SC22-1457

In the Supreme Court of Florida

ERIC DESMOND PARRISH,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL
CASE NO. 1D21-1435

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE ISSUE

After a jury convicted Petitioner Eric Parrish of sexually battering his foster mother, the trial court denied his request for a downward departure and sentenced him to 30 years in prison. Petitioner appealed the sentence not because the trial court committed any legal error, but because, in his view, the trial court abused its discretion in imposing a sentence within the range prescribed by the Criminal Punishment Code. The First District dismissed that portion of Petitioner's appeal, concluding that it lacked jurisdiction to consider a challenge to the exercise of pure sentencing discretion.

The issue before this Court is whether a trial court's exercise of its sentencing discretion to deny a motion for a downward departure is appealable.

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STATEMENT OF THE CASE AND FACTS

A. Legal background

Florida's Criminal Punishment Code establishes a uniform sentencing policy that applies to "all felony offenses, except capital felonies, committed on or after October 1, 1998." § 921.002, Fla. Stat. A trial court uses a scoresheet to determine the lowest permissible sentence, which is based on factors identified by the Legislature as relevant to the sentencing process. *Id.* § 921.0024(1)(a). "The lowest permissible sentence is the minimum sentence that may be imposed by the trial court, absent a valid reason for departure," and "[t]he permissible range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum, as defined in s. 775.082, for the primary offense and any additional offenses before the court for sentencing." *Id.* § 921.0024(2); *see also id.* § 921.002(1)(g) ("The trial court judge may impose a sentence up to and including the statutory maximum for any offense . . . ."). A trial court's choice of the appropriate sentence, if within the minimum and maximum sentence, is unreviewable. *See, e.g.*, *Davis v. State*, 123 So. 2d 703, 707 (Fla. 1960).

A trial court may depart downward from the lowest permissible sentence in limited circumstances. *See* § 921.00265(1), Fla. Stat. ("A departure sentence is prohibited unless there are mitigating circumstances or factors present as provided in s. 921.0026 which reasonably justify a departure."). Section 921.0026 contains a nonexhaustive list of permissible bases to depart downward, including that the defendant "is to be sentenced as a youthful offender," *id.* § 921.0026(2)(l), or "requires specialized treatment for a mental disorder . . . unrelated to substance abuse . . . , and . . . is amenable to treatment," *id.* § 921.0026(2)(d).

A two-part framework guides trial courts in deciding whether to depart downward. *Banks v. State*, 732 So. 2d 1065 (Fla. 1999). At step one, "the court must determine whether it *can* depart" based on the presence of a "valid legal ground and adequate factual support for that ground." *Id.* at 1067. "Second, where the step 1 requirements are met, the trial court further must determine whether it *should* depart . . . ." *Id.* at 1068. Step two is a "judgment call within the sound discretion of the court." *Id.*

The district courts agree that they have the power to review whether a trial court improperly determined that it lacked the power

to depart under step 1, or refused to consider that question at all due to some blanket policy. *See*, *e.g.*, *Wilson v. State*, 306 So. 3d 1267, 1271–72 (Fla. 1st DCA 2020). But the districts are divided over whether denials of downward-departure motions based on step two (i.e., when the trial court concludes that it may legally depart but that it would exercise its discretion not to) are appealable. *Compare id.* at 1272–73, *with Barnhill v. State*, 140 So. 3d 1055, 1060 (Fla. 2d DCA 2014) (en banc); *Fogarty v. State*, 158 So. 3d 669, 671 (Fla. 4th DCA 2014) (en banc); *Kiley v. State*, 273 So. 3d 193, 194 (Fla. 5th DCA 2019).

B. Facts and procedural history

One January morning in 2020, while helping his 53-year-old foster mother take down Christmas decorations, Petitioner approached her from behind and whispered in her ear that they were "fixing to do this." T. 136–37, 155. Telling her that he "just needed a warm body," Petitioner put his hands down her pants and removed her clothes. T. 137, 139, 144. He tried to force her into the bedroom, but she resisted. T. 139–40. He then pushed her face down onto the couch with her hands behind her and penetrated her, causing her to bleed. T. 139–40, 145. When he told her that she could get up and

put her clothes on, she grabbed her clothes and ran to the front door. T. 144. But he tried to pull her back inside. T. 144. After falling in the street trying to get away, she made it to a neighbor's house but her pants and underwear had gotten stuck on her door handle. T. 145, 152. The neighbor called the police and gave her a blanket. T. 152.

After trial, the jury convicted Petitioner of sexual battery with force, battery, and false imprisonment. Pet. App'x 4–5.

Under the Code, those offenses subjected Petitioner to a lowest permissible sentence of 146.85 months and a statutory maximum of life. R. 136–38. At sentencing, Petitioner presented evidence that he qualified for a downward-departure sentence on the ground that he requires specialized treatment for a disorder. *See* § 921.0026(2)(d), Fla. Stat. Specifically, a forensic psychologist testified that she evaluated Petitioner in 2017 after he attempted to rape his grandmother at 13 years old and was sent to the Escambia County Regional Detention Center. R. 123, 172–74. She diagnosed him with conduct disorder, ADHD, and schizophrenia, and noted that he had a history of physical abuse. R. 174–75, 184. She recommended that Petitioner

undergo "specialized behavior treatment" at either of two juvenile facilities in Tampa. R. 179–80. Petitioner's expert also noted that Petitioner's "risk to reoffend is at the highest level." R. 178.

In response, the State noted Petitioner's "extensive criminal history, the escalating nature of his criminal conduct, and his high risk of reoffending." Pet. App'x 5. Petitioner's conduct had become increasingly violent over time. R. 203. In 2015, Petitioner took a gun to school; in 2016, he allegedly pushed his aunt down on a couch and "held her down"; in 2017, he received probation for theft of a golf cart and was charged with attempted sexual battery on his grandmother, though he was found guilty of the lesser-included offense of battery; and in 2018, "he struck his mother in the face and pushed her." R. 200–01. Finally, in 2020, at the age of 16, Petitioner committed the sexual violence at issue in this case. T. 155; R. 123, 112–13. As prosecutors observed, Petitioner "has a long history of problems with impulse control," including violating his probation for an earlier case by committing the offenses here. R. 201–03.

The trial court rejected Petitioner's request for a downward departure. It predicated that decision on step two of the *Banks* framework and noted that it need not decide whether it had the power to

depart under step one. R. 211–12. As it explained, "I do not—despite whether he would qualify as a downward departure or not, I don't believe this is a case where it's appropriate for a downward departure at all. It's not even a close question for me." R. 212; *see also* Pet. App'x 5. The court had little difficulty in arriving at that conclusion because the jury verdict and evidence were "crystal clear" and it had "never seen a case where someone ha[d] such a high risk for reoffending based on the evidence and . . . behavior." R. 211–12.

The trial court then sentenced Petitioner to 30 years in prison on the sexual-battery count, five years concurrent on the false-imprisonment count, and time served on the battery count.

Petitioner appealed to the First District. There, he argued that the trial court erred in refusing to impose a downward-departure sentence. DCA Init. Br. 20, 25–30. In Petitioner's view, because the evidence showed that Petitioner had an "unstable youth" and "fell through the cracks," the trial court "should have at least imposed a downward departure" based on either of two mitigating circumstances: that he was a youthful offender and suffered from a mental disorder unrelated to substance abuse. *Id.* at 25–26, 30. The First District dismissed that portion of his appeal, noting that in *Wilson* it

had "held that it lacks authority to review a sentencing court's decision not to grant a departure sentence." Pet. App'x 7.

Petitioner then invoked this Court's discretionary jurisdiction. After a series of stays pending the Court's consideration of other cases potentially presenting the issue in this case, in June 2023 the Court lifted the stay here and stayed the others. On August 15, 2023, the Court accepted jurisdiction.

SUMMARY OF ARGUMENT

I. Subject-matter jurisdiction is the power of a court to hear and determine a cause. This Court should approve the First District's decision that it lacked jurisdiction to review a sentencing court's denial of a downward-departure motion at step two of the *Banks* analysis. Petitioner leads with his theory that the Florida Constitution itself, in allocating jurisdiction over appeals from final judgments to the district courts, answers the question. But Article V, Section 4(b)(1) does not speak to the sorts of claims that a defendant may raise on appeal from a final judgment, and the longstanding rule in Florida is that a judge's discretionary decision to sentence a defendant within the statutory range is unreviewable. In urging a contrary result, Petitioner would have this Court usher in a radical shift to

sentencing appeals in this State, which have traditionally been confined to adjudicating claims of *legal* error, not alleged abuses of pure sentencing discretion within the legislatively prescribed range.

Petitioner is likewise incorrect that Section 924.06 and Rule 9.140(b) create district-court jurisdiction over a defendant's *Banks* step-two appeal. The statute authorizes an appeal from a sentence on the ground that it is "illegal," whereas Rule 9.140(b)(1) authorizes appeals of "unlawful or illegal" sentences. As this Court has defined those terms, a purported abuse of discretion at step two constitutes neither.

An "illegal" sentence is one that no judge under any set of circumstances could impose. *State v. McMahon*, 94 So. 3d 468, 477 (Fla. 2012). The paradigmatic example is a sentence exceeding the statutory maximum. A *Banks* step-two denial cannot be "illegal" because it falls within the range. An "unlawful" sentence, on the other hand, is one that is not "illegal" but is "nevertheless[ ] subject to correction on direct appeal," Fla. R. App. P. 9.140, Court Commentary (1996), such as a sentence resulting from a scoresheet error that is not apparent on the face of the scoresheet. Under the longstanding rule just

noted, exercises of pure sentencing discretion are unreviewable. They are therefore not "subject to correction."

II. But even if this Court determines that the district courts have jurisdiction in this scenario, the First District committed no reversible error because Petitioner's sentence falls within the statutory range. Holding otherwise would cause a sea change in Florida law and overwhelm the district courts with a rash of resource-consuming and needless sentencing appeals.

ARGUMENT

After raping his 53-year-old foster mom, Petitioner appealed to the First District, alleging that the trial court sentenced him too harshly. Though Petitioner did not dispute that a trial court has broad discretion to impose a sentence within the range prescribed by the Criminal Punishment Code, he nevertheless contended that the trial court abused that discretion by declining to depart downward.

That effort to substitute the appellate court's judgment for the trial court's fails many times over. Most basically, a district court lacks jurisdiction to review the exercise of pure sentencing discretion and is instead limited to considering *legal* challenges to a sentence. But even if there were jurisdiction, this Court has long said that the

result of any such appeal is predestined—a trial court's authority to impose an in-range sentence is absolute, meaning the district court would have been bound to affirm in any event.

I. The First District lacked jurisdiction to review Petitioner's challenge to the denial of his downward-departure motion.

"Subject matter jurisdiction 'means no more than the power lawfully existing to hear and determine a cause.'" *Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 801 n.3 (Fla. 2003) (quoting *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994)). "It 'concerns the power of the [court] to deal with a class of cases to which a particular case belongs.'" *Id.* (quoting *Cunningham*, 630 So. 2d at 181).

Petitioner contends that criminal sentences "are final, appealable orders that defendants have the right to appeal," and thus that the First District could entertain his claim that the trial court should have departed. Init. Br. 9. But no one disputes that, in the abstract, a defendant may appeal the imposition of a sentence to the district courts. The question here is whether district courts may review a claim that a trial court abused its discretion when declining to depart and instead imposing a sentence within the range provided by the

Criminal Punishment Code. To answer that question, Petitioner alleges three separate jurisdictional bases that, he says, would permit the district court to second-guess the trial court's exercise of pure sentencing discretion: (1) Article V, Section 4 of the Florida Constitution, (2) Chapter 924, Florida Statutes, and (3) Florida Rule of Appellate Procedure 9.140(b). Init. Br. 9–17. He is incorrect on each count.

A. The Florida Constitution does not create jurisdiction to entertain this type of appeal.

In *Banks v. State*, this Court set out a two-step framework to guide trial judges who are asked to depart from the lowest permissible sentence. 732 So. 2d 1065 (Fla. 1999). At step one, "the court must determine whether it *can* depart" based on the presence of a "valid legal ground and adequate factual support for that ground." *Id.* at 1067. "Second, where the step 1 requirements are met, the trial court further must determine whether it *should* depart." *Id.* at 1068. Step two is a "judgment call within the sound discretion of the court." *Id.* The Court announced that the grant of a downward-departure motion is reviewed for an abuse of discretion. *Id.*

Petitioner begins by asserting that Article V, Section 4(b)(1) of the Florida Constitution creates subject-matter jurisdiction for appeals of a trial judge's refusal to depart under *Banks* step two. Init. Br. 9–12. In support, he observes that this Court has interpreted Section 4(b)(1) to "afford[] criminal defendants a constitutional right to an appeal," Init. Br. 10 (citing *McFadden v. State*, 177 So. 3d 562, 566 (Fla. 2015); *Amends. to the Fla. Rules of App. Proc.*, 696 So. 2d 1103, 1104–05 (Fla. 1996) ("*Amendments*")), and that "[c]omplying with due process necessarily envisions that defendants can challenge their sentence on appeal." *Id.* (citing *Cromartie v. State*, 70 So. 3d 559, 564 (Fla. 2011)). In light of that, he says, "[a] statutory provision specifically providing" this form of jurisdiction "would be unnecessary." Init. Br. 11. But even if there were a constitutional right of appeal, Petitioner is incorrect that it resolves the issue here; he merely *assumes* that the right would encompass a right to appeal a trial court's discretionary sentencing calculus.

1. Article V, Section 4(b)(1) states:

> District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may

> review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

Art. V, § 4(b)(1), Fla. Const. This Court has vacillated on whether that provision creates an individual right to appeal. It initially concluded that Section 4(b)(1) "merely allocates jurisdiction" to be determined by the Legislature, *State v. Creighton*, 469 So. 2d 735, 737–41 (Fla. 1985), but later overruled that decision and deemed Section 4(b)(1) to be rights-generating. *Amendments*, 696 So. 2d at 1104.

In *Creighton*, the Court considered text, history, and legislative practice, concluding that each supported the view that the Legislature dictates district-court jurisdiction, not the Constitution. First, looking to "[p]rinciples of English usage," the Court explained that the text's use of "that"—in the clause "that may be taken as a matter of right"—was best understood to "define[], restrict[], modif[y], or qualif[y] the matter to which it refers." *Creighton*, 469 So. 2d at 739. Contemporary grammar and style guides, the Court wrote, reflected that "[t]he word 'that' is the restrictive, or defining pronoun," whereas "the word 'which' is the nonrestrictive or nondefining pronoun and is used to introduce a separate, independent, or additional fact about

the matter referred to." *Id.* (citing W. Strunk & E.B. White, *The Elements of Style* 53 (1972); M. Kammer & C. Mulligan, *Writing Handbook* 117–18, 138, 151–52 (1953); H.W. Fowler, *Modern English Usage* 713 (1937)).

Were the text to convey a right of appeal, it would have provided that the district courts would hear appeals "*which* may be taken as a matter of right," since the word "which" would "not define or restrict such appeals but independently describe[] them, adding information in a way that would have independent substantive effect." *Id.* "So," the Court concluded, "the clause, 'that may be taken as a matter of right,' restricts the term 'appeals' so as to apply the grant of jurisdiction only with regard to appeals that may be taken as a matter of right." *Id.*

Second, the Court relied on differences between Section 4(b)(1) and its predecessor in the 1885 Constitution. The original constitutional provision creating Florida's district courts, ratified in 1956, provided that "[a]ppeals . . . may be taken to the court of appeal . . . as a matter of right." *Id.* (quoting Art. V, § 5(3), Fla. Const. of 1885 (1956)). That language had been construed to convey a right of appeal. *Id.* at 737–38 (citing *Crownover v. Shannon*, 170 So. 2d 299,

301 (Fla. 1964)). But the 1972 amendment creating the modern text of Article V, Section 4(b)(1) made a "significant change in the language of the constitution." *Id.* at 739. No longer may appeals "be taken . . . as a matter of right"; the Constitution now says that the district courts shall have jurisdiction over those appeals "that may be taken as a matter of right." *Id.* Invoking the familiar rule that a "change" in language is "intended to have a different effect from the prior language," the Court reasoned that "[t]he elimination of the language found dispositive in [the Court's precedent] must be taken as having intended to negate the interpretation given by [that precedent] that the constitution had bestowed a right of appeal." *Id.*

Third, the Court turned to legislative practice, noting that "the right of litigants to appeal in non-criminal cases is governed by statute as well." *Id.* at 740. Indeed, numerous statutes provided for appeals as of right in civil and administrative actions. *Id.* at 740–41 (citing statutes). "[A]s a matter of logical consistency," criminal appeals from final judgments must likewise be governed by statute. *Id.* at 740.

In sum, *Creighton* held that "the present constitutional language merely allocates jurisdiction rather than conferring appeal

rights." *Id.* Following that decision, the Legislature was understood to dictate the district courts' jurisdiction over appeals of final orders, with this Court deciding their jurisdiction over non-final orders. *See* Art. V, § 4(b)(1), Fla. Const. ("[District courts] may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.").

That remained the law until 1996, when the Court decided the non-adversarial rules case *Amendments*, 696 So. 2d 1103. In a single paragraph, the Court dismissed *Creighton* as wrongly decided. *Id.* at 1104–05. It initially observed that "the issue in *Creighton* was whether the *State* had a constitutional right to appeal," though it did not explain why criminal defendants would be treated differently from the State for purposes of Section 4(b). *Id.* at 1104. It then faulted *Creighton* for failing to consider legislative history: "we did not consider in *Creighton* the fact that nowhere in the voluminous documents which reflect the history and intent of the 1972 revision of article V is there any suggestion that the revisers intended to remove from the constitution the right to appeal." *Id.*

In "receding from *Creighton* to the extent that [it] construe[d] the language of article V, section 4(b) as a constitutional protection

of the right to appeal," the Court never addressed the text of Section 4(b)(1). *Id.* at 1104.[1]

2. But the Court need not revisit its case law here. Instead, even if Petitioner were correct that Section 4(b)(1) guarantees criminal defendants' right to appeal, that would not decide the issue. The fact that a litigant has a right to appeal does not say what sorts of issues

[1] Justice Anstead concurred to offer additional support for the decision to recede from *Creighton*. *See Amendments*, 696 So. 2d at 1107–11. He criticized the Court in *Creighton* for considering the text of the 1972 revision. *Id.* at 1107. The better "method of analysis," he thought, was instead to "examine[] the constitutional revision proceedings of 1972," including statements by "the chair of the legislative committee responsible for the revisions" and "the drafters of the amendments," to discern their "intent." *Id.* at 1108; *see also id.* at 1109 (noting that "there are sixteen file folders in our own Supreme Court Library labeled 'Legislative History and Intent' and brimming with letters, drafts, committee notes, and research materials" that the Court failed to account for in *Creighton*). Turning secondly to the text of Section 4(b)(1), he explained that *Creighton*'s analysis of the word "that" is "clearly flawed" because the clause introduced by "that" is set off by commas, making it a "nonrestrictive clause[ ] intended to introduce [an] independent concept[ ]." *Id.* at 1107 & n.6. Thus, he concluded that "only if the commas in Article V, Section 4(b)[(1)], were absent would *Creighton* have been correct that this clause is a restrictive clause which restricts appeals to those permitted by the legislature." *Id.* at 1107 n.6. He also observed that in some places the Florida Constitution delegates authority to the Legislature to decide matters "by general law," which it had not done here. *Id.* at 1111.

the litigant may raise on appeal, nor the types of issues that the district court may adjudicate. Indeed, as this Court acknowledged in *Amendments*, "the legislature may implement this constitutional right [to an appeal] and place reasonable conditions upon it," and "this Court . . . ha[s] jurisdiction over the practice and procedure relating to appeals." *Id.* at 1104–05; *see, e.g.*, *Robinson v. State*, 373 So. 2d 898, 902 (Fla. 1979) ("It is our opinion that the statute and our present rules reflect a codification of the existing case law which holds that a valid guilty plea conclusively disposes of all prior issues presented in the cause.").

Background legal principles confirm that the district courts do not have subject-matter jurisdiction to entertain *every* sort of claim arising from a judgment. Though the district courts generally may hear appeals from final judgments, *see* Art. V, § 4(b)(1), Fla. Const., they nevertheless "have no jurisdiction to determine" "political question[s]." *McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981). So too, courts of general jurisdiction lack the power to hear a suit against a government entity endowed with sovereign immunity. *See Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1185 (Fla. 2020) (noting that

"in Florida, '[g]overnmental immunity derives entirely from the separation of powers'" (citation omitted)). And this Court has held that Florida Rule of Appellate Procedure 9.140 contains a "limited list of appealable issues" in plea-bargain cases, beyond which the district courts lack the power to adjudicate on the merits. *State v. Dortch*, 317 So. 3d 1074, 1077–78 (Fla. 2021) (explaining that "the state constitutional right to appeal does not include the right to appeal an involuntary plea without first filing a motion to withdraw plea").

These cases illustrate that whatever else Article V, Section 4(b)(1)'s allocation of jurisdiction means, it does not grant the district courts the power to decide certain types of issues that have traditionally fallen outside their purview. That includes, as here, the claim that a trial court abused its discretion by sentencing the defendant too harshly within the prescribed range—which is all that a defendant's *Banks* step-two claim amounts to. *See, e.g.*, *Davis v. State*, 123 So. 2d 703, 707 (Fla. 1960); *Brown v. State*, 13 So. 2d 458, 461 (Fla. 1943), *superseded by statute on other grounds as recognized in State v. Altman*, 106 So. 2d 401, 405 (Fla. 1958); *cf. Howard v. State*, 820 So. 2d 337, 339 (Fla. 4th DCA 2002) ("Indeed, the general rule in Florida is that when a sentence is within statutory limits, it is not

subject to review by an appellate court."). In *Davis*, this Court cited "a long adhered to line of cases"—from which there has been "no deviation" since "1943"—holding that "where a sentence is within the statutory limit, the extent of it cannot be reviewed on appeal regardless of the existence or nonexistence of mitigating circumstances." 123 So. 2d at 707. Though a sentence may "sound[] harsh when viewed in the cold light of th[e] record," it wrote, a reviewing court has "no power to reduce or modify" a sentence so long as it is "less than the maximum fixed by law." *Id.* at 708 (quoting *Stanford v. State*, 110 So. 1, 2 (Fla. 1959)).

That doctrine finds its footing in the separation of powers. "[T]he power to declare what punishment may be assessed against those convicted of crime is not a judicial power, but a legislative power." *Brown*, 13 So. 2d at 461. In other words, the *Legislature* "by statute fixe[s] the maximum punishment" "for violation[s]" of a criminal statute, and a trial court simply "fix[es] by sentence the punishment within the limits prescribed by statute." *Id.*; *see also* § 921.002(1), Fla. Stat. ("The provision of criminal penalties . . . is a matter of predominantly substantive law and, as such, is a matter properly ad-

dressed by the Legislature."). As for the power to review the "excessive[ness]" of a sentence, the Florida Constitution assigns that role to a different branch of government: the *executive* branch, which possesses the "power of commutation." *Brown*, 13 So. 2d at 461–62; *see* Art. IV, § 8(a), Fla. Const. (discussing the Governor's power to "grant full or conditional pardons, restore civil rights, *commute punishment*, and remit fines and forfeitures for offenses" (emphasis added)); *see also Stanford*, 110 So. 2d at 2 n.4 (holding that "if a trial judge imposes a sentence that is within the limits defined by statute, the only relief is before the parole authorities"). A defendant who believes he has been sentenced too harshly within the range provided by the Legislature may therefore avail himself of the clemency process. But when a defendant invites the district court to find that a judge abused its discretion by imposing an allegedly excessive sentence, he asks the court to usurp the role of the executive.

The result, in short, is that the excessiveness of a sentence "is not a matter for review and remedy by the appellate court." *Brown*, 13 So. 2d at 461–62. To the extent several districts purport to review *Banks* step-two claims for abuse of discretion, *see, e.g.*, *Barnhill*, 140 So. 3d at 1060; *Fogarty*, 158 So. 3d at 671; *Kiley*, 273 So. 3d at 194—

though none has apparently ever actually *found* an abuse of discretion—they are historical outliers.

That is not to say that appellate courts do not review the lawfulness of a sentence. District courts may conduct *de novo* review under *Banks* step one to decide whether the trial court properly concluded that it lacked the discretion to depart downward under Section 921.0026, a purely legal error. *See, e.g.*, *Wallace v. State*, 197 So. 3d 1204, 1205–06 (Fla. 1st DCA 2016) (reversing the denial of a departure motion because the trial court erred "as a matter of law" in concluding that defendant's prior record precluded a finding that the isolated-incident statutory mitigator was satisfied). They likewise may reverse a sentence where it appears that the trial court considered factors forbidden by the Constitution or a statute, like race or religion, *see, e.g.*, *Nawaz v. State*, 28 So. 3d 122, 125 (Fla. 1st DCA 2010) (vacating and remanding for resentencing where trial court based a sentence in part on the defendant's "national origin"), or a sentence that is "cruel and unusual" within the technical meaning of the Eighth Amendment—a claim Petitioner has not made. When district courts do that, however, they perform the quintessential role of

an appellate court: interpreting statutes and construing the Constitution. That is quite different from second-guessing the trial court's exercise of pure sentencing discretion.

In arguing to the contrary, Petitioner invokes *Banks* itself. Init. Br. 5, 19–20. There, the Court said that the *grant* of a departure under step two is reviewable for abuse of discretion in an appeal taken by the State. *Banks*, 732 So. 2d 1068. But that does not speak to the issue here, which involves a departure *denial*. That distinction is meaningful. The traditional rule of non-reviewability is triggered only when the sentence on review falls within the range prescribed by the Legislature. By setting the permissible sentencing range for a particular crime, the Legislature has conveyed its judgment that a sentence within that range is presumptively appropriate for the crime. So the safeguard of appellate review is only necessary when a sentence falls outside that range; that is, when a trial court "*depart*[*s*]" from the Code's presumptive range. § 921.0026(1), Fla. Stat. (emphasis added). Perhaps for that reason, the Legislature has specified that "[t]he imposition of a sentence below the lowest permissible sentence is subject to appellate review." *Id.*; *see also* Fla. R. App. P. 9.140(c)(1)(M) (permitting the State to appeal the "imposi[tion] [of] a

sentence outside the range permitted by the sentencing guidelines"). *Banks* thus has nothing to say here.

Petitioner also responds that the State's view "conflates reversible error with jurisdiction," because the fact that relief might be categorically unavailable "does not divest the DCA of jurisdiction." Init. Br. 17. But jurisdictional rules inform when a court has the power to hear and determine a cause, *Paulucci*, 842 So. 2d at 801 n.3, while a rule for adjudicating the merits of a claim provides guidance as to when a claim fails or succeeds. In Florida, challenges to in-range sentences do not merely fail; they are "*not reviewable*." *Davis*, 123 So. 2d at 707 (emphasis added). It would be a rather inert rule for adjudicating the merits were a claim to never succeed.

Petitioner asked the First District to conduct precisely the sort of impermissible second-guessing that Florida law forbids. Nothing in Article V, Section 4(b)(1) gave the First District that authority.

B. Rule 9.140(b) and Section 924.06 likewise do not create this type of appellate jurisdiction.

Petitioner also asserts that the district court had the power to scrutinize the trial judge's step-two discretionary calculus by virtue of Rule 9.140(b) and Section 924.06 of the Florida Statutes. Init. Br.

12–17. But those authorities are drafted to respect the longstanding rule described above.

In criminal cases, the categories of appealable orders—and thus the scope of the district courts' jurisdiction—are enumerated, with respect to final orders, by Chapter 924 of the Florida Statutes, and, as to non-final orders, by Florida Rules of Appellate Procedure 9.030 and 9.140. Section 924.06, entitled "Appeal by defendant," provides that "[a] defendant may appeal from" certain enumerated types of orders. § 924.06(1), Fla. Stat. The converse is that, if a defendant "may [not] appeal" a class of issues, the district courts necessarily lack the power "to hear and determine" those issues. *Paulucci*, 842 So. 2d at 801 n.3 (quoting *Cunningham*, 630 So. 2d at 181).

As relevant here, the categories of statutorily authorized defense appeals pertaining to the sentence include appeals of "[a] sentence, on the ground that it is illegal," and "[a] sentence imposed under s. 921.0024 of the Criminal Punishment Code which exceeds the statutory maximum penalty provided in s. 775.082 for an offense at conviction, or the consecutive statutory maximums for offenses at conviction, unless otherwise provided by law." § 924.06(1)(d), (e), Fla. Stat.

The rules of appellate procedure are similar. Rule 9.030(b)(1)(A), addressing the "[j]urisdiction of [d]istrict [c]ourts of [a]ppeal," provides that the district courts have jurisdiction to review final orders of trial courts that are not directly reviewable by this Court or a circuit court. The rule cross-references Rule 9.140, *see* Fla. R. App. P. 9.030(b)(1)(A) n.1, which (among other things) sets forth what sorts of issues a criminal defendant may raise on appeal. *See* Fla. R. App. P. 9.140(b)(1) ("Appeals Permitted. A defendant may appeal: [enumerated categories of issues]."); Fla. R. App. P. 9.140, Comm. Notes re: 1977 Amend., subdiv. (b)(1) (explaining that Rule 9.140(b) "lists the only matters that may be appealed by a criminal defendant").[2] Like the statute, Rule 9.140(b) sets forth the "class of cases" over which district courts of appeal have the power "to hear and determine." *Paulucci*, 842 So. 2d at 801 n.3 (quoting *Cunningham*, 630 So. 2d at

[2] Under Article V, Section 4(b)(1), Fla. Const., district courts of appeal "may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court." Rule 9.140 delineates which interlocutory orders may be appealed in criminal cases. *E.g.*, Fla. R. App. P. 9.140(c)(1). Rule 9.140 is thus at least in part unquestionably an exercise of this Court's authority to set forth jurisdictional limitations. It would be strange then for certain subsections of the rule to be jurisdictional but not others, especially without any indication of that in the rule itself.

181). Accordingly, when a defendant raises a claim falling outside the enumerated list in Rule 9.140(b), the district court lacks the authority to adjudicate it. *See, e.g.*, *Brown v. State*, 227 So. 3d 215, 216 (Fla. 3d DCA 2017) (dismissing for lack of jurisdiction because "the order is not an appealable order pursuant to rule 9.140(b)(1)(D)").

As relevant here, under Rule 9.140(b)(1), a defendant may appeal "an unlawful or illegal sentence," Fla. R. App. P. 9.140(b)(1)(E), "a sentence, if the appeal is required or permitted by general law," Fla. R. App. P. 9.140(b)(1)(F), or "as otherwise provided by general law." Fla. R. App. P. 9.140(b)(1)(G).

Neither the statute nor the rule authorized the First District to evaluate the propriety of Petitioner's in-range sentence. Petitioner does not challenge his sentence as "illegal" under Section 924.06(1)(d) or Rule 9.140(b)(1)(E). "An illegal sentence has generally been defined as one that imposes a punishment or penalty that no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances." *McMahon*, 94 So. 3d

at 477 (quotation omitted).[3] Because Petitioner received a sentence within the minimum and maximum sentences allowable by the Legislature, he did not receive an illegal sentence. *See id.* (determining that the sentence was not "illegal" because it "was within the range established by the sentencing scoresheet").

Instead, Petitioner appears to argue that this is an "unlawful" sentence because the trial court "abuse[d] its discretion" at step two of *Banks*. *See* Init. Br. 15–16, 19–22. When this Court amended the appellate rules, it "expanded the scope of appellate review to include unlawful sentences." *Wilson*, 306 So. 3d at 1270. As used in Rule

[3] In *McMahon*, this Court indicated that definition of an "illegal sentence" it quoted was originally "stated in the context of an appeal from a defendant's motion to correct an illegal sentence," but that it "discern[ed] no practical or legal rationale that would require application of a different definition when determining if the State is authorized under section 924.07(1)(e) to appeal 'a sentence on the ground that it is illegal.'" 94 So. 3d at 477 n.7 (quoting § 924.07(1)(e), Fla. Stat. (2009)). The State is similarly unaware of any practical or legal rationale requiring a different definition of "illegal sentence" under Rule 9.140. That term may have a broader meaning in Section 924.06(1)(d), more akin to "unlawful sentence," since a different provision of that statute (Section 924.06(1)(e)) authorizes appeals exceeding the statutory maximum, which under Rule 9.140(b) would fall under the rubric of an "illegal sentence." An "illegal sentence" for purposes of the statute likely encompasses a sentence that is subject to challenge on some *legal*, but not *discretionary*, basis. But Petitioner makes no effort to show that his sentence is "illegal" here, so the Court need not delineate the meaning of that statutory phrase.

9.140(b) and (c), "unlawful sentence" means "those sentences not meeting the definition of illegal under *Davis v. State*, 661 So. 2d 1193 (Fla. 1995), but, nevertheless, subject to correction on direct appeal." Fla. R. App. P. 9.140, Court Commentary (1996). Since the rules were amended, "there have been innumerable reported cases correcting sentencing errors that rendered a sentence unlawful but not completely illegal." *Barnhill*, 140 So. 3d at 1060. Decisions reversing under that rule bear in common that they identified some legal error short of the sentence's being outright "illegal." For example, "scoresheet errors that are not apparent from the face of the scoresheet may result in an erroneous sentence correctable on direct appeal," even though such an error does not qualify as creating an illegal sentence. *Judge v. State*, 596 So. 2d 73, 77 (Fla. 2d DCA 1991) (en banc) (per curiam). Reversals due to the trial court's consideration of an impermissible sentencing factor also fit that bill. An unlawful sentence is therefore not one that is per se impermissible as a matter of law, but one where the "procedure employed to impose the punishment" did not "compor[t] with statutory law and due process." *Id.*

The question, then, is whether Petitioner's challenge to his sentence (based on the trial court's denial of his downward-departure motion) was to an "unlawful sentence." But an argument that the trial court erred at *Banks* step two does not raise a claim that the trial court imposed an "unlawful sentence," because under this Court's "long adhered to line of cases," when a sentence is "within the statutory limit, the extent of it cannot be reviewed on appeal regardless of the existence or nonexistence of mitigating circumstances." *Davis*, 123 So. 2d at 707; *see also Brown*, 13 So. 2d at 461. Nothing in the Criminal Punishment Code alters that longstanding approach, *cf.* 1997 Session Summary, Major Legislation Passed, Reg. Sess., S. Comm. Crim. J., Sentencing at 93 ("Any sentence within the permissible range is not appealable by the defendant."), and so *Banks* step-two denials are not "subject to correction on direct appeal." Fla. R. App. P. 9.140, Court Commentary (1996).

Finally, contrary to Petitioner's contention, Rule 9.140(b)(1)(G) is not a generic "catch-all, which can encompass a review of a sentence to the extent (E) and (F) do not," Init. Br. 16, because that subsection is triggered only "as otherwise provided by general law." That reference to "general law" requires specific statutory authorization.

But Petitioner identifies no statute requiring or permitting his *Banks* step-two appeal.[4]

Petitioner has thus shown no basis for the district court to exercise jurisdiction over his *Banks* step-two appeal.

II. Even if the district court had jurisdiction, Petitioner's sentencing claim fails under longstanding precedent.

Even if there were jurisdiction, however, *Banks* step-two denials still result in no reversible error because, by definition, the sentence falls within the statutory range. As explained above, a trial court's discretionary decision to sentence a defendant within the statutorily prescribed range is not cognizable error. *See Davis*, 123 So. 2d at 707; *Davis v. State*, 332 So. 3d 970, 977 (Fla. 2021) ("The Court has 'never [called into] doubt[ ] the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.'" (quoting

[4] Petitioner also argues that "[b]ecause the Florida Constitution provides the right to a direct appeal, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution," and "complying with due process necessarily envisions that defendants can challenge their sentence on appeal." Init. Br. 9–10 (quotation omitted). But under Florida's longstanding rule that in-range sentences are unreviewable, a defendant may still appeal "claims concerning constitutional violations during the sentencing process." *Howard*, 820 So. 2d at 340–41 (quoting *Brown*, 13 So. 2d at 461). Petitioner asserts no claim of a constitutional violation.

United States v. Booker, 543 U.S. 220, 233 (2005)). Petitioner's claim would thus fail on the merits in any event.

As noted, "any punishment assessed by a court . . . within the limits fixed [by a constitutional statute] cannot be adjudged excessive" because "the power to declare what punishment may be assessed against those convicted of a crime is not a judicial power, but a legislative power." *Brown*, 13 So. 2d at 461; *see also* § 921.002(1), Fla. Stat. And the Legislature has expressly granted trial judges the power to "impose a sentence up to and including the statutory maximum for any offense." *Id.* § 921.002(1)(g). Appellate courts therefore may not review in-range sentences because doing so would usurp the Legislature's authority to determine the appropriate criminal penalty for an offense, and the trial court's power to "fix by sentence the punishment within the limits prescribed by statute." *Brown*, 13 So. 2d at 461.

That form of appellate review would also infringe executive prerogatives. Whether a sentence qualifies as "excessive . . . is a matter" for "commutation" by the executive branch, not "for review and remedy by the appellate court." *Id.* at 461–62; *accord Mason v. State*, 375 S.W.2d 916, 919 (Tex. Ct. Crim. App. 1964) (explaining the court was

"without authority to reduce [the punishment] or to set aside the conviction upon the theory that the punishment is excessive" because the "[a]uthority to grant pardons, reprieves and commutations of punishment is vested by the Constitution in the Governor upon recommendation of the Board of Pardons and Paroles").

The break from tradition that Petitioner advocates is radical enough. But if accepted, his theory could compel far more sweeping changes to the reviewability of criminal sentences in Florida. Indeed, if the denial of a departure request is reviewable for abuse of discretion, that same reasoning could subject *any* in-range sentence to costly appellate review. After all, when a judge denies a departure request under step two, it exercises its discretion to conclude that another sentence—one within the range—is the more appropriate sentencing disposition. *See Banks*, 732 So. 2d at 1068. In other words, the judge in that circumstance performs the same discretionary weighing that judges perform *every* time they impose a sentence within the range. Petitioner identifies no principle that would permit *Banks* step-two challenges but not also permit review of all other in-range sentences on the theory that discretion was abused.

Were that the rule, appellate courts would undoubtedly be deluged with sentencing appeals in which a defendant simply deemed his sentence too high. That is not hyperbole. Consider the arguments the defendant in this very case has offered up for reversal. After violently raping his 53-year-old foster mother, which resulted in her fleeing naked through the street to a neighbor's home, Petitioner was convicted of numerous offenses with a sentencing range of 146.85 months to life in prison. Yet that was hardly Petitioner's first offense. To the contrary, his lengthy and increasingly violent criminal record convinced his own expert witness that Petitioner's risk of recidivism was at the "highest level." R. 178. For its part, the trial court had "never seen a case where someone ha[d] such a high risk for reoffending based on the evidence and . . . behavior," and thought that denying the departure motion was "not even a close question." R. 212. It had no intention of departing even if Petitioner could point to some mitigation based on his youth and mental health. *Id.*

If Petitioner of all people was content to shoot his taxpayer-funded shot on appeal, there is no end to the defendants who might flood the district courts with senseless and resource-consuming appeals. That need not be. This Court should reaffirm its longstanding

rule that in-range sentences are not reversible unless the defendant can point to some pure error of law, not of discretion, in their imposition.

Thus, even if the First District had jurisdiction, Petitioner's *Banks* step-two appeal fails.

CONCLUSION

The Court should approve the First District's decision.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished via the E-Filing Portal on this 31st day of January, 2024, on all parties required to be served.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Bookman Old Style, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure; and that it contains 7,358 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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