IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANDRE ISAIAH DUNBAR,

Petitioner,

v. CASE NO. SC10-2296

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The only facts relevant to this Court in determining whether to accept jurisdiction are those contained within the opinion of the District Court.[1] The facts set forth in the decision of the Fifth District Court of Appeal were as follows:

> Andre Isaiah Dunbar (defendant) appeals his judgments and sentences which were entered by the trial court after a jury found him guilty of committing the crimes of robbery with a firearm FN1, two counts of aggravated assault with a firearm FN2, and grand theft.FN3 The defendant asserts, among other things, that his 10-year mandatory minimum sentence for robbery with a firearm must be stricken because the imposition of a mandatory minimum sentence was not orally pronounced by the trial court at sentencing. We disagree and affirm. (footnotes omitted).
>
> No dispute exists between the parties concerning the underlying facts in this appeal. The trial court's oral pronouncement of the defendant's sentence was inconsistent with the court's written sentencing order entered later that day: the trial court did not orally pronounce the imposition of a mandatory minimum sentence, but the defendant's written sentencing documents state that the defendant must serve a 10-year mandatory minimum on the robbery count.

Dunbar v. State, 46 So. 3d 81 (Fla. 5th DCA 2010).

Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court. Petitioner filed an initial brief on jurisdiction. The State now responds.

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[1] *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction in the instant case. The Court is limited to the facts contained within the four corners of the decision in determining whether an express and direct conflict exists. On the face of the decision under review, there is no express and direct conflict with any decision of this Court or any district court.

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION IN THIS MATTER.

Petitioner seeks discretionary review with this Honorable Court under Article V, Section 3(b)(3) of the Florida Constitution. *See also* Fla. R. App. P. 9.030(a)(2)(A)(iv). Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." In *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986), this Court explained:

> Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

Reaves, 485 So. 2d at 830, n.3. Additionally, this Court has held that inherent or so-called "implied" conflict may not serve as a basis for this Court's jurisdiction. *DHRS v. National Adoption Counseling Service, Inc.*, 498 So. 2d 888, 889 (Fla. 1986).

Petitioner urges this Court to accept jurisdiction based upon his assertion that the opinion of the Fifth District Court of Appeal (hereinafter Fifth District) expressly and directly conflicts with the majority of Florida appellate court decisions that address the issue of whether a trial court can impose, post-sentencing, in writing a minimum mandatory sentence which was not

pronounced at sentencing. Respondent contends that the Fifth District's opinion in *Dunbar v. State*, 46 So. 3d 81 (Fla. 5th DCA 2010)(*en banc*), does not expressly and directly conflict with the cited cases.

In *Dunbar*, the Fifth District, sitting *en banc*, found:

> The imposition of a mandatory minimum sentence under section 775.087(2) of the Florida Statutes is a nondiscretionary duty of a trial court when the record indicates that the defendant qualifies for mandatory minimum sentencing. A trial court must impose the mandatory minimum sentence once a defendant is convicted of an enumerated felony under section 775.087(2), and the failure to do so is reversible error.

Dunbar, 46 So. 3d at 82-83. Double jeopardy principles were not violated, found the court, as the defendant's original sentence was invalid. *Id.* at 83.

Petitioner contends that the Fifth District's opinion in *Dunbar* expressly and directly conflicts with a large number of cases. Respondent, however, asserts that the purported conflict cases are distinguishable from *Dunbar*. Specifically, almost none of the cited cases expressly and directly rely upon or construe section 775.087(2), Florida Statutes. As the cases cited by Petitioner[2] fail to construe the same subsection, no express and

[2] *Ashley v. State*, 850 So. 2d 1265 (Fla. 2003); *Williams v. State*, 35 So. 3d 165 (Fla. 3d DCA 2010); *Delemos v. State*, 969 So. 2d 544 (Fla. 2d DCA 2007); *Felton v. State*, 939 So. 2d 1159 (Fla. 4th DA 2006); *Allmond v. State*, 933 So. 2d 1250 (Fla. 1st DCA 2006); *Regino v. State*, 921 So. 2d 845 (Fla. 2d DCA 2006); *Cooley v.*

direct conflict exists; implied conflict in insufficient to provide jurisdiction.

The sole cited case which relies upon section 775.087(2) is *Gardner v. State*, 30 So. 3d 629 (Fla. 2d DCA 2010). That case is, however, distinguishable based upon the fact that it was at a different procedural posture in that it was a post-conviction case, rather than being a direct appeal like *Dunbar*. In *Gardner*, the Second District noted that "[a]bsent a proper appeal, double jeopardy considerations bar increasing even an illegal sentence." *Gardner*, 30 So. 3d at 632. Thus, since the posture of the case clearly factored into the court's decision, no express and direct conflict can be demonstrated.

Given the absence of express and direct conflict on the same question of law, this Court should decline to accept jurisdiction in the case.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court decline to accept jurisdiction in this case.

State, 901 So. 2d 271 (Fla. 1st DCA 2005); *Turner v. State*, 875 So. 2d 731 (Fla. 2d DCA), *cause dismissed*, 900 So. 2d 556 (Fla. 2005); *Gonzalez v. State*, 854 So. 2d 847 (Fla. 3d DCA 2003); *Lemar v. State*, 751 So. 2d 603 (Fla. 2d DA 1999); *Moore v. State*, 708 So. 2d 301 (Fla. 1st DCA 1998).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Respondent has been furnished by delivery to counsel for Petitioner, David Morgan, at 444 Seabreeze Boulevard, Suite 210, Daytona Beach, Florida 32118, this 9th day of December, 2010.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was typed in 12 point Courier New as required by Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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