IN THE SUPREME COURT OF FLORIDA

CHARLES MENDENHALL,	)	
	)	
Petitioner,	)	
vs.	)	CASE NO. SC09-400
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, AND THE FIFTH JUDICIAL CIRCUIT IN AND FOR LAKE COUNTY, FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the Defendant and the Respondent was the Prosecution in the Fifth Judicial Circuit Court, in and for Lake County, Florida. In the brief the Respondent will be called "the State" and the Petitioner will be called "the Petitioner" or "Mr. Mendenhall."

The following is a consolidated appeal, page citations refer to the record on appeal in case no. 5D07-1059. In the brief the following symbols will be used: "R"-volume one and two of the record on appeal; "T"-transcript of trial and sentencing, volumes three, four, and five of record on appeal; "S"-supplements to record on appeal, volumes six and seven; "IB" - Initial Brief; "AB"- Answer Brief.

SUMMARY OF ARGUMENT

The Petitioner was convicted of attempted second-degree murder with a firearm and was sentenced pursuant to the 10/20/Life statute. The applicable minimum mandatory sentence was a range of years from twenty-five years to life. The Fifth District Court of Appeal has held that the minimum mandatory provision increases the statutory maximum and that a sentence of thirty-five years with a thirty-five year minimum mandatory is legal. Petitioner argues that the Fifth District Court of Appeal's interpretation of the 10/20/Life statute is flawed and that the correct interpretation has been set forth by the First and Second District Courts of Appeal who have held that the maximum sentence is thirty years with a twenty-five year minimum mandatory.

The standard of review is *de novo*. Waste Management, Inc. v. Mora, 940 So.2d 1105, 1107 (Fla.2006) ("The resolution of the conflict between the decisions of the First and Fourth Districts and the decision of the Second District is an issue of statutory construction. Our standard of review is *de novo*.")

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRONEOUSLY HELD THAT, UNDER THE 10/20/LIFE STATUTE, THE TRIAL COURT COULD SENTENCE THE PETITIONER TO 35 YEARS IN PRISON WITH A 35 YEAR MANDATORY MINIMUM

In the Initial Brief, the Petitioner stated that the issue before this Court is what term of imprisonment is the maximum sentence that may be imposed upon a defendant convicted of attempted second degree murder while discharging a firearm causing either death or great bodily harm and the defendant is sentenced pursuant to section 775.087, Florida Statutes, also known as Florida's "10/20/Life" statute. The Fifth District Court of Appeal held in Mendenhall v. State, 999 So.2d 665 (Fla. 5th DCA 2008), rehearing denied January 28, 2009, that the mandatory minimum provision of the 10/20/Life statute increased the statutory maximum and that a sentence of thirty-five years with a thirty-five year minimum mandatory is a legal sentence. In the Respondent's Answer Brief, the State claimed that the plain language of the mandatory minimum provision of the 10/20/Life statute created a new statutory maximum. The State concluded that this interpretation is in keeping with the Legislature's stated intent to punish "gun wielding offenders to the fullest extent of the law." (AB15) Petitioner argues, however, as argued in the Initial

Brief, that the Fifth District Court of Appeal misinterpreted the "10/20/Life" statute and that the plain language of the statute mandates reversal and, alternatively, should this Court find that the statute is ambiguous and requires interpretation, then the rule of lenity would apply and demand the same result.

Initially, Petitioner wishes clarify a point in the Initial Brief. Petitioner had argued that, in Mendenhall, the Fifth District Court had erred in relying on dicta in this Court's opinion in Sanders v. State, 944 So.2d 203 (Fla. 2006). (IB16-18) In Sanders, this Court stated that life was the maximum penalty for attempted second degree murder while discharging a firearm and inflicting great bodily harm. Id. at 205. Petitioner argued that it was unclear how the Court reached this result and that the logical explanation was that the life sentence was a combination of the 10/20/Life statute and the enhancement provision of the habitual felony offender statute. (IB18). Upon review of the appendix to the Second District Court of Appeal's decision in Sanders v. State, 912 So.2d 1286 (Fla. 2nd DCA 2005), it is clear that the determination that the maximum sentence was life derived from the mandatory minimum provisions of the 10/20/Life statute. Petitioner continues to maintain that pronouncement of life as the maximum sentence in this Court's opinion in Sanders was mere dicta and should not control the outcome of the instant case. The issue before this case in Sanders was whether a lesser included

offense must necessarily result in a lesser penalty and not the determination of the maximum sentence for attempted second degree murder.

In the Answer Brief, the State argued that a plain reading of section 775.087(2) would allow a trial judge to sentence a defendant who was convicted of attempted second degree murder and who discharged a firearm causing great bodily harm to any sentence between twenty-five years and life. (AB7) In support of this proposition, the State cited to Brazill v. State, 845 So.2d 282, 292 (Fla. 4th DCA 2003), *rev. denied*, 876 So.2d 561 (Fla. 2004) and Brown v. State, 843 So.2d 930 (Fla. 3d DCA), *rev. denied*, 853 So.2d 1070 (Fla. 2003). In both cases, the appellate courts upheld mandatory minimum sentences greater than twenty-five years. Id. Both Brazill and Brown are distinguishable from Petitioner's case, because Mr. Brazill and Mr. Brown were convicted of second degree murder, while the Petitioner was convicted of attempted second degree murder. Brazill, 845 So.2d at 285, Brown, 843 So.2d at 931. Second degree murder is a first degree felony punishable by life. Section 782.04(2), Florida Statutes (2007). Therefore neither Brazill nor Brown addresses the question currently before this Court, namely the maximum permissible sentence under the 10/20/Life statute when a defendant has been convicted of attempted second degree murder.

The First and Second District Courts of appeal have both properly concluded

that, under 10/20/Life, the maximum sentence for attempted second degree murder is thirty years with a twenty-five year minimum mandatory[1]. In the Answer Brief, the State characterizes these courts as "seem[ing] to be uneasy in the conclusion that the 10/20/Life statute creates new statutory mandatory minimums for offenses committed with firearms." (AB11) The State opines that these courts have utilized section 775.087(2)(c), specifically the second sentence of that provision, in order to restrict the sentences that can be imposed. (AB11) As was argued in the Initial Brief, it is Petitioner's position that the first sentence in section 775.087(2)(c) that mandates the "mandatory minimum" sentence be imposed where the sentence exceeds the statutory maximum:

> **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 added)

See (IB10-12). The First and Second District Courts of Appeal have properly interpreted the plain language of the statute hold that the mandatory minimum

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[1]Wilson v. State, 898 So. 2d 191 (Fla. 1st DCA 2005), Sousa v. State, 976

provision does not inflate the statutory maximum. While the Legislature's intent to harshly punish people who use guns during the commission of criminal offenses is undeniable, their oft stated intent does not relieve them of the responsibility to craft the statutes carefully to fulfill their intent.

So. 2d 639 (Fla. 2nd DCA 2008).

CONCLUSION

BASED UPON the foregoing cases, authorities, and policies, the Petitioner respectfully requests this Honorable Court to quash the decision of the Fifth District Court of Appeal and remand with an order to reinstate Petitioner's earlier sentence of thirty years with a twenty-five year minimum mandatory.

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 hand delivery, and mailed to: Charles Mendenhall, DOC #D11896, Tomoka Correctional Institution, 3950 Tiger Bay Road, Daytona Beach, Florida 32124 on this 11th day of January, 2010.

_____
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.

_____
MEGHAN ANN COLLINS
ASSISTANT PUBLIC DEFENDER