IN THE SUPREME COURT OF THE STATE OF FLORIDA

CHARLES MENDENHALL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_______________________/

CASE NO.: SC09-400

District Court case nos.: 5D07-1059, 5D07-3616

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF CASE AND FACTS

Petitioner gave notice of appeal from his conviction and sentence for attempted second degree murder with a firearm. Petitioner then filed a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) contending, among other things, that his 35 year sentence, with a 35 year mandatory minimum, assessed pursuant to the 10/20/Life provisions of section 775.087, Florida Statutes, was illegal in that it exceeded the maximum set by law. The trial court agreed, vacated Petitioner's sentence, and re-sentenced Petitioner to 30 years, with a 25 year mandatory minimum. The State cross-appealed urging that, as the maximum penalty was life, the original sentence did not exceed that set by statute.

The Fifth District Court of Appeal affirmed the judgment, reversed the sentence, and remanded for re-imposition of the original sentence. Mendenhall v. State, 33 Fla. L. Weekly D 2783 (Fla. 5th DCA Dec 5, 2008). It is from that decision ordering re-imposition of the original sentence that Petitioner seeks discretionary review. The Court wrote:

> In Sanders v. State, 944 So. 2d 203 (Fla. 2006), our Supreme Court affirmed a defendant's life sentence under factual circumstances similar to those presented sub judice. Inthat case, the defendant appealed his conviction arguing that it was fundamental error to list attempted second-degree murder while discharging a firearm and inflicting great bodily harm on the verdict form as a lesser offense to attempted first-degree murder while discharging a firearm and inflicting great bodily harm. The case was presented to the Supreme Court for review from the Second District Court of Appeal. On direct appeal, in dicta, the Second District had included

the following paragraph in its opinion:

> Although attempted second-degree murder with a firearm is a first-degree felony for which the usual maximum penalty is thirty years' imprisonment, the minimum mandatory sentence when the firearm isdischarged inflicting great bodily harm is a term no less than twenty-five years and no more than life. Thus, at the sentencing hearing, the trial court had discretion to impose a sentence between twenty-five years' imprisonment and life imprisonment. The trial court determined that Mr. Sanders was eligible for a habitual offender sentence if the court elected to use that sentencing method. Mr. Sanders' attorney argued vigorously for a sentence at the bottom of the minimum mandatory range. However, Mr. Sanders had already committed earlier offenses involving a firearm. Moreover, the evidence at trial indicated that Mr. Sanders had fired more than one shot in an area with many bystanders. Accordingly, the trial court exercised its discretion to impose a sentence of life imprisonment under the 10-20-life statute.

Sanders v. State, 912 So. 2d 1286, 1288 (Fla. 2d DCA 2005). Importantly, upon review, our Supreme Court affirmed the Second District's opinion regarding their analysis of the penalty for a lesser included offense and, in dicta, the Court made the following observation:

> The maximum sentence for the core offense of attempted first-degree murder is thirty years, while the sentence for attempted second-degree murder without any enhancements is fifteen years. However, with the application of the ten-twenty-life statute, the resulting maximum sentence for both attempted first- and second-degree murder while discharging a firearm and inflicting great bodily harm is the same--life.

Sanders v. State, 944 So. 2d 203, 205 (Fla. 2006).

Mendenhall, at *7-8.

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction in this case. Petitioner has demonstrated that the decision of the court below conflicts with a decision of another district court. However, as the district court's opinion below correctly interpreted the 10/20/Life statute, this Court need not exercise its discretion to accept jurisdiction.

ARGUMENT

ALTHOUGH THE DECISION BY THE DISTRICT COURT IN THE INSTANT CASE APPEARS TO EXPRESSLY CONFLICT WITH ANOTHER CASE, JURISDICTION OUGHT NOT BE ACCEPTED.

This Court may exercise discretionary jurisdiction to review the decision of a district court that "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv). See Art. V, § 3(b)(3), Fla. Const.

Petitioner asserts that the decision below conflicts with the decisions in Wilson v. State, 898 So. 2d 191 (Fla. 1st DCA 2005), and Souza v. State, 976 So. 2d 639 (Fla. 2d DCA 2008). Although the decision below is not in conflict with the decision in Wilson,[1] Respondents acknowledge that there appears to be a direct conflict with the decision in Souza. Regardless, this Court should not exercise its discretionary discretion.

As the opinion below makes clear, in Sanders, this Court three years ago recognized that the maximum penalty for attempted second degree murder while discharging a firearm and inflicting great bodily harm is life. At issue in Sanders was whether, to constitute a lesser included offense, the offense must necessarily result in a lesser penalty than the main offense or the offense

[1] Wilson held that the sentencing issue had not been preserved for direct review and affirmed, thus the decision was not in conflict.

immediately preceding it on the verdict form. Acknowledging that after the application of the 10/20/Life statute, the maximum penalties for attempted first degree murder, which normally carried a 30 year maximum, and attempted second degree murder, which normally carried a 15 year maximum, were the same, this Court concluded that an offense may still be a lesser included offense although it did not necessarily result in a lesser penalty.

Restated, attempted second degree murder by discharging a firearm resulting in great bodily harm is a lesser included offense of attempted first degree murder by discharging a firearm resulting in great bodily harm even though they both carry the same maximum penalty - life, by operation of the 10/20/Life statute.

This Court's decision in Sanders previously settled the question which Petitioner poses. This Court should decline to exercise its discretionary jurisdiction.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court not to accept jurisdiction in this matter.

Respectfully submitted,

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CERTIFICATE OF 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).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the above Jurisdictional Brief has been furnished by U.S. mail to: Meghan Ann Collins, Assistant Public Defender, Attorney for Petitioner, 444 Seabreeze, Suite 210, Daytona Beach, FL 32118, this the _________ day of March 2009.

____
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APPENDIX

EXHIBIT	DOCUMENT
A	Opinion in Mendenhall v. State, 33 Fla. L. Weekly D 2783 (Fla. 5th DCA 2008).