

IN THE SUPREME COURT OF FLORIDA

DENNIS STARK,

Petitioner,

v.

Case No. SC10-409

STATE OF FLORIDA,

Respondent.

ON PETITION FOR REVIEW FROM  
THE SECOND DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

**BRIEF ON JURISDICTION**

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**STATEMENT OF THE CASE AND FACTS**

The opinion of the Second District Court of Appeal, a copy of which is appended hereto, outlines the relevant facts at this stage of the proceedings.

### **SUMMARY OF THE ARGUMENT**

The Second District's opinion in Stark v. State, Case No. 2D07-3913 (Fla. 2<sup>nd</sup> DCA February 10, 2010) does not expressly and directly conflict with the decision in with the Fifth District in Michel v. State, 935 So.2d 1228 (Fla. 5<sup>th</sup> DCA 2006).

### ARGUMENT

DOES THE DECISION THE SECOND DISTRICT IN STARK v. STATE, CASE NO.2D07-3913 (FLA 2<sup>ND</sup> DCA FEBRUARY 10, 2010) EXPRESSELY AND DIRECTLY CONFLICTS WITH THE DECISION IN WITH THE FIFTH DISTRICT IN MICHEL V. STATE, 935 SO.2D 1228 (Fla. 5<sup>th</sup> DCA 2006) WHICH WOULD PERMIT THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICATION. (RESTATED)

There is no express and direct and direct conflict between the decision of the Second District in Stark v. State, *supra.*, and the Fifth District in Michel v. State, *supra.* **Both** cases apply the same rule of law, to wit: that pursuant to Grant v. State, 770 So.2d 655, 659 (Fla. 2000) while a person may be sentenced as a Prison Releasee Reoffender and as a Habitual Felony Offender to concurrent prison terms for a single offense, the sentence of incarceration imposed as a Habitual Felony offender must be greater than the minimum mandatory term imposed under the Prison Releasee Reoffender Act. The Petitioner argues that both appellate courts applied the same rule of law to "essentially the same facts" and reached different results and that therefore conflict was established pursuant to the reasoning in Nielsen v. City of Sarasota, 117 So.2d 731, at 735 (Fla. 1960), wherein this Court stated:

...[t]he principle situations justifying the invocation of our jurisdiction to review decisions of Court of Appeal because of alleged conflicts are (1) the announcement of a rule of law which conflicts with a rule previously announced by this court, **or**

**(2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this court.**

(Bold emphasis added)

In both the Second District and Fifth District cases, the defendants had been sentenced for separate offenses and were sentenced as both a Prison releasee Reoffender and Habitual Felony offender for each offense. For each offense the defendant was sentenced to prison followed by probation and the length of incarceration for each sentence was the 15 years as both a Prison Releasee Reoffender and as a Habitual Felony Offender. More specifically:

In Michel [3 cases]: (1) 15 yrs incarceration followed by 10 yrs Prob. as PRR & HFO for possession of a Firearm by convicted felon  
(2) 15 yrs incarceration followed by 10 yrs Prob as PRR & HFO for robbery  
(3) 15 yrs incarceration followed by 10 yr Prob as PRR & HFO for robbery

In Stark [2 cases]: (1) 30 yrs incarceration suspended after 15 yrs as PRR & HFO for burglary/dwelling  
(2) 30 yrs incarceration suspended after 15 yrs as PRR & HFO for burglary/dwelling

Relying on Grant, supra., the Fifth District in Michel, 935 So.2d at 1230, ruled:

...[t]he 10 year probationary term which follows the defendant's 15 year HFO prison sentence, is not a "sentence of incarceration" and therefore cannot be added to the 15 year HFO prison term in order to

create "a greater sentence of incarceration" such that defendant's sentencing as an HFO and PRR can stand...As such, we reverse the trial court's denial of the defendant's rule 3.800(a) motion and **strike the defendant's HFO sentences, leaving only the PRR sentences in effect.**

(bold emphasis added)

In Stark, *supra.* at 4, the court points:

...Because the court may not increase the incarcerative portions of the of the HFO sentences beyond the fifteen years already imposed, Stark maintains that its only recourse is to strike the HFO sentences altogether...because the court is unable to impose HFO incarcerations that exceed the PRR terms, which, he points out are mandatory. See *State v. Garcia*, 923 So.2d 923 So.2d 1186, 1187-1188 (Fla. 3<sup>rd</sup> DCA 2006).

The Second District disagreed Stark finding the proposition that the court may not forego PRR sentencing once the State invokes PRR sentencing and proves its applicability, while generally true, is not absolute." *Id.* at 4-5. The Second District reasoned:

...The PRRPA was designed to increase, not decrease, the potential punishments of those who qualify under the Act's terms. "{If a defendant is eligible for a harsher sentence 'pursuant to [habitual offender statute] or any other provision of law' the court may, in its discretion, impose the harsher sentence." *State v. Cotton*, 769 So.2d 345, 354 (Fla. 2000) (quoting s. 775.082(9)(c)). That purpose would not be served by limiting the court's ability to "opt out of the PRR designation when it recognized, post-sentencing via a defendant's 3.800(b)

motion...that choosing to maintain the PRR designation could result in a lesser sentence." Phillips v. State, 864 So.2d 272, 275 (Fla. 5<sup>th</sup> DCA 2002).

\* \* \*

...A court may restructure erroneous sentences to come as close to, but not exceed, the original sentencing intent. Suarez v. State, 974 So.2d 451, 453 (Fla. 3d DCA 2008). See also Blackshear v. State, 531 So.2d 956 (Fla. 1998).

The Second District, concluded:

We offer no opinion on what new sentences should be imposed on remand. **The court may chose to strike Stark's HFO sentences, see Michel, 935 So.2d at 1230**, or it may reimpose the sentence structure devised at the first sentencing<sup>1</sup>, or it may fashion another sentencing scheme altogether so long as the new sentences do not exceed Stark's original sentences.

Stark, *id.* at 5-6. (Bold emphasis added)

The Respondent submits, that a review the written opinions as set forth above herein, reveals that there is no express and direct conflict between the Second District's opinion in *Stark*, *id.*, and the Fifth District in Michel, *id.* This Court is limited in determining conflict jurisdiction to those facts within the four corners of the *See Reaves v. State*, 485 So.2d 829, 830 n. 3 (Fla. 1986). There is no indication with the "four corners" of

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<sup>1</sup> Stark was resentenced initially as and HFO on only one burglary and the court imposed a sentence of 30 years imprisonment suspended after 15 years with the balance on probation. On the other separate burglary the court sentenced him only as a PRR to the min. man. 15 years, but this sentence was later reversed because he was not present at resentencing.

the Fifth District's opinion in Michel, *id.*, that the appellate court ever considered any other sentencing alternatives except that of striking the HFO sentences in all the cases. Furthermore, the Second District's opinion in Stark, *id.*, did expressly and directly conflict with the Fifth District because the Second stated in its opinion, that one of the alternative resentencing options was, that the trial court, "[m]ay chose to strike Stark's HFO sentences, see Michel, 935 So.2d at 1230..."

#### **CONCLUSION**

Respondent respectfully requests that this Honorable Court decline to accept jurisdiction to review this case.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Bruce P. Taylor, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, this \_\_\_\_ day of \_\_\_\_\_, 2010.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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