

IN THE SUPREME COURT  
STATE OF FLORIDA

CASE No. SC16-645  
LOWER CASE No. 3D10-2704

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FREDDY D'AGASTINO and FRATERNAL ORDER OF POLICE, WALTER E.  
HEADLEY, JR., MIAMI LODGE NO. 20,

*Petitioners,*

v.

THE CITY OF MIAMI and THE CITY OF MIAMI CIVILIAN  
INVESTIGATIVE PANEL,

*Respondents.*

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BRIEF ON JURISDICTION  
OF THE CITY OF MIAMI CIVILIAN INVESTIGATIVE PANEL

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ON DISCRETIONARY REVIEW FROM A DECISION OF THE  
THIRD DISTRICT COURT OF APPEAL

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## STATEMENT OF THE CASE AND FACTS

Petitioners' statement of the case and facts is acceptable insofar as it goes. However, it omits information relevant to the Court's consideration of its discretionary jurisdiction. The following facts are set forth in the Third District Court of Appeal's decision in *D'Agastino v. City of Miami*, \_\_\_ So. 3d \_\_\_, 2016 WL 1051850 (Fla. 3d DCA Mar. 16, 2016).

The City of Miami ("City") ordinance creating the City's Civilian Investigative Panel ("CIP) was the result of a public referendum in 2001 amending the City's Charter to provide for civilian oversight of police conduct. *Id.* at \*2. The CIP's express mandate is to act *independently* of internal police investigations of police conduct. *Id.* at \*\*2, 3. While the City's ordinance allows the CIP 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," the Third District correctly observed that the CIP has "no management authority over City police officers. It cannot discipline, suspend, demote, discharge, or transfer city police officers. Management decisions as a result of police misconduct are reserved to city police administrators...." *Id.* at \*3.

More germane to the question of express and direct conflict presented here, the CIP ordinance provides that "[p]olicies and procedures shall be established to ensure compliance with Chapters 112 and 119 of the Florida Statutes and any other

applicable laws.” *Id.* (citing Miami, Fla., Code, art. II, § 11.5–33(e) (2002)). The Third District noted the following critical components of the City Charter:

[T]he CIP “shall not interfere with any pending or potential criminal investigation or prosecution.” City of Miami Charter § 51(D). The CIP ordinance further dictates the CIP shall “[e]xercise its powers so as to not interfere with any ongoing investigations and conduct its activities consistent with applicable law ... and labor contracts.” Miami, Fla., Code, art. II, § 11.5–27(2). To that end, the CIP is restricted from investigating a complaint until “after determination by its independent counsel, who shall be required to consult with the appropriate prosecutorial agencies, [so] that an investigation will not interfere with any pending criminal investigation.” Miami, Fla., Code, art. II, § 11.5–31(2)(a). Finally, the Ordinance provides that “[a] decision of the CIP to proceed with an investigation may be challenged by any agency engaged in such investigation or prosecution by seeking judicial order in law or equity in a court of competent jurisdiction,” and that “[w]ritten notification of such challenge to the CIP shall stay the investigation for 48 hours permitting the agency to obtain such a judicial order.”

*Id.* at \*4.

Petitioners correctly concede that the Law Enforcement and Correctional Officers Bill of Rights, codified in Chapter 112 (the “PBR”), is intended to provide “procedural and substantive rights” when “*internal* investigations are conducted.” Pet. Jur. Br. at 5 (emphasis added). The Third District also noted Petitioners’ concession that the PBR “does not purport to expressly preempt other investigative bodies or means of oversight.” *D’Agastino* at \*3. As Petitioners correctly observe, the CIP did not commence its investigation of Lieutenant D’Agastino until the City’s Internal Affairs investigation had been completed and reached a

determination that the allegations against him were “inconclusive.” Pet. Jur. Br. at 1 (citing *D’Agastino* at n. 1).

### **SUMMARY OF ARGUMENT**

The Third District’s decision below does not expressly and directly conflict with the Fifth District Court of Appeal’s decision in *Demings v. Orange County Citizens Review Bd.*, 15 So. 3d 604 (Fla. 5th DCA 2009), for two principal reasons. First, the Court cannot ascertain from the face of both decisions whether the two enabling ordinances are sufficiently similar in nature and operation to create an express and direct conflict between the decisions. Second, the Fifth District in *Demings* chose (when it did not have to) to analyze the validity of Orange County’s ordinance in the context of its impacts on a constitutional officer (the Orange County Sheriff) over which the County lacked authority. That analytical approach, which does not exist in this case because no constitutional officer is involved, cannot be written out of *Demings*.

Accordingly, the Court, respectfully, lacks the requisite jurisdiction to exercise discretionary review of the Third District’s decision.

### **ARGUMENT**

#### **I. THE THIRD DISTRICT’S DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE FIFTH DISTRICT’S DECISION IN *DEMINGS*.**

##### **A. The Court’s conflict jurisdiction.**

Article V, section 3(b)(3) of the Florida Constitution provides, in relevant part, that this Court shall have discretionary jurisdiction to review a decision of a

district court of appeal that “expressly and directly conflicts with a decision of another district court of appeal ... on the same question of law.” Art. V, § 3(b)(3), Fla. Const. This provision was written into the Florida Constitution in 1980 because voters elected to *restrict*, rather than expand, the jurisdiction of the Court. *In re Emergency Amendments to Rules of Appellate Procedure*, 381 So. 2d 1370, 1374 (Fla. 1980) “(Subsection (a)(2) has been substantially revised in accordance with amended Article V, Section 3(b)(3), Florida Constitution (1980) to restrict the scope of review under the Supreme Court’s discretionary jurisdiction.”); *see also Petersen v. State*, 775 So. 2d 376, 379-80 (Fla. 4th DCA 2000) (noting “[w]hen Article V of the Florida Constitution was amended in 1980, one of the purposes was to limit the jurisdiction of the Florida Supreme Court....”).

One of the critical factors in determining whether two decisions expressly and directly conflict is whether they are irreconcilable. *Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166 (Fla. 2006). Moreover, subsequent to the 1980 constitutional amendments, the conflict must appear on the face of the decisions and can be neither inherent nor implied. *Dept. of Health and Rehab. Servs. v. Nat’l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986); *see also Reaves v. State*, 485 So. 2d 829 (Fla. 1986) (holding conflict may not arise from an examination of the underlying records). If the two cases being compared involve factually distinguishable contexts, as reflected in the decisions, a basis for conflict jurisdiction does not exist. *Robinson v. State*, 770 So. 2d 1167, 1170 (Fla. 2000) *Dept. of Rev. v. Johnston*, 442 So. 2d 950, 951-52 (Fla. 1983).



For example, in *Eskind v. City of Vero Beach*, 159 So. 2d 209 (Fla. 1963), the Court concluded a conflict warranting certiorari review existed because the municipal ordinances in the conflicting decisions were “almost identical” and “[t]he factual background of the two decisions is likewise substantially the same.”<sup>1</sup> *Id.* at 210. *See also Fla. Power & Light v. Bell*, 113 So. 2d 697, 698, 699 (Fla. 1959) (rejecting conflict jurisdiction because decisions were not ““on all fours” factually in all material respects” and decisions were not “patently irreconcilable”).

**B. There is insufficient indication of the nature and operation of the Orange County ordinance in *Demings* to allow the conclusion that the City’s ordinance here is sufficiently identical so as to result in irreconcilable decisions.**

Virtually nothing can be ascertained from *Demings* regarding the interaction of the Orange County ordinance in question and the statutes codifying the PBR. All that is substantively known from a review of *Demings* is that the ordinance created a citizens board charged with investigating complaints regarding alleged use of excessive force or abuse of power by an officer or employee of the sheriff’s office. 15 So.3d at 606-07. The decision is silent, however, as to the operation of the ordinance – whether it requires the board (i) to comply with the PBR and other applicable laws and labor contracts, (ii) to refrain from interfering with potential criminal and internal police investigations, (iii) to have independent counsel confer

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<sup>1</sup> While *Eskind* was decided prior to the 1980 constitutional amendments, the Court’s certiorari jurisdiction then was even *broader* than its discretionary jurisdiction after the 1980 amendments.

with prosecutorial authorities before commencing an investigation; or (iv) to stay investigative proceedings while the affected officer seeks judicial review of the board's decision to commence an investigation.<sup>2</sup>

Most significantly, the *Demings* decision fails to discuss what the Orange County board was permitted to do with respect to its investigation and findings in terms of discipline of the investigated deputy. This silence stands in stark contrast to the centrality of that issue in the Third District's decision, where the court focused on the fact that the CIP lacked any authority to impose discipline on the investigated officer:

The CIP is granted limited power to act in response to its investigations, and may only propose recommendations to the City Manager or Police Chief. [citation omitted]. The CIP has no management authority over City police officers. It cannot discipline, suspend, demote, discharge, or transfer city police officers. Management decisions as a result of police misconduct are reserved to city police administrators, *in keeping with the structure of the PBR*.

*D'Agastino*, 2016 WL 1051850, at \*3 (emphasis added). For all that can be ascertained from the four corners of *Demings*, an investigation by the Orange County board might well have resulted in direct discipline of the investigated deputy.

While the Petitioners' brief on jurisdiction (and the dissent below) focus extensively on safeguarding the protections afforded to officers by the PBR – *see*

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<sup>2</sup> In fact, *Demings* reflects that the Orange County board proceeded with its investigation even after the deputy challenged the board's subpoena in court. 15 So. 3d at 607.

Pet. J. Br. at 4, 5, 10; *D'Agastino* at \*\*8-10, 13-14 – *Demings* in no way addresses how those protections were impacted by the Orange County ordinance. Whether the Fifth District would have reached the same conclusion in *Demings* had it been confronted with an ordinance that *explicitly* mandated compliance with the PBR and other applicable laws, prohibited interference with internal and criminal investigations, and precluded discipline of the investigated deputy, cannot be determined. Absent the ability to make such a determination, there is no express and direct conflict to support the Court's exercise of jurisdiction.

**C. The Fifth District chose to approach its analysis of the Orange County ordinance in the context of the sheriff's constitutional office.**

Petitioners suggest that the Fifth District's decision to analyze the Orange County ordinance *in the context of* the constitutional office of the Orange County Sheriff is an inconsequential decision without material significance. And yet, it is readily apparent that the issue was repeatedly at the heart of the Fifth District's reasoning. After all, the Fifth District *chose* to formulate the issue on appeal in *Demings* as follows: "Based on these constitutional provisions, the question presented is whether the County charter and ordinance creating and authorizing an independent board to review citizen complaints against the Sheriff's deputies, *without first abolishing the constitutional office of sheriff*, is 'inconsistent with general law.'" 15 So. 3d at 609 (emphasis added).

In fact, the decision *begins* with a comprehensive discussion of the authority of constitutional officers and how charter counties have the option of either

maintaining these officers or transferring their responsibilities. *Id.* at 606. The *Demings* court took pains to carefully establish the chronology reflecting the county’s abolition of the Office of Sheriff, followed by the creation of the citizens board, followed four years later by the reinstatement of the Office of Sheriff, “but leaving the CRB intact.” *Id.* at 607. This discussion would have been pointless if not material to the Fifth District’s analysis.

The Fifth District’s reading of section 112.533, Florida Statutes, *id.* at 609, cannot be divorced from the conclusion that immediately precedes it, where the Fifth District stated, “The County is also prohibited from transferring any of the Sheriff’s powers or duties” – including, presumably, those conferred or assigned pursuant to section 112.533 – “to another county office, department or *board*, without abolishing the constitutional office of sheriff by charter.” *Id.* (emphasis added; citing Art. VIII, § 1(d), Fla. Const.; *Dade County v. Kelly*, 99 So. 2d 856 (Fla. 1958)). In short, independent of the Fifth District’s later observation that the Orange County Sheriff, as a result of his constitutional office, was not subject to the authority of or interference from the county’s citizens board in the performance of his duties, *Demings*, 15 So. 3d at 610-11, the Fifth District *also* earlier concluded that the Orange County ordinance could not transfer the duties set forth in section 112.533 from the Sheriff to the citizens board without abolishing the Office of Sheriff. Absent this perceived constitutional prohibition, one cannot predict how the Fifth District would have analyzed the county ordinance.

## CONCLUSION

It cannot be ascertained from the decision below and *Demings* that the ordinances at issue in those cases are sufficiently similar in operation and effect vis-à-vis Chapter 112, Florida Statutes, to support conflict jurisdiction here. In addition, it is apparent that the Fifth District focused on the constitutional office of the Orange County Sheriff in considering whether the Orange County ordinance constituted a permissible transfer of functions from the Sheriff to the citizens board in that case. Those issues do not form a part of the Third District's analysis below. Consequently, the decision here does not expressly and directly conflict with *Demings*.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of this brief on jurisdiction has been served via E-Portal this 19<sup>th</sup> day of May, 2016, on **Robert C. Buschel, Esq.**, Buschel Gibbons, P.A., (Counsel for Petitioner) 100 S.E. Third Avenue, Suite 1300, Fort Lauderdale, FL 33394 ([buschel@bglaw-pa.com](mailto:buschel@bglaw-pa.com)); **Ronald J. Cohen, Esq.**, Rice Pugatch Robinson Storfer & Cohen, PLLC, (Counsel for Petitioner) 101 Northeast Third Avenue, Suite 1800, Fort Lauderdale, FL 33301 ([rcohen@rprslaw.com](mailto:rcohen@rprslaw.com)); **Charles C. Mays, Esq.**, (Counsel for CIP), 10240 S.W. 144<sup>th</sup> Street, Miami, Florida 33176 ([ccmays@bellsouth.net](mailto:ccmays@bellsouth.net)); **Victoria Mendez, Esq.**, and **John Greco, Esq.**, (Counsel for City) Miami Riverside Center, Suite 945, 444 S.W. 2<sup>nd</sup> Avenue, Miami, FL 33130 ([jagreco@miamigov.com](mailto:jagreco@miamigov.com); [victoriamedez@aol.com](mailto:victoriamedez@aol.com)).

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Edward G. Guedes

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