IN THE SUPREME COURT OF FLORIDA

MARK MILLS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC01-1862

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Mark Mills, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The full text of the decision below is:

> AFFIRMED. *Harvey v. State, 786 So.2d 595 (Fla. 1st DCA 2001)*, approving and certifying questions, *786 So.2d 28 (Fla. 1st DCA 2001)*, review pending (Fla. May 21, 2001)(no.01-1139).

A copy of the decision is appended. It can also be found at Mills v. State, 791 So.2d 591 (Fla. 1st DCA 2001).

The State rejects petitioner's statement of the case and facts because it contains recitations outside the four corners of the decision below which are not relevant to the issue of this Court's jurisdiction. Reaves v. State, 485 So.2d 829 (Fla. 1986)("The facts of the case are drawn from the district court opinion below").

SUMMARY OF ARGUMENT

Petitioner has not shown that there is any express and direct conflict between the decision below and the decisions of this Court or of any other district court.

ARGUMENT

ISSUE

IS THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS IN STATE V. JEFFERSON, 758 SO.2D 661 (FLA. 2000) AND BAIN V. STATE, 730 SO.2D 296 (FLA.2ND DCA 1999)?(Restated)

Appellate Standard of Review and Jurisdictional Criteria

The applicable standard of review is **de novo** subject to the following jurisdictional criteria.

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla.

1986)(rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a dissenting or concurring opinion"). In addition, it is the "conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether the District Court's decision reached a result opposite the decisions in Jefferson and Bain.

DECISION BELOW IS NOT IN "EXPRESS AND DIRECT" CONFLICT WITH JEFFERSON AND BAIN.

The decision below cites to Harvey, which adheres to the holding of *Maddox*[1] that for those defendants who had available rule 3.800(b), there is no longer the concept of fundamental sentencing error. Like the decision below, the decision in Jefferson adheres to the holding of *Maddox*. The decision in Bain provided conflict jurisdiction for this Court's holding in *Maddox*. *Maddox* approved Bain only to the extent that it was consistent with Maddox. Thus, the decision below is not in express and direct conflict with Jefferson and Bain.

A. DECISION BELOW

The District Court opinion below is a per curiam affirmance citing to Harvey. The District Court in Harvey held that, for those defendants who had available to them the procedural mechanism of Fla. R. Crim. P. 3.800(b), there would no longer be the concept of fundamental sentencing error. The court stated:

> While the Supreme Court in *Maddox v. State*, 760 So.2d 89 (Fla. 2000), indicated that the concept of fundamental sentencing error survived the enactment of the Criminal Appeal Reform Act of 1996 and the 1996 amendments to Florida Rule of Criminal Procedure 3.800(b), the court also indicated that, **for defendants whose appeals fall outside the window period identified in Maddox as having closed on the effective date of their most recent amendments to Florida Rule of Criminal Procedure 3.800(b) in Amendments II, there would no longer be the concept of fundamental sentencing error** because the procedural mechanism provided by the most recent amendments to the rule would allow for raising any alleged

[1] Maddox v. State, 760 So.2d 89 (Fla. 2000).

> sentencing errors prior to the filing of the first appellate brief.
>
> ****
>
> As a result of appellant's failure to utilize the procedural mechanisms available to him for preserving his single subject challenge for appellate review, this court, **in keeping with the limitations on the impact of the decision in *Maddox***, will not consider the merits of the single subject challenge raised by appellant for the first time in his amended initial brief.

(Citations omitted). Harvey at 598.

Subsequently, in reviewing Harvey, this Court likewise reaffirmed *Maddox* and held that for those defendants who could have availed themselves of Rule 3.800(b), there was no longer the concept of fundamental sentencing error. Harvey v. State, 848 So.2d 1060 (Fla. 2003). However, this Court held that *Maddox* did not apply to Harvey because of the "unique circumstances" - the timing - of the case. The court explained:

> Our decision in *Maddox* advances the concept that fundamental sentencing error does not apply to defendants who could have availed themselves of the amendments to *rule 3.800(b)* as set forth in *Amendments II*; however, this concept does not trump fairness and due process and should not be used as a trap.
>
> Harvey argues that to require him to raise a single subject challenge to chapter 95-184, Laws of Florida, by filing a motion to correct sentencing error pursuant to the amended *rule 3.800(b)* would have been a useless act because at the time that he filed his first appellate brief on February 10, 2000, the First District Court of Appeal's opinion in *Trapp v. State*, 736 So.2d 736 (Fla. 1st DCA 1999), was binding precedent.
>
> ***
>
> We agree with Harvey that he should not be penalized for his appellate counsel's failure to file a *rule 3.800(b)(2)* motion based on speculation that

> our opinion in Heggs[2] would disapprove the First District's decision in Trapp. Harvey had no sentencing error to complain of at the time he filed his Anders brief on February 10, 2000. We issued our decision in *Heggs* a week later, which created a unique situation - a sentencing error developed that did not exist before the first brief was filed.
>
> ***
>
> **Due to** the interests of justice, judicial efficiency, and the **unique circumstances of this case**, we permit Harvey to raise his *Heggs* error as a fundamental sentencing error for the first time on appeal.
>
> ***
>
> We therefore quash the decision of the district court of appeal and answer the certified question in the affirmative **for the limited purpose expressed herein**.

Id. at 1063-1064.

In sum, the decision below cites to Harvey, which adheres to the holding of *Maddox* that for those defendants who had available rule 3.800(b), there was no longer the concept of fundamental sentencing error.

B. STATE V. JEFFERSON

In State v. Jefferson, 758 So.2d 661 (Fla. 2000), this Court addressed the following certified question:

> Under section 924.051(3)[3], Florida Statutes (Sup. 1996), is the failure to preserve for appeal an alleged sentencing error that is not fundamental a

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[2]Heggs v. State, 759 So.2d 620 (Fla. 2000).

[3]Section 924.051(3) provides: "An appeal may not be taken from a judgement or order of a trial court unless a prejudicial error is alleged and is properly preserved, or, if not properly preserved, would constitute fundamental error."

> jurisdictional impediment to an appeal that should result in dismissal of the appeal, or is it a non-jurisdictional bar to review that should result in affirmance?

The court answered the first part of the certified question in the negative and the second part of the question in the affirmative. The Court stated:

> After considering the language of the Act [Criminal Appeal Reform Act] and the legislative history of section 924.051(3), we conclude that construing this statute as merely codifying the existing procedural bars to appellate review both upholds the statute's constitutionality and is consistent with the actual legislative intent in passing the Act. **Nothing in our opinion today circumvents the requirement codified in the Act** that in order to constitute reversible error, the error must first either be preserved for review or amount to fundamental error.

Id. At 666.

In sum, Jefferson reaffirmed the procedural bars to appellate review set forth in the Criminal Appeal Reform Act and merely held that such do not operate as a *jurisdictional* bar to appellate review.

Likewise, the decision below adheres to the procedural bars set forth in the Criminal Appeal Reform Act. Thus, there is no conflict between the decisions. Appellant is trying to argue that based on Jefferson, the concept of fundamental *sentencing* error exists for those who had available to them rule 3.800(b). However, the State reiterates that Jefferson only addressed the issue of whether the Criminal Appeal Reform Act constituted a

limit on the subject matter jurisdiction of appellate courts. It did not overrule Maddox. Thus, Jefferson does not conflict with the decision below.

B. BAIN V. STATE

In Bain v. State, 730 So.2d 296 (Fla. 1999), Bain attempted to challenge his sentence, notwithstanding that he did not object at sentencing, nor move to correct the sentence via Rule 3.800(b), nor move to withdraw his plea. The District Court found the alleged error to be fundamental[4], reversing and remanding accordingly.

Petitioner argues that, based on Bain, the concept of fundamental sentencing error exists - thereby conflicting with the decision below. However, the State points out that Bain has been superceded by *Maddox*. Indeed, this Court reviewed *Maddox* based on conflict jurisdiction with Bain and other cases. Maddox v. State, 760 So.2d 89, 93 (Fla. 2000)("We have for review the en banc decision of the Fifth District Court of Appeal in Maddox ... which expressly and directly conflicts with

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[4]Bain was convicted of Robbery without a weapon and received a 15 year minimum mandatory sentence as an habitual violent felony offender. The court found that under the habitual violent felony offender statute the mandatory portion of a sentence for a second degree felony cannot exceed ten years. The court held that because his minimum mandatory exceeded the maximum under the statute, the sentence was illegal and constituted fundamental error.

... the en banc opinion of the Second District Court of Appeal in *Bain v. State*, 730 So.2d 296 (Fla. 2nd DCA 1999)).

In *Maddox,* this Court eliminated the concept of fundamental sentencing error for all defendants who had available to them rule 3.800(b): "We anticipate that the amendments to rule 3.800(b) recently promulgated by this Court ... should eliminate the problem of un-preserved sentencing errors raised on direct appeal because the time in which a defendant can file a motion to correct sentencing error in the trial court is expanded to the time the first appellate brief is filed." *Maddox* at 94.

The *Maddox* Court approved Bain only to the extent that it recognized that for those defendants who had available rule 3.800(b), the concept of fundamental sentencing error no longer existed. The *Maddox* Court stated:

> In those cases where the appellant's first appellate brief was filed **before** our recent enactment of rule 3.800(b) in Amendments II, we approve of the district Courts' holding in *Nelson*, *Bain*, *Jordan*, and *Hyden* **to the extent that they recognize that a narrow class of unpreserved sentencing errors can be raised on direct appeal as fundamental error."** *Maddox* at 94-95.

Thus, Petitioner's claim that Bain establishes the concept of fundamental sentencing error for those who had available rule 3.800(b) is without merit. Bain has been superceded by *Maddox*.

Thus, Bain does not establish conflict with the decision below - which adheres to *Maddox*.

Summary

The decision below (citing to *Harvey)* adheres to *Maddox.* The decision in Jefferson likewise adheres to *Maddox.* Jefferson merely held that the procedural requirements of the Criminal Appeal Reform Act are not a jurisdictional bar to review. The decision in Bain provided conflict jurisdiction for this Court's holding in *Maddox*. *Maddox* approved Bain only to the extent that it was consistent with Maddox. Thus, the decision below is not in conflict with Jefferson and Bain.

CONCLUSION

There is no express and direct conflict and no constitutional basis for discretionary jurisdiction. The petition should be denied.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **Phil Patterson**, Assistant Public Defender, Leon County Courthouse, 301 S. Monroe Street, Suite 401, Tallahassee, Florida 32301 by MAIL on 8 December 2003.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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