DIRECTLY CONFLICT.

This Court has discretionary jurisdiction to review a decision of a district court that “expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.” *See* Art. V, § 3(b)(3), Fla. Const. “It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an ‘express’ conflict under section 3(b)(3).” *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla 1981). In this case, however, *Demings*, the case that conflicts with

D'Agastino, is expressly mentioned, reviewed, and discounted. *D'Agastino*, at *5. See also *id.* at 11 (citing *City of Palm Bay v. Wells Fargo Bank*, 114 So. 3d 924 (Fla. 2013) (Rothenberg, J., dissenting) (“the City of Miami’s ordinance does exactly what Florida’s constitution and the Florida Supreme Court in *City of Palm Bay* forbids”). Since the Third District’s opinion in this case expressly *conflicts* with *Demings*, this Court has the discretionary jurisdiction to grant review on the merits.

Chapter 112, Part VI, Florida Statutes is known as a Law Enforcement and Correctional Officer’s Bill of Rights and provides in part:

112.533 Receipt and processing of complaints.—
(1)(a) Every law enforcement agency and correctional agency shall establish and put into operation a system for the receipt, investigation, and determination of complaints received by such agency from any person, which shall be **the** procedure for investigating a complaint against a law enforcement and correctional officer and for determining whether to proceed with disciplinary action or to file disciplinary charges, **notwithstanding any other law or ordinance to the contrary.** (emphasis added).

The FOP and *D'Agastino* argued that the Law Enforcement and Correctional Officers Bill of Rights was the exclusive method and sole procedure for a municipality to investigate police misconduct. *D'Agastino* and the union relied on *Demings*, which held:

Section 112.533, as amended in 2003 and 2007, is unambiguous. It conveys a clear and definite directive

that when a complaint is registered against a law enforcement officer, the employing agency is **the only local governmental entity authorized to investigate** that complaint.

15 So. 3d at 608-09 (emphasis added).

Additionally, *Demings* ruled:

Because section 112.533 limits the investigation of complaints against law enforcement officers by local government to the employing agency's investigation, the charter provisions and ordinance that establish an additional procedure for investigating these complaints necessarily and directly conflict with the statute.

15 So. 3d at 609.

The Third District recognized that the review board which was found to be illegal in *Demings* was the “equivalent” of the civilian review board here. *D’Agastino* at *5. Nevertheless, the Third District ruled that the CIP in Miami was lawful and expressly disagreed with the Fifth District Court in *Demings*. “The majority recognizes and clearly states that it ‘disagrees’ with the Fifth District Court of Appeals’ opinion in *Demings*” and also concludes that there is “direct conflict with *Demings*.” *Id.* at *15 (Rothenberg, J., dissenting). Thus, there is apparent express conflict between the districts which conveys jurisdiction upon this Court.

The City and the CIP are likely to argue that there is no express conflict between *D’Agastino* and *Demings* because *Demings* is a Sheriff who is a constitutional officer and not a municipal police department chief. *Demings*,

however, was not based exclusively on the differences between a Sheriff versus a Chief of Police. As shown above, *Demings* squarely held that the Law Enforcement and Correctional Officers Bill of Rights created the exclusive method for investigating law enforcement officers, and any local law which created an additional procedure was in conflict. *Id.* Even though the cases were analyzed under different constitutional provisions, the Third District stated that the 1968 Constitution, under which *Demings* was analyzed, and the 1885 Constitution under which *D'Agastino* was analyzed, both required an analysis of whether two legislative provisions can co-exist. *D'Agastino*, at *15 n. 3 (“The terms are given the same construction in local government law in this state”) (citations omitted).

The Third District also incorrectly states that the “decisive holding” in *Demings* was that the “Sheriff could not be required to account for his activities to a locally-created Board,” and quotes a portion of *Demings*, but the quotation is incomplete and leaves out an important word, which context is critical to its meaning. First, the quotation of *Demings* appearing in *D'Agastino*:

Given this constitutional framework, we [] find that the County cannot interfere with the Sheriff’s independent exercise of his duty to investigate misconduct by his deputies either by forcing him to appoint members to the CRB or by mandating his participation in CRB proceedings, either in person or through his deputies or employees.

The actual statement in *Demings*, without the brackets, is as follows:

Given this constitutional framework, we **also** find that the County cannot interfere with the Sheriff's independent exercise of his duty to investigate misconduct by his deputies either by forcing him to appoint members to the CRB or by mandating his participation in CRB proceedings, either in person or through his deputies or employees.

(emphasis added).

Indeed, this part of the *Demings* opinion is well after the Court had already ruled that “when a complaint is registered against a law enforcement officer, the employing agency is the only local governmental entity authorized to investigate that complaint,” and “[b]ecause section 112.533 limits the investigation of complaints against law enforcement officers by local government to the employing agency's investigation, the charter provisions and ordinance that establish an additional procedure for investigating these complaints necessarily and directly conflict with the statute.” *Demings*, 15 So. 3d at 609. Indeed the quotation from *Demings* relied on by the Third District is under a section entitled: “*Other problems with the CRB Charter Provision and Implementing Ordinance*,” which appears after it decided the statutory conflict issue. *Id.* at 611 (italics in the original).

This Court should exercise its discretion and review this case. By the nature of their job, police officers will generate complaints. Society certainly has an interest in investigating these complaints, but all involved need to know the procedural rules of investigation. Actions of police officers can be investigated and

enforced by the state attorney's office, state and federal grand juries, FBI, and U.S. Department of Justice. Also, there is an express exception in Section 112.533(1)(a) for the state Criminal Justice Standards and Training Commission. But when a police officer is under investigation by the entity that employs him, there is an important question about who investigates that complaint-- is it the employing law enforcement agency, or is it an outside, civilian panel. The Fifth District has ruled that the Legislature has spoken in Chapter 112 and limits the investigation to the employing law enforcement agency, but the Third District has ruled conversely.

When a police officer is under investigation and subject to interrogation by his or her agency, a multitude of safeguards apply. See § §112.532(1)(a)-(j), Fla Stat. The procedural safeguards do not apply when a law enforcement officer is questioned by a civilian panel. The Legislature has carefully crafted the Law Enforcement and Correctional Officers Bill of Rights. It requires that there be a method to receive and process complaints by a law enforcement agency; it provides that it be the exclusive method for processing complaints, and grants law enforcement officers certain carefully delineated rights. The decision in *D'Agastino* allows a City or other government agency to skirt the procedural protections.

It is an important matter for police and corrections officers and their employers to fully understand the methods that can be used to investigate

complaints against them. Since the holding in *Demings* in 2009, there has been a clear understanding that civilian review boards outside the agency were not permitted to compel questioning of police officers. Now, neither the local government community, the law enforcement community, nor the community at large can be sure.

CONCLUSION

The petitioners respectfully request that this Honorable Court accept jurisdiction in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email to: **Charles C. Mays, Esq.**, Attorney for CIP, 10240 S.W. 144th Street, Miami, Florida 33176 (ccmays@bellsouth.net); **John J. Quick, Esq.**, Attorney for CIP, Weiss Serota Helfman Cole & Bierman, P.L., 2525 Ponce de Leon Boulevard, Suite 700, Coral Gables, Florida 33134 (jquick@wsh-law.com); and **Victoria Mendez**, City Attorney and **John Greco, Esq.**, Deputy City Attorney, Attorney for City of Miami, Miami Riverside Center, Suite 945, 444 S.W. 2nd Avenue, Miami, Florida 33130-1910 (jagreco@miamigov.com).

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this brief is in Times New Roman 14 Point Font and is in compliance with Rule 9.210, Fla. R. App. P.

_____/s/ Robert Buschel_____
Robert C. Buschel