

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC16-645**

**L.T. Case No. 3D10-2704**

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FREDDY D'AGASTINO, et al.,

Petitioners,

vs.

CITY OF MIAMI, et al.,

Respondents.

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**RESPONDENT CITY OF MIAMI'S  
JURISDICTIONAL BRIEF**

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ON DISCRETIONARY REVIEW  
FROM THE THIRD DISTRICT COURT OF APPEAL

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## SUMMARY OF ARGUMENT

This case is about whether the City of Miami's Civilian Investigative Panel, established to conduct external investigations of law enforcement officers and make recommendations to the police department, is in conflict with Florida Statutes which provide for a system for internal investigations by the police department leading to discipline. The Third District Court of Appeal held that the specific process adopted by the City of Miami was not in conflict with the Florida Statutes and was therefore constitutional. *See D'Agastino v. City of Miami*, 2016 WL 1051850 (Fla. 3d DCA March 16, 2016).

The Fifth District Court of Appeal held that the process adopted by Orange County creating a citizens review board and authorizing it to investigate the Sheriff and deputies was unconstitutional. *See Demings v. Orange County Citizens Review Board*, 15 So. 3d 604 (Fla. 5th DCA 2009). Significantly, the Fifth District held in part that the County Sheriff was an independent constitutional officer and therefore the County could not interfere with his independence by mandating his participation in review board proceedings either in person or through his deputies or employees.

The Petitioners seek review based on express and direct conflict between this case and the decision in *Demings*. However, the holding in *Demings* that the County could not interfere with the Sheriff's independence was dispositive of the case and no other analysis was necessary. Further, review is not warranted in this case because there is no indication of how many review boards exist and whether this is an issue of statewide impact. Moreover, the constitutionality of such review boards may depend upon the actual powers of the review boards which may vary from government to government. Hence, the ultimate decision in *D'Agastino* may not be applicable to other review boards depending upon their functions. Thus, review should be denied.

### **ARGUMENT**

#### **THIS COURT SHOULD DECLINE TO EXERCISE CONFLICT JURISDICTION.**

The basis for jurisdiction in this Court is express and direct conflict between the decision of the Third District in *D'Agastino v. City of Miami*, and the Fifth District in *Demings v. Orange County Citizens Review Bd.* However, as explained below, a comparison of the *D'Agastino* and *Demings* cases demonstrates that the District Courts of Appeal considered these cases in different legal contexts. Moreover, the Charters and Ordinances that

establish the review boards differ in significant respects. Thus, exercise of jurisdiction is not warranted.

1. *D'Agastino, et al. v. City of Miami, et al.*

The City of Miami created the Civilian Investigative Panel (“CIP”) to conduct external investigations of police misconduct. Freddy D’Agastino and the Fraternal Order of Police challenged the authority of the CIP, arguing that the sole procedure for investigating police misconduct is set forth in the Florida Statutes, which provides that “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.” *See* § 112.532, Fla. Stat.

The Third District in *D’Agastino* summarized the structure of the CIP as follows:

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. City of Miami Charter § 51(E)(1)-(3); Miami, Fla., Code, art. II, § 11.5–27. 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. Indeed, 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.” Miami, Fla., Code, art. II, § 11.5–33(e) (2002).

Additionally, the City Charter provides the 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.*

*Id.* at \*3-4.

The Third District concluded that the “CIP provides a distinct function that is not prohibited by the rights and restrictions set forth under Chapter 112.” *Id.* at \*5. “The absence of any authority granted to the CIP to make the sort of police management decisions addressed in Chapter 112,

or to affect the obligations that chapter imposes on the Miami Police Department and its investigators, makes manifest the absence of a conflict between the CIP ordinance and Chapter 112.” *Id.* at \*4.

## **2. *Demings v. Orange County Citizens Review Board***

The Fifth District in *Demings* determined the constitutionality of the Orange County Citizens Review Board (“CRB”). Although the Fifth District held that the CRB conflicted with Chapter 112, Florida Statutes, there was another dispositive basis for its decision on the constitutionality of the CRB, stated as follows:

**As an independent constitutional officer, the Sheriff does not derive his authority from the County's charter or the board of county commissioners, and is neither generally accountable to the Board for his conduct in office nor subject to the board's direction in the fulfillment of his duties.** Art. VIII, § 1(d), Fla. Const. In the event of misconduct or misfeasance by the Sheriff, it is Florida's governor who is authorized to suspend the Sheriff from office—and not the County's governing board. Art. IV, § 7(a), Fla. Const.<sup>9</sup> And, ultimately, the Sheriff is independently accountable to the electorate of Orange County. Art. VIII, § 1(d), Fla. Const.; *State v. Sheats*, 78 Fla. 583, 83 So. 508 (1919) (explaining that the term “office” as used in the Florida Constitution “implies a delegation of a portion of the sovereign power to, and the possession of it by, the \*611 person filling the office” or “independent authority of a governmental nature”). **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.** Therefore, we agree with the Sheriff that the basic structure or composition of the CRB is constitutionally infirm, and with Jenny that those provisions of the charter and ordinance authorizing the CRB to compel the attendance of Sheriff's employees to appear for questioning by the CRB, or to produce documents, are also unconstitutional.

*Id.* at 610-611 (emphasis added). Thus, the constitutionality of the CRB also turned in significant part on the independence of the Sheriff. This holding alone would have been dispositive of that case.

### **3. Exercise of Jurisdiction is unnecessary and unwarranted.**

Based on the distinctions between *D'Agastino* and *Demings*, conflict jurisdiction should be declined. As set forth in detail by the Third District, the CIP contains provisions to ensure that the Charter and Ordinance are not in conflict with Chapter 112, Florida Statutes. Moreover, the Fifth District was concerned in substantial part with the encroachment on the powers of the Sheriff by the CRB. These decisions are sufficiently distinguishable such that exercise of conflict jurisdiction is not warranted.

Furthermore, exercise of conflict jurisdiction is unnecessary. There is no indication of how many review boards exist and whether this is an issue of statewide impact. Moreover, the constitutionality of such review boards may depend upon the actual powers of the review boards which may vary

from government to government. Hence, the ultimate decision in *D'Agastino* may not be applicable to other review boards depending upon their functions. Accordingly, this Court should decline to exercise jurisdiction over the decision of the Third District Court of Appeal.

**CONCLUSION**

Based on the foregoing, the City of Miami respectfully requests that this Court decline jurisdiction over the decision of the Third District Court of Appeal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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**CERTIFICATE OF COMPLIANCE**

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