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**IN THE SUPREME COURT OF FLORIDA**

STATE OF FLORIDA	)	
Petitioner/Appellee,	)	
	)	
vs.	)	CASE NO. SC14-
	)	Lower Case No. 4D11-4581
JAMES RILEY,	)	
Respondent/Appellant.	)	
	)	
_____	)	

**RESPONDENT'S BRIEF ON DISCRETIONARY JURISDICTION**

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## STATEMENT OF THE CASE AND THE FACTS

Respondent accepts Petitioner's Statement of the Case and the Facts.

## SUMMARY OF THE ARGUMENT

Petitioner misconstrues the opinion of the Fourth District Court in **Riley v. State**, 145 So.3d 886 (Fla. 4<sup>th</sup> DCA 2014). The decision of the District Court does not expressly and directly conflict with any decision of this Court with that of other District Courts of Appeal.

## ARGUMENT

### **THE DISTRICT COURT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT**

The State seeks to invoke this Court's discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of this Court. Art. V, § 3(b) (3), Fla. Const. Conflict jurisdiction can arise when a district court announces a rule of law that conflicts with a rule previously announced by this Court or another district court of appeal, or applies a rule of law to produce a different result in a case with substantially the same controlling facts as a case disposed of by this Court or another district court of appeal. **Nielson v. City of Sarasota**, 117 So.2d 731(Fla. 1960).

The State argues that the Fourth District Court of Appeal's decision in **Riley v. State**, 145 So.3d 886 (Fla. 4<sup>th</sup> DCA 2014), conflicts with this Court's decisions in **Taylor v. State**, 104 So.2d 526 (Fla. 2014); **State v. Fleming**, 61 So.3d 399 (Fla. 2011); **State v. Collins**, 985 So.2d 985 (Fla. 2008); and **Teffeteller v. State**, 495 So.2d 744 (Fla. 1986).

In determining whether to accept a case for review, this Court will consider three factors: (1) whether jurisdiction exists, (2) whether discretion exists, and (3) whether the case is significant enough to be heard. See Harry Lee Anstead, Gerald Kogan, Thomas D. Hall, & Robert Craig Waters, **The Operation and Jurisdiction of the Supreme Court of Florida**, 29 Nova L. Rev. 431, 512 (2005). In the instant case, none of these factors have been met.

"Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." **Reaves v. State**, 485 So.2d 829, 830 (Fla. 1986). See also **Wells v. State**, 132 So.3d 1110, 1111 (Fla. 2014)("As in all petitions seeking this Court's discretionary jurisdiction pursuant to article V, section 3(b)(3), we are confined to consider only those facts contained within the four corners of the district court's majority

opinion." ). In an attempt to create conflict where it does not exist, Petitioner goes outside the "four corners of the majority opinion" citing to the record, the testimony of various witnesses and oral pronouncements of the trial court at the November, 2011 resentencing hearing (PJB4, 7-8).

Despite Petitioner's allegations to the contrary, the Fourth District's opinion does not establish grounds for express and direct conflict nor does it deprive either party of a *de novo* sentencing hearing (PJB4-5). The Fourth District concluded its opinion by holding

As the state has now had two opportunities to meet its burden and has been unable to do so with respect to two of the misdemeanors, we reverse and remand for the trial court to resentence Riley based on a scoresheet that does not include the convictions for the two traffic misdemeanors.

**Riley**, 145 So.3d at 888.

The Fourth District simply held that, as the state was unable to prove that Respondent had been provided with or had waived his right to counsel in relation to the two traffic crimes despite two opportunities to do so, the case would be remanded for a new resentencing hearing based on a scoresheet that did not include those convictions. *Id.*

After being sentenced to 27 years in prison for a violation of probation, Respondent filed a motion for post conviction

relief alleging that his attorney was ineffective for failing to object to the inclusion of those uncounseled misdemeanor convictions. The trial court summarily denied the motion twice and the Fourth District reversed twice, the second time remanding for an evidentiary hearing. After that hearing, the trial court found that court had been ineffective for failing to investigate whether the priors in question were counseled and granted Appellant a new sentencing hearing. The Court also held that Respondent was entitled to be resentenced based on a corrected scoresheet with a 164 point baseline<sup>1</sup>.

The parties returned for another evidentiary hearing on November 7, 2011. At that hearing, the evidence and testimony referenced by Petitioner in its jurisdictional brief was admitted (PJD7-8). The state called Retired Senior Judge Steven Shutter who testified as to his normal practice when taking a plea in a traffic crime case. James Stark, the state's proposed expert criminal defense attorney, testified that there was no proof counsel had been ineffective<sup>2</sup>. The "certified copies of the

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<sup>1</sup> This case history is being provided to rebut certain factual assertions made in Petitioner's Jurisdictional Brief.

<sup>2</sup> This is not necessarily the same thing as testifying that "the convictions were properly scored" as Petitioner characterized Stark's testimony. These differences illustrate



two convictions" which Petitioner referenced were admitted. However, those forms appear to be court status forms which simply reflect that he entered a plea and paid court costs.

Petitioner seems to imply that in reversing and remanded a case for resentencing, the District Court cannot do so with instructions nor can it place restrictions on the sentence that can be imposed by the resentencing court. This is not accurate.

For instance, in ***Shull v. Dugger***, 515 So.2d 748 (Fla. 1987), this Court reversed a departure sentence and remanded for resentencing within the guidelines. ***Id.*** at 749. This Court acknowledged that "[g]enerally, when all of the reasons stated by the trial court in support of departure are found invalid, resentencing following remand must be within the presumptive guidelines sentence" ***Id.*** However, the Court went on to hold that even if the single reason for departure was valid at the time of sentencing, but later held invalid, a guidelines sentence should be imposed at resentencing. ***Id.*** In so holding, this Court explained

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why this Court has held that conflict must be apparent on the "four corners" of the opinion, rather than searched for in the record and transcripts. See ***Reaves***, 485 So.2d at 830.

To hold otherwise may needlessly subject the defendant to unwarranted efforts to justify the original sentence and also might lead to absurd results. One can envision numerous resentencings as, one by one, reasons are rejected in multiple appeals. Thus, we hold that a trial court may not enunciate new reasons for a departure sentence after the reasons given for the original departure sentence have been reversed by an appellate court.

*Id.*

See also **Brown v. State**, 593 So.2d 1042 (Fla. 1992)(remanded with instructions that the defendant be resentenced within the range of the sentencing guidelines); **Bates v. State**, 579 So.2d 849 (Fla. 2d DCA 1991)(because trial court failed to enter sole improper reason for departure on written order, sentence reversed and remanded with instructions for sentencing within the guidelines).

In **Clement v. State**, 468 So.2d 467, 468 (Fla. 4<sup>th</sup> DCA 1985), the District Court reversed for resentencing based on **Boynton v. State**, 473 So.2d 703 (Fla. 4<sup>th</sup> DCA 1985) which required reasons for a departure sentence be expressed in writing. The court required that, upon resentencing, "any departure from the guidelines must be based upon clear and convincing reasons, expressed in writing." *Id.*

Upon remand, the trial court imposed a one-cell departure sentence. **Clement v. State**, 508 So.2d 573 (Fla. 4<sup>th</sup> DCA 1987). The District Court held that none of the reasons for departure

were clear and convincing. Therefore, the District Court again reversed and remanded with instructions that the defendant be sentenced within the guidelines. **Id.**

As in the above referenced cases, the Fourth District remanded for resentencing with instructions. The opinion in **Riley** did not prohibit the trial court from conducting a *de novo* sentencing hearing. It simply prohibited the court from including two particular traffic crimes on the scoresheet at the re-sentencing hearing as the state, despite attempts at two evidentiary hearings, had been unable to show that they were scorable. **Riley**, 145 So.2d at 888.

As further grounds for discretionary review, Petitioner argues that the "Fourth District Court of Appeal improperly substituted its judgment for that of the trial court on a factual issue" (PJB8). Specifically, Petitioner asserts that the District Court erred in concluding that the "state has repeatedly failed to establish that counsel was provided or waived as to two traffic crimes." **Riley**, 145 So.2d at 188. There is nothing to support such a ground for review within the "four corners" of the opinion. Even if Petitioner could point to support for this assertions within the confines of the opinion, it would still fail.

The issue presented is strictly a legal one. The "defendant must allege that (1) the offense was punishable by imprisonment; (2) the defendant was indigent and entitled to court appointed counsel; (3) counsel was not appointed; and, (4) the right to counsel was not waived." *Id.* at 887, quoting **Riley**, 8 So.3d 1285, 1286 n1. Once Petitioner meet requirement, the burden shifted to the state to prove that counsel was provided or that Petitioner had waived counsel. *Id.*

Determining whether the defendant met his burden in establishing that his plea was uncounseled presents a mixed question of law and fact. Courts "review the legal issue *de novo* while accepting the trial court's factual findings as true when supported by competent, substantial evidence." **Johnson v. State**, 952 So.2d 1254, 1256 (Fla. 5<sup>th</sup> DCA 2007) citing to **State v. Glatzmeyer**, 789 So.2d 297, 301 n.7 (Fla. 2001).

Normally, such a standard would not present a problem. However, as the District Court's opinion does not contain a recitation of the trial court's findings of fact, it cannot be determined whether they were supported by competent, substantial evidence. Instead, the state asks this Court to do exactly what it complains of- to substitute its fact finding judgment for that of the lower court (PJB7-8). As such, this Court should

review the District Court's application of the law to the facts as they appear in the decision.

In sum, opinion of the Fourth District Court below does not prohibit a *de novo* sentencing hearing. Petitioner has failed to establish that the decision of the Fourth District Court, on its face and within its four corners, is in direct or express conflict with the any decision of this Court or of any District Court. Respondent asks the Court to deny review of ***Riley v. State***, 145 So.3d 186 (Fla. 4<sup>th</sup> DCA 2014).

**CONCLUSION**

Respondent respectfully requests this Court to deny review.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of Respondents Brief on Discretionary Jurisdiction was electronically filed with the Court and a copy of it was served to Mark Hamel, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com this 31<sup>st</sup> day of October, 2014.

/s/ Ellen Griffin  
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**CERTIFICATE OF FONT SIZE**

I HEREBY CERTIFY the instant brief has been prepared with  
12 point Courier New type, in compliance with a R. App. P.  
9.210(a)(2).

/s/ Ellen Griffin  
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