IN THE SUPREME COURT OF FLORIDA

CHARLES MENDENHALL,

Petitioner, Case no. SC09-400

vs.

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Charles Mendenhall, petitioner, appealed his judgment and sentence to the Fifth District Court of Appeal, which held, *inter alia*, that the trial court erred in granting a motion to correct sentencing error[1]. *See Mendenhall v. State*, 33 Fla. L. Weekly D2783, 2008 WL 5100312 (Fla. 5th DCA December 5, 2008). The Fifth District Court of Appeal reversed the sentence, holding that the original sentence was legal, and remanded for the imposition of the original sentence. *Id.* The facts as set forth by the opinion are as follows:

> Charles Mendenhall (defendant) appeals his sentence of 30 years' imprisonment, with a 25-year mandatory minimum, which was imposed by the trial court pursuant to the grant of the defendant's rule 3.800 motion to correct illegal sentence. The State

[1] *See* Rule 3.800(b)(2), Florida Rules of Criminal Procedure.

cross-appeals contending that the trial court's original sentence of 35 years' imprisonment, with a 35-year mandatory minimum, was legal and, accordingly, the trial court erred in granting the defendant's motion to correct illegal sentence. Determining that the defendant's direct appeal lacks merit but that the State's cross-appeal possesses merit, we reverse the defendant's sentence and remand for reinstatement of his original sentence.

The defendant was charged with committing one count of attempted first degree murder with a firearm, a life felony. At the conclusion of the trial, the jury found the defendant guilty of the lesser included offense of attempted second degree murder with a firearm, a second degree felony. The jury also returned three special verdicts finding that, during the commission of the offense, the defendant: (1) was in possession of a firearm, (2) discharged a firearm, and (3) inflicted serious bodily injury by discharging the firearm.

The trial court entered judgment in accordance with the jury's verdict and sentenced the defendant, pursuant to Florida's 10/20/Life statute, to a term of

> 35 years' imprisonment, with a 35-year mandatory minimum. The defendant thereafter filed a motion to correct a sentencing error asserting that his sentence was illegal because: (1) under Florida's 10/20/Life statute the maximum sentence for a second degree felony was 30 years with a 25-year mandatory minimum, and (2) the jury failed to return the proper verdict for the imposition of a 25-year mandatory minimum because the jury did not specifically find that "death or great bodily harm was inflicted."
>
> The trial court granted the defendant's motion in part and denied it in part. In granting part of the motion, the trial court concluded that it was required to reduce the defendant's sentence to a term of 30 years' imprisonment, with a 25-year mandatory minimum. The trial court denied defendant's motion on the basis of his argument that the jury failed to return a specific verdict finding great bodily harm.
>
> (footnotes omitted)

Mendenhall, 2008 WL 5100312, at *1.

The opinion in *Mendenhall* was issued on December 5, 2008,

rehearing denied January 28, 2009. *Id.*

SUMMARY OF ARGUMENT

In *Mendenhall,* the Fifth District Court of Appeal adopted the State's interpretation of the 10/20/Life statute[2] and held that the imposition a sentence of 35 years' imprisonment, with a 35 year mandatory minimum, for a second degree felony was legal. The opinion in *Mendenhall* conflicts with the opinion issued by the Second District Court of Appeal opinion in *Sousa*[3], holding that the mandatory minimum provision of the 10/20/Life statute does not override the statutory maximum as set forth in section 775.082(3)(b), Florida Statutes. *Mendenhall* also conflicts with the First District Court of Appeal's opinion in *Wilson,*[4] which holds that the maximum sentence for

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[2]Section 775.087, Florida Statutes (2007)

[3] *Sousa v. State*, 976 So.2d 639 (Fla. 2nd DCA 2008).

[4] *Wilson v. State,* 898 So.2d 191 (Fla. 1st DCA 2005).

attempted second degree murder under the 10/20/Life statute is thirty years' imprisonment with a mandatory minimum sentence.

Since the Fifth District Court's decision in *Mendenhall* is in express and direct conflict with First and Second District Courts' decisions, this Court has jurisdiction to accept the instant case for review pursuant to Article V, § 3(b)(3), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT CASE PURSUANT TO RULE 9.030(a)(2)(A)(iv), Fla. R. App. P.

Pursuant to Article V, § 3(b)(3), Florida Constitution, and Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., this Court has discretionary jurisdiction over cases that "expressly and directly conflict with a decision from another

district court." *See Nielson v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960) ("It is the announcement of a conflicting rule of law that conveys jurisdiction to us to review the decision of the Court of Appeal.") In *Kincaid v. World Insurance Co.*, 157 So. 2d 517, 518 (Fla. 1963), this Court set forth the constitutional standard to be applied to determine whether such a conflict exists:

> The measure of our appellate jurisdiction on the so-called 'conflict theory' is not whether we would necessarily have arrived at a conclusion differing from that reached by the District Court. The constitutional standard is whether the decisions of the District Court on its face collides with a prior decision of this Court, or another District Court, on the same point of law so as to create an inconsistency or conflict among precedents.

Petitioner asserts that the Fifth District Court of Appeal's decision in *Mendenhall* expressly and directly conflicts, on the same point of law, with

the decision of the First District Court of Appeal's opinion in *Wilson*, and the Second District Court of Appeal's opinion in *Sousa*. In each of the three cases, the defendants were convicted of attempted second degree murder, sentenced pursuant to 10/20/Life, and the issue before the district court was the determination of the maximum sentence for the offense. Section 775.087, Florida Statutes (2007). The First and Second District Courts of Appeal held that the maximum sentence is thirty years as set forth in section 775.082(3)(b), Florida Statutes, while the Fifth District Court held in *Mendenhall* that a 35-year sentence was legal. *Wilson,* 898 So. 2d at 192-193. *Sousa,* 976 So.2d at 640. *Mendenhall*. 2008 WL 5100312, at *3-4.

In *Wilson*, the defendant appealed the denial of his motion to correct illegal sentence, pursuant to Rule 3.800(a), Fla. R. Crim. P. *Wilson,* 898 So.

2d at 192. The First District Court of Appeal held that his sentence of 45 years imprisonment with a 25-year minimum mandatory sentence was not legal and explained:

> Second-degree murder is a first-degree felony. See § 782.04(2), Fla. Stat. (2003). If the criminal offense attempted is a first-degree felony, the offense of criminal attempt is a second-degree felony. See § 777.04(4)(c), Fla. Stat. (2003). Attempted second-degree murder is thus a second-degree felony punishable by a maximum sentence of 15 years. If, as in the instant case, the offense is committed with a firearm, the crime is re-classified to a first-degree felony pursuant to section 775.087 (1)(b), subject to an enhanced sentence not to exceed 30 years.
>
> * * *
>
> Where the sentence imposed exceeds the 30-year maximum sentence for a first-degree felony, as outlined in section 775.082(3)(b), Florida Statutes (2003), it is subject to correction in a rule 3.800(a) proceeding.
>
> * * *
>
> Appellant is subject to a mandatory minimum

> sentence of 25 years pursuant to section 775.087(2)(a) 3, Florida Statutes (2003), for discharge of a firearm resulting in death or great bodily harm. **Notwithstanding the minimum mandatory term, the maximum sentence the trial court properly may impose is a sentence of 30 years.**

Wilson, 898 So.2d at 192-193. (citations omitted) (emphasis added)

In *Sousa,* the defendant also appealed the denial of his motion to correct an illegal sentence. *Sousa*, 976 So. 2d at 639-640. The defendant was convicted of two counts of attempted second degree murder and sentenced to two terms of 50 years' imprisonment, with a 25-year mandatory minimum. *Id.* The Second District Court of Appeal, reversed Sousa's sentences and, echoing *Wilson,* determined that the maximum sentence for the offense was thirty years:

> Second-degree murder is a first-degree felony, punishable by life imprisonment. § 782.04(2), Fla.

Stat. (1999). Attempted second-degree murder is thus a second-degree felony, punishable by no more than fifteen years' imprisonment. §§ 777.04(4)(c), 775.082(3)(c), Fla. Stat. (1999). Because Mr. Sousa was charged with committing these crimes while using a firearm, the offense was reclassified as a first-degree felony. § 775.087(1)(b). The maximum term of imprisonment for a reclassified first-degree felony, without some special sentencing enhancement, is thirty years' imprisonment. § 775.082(3)(b).

Because Mr. Sousa clearly discharged his firearm during the commission of both of these crimes, causing great bodily harm to his victims, he was subject to section 775.087(2)(a)(3) of the 10/20/life statute, which required that he be sentenced "to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison." **It could be argued that the language of this statute overrides the language in section 775.082(3)(b) that provides for a thirty-year sentence. The case law, however, interprets these statutes in favor of the defendant, so that the maximum term of years is thirty.**

Sousa, 976 So. 2d at 640. (foot notes omitted) (emphasis added)

On its face, the opinion issued by the Fifth District Court of Appeal in *Mendenhall* conflicts with *Sousa* and *Wilson.* The Fifth District Court of Appeal held that the defendant's sentence of 35 years' imprisonment with a 35-year mandatory minimum was a legal sentence, because the 10/20/Life statute authorized minimum mandatory sentences in excess of the statutory maximum. *Mendenhall*, 2008 WL 5100312. The court cited to the reclassification provision and minimum mandatory provisions of the 10/20/Life statute, emphasizing section 775.087(2)(a)3, which provides:

> Any person who is convicted of a felony or an attempt to commit a felony ... regardless of whether the use of a weapon is an element of the felony, and during the course of the commission of the felony such person discharged a "firearm" or "destructive device" ... and, as the result of the discharge, death or great bodily harm was inflicted upon any person,

> the convicted person **shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison.**
>
> * * *
>
> If the minimum mandatory terms of imprisonment imposed pursuant to this section exceed the maximum sentences authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, **then the mandatory minimum sentence must be imposed.** If the mandatory minimum terms of imprisonment pursuant to this section are less than the sentences that could be imposed as authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the sentence imposed by the court must include the mandatory minimum term of imprisonment as required in this section.

(emphasis in opinion) *Mendenhall*. 2008 WL 5100312, at *2-3.

The Fifth District Court of Appeal stated that case law, particularly the dicta in this Court's opinion in *Sanders v. State*, 944 So.2d 203 (Fla.

2006), authorized the imposition of a 35-year sentence because, in dicta, this Court adopted the dicta of the Second District Court of Appeal, which stated that the maximum sentence for attempted second degree murder was life. *Mendenhall*, 2008 WL 5100312, at *3-4. The court opined:

> 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, 944 So.2d at 205. The court then concluded the opinion stating:

> Additional support for our conclusion that the trial court's original sentence was proper is found in our recent opinion in *Brown v. State*, 983 So.2d 706 (Fla. 5th DCA 2008). In *Brown*, we recognized that the imposition of a mandatory minimum sentence in excess of the maximum penalty was indeed permissible based upon special findings such as those found in this case. Notably, in *Brown*, the panel cited to *Yasin v. State*, 896 So.2d 875 (Fla. 5th DCA 2005), wherein Judge Griffin explained, in her concurring opinion, that the intent of Florida's 10/20/Life statute is to **"give the trial judge discretion to inflate the mandatory minimum term of incarceration but not to re-define the statutory maximums."**

Mendenhall, 2008 WL 5100312, at *4. (emphasis added) The holding in *Mendenhall,* which permits a trial court to impose a sentence in excess of the statutory maximum- provided it is a "minimum mandatory sentence"- expressly contradicts *Sousa* and *Wilson*. In *Sousa,* the Second District Court of Appeal explicitly rejected the position that the Fifth later adopted, in *Mendenhall*, and held that minimum mandatory provisions of the 10/20/Life statute do not trump the statutory maximum set forth in section 775.082(3)(b). "It could be argued that the language of this statute

overrides the language in section 775.082(3)(b).... The case law, however, interprets these statutes in favor of the defendant, so that the maximum term of years is thirty." *Sousa,* 976 So.2d at 640. Since *Mendenhall* expressly and directly conflicts with decisions from the First and Second District Courts of Appeal, this Court had jurisdiction to take this appeal.

CONCLUSION

Petitioner has demonstrated the existence of express and direct conflict between the opinion on review and the opinion of another District Court of Appeal and, as a result, this Court should grant the petition for discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon The Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Charles Mendenhall, DOC# D11896, Tomoka Correctional Institution, 3950 Tiger Bay Road, Daytona Beach, Florida 32124, on this date of March 9, 2009.

_____

MEGHAN ANN COLLINS
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY certify that the size and style of type used in the brief is 14

point proportionally spaced Times New Roman.

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MEGHAN ANN COLLINS

ASSISTANT PUBLIC DEFENDER

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APPENDIX