

IN THE SUPREME COURT OF FLORIDA

CASE NO.

**WILFREDO DELGADO,**

Petitioner,

-vs-

**STATE OF FLORIDA,**

Respondent.

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**BRIEF OF PETITIONER ON JURISDICTION**

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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 *Delgado v. State*, 973 So.2d 644 (Fla. 3d DCA 2008), on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the attached appendix, paginated separately and identified as “A” followed by the page number.

## **STATEMENT OF THE CASE AND FACTS**

Wilfredo Delgado appealed the denial of his motion under Florida Rule of Criminal Procedure 3.800(a) on grounds that his sentence was greater than that allowed by law due to the incorrect calculation of his scoresheet points (A. 2). After acknowledging that the defendant’s scoresheet had been improperly calculated, the appellate court refused to consider the validity of the reasons for the trial court’s departure from the guidelines scoresheet (A. 2). The court held that the validity of the departure reasons could not be considered on appeal from the denial of a 3.800(a) motion (A. 2). Based on this holding, the court affirmed the trial court's denial of the defendant's 3.800(a) motion (A. 2).

Motion for rehearing was filed on February 14, 2008, and denied on August 7, 2009. A notice invoking this Court's discretionary jurisdiction was filed on September 4, 2009.

## SUMMARY OF ARGUMENT

*Lemon v. State*, 825 So.2d 927 (Fla.2002), *Brooks v. State*, 969 So.2d 238 (Fla.2007), and *Squires v. State*, 891 So.2d 600 (Fla. 2d DCA 2005) establish that the validity of a departure reason can be considered on direct appeal from the denial of a 3.800(a) motion to determine whether a calculation error in a guidelines scoresheet is harmless error. In the present case, the Third District Court of Appeal held that the validity of departure reasons could not be considered under such circumstances in an appeal from the denial of a 3.800(a) motion. Thus, the decision of the Third District Court of Appeal in this case expressly and directly conflicts with the decisions of this Court in *Lemon* and *Brooks*, and the decision of the Second District Court of Appeal in *Squires*.

## ARGUMENT

**THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN *Lemon v. State*, 825 So.2d 927 (Fla.2002), and *Brooks v. State*, 969 So.2d 238, 243 (Fla. 2007), AND THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN *Squires v. State*, 891 So. 2d 600 (Fla. 2d DCA 2005).**

In *Lemon v. State*, 825 So.2d 927, 928 (Fla.2002), the defendant had been given an upward departure sentence under a 1995 guidelines scoresheet, when the 1994 guidelines scoresheet would have been somewhat lower. The defendant filed a Rule 3.800(a) motion seeking to be resentenced under a corrected scoresheet. *Id.* at 928-29. The trial court denied the motion. *Id.* at 929. On the defendant's appeal of that denial, the Fourth District Court of Appeal rejected the State's argument that the defendant was not entitled to relief because the departure sentence could have been imposed even if the 1994 guidelines had been used. *Lemon v. State*, 769 So.2d 417, 418 (Fla. 4th DCA 2000). This Court quashed the decision of the Fourth District Court of Appeal, determined that the reasons given by the trial court for its departure from the guidelines scoresheet were valid, and based on that determination held that the scoresheet calculation error was harmless. *Lemon*, 825 So.2d at 931.

Similarly, in *Squires v. State*, 891 So.2d 600 (Fla. 2d DCA 2005), the defendant had been given an upward departure sentence and he filed a Rule

3.800(a) motion to correct a calculation error in his sentencing guidelines scoresheet. On appeal from the denial of the 3.800(a) motion, the appellate court determined that the reasons for his upward departure sentence were correct, and based on that determination held that any calculation error in the scoresheet was harmless.

In *Brooks v. State*, 969 So.2d 238, 243 (Fla. 2007), this Court held that when an appellate court reviews a trial court's denial of a rule 3.800(a) motion and determines that an error was made in the guidelines scoresheet, the appellate court is required to determine if the scoresheet error is harmless by determining if the trial court could have imposed the same sentence using a correct scoresheet.

In the present case, Wilfredo Delgado received an upward departure sentence and filed a 3.800(a) motion to correct a calculation error in his sentencing guidelines scoresheet (A. 2). On appeal, the Third District Court of Appeal acknowledged that the defendant's scoresheet had been improperly calculated, but refused to consider the validity of the reasons for the trial court's departure from the guidelines scoresheet (A. 2). The Third District held that the validity of the departure reasons could not be considered on appeal from the denial of a 3.800(a) motion (A. 2).

As *Lemon*, *Squires* and *Brooks* establish that the validity of a departure reason can be considered on direct appeal from the denial of a 3.800(a) motion to

determine whether a calculation error in a guidelines scoresheet is harmless error, and as the Third District Court of Appeal held that the validity of departure reasons could not be considered under such circumstances in an appeal from the denial of a 3.800(a) motion, the decision of the Third District Court of Appeal in this case expressly and directly conflicts with the decisions of this Court in *Lemon* and *Brooks*, and the decision of the Second District Court of Appeal in *Squires*. Accordingly, it is respectfully submitted that this Court should accept jurisdiction in this case to resolve the conflict generated by the Third District's decision in this case.<sup>1</sup>

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<sup>1</sup> Pursuant to his obligation to advise this Court of any similar cases pending in this Court, petitioner Wilfredo Delgado directs this Court's attention to Case No. SC09-157 presently pending in this Court. In that case, this Court granted discretionary review of the decision of the Third District Court of Appeal in *Delgado v. State*, 997 So.2d 161 (Fla. 3d DCA 2008), on the grounds of express and direct conflict of decisions. The petitioner in Case No. SC09-157, Luis Delgado, is Wilfredo Delgado's brother. Luis Delgado and Wilfredo Delgado were co-defendants in this case, and they each filed a Rule 3.800(a) motion attacking their sentences on the grounds that their sentencing guidelines scoresheet had been improperly calculated and the trial court's reasons for departure from the guidelines were invalid. Presently pending review on the merits in Case No. SC09-157 is the decision of the Third District affirming the trial court's denial of the 3.800(a) motion filed by Luis Delgado. All briefs have been filed in Case No. SC09-157, and on August 25, 2009, this Court determined that the case would be submitted to the Court without oral argument.

## 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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BY: \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this 14th day of September, 2009.

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HOWARD K. BLUMBERG  
Assistant Public Defender

**CERTIFICATE OF FONT**

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

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HOWARD K. BLUMBERG  
Assistant Public Defender