**IN THE SUPREME COURT OF FLORIDA**

ANDRE ISAIAH DUNBAR, )
)
Petitioner, )
)
v. )
) CASE NO.: SC10-2296
STATE OF FLORIDA, )
)
Respondent. )
_____ )

**ON DISCRETIONARY REVIEW FROM**
**THE DISTRICT COURT OF APPEAL OF FLORIDA**
**FIFTH DISTRICT**

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# INITIAL BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

This Court has jurisdiction under Article V, section 3(b)(3), of the Florida Constitution.

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At the sentencing hearing in Orange County Circuit Court case number 2008-CF-003773-O the sentencing judge pronounced a life sentence on the first count, *i.e.*, robbery with a firearm (T-191) (references to the transcripts are indicated "(T-page)"). The judge, however, did not pronounce a 10-year minimum mandatory term. *Ibid.* The sentence was later enhanced when the minimum mandatory provision was added on the written sentence (R-83) (references to other record documents are indicated "(R-page)").

A direct appeal was pursued before the District Court of Appeal of Florida, Fifth District (hereafter "Fifth District"). Appellate counsel for the petitioner filed in the trial court a motion to correct a sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). (SR-112) (references to the supplemental record are indicated "(SR-page)"). It was argued that the 10-year minimum mandatory should be stricken from the written sentencing document because it was not pronounced at sentencing. The clerk of the circuit court filed an affidavit that indicated that no order had been rendered on the 3.800(b)(2) motion (SR-122).

Two grounds were argued before the Fifth District. First, it was contended that convictions for both robbery with a firearm and grand theft under the circumstances of the case violated double jeopardy (IB-i; 5) (references to the initial brief are indicated "(IB-page)"). The second argument was that the 10-year minimum mandatory that had not been pronounced and was imposed subsequently by written document should have been stricken (IB-i; 7). The district court rendered a written opinion in *Dunbar v. State*, 46 So. 3d 81 (Fla. 5th DCA 2010) (*en banc*), *review granted*, slip op., SC10-2296 (Fla. March 28, 2011). The first claim was not addressed by the district court. The second claim was considered, but relief was denied. The opinion included in part the following conclusion:

> We conclude that *Salyer* is inconsistent with the legislative intent behind restricting the sentencing discretion of trial courts for certain enumerated crimes with mandatory minimum penalties and creates a potential loophole which could allow a trial court to avoid the imposition of a mandatory minimum sentence by simply failing to announce the mandatory minimum provision at sentencing.

*Ibid*., (*citing Salyer v. State*, 951 So. 2d 68 (Fla. 5th DCA 2007) ("Oral pronouncements of sentence control over the written sentencing document. *State v. Jones*, 753 So. 2d 1276, 1277 n. 2 (Fla. 2000)").

A "Motion For Certification of Conflict" was filed on behalf of the petitioner. It was denied.

The petitioner then sought review in this Court on the basis of express and direct conflict with decisions of this Court and those of other district courts of

appeal. *See* (JB-i; 3) (references to the petitioner's jurisdictional brief are indicated "(JB-page)"). Conflict was asserted between the holding by the Fifth District in this case and those in this Court and the other district courts of appeal regarding the propriety *vel non* of enhancing a sentence after the pronouncement of sentence to include a minimum mandatory provision that had not been pronounced at the sentencing hearing (JB-3-8).

This Court accepted jurisdiction on March 28, 2011.

This brief follows.

## SUMMARY OF ARGUMENT

A written sentence that conflicts with the oral pronouncement of sentence is an illegal sentence. No court has the authority to enter such a written sentence because the pronouncement of sentence controls and the pronounced sentence is the legal sentence. At the sentencing hearing in this case the court sentenced the petitioner to life imprisonment on the first count, but did not impose a 10-year minimum mandatory term. The sentence was later enhanced when the minimum mandatory provision was added through the execution of the written sentencing document. The imposition of the minimum mandatory provision that conflicted with the pronouncement deprived the petitioner of substantive and procedural due process under both the state and federal constitutions. Due process was also violated when the minimum mandatory provision was added to the written document because the petitioner and his counsel had received no notice and they were not present when the court enhanced the sentence. Sentencing is a critical stage of the proceedings. When the sentencing court went forward in the absence of the petitioner and his counsel fundamental error occurred. Also, the multiple punishments imposed as a result of the written sentence constituted a double jeopardy violation under the constitutions of Florida and the United States. The decision of the Fifth District should be quashed, and the 10-year minimum

mandatory provision added to count one after the sentencing should be vacated.

## ARGUMENT

### THE WRITTEN SENTENCE IS AN ILLEGAL SENTENCE BECAUSE IT CONFLICTS WITH THE ORAL PRONOUNCEMENT OF SENTENCE.

At the sentencing hearing the court sentenced the petitioner to a life sentence on the first count, robbery with a firearm, but did not impose a 10-year minimum mandatory (T-191). The sentence was later enhanced when the minimum mandatory provision was added through the written document (R-83).

#### STANDARD OF REVIEW

"Because this is a question of law arising from undisputed facts, the standard of review is *de novo*." *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) (*citing Kirton v. Fields*, 997 So. 2d 349, 352 (Fla. 2008); *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla .2003) (stating that the standard of review for pure questions of law is *de novo*)).

#### MERITS

***The Oral Pronouncement of Sentence Constitutes the Legal Sentence***

"[A] written sentence that conflicts with the oral pronouncement of sentence imposed in open court is an illegal sentence." *Williams v. State*, 957 So. 2d 600, 603 (Fla. 2007) (unanimous decision) (*citing Ashley v. State*, 850 So. 2d 1265 (Fla. 2003); *Justice v. State*, 674 So. 2d 123 (Fla. 1996); *State v. Jones*, 753 So. 2d 1276,

1277 n. 2 (Fla. 2000)). This Court also held in *Williams* that "no court has the authority to enter such a sentence, since the oral pronouncement controls and constitutes the legal sentence imposed." *Id.*, 957 So. 2d at 603. Florida Rule of Criminal Procedure 3.700(a) expressly defines what a sentence is. "The term sentence means the pronouncement by the court of the penalty imposed on a defendant for the offense of which the defendant has been adjudged guilty." *Ibid*. Subsection (b) of the rule provides:

> **Pronouncement and Entry.** Every sentence or other final disposition of the case shall be pronounced in open court, including, if available at the time of sentencing, the amount of jail time credit the defendant is to receive. The final disposition of every case shall be entered in the minutes in courts in which minutes are kept and shall be docketed in courts that do not maintain minutes.

Fla. R. Crim. P. 3.700(b) (bold emphasis in rule).

This Court has consistently held that the oral pronouncement of sentence controls over the written document. For example, in *Justice v. State*, 674 So. 2d 123 (Fla. 1996), this Court considered the validity *vel non* of a subsequent written document containing numerous probation conditions that had not been pronounced. *Id*., 674 So. 2d at 124. In quashing the decision of the district court, this Court held: "[W]here a sentence is reversed because the trial court failed to orally pronounce certain special conditions of probation which later appeared in the written sentence, the court must strike the unannounced conditions and cannot reimpose them upon

resentencing." In so holding, the reasoning of the dissenting judge in the Fifth District was quoted.

> An order of probation, like any other aspect of sentencing, ought not be a work in progress that the trial court can add to or subtract from at will so long as he or she brings the defendant back in and informs the defendant of the changes. To permit this would mean a lack of finality for no good reason and multiple appeals. It is not too much to ask of a sentencing judge to decide on and recite the special conditions of probation at the sentencing hearing, just as is done with the balance of the sentence. If the court has omitted a condition it wishes it had imposed, its chance has passed unless the defendant violates probation.

*Id.*, 674 So. 2d at 126 (*citing Justice v. State*, 658 So. 2d 1028, 1032, 11035-1036) (Griffin, J., dissenting)).

This rationale applies with equal force to this case. The lack of finality would be just as apparent when the omitted sentencing provision is a minimum mandatory provision.

In *Ashley v. State*, 850 So. 2d 1265 (Fla. 2003), the sentencing judge pronounced that Ashley was a habitual felony offender. *Id.*, 850 So. 2d at 1266. The written sentence, however, reflected that he had been sentenced as a habitual violent felony offender. *Ibid.* Ashley was brought back to court and was sentenced as a habitual violent felony offender, and the judge for the first time imposed a minimum mandatory term. *Ibid.* While *Ashley* centered primarily around double jeopardy (*see* below), this Court observed that there is "a longstanding principle of law - that a court's oral pronouncement controls over the

written document.... Generally, the oral pronouncement prevails unless the oral pronouncement is in error due to a clerical error such as the calculation of jail credit." *Id.*, 850 So. 2d at 1268 (citations omitted). There was no clerical error in this case. Rather, the judge simply failed to pronounce the minimum mandatory.

This Court employed the strongest language to date on the subject in *Williams*, *supra*, 957 So. 2d 600. As indicated in the opening sentences to the argument, "a written sentence that conflicts with the oral pronouncement of sentence imposed in open court is an illegal sentence.... Accordingly, no court has the authority to enter such a sentence, since the oral pronouncement controls and constitutes the legal sentence imposed." *Id.*, 957 So. 2d at 603. Hence, it was not the failure of the sentencing court to include the minimum mandatory term that rendered the pronounced sentence illegal, it was the subsequent addition of the minimum mandatory provision in the written sentencing document that rendered the written sentence illegal.

It is anticipated that the state will argue that the above cases contain *obiter dicta* as to the issue of written imposition of a minimum mandatory provision after the sentence has been pronounced. The holdings of those cases, however, are not *obiter dicta*. This Court explained:

> *Obiter dictum* is language quoted in an opinion which is not essential to a decision of the case. *Pell v. State*, 97 Fla. 650, 122 So. 110 (1929); *State v. Florida State Improve. Com.*, 60 So. 2d 747 (Fla. 1952).

> However, a statement in a decision will not be regarded as mere dicta if the statement was necessary to the disposition of the case. *Therrell v. Reilly*, 111 Fla. 805, 151 So. 305 (1932)."

*Wright v. State*, 376 So. 2d 236, 241 (Fla. 1979).

There appears to be an evolutionary relationship among the cases. This Court has quashed decisions that have allowed amendments to sentences beyond the sentence pronounced, and the issue crystalized in *Williams.* This Court considered in that case the necessity of review of such a written sentence under Florida Rule of Criminal Procedure 3.800(a). Nothing within the earlier cases was *obiter dicta*. The language in all of the above mentioned cases was necessary for this Court to pursue its goal of "simultaneous entry of a written judgment and oral pronouncement ..." *Williams*, *supra*, 957 So. 2d at 604. Moreover, the statements that the oral pronouncement controls, and that a contrary, enhanced sentence imposed in writing is an illegal sentence are direct holdings.

***Due Process***

Due process concerns are implicated by the imposition of an enhanced sentence by entry upon a written document after the pronouncement of sentence. "The Due Process clauses of the United States and Florida Constitutions encompass both substantive and procedural due process." *M.W. v. Davis*, 756 So. 2d 90, 97 (Fla. 2000) (*citing Department of Law Enforcement v. Real Property*, 588 So.2d

957, 960 (Fla.1991)). "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). This Court explained the dual nature of due process:

> The United States Supreme Court has identified two distinct areas of due process protection: procedural and substantive. Procedural due process affords notice of a possible government deprivation and a meaningful opportunity to contest it, usually before it is imposed. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (explaining that the "essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it"). By contrast, substantive due process bars "certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (*quoting Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)).

*State v. Robinson*, 873 So. 2d 1205, 1212-1213 (Fla. 2004).

The petitioner received no prior notice of the enhancement of his sentence. Nor was there an opportunity for the petitioner or his counsel to challenge the imposition of the enhanced sentence as no hearing was held.

"Sentencing is a critical stage of criminal prosecution for which the defendant has a constitutional right to attend." *Santeufemio v. State*, 745 So. 2d 1002, 1003 (Fla. 2d DCA 1999) (*citing* Fla. R. Crim. P. 3.180(a)(9) (mandating that criminal defendants be present at the imposition of sentence); *Nelson v. State*, 724

So. 2d 1202 (Fla. 2d DCA 1998)). Similarly, "due process principles apply to a resentencing." *State v. Collins*, 985 So. 2d 985, 993 (Fla. 2008) (*citing Griffin v. State*, 517 So. 2d 669, 670 (Fla. 1987) ("The pronouncement of sentence upon a criminal defendant is a critical stage of the proceedings to which all due process guarantees attach whether the sentence is the immediate result of adjudication of guilt or, as here, the sentence is the result of an order directing the trial court to resentence the defendant."). Whether the imposition of the minimum mandatory term upon the petitioner is characterized as a sentencing or a resentencing, the petitioner had a fundamental right to be present with counsel.

"Our cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." *Lebron v. State*, 799 So. 2d 997, 1016 (Fla. 2001). There is a "long-standing principle that a defendant in a criminal case has a fundamental right, guaranteed by the Constitutions of the United States and of Florida, and explicitly provided in the Florida Rules of Criminal Procedure, to be present at sentencing, a critical stage of every criminal proceeding." *Jackson v. State*, 767 So. 2d 1156, 1160 (Fla. 2000). "[A]ny error in denying a defendant his or her right to be present at a critical stage of any proceeding is fundamental error." *Blair v. State*, 25 So. 3d 46, 48 (Fla. 5th DCA 2009) (*citing Orta v. State*, 919 So. 2d 602, 604 (Fla. 3d DCA

2006) (*citing Dougherty v. State*, 785 So. 2d 1221, 1223 (Fla. 4th DCA 2001)). This Court has also held that "[s]entencing is considered a critical stage at which a defendant is entitled to counsel." *Jackson v. State*, 983 So. 2d 562, 575 (Fla. 2008) (*citing Williams v. State*, 936 So. 2d 663, 664 (Fla. 4th DCA 2006)). Moreover, Florida Rule of Criminal Procedure 3.180(a)(9) provides that "[i]n all prosecutions for crime the defendant shall be present ... at ... the imposition of sentence." The petitioner clearly had a fundamental right to be present with defense counsel when the judge enhanced the sentence.

There was no waiver of presence by the defendant when the court enhanced his sentence. That would have been an impossibility as neither he nor counsel was present when the sentence was enhanced. "An on-the-record waiver by the defendant is necessary for 'those rights which go to the very heart of the adjudicatory process such as the right to a lawyer, the right to a jury trial, or the right to be present at a critical stage in the proceeding.'" *Johnson v. State*, 750 So. 2d 22, 28 (Fla. 1999) (emphasis added) (*quoting Mack v. State*, 537 So. 2d 109, 110 (Fla. 1989) (Grimes, J., concurring). The Fourth District Court of Appeal considered a similar situation, albeit in the double jeopardy context. In *Losh v. State*, 51 So. 3d 1188 (Fla. 4th DCA 2011), the district court concluded that "as appellant was not present at that hearing, we cannot presume a knowing waiver of

the double jeopardy protection." The same holds true in this case. That is, because there is no waiver of record by the defendant of his and counsel's presence and there was no hearing regarding the imposition of the 10-year minimum mandatory provision, no waiver by the petitioner can be inferred.

While it recognized that this Court and all of the district courts of appeal have addressed whether a sentence can be enhanced in writing after the sentencing hearing, the *Dunbar* decision reveals that the appellate courts of Florida are not yet in harmony. The Fourth District Court of Appeal considered the *Dunbar* decision in *Losh v. State*, 51 So. 3d 1188 (Fla. 4th DCA 2011). *Losh* also involved a 10-year minimum mandatory for armed robbery with a firearm. *Id*., 51 So. 3d 1189. The Fourth District noted that the Fifth District had concluded that a sentence pronounced that did not include a minimum mandatory was "illegal" *Ibid.*, 1189. Of course, the holding in *Dunbar* is precisely the opposite of what this Court held in *Williams*. As pointed out *ante*, the failure to pronounce a minimum mandatory term does not render the pronounced sentence illegal, it is the written sentence that is contrary to the pronounced sentence that is illegal because "the oral pronouncement controls and constitutes the legal sentence imposed." *Id.*, 957 So. 2d at 603. The *Losh* court, however, chose not to address the "illegal" characterization. The district court chose instead to rule on double jeopardy

grounds. It held that the mandatory provision was to be stricken and Losh was to be sentenced as had been pronounced. *Ibid.*, 1190-1191.

**Double Jeopardy**

"Once a sentence has been imposed and the person begins to serve the sentence, that sentence may not be increased without running afoul of double jeopardy principles." *Ashley, supra*, 850 So. 2d at 1267 (*citing Lippman v. State*, 633 So. 2d 1061 (Fla. 1994); *Clark v. State*, 579 So. 2d 109 (Fla. 1991); *N.H. v. State*, 723 So. 2d 889 (Fla. 1991)). "The double jeopardy clause affords three basic protections: It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *State v. Wilson*, 680 So. 2d 411, 413 (Fla. 1996) (internal quotation marks omitted) (*citing North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). The latter applies in the context of the minimum mandatory term that was added to the written sentence after the oral pronouncement of sentence had already been made.

This Court quoted the United States Supreme Court in *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980), as follows: "Like the United States Supreme Court, we find that the Double Jeopardy Clause is not an absolute bar to the imposition of an increased sentence on remand from an authorized appellate

review of an issue of law concerning the original sentence." *Harris v. State*, 645 So. 2d 386, 388 (Fla. 1994). The *DiFrancesco* Court had observed:

> Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence.

*Id*., 449 U.S. at 139.

However, "Florida law generally accords a level of finality to a sentence once it has been orally pronounced and the defendant has begun to serve the sentence." *Gardner v. State*, 30 So. 3d 629, 632 (Fla. 2d DCA 2010) (*citing Delemos v. State*, 969 So. 2d 544, 548 (Fla. 2d DCA 2007)). Also, in light of the *Williams* holding by this Court that written sentences rendered after the pronouncement of sentence are illegal, sentence pronouncements in Florida do have the qualities of constitutional finality that attend an acquittal." Hence, the *Dunbar* decision should be quashed on this basis as well.

***Presumptions Regarding Sentencing***

There appears to be conflict regarding presumptions concerning trial judges between this Court and the Fifth District as expressed in *Dunbar*, *supra*, 46 So. 2d 81. In *Williams*, *supra*, the observation was made that:

> This issue arises in part because we have not yet been able to ensure

> that a written judgment and sentence is always issued simultaneously with the oral pronouncement of sentence. While Florida's criminal trial courts are working with diligence towards that goal, there remains the chance that a conflicting written sentence may be issued sometime after oral pronouncement.

*Id.*, 957 So. 2d at 604.

The approach taken was positive in nature. This Court further said: "Until we have achieved the simultaneous entry of a written judgment and oral pronouncement, and since the oral pronouncement controls, we urge courts to continue to be diligent in ensuring that the written sentence does conform with the oral pronouncement." *Ibid.* This Court has ruled consistently in other cases. For example, "there are, of course, limits that every judicial officer must observe. Judges are required to follow the law and apply it fairly and objectively to all who appear before them." *In re Eriksson*, 36 So. 3d 580, 589 (Fla. 2010) (*quoting In re Taunton*, 357 So. 2d 172, 179 (Fla. 1978)). Also, a "court should presume ... that the judge or jury acted according to law." *Sanders v. State*, 946 So. 2d 953, 956 (Fla. 2006) (*quoting Strickland v. Washington*, 466 U.S. 668, 694-695 (1984). "Indeed, an appellate court presumes that a trial court judge followed the law." *Thomas v. Wainwright*, 495 So. 2d 172, 174 (Fla. 1986).

Inexplicably, the *Dunbar* decision appears to presume precisely the opposite about trial judges on the criminal bench. The language used by the Fifth District is

quite remarkable. The district court concluded that were it to let the law stand as it stated in its earlier *Salyer* case it would "create[] a potential loophole which could allow a trial court to avoid the imposition of a mandatory minimum sentence by simply failing to announce the mandatory minimum provision at sentencing." *Dunbar*, *supra*., 46 So. 3d at 83 (*citing Salyer v. State*, 951 So. 2d 68 (Fla. 5th DCA 2007) (post-pronouncement three year minimum mandatory stricken)).

While the *Dunbar* court expressed its concern that judges might find a loophole to avoid imposing minimum mandatory sentences had it ruled in different fashion, the court did not explain how its ruling would encourage purported hesitant sentencing judges to impose minimum mandatory sentences. *Id.*, 46 So. 3d at 83. Assuming, solely for purposes of discussion, that there are circuit court judges who affirmatively seek to avoid imposing minimum mandatory sentences, the *Dunbar* opinion will not contribute to compelling such judges to impose minimum mandatory terms. If a judge intentionally fails to impose a minimum mandatory sentence, all he or she has to do to ensure that the minimum mandatory is not imposed after the sentencing hearing is to ignore it. That is, the judge simply needs to add nothing to the written document beyond the terms of the pronounced sentence. The *Dunbar* holding does nothing to change that fact.

Lastly, the concern expressed by the Fifth District in *Dunbar* appears to be

unfounded. Those who are familiar with the criminal justice system in this state know that Florida's circuit court judges are not particularly lenient when it comes to sentencing violent criminals. Moreover, there are very few trial judges, if any, who would intentionally leave out a minimum mandatory provision when pronouncing sentence. Also, this case exemplifies precisely why the "loophole" concern is without substance. The petitioner received a life sentence, but the minimum mandatory was only 10 years (T-191; R-83) *see also* §§ 775.087(2)(a)1; 812.13(2)(A), Fla. Stat. (2008). Consideration of some other crimes in which firearms are frequently used reveals similar disparities between maximum sentences and minimum mandatory provisions. Aggravated battery with a firearm, for example, is a second degree felony with a maximum sentence of 15 years. §§ 784.045(1)(a)2; 775.082(3)(c), Fla. Stat. (2008). It, too, has a minimum mandatory provision of 10 years. § 775.087(2)(a)1, Fla. Stat. (2008). Consider also second degree murder with a firearm. § 782.04(2), Fla. Stat. (2008). It is a felony of the first degree, punishable by life imprisonment. *Ibid.* The applicable minimum mandatory is 25 years imprisonment. § 775.087(2)(a)1, Fla. Stat. (2008). It seems apparent that the concern about sentencing judges taking advantage of a "loophole" in order not to impose a minimum mandatory provision is unwarranted. In any event, the record in this case is clear that the sentencing judge did not do so.

Not only did the judge impose a life sentence and later add the 10-year minimum mandatory, but the sentence on count one is to run consecutively to any active sentences (R-83).

## SUMMARY

A written sentence that conflicts with the oral pronouncement of sentence is an illegal sentence. No court has the authority to enter such a written sentence because the pronouncement of sentence controls and the pronounced sentence is the legal sentence. At the sentencing hearing in this case the court sentenced the petitioner to life imprisonment on the first count, but did not impose a 10-year minimum mandatory term. The sentence was later enhanced when the minimum mandatory provision was added through the execution of the written sentencing document. The imposition of the minimum mandatory provision that conflicted with the pronouncement deprived the petitioner of substantive and procedural due process under both the state and federal constitutions. Due process was also violated when the minimum mandatory provision was added to the written document because the petitioner and his counsel had received no notice and they were not present when the court enhanced the sentence. Sentencing is a critical stage of the proceedings. When the sentencing court went forward in the absence of the petitioner and his counsel fundamental error occurred. Also, the multiple punishments imposed as a result of the written sentence constituted a double jeopardy violation under the constitutions of Florida and the United States. The decision of the Fifth District should be quashed, and the 10-year minimum

mandatory provision added to count one after the sentencing should be vacated.

## CONCLUSION

The decision of the District Court of Appeal of the State of Florida, Fifth District, should be quashed, and the 10-year minimum mandatory term under count one should be vacated.

Respectfully submitted,

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## CERTIFICATE OF FONT

I certify that the font used in this brief is 14 point proportionally spaced Times New Roman.

## CERTIFICATE OF SERVICE

I certify that an accurate copy of this brief was hand delivered to the Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118; and mailed to: Mr. Andre Dunbar, Inmate # X34150, Santa Rosa Correctional Institution - Annex, 5850 East Milton Road, Milton, Florida 32583-7914, on this ____ day of April 2011.

_____

David S. Morgan
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