IN THE SUPREME COURT OF FLORIDA

ANDRE ISAIAH DUNBAR,	)	
	)	
Petitioner,	)	
	)	
v.	)	Supreme Ct. Case No. SC1_____
	)	DCA Case No. 5D09-1903
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

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

JURISDICTIONAL BRIEF OF PETITIONER

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

David S. Morgan
Assistant Public Defender
Florida Bar number 0651265
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
(386) 254-3758

COUNSEL FOR THE PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

STATEMENT OF CASE AND FACTS

The material facts were stated succinctly in the decision of the Fifth District Court of 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, __So. 3d__, 35 Fla. L. Weekly D2048, 2010 WL 3515566, 1 (Fla. 5th DCA 2010) (copy appended).

It was argued on appeal that the pronounced sentence controls over the written sentence. The district court affirmed. *Id*. A "Motion For Certification of Conflict" was filed in the district court on September 27, 2010. The order denying the motion seeking certification of conflict was rendered on October 18, 2010.

This jurisdictional brief follows.

SUMMARY OF ARGUMENT

This Court should exercise its discretionary conflict jurisdiction. The Fifth District Court of Appeal decided in this case that a judge may add a minimum mandatory provision to the written sentence despite the fact that there had been no minimum mandatory provision pronounced at sentencing. This holding expressly and directly conflicts with cases from this Court and all of the other district courts of appeal. Not only does the decision conflict with the well established principle of law that the oral pronouncement controls over the written sentence, it also conflicts in the regard that it holds that such a post-sentencing enhancement of the sentencing does not violate double jeopardy. Review is necessary to bring the decisions into conformity.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THOSE OF THE OTHER DISTRICT COURTS OF APPEAL.

This Court has jurisdiction to review the decision of the Fifth District Court of Appeal in *Dunbar v. State*, __So. 3d__, 35 Fla. L. Weekly D2048, 2010 WL 3515566 (Fla. 5th DCA September 10, 2010), because it expressly and directly conflicts with decisions of this Court and the other district courts of appeal. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). This Court should exercise its discretionary jurisdiction because the *Dunbar* decision is in express and direct conflict with the majority of Florida appellate court decisions that address the issue whether a trial court can post-sentencing impose in writing a minimum mandatory sentence that was not pronounced at sentencing.

In *Dunbar* the Fifth District Court of Appeal held in pertinent part that a trial judge who did not pronounce a minimum mandatory sentence may do so after sentencing. This Court has held in a case involving the raising of a habitual felony offender sentence post-sentencing to a habitual violent felony offender sentence that "the oral pronouncement prevails unless the oral pronouncement is in error due to a clerical error such as the calculation of jail credit." *Ashley v. State*, 850 So.

2d 1265, 1268 (Fla. 2003) (*citing Martindale v. State*, 678 So. 2d 883, 884 (Fla. 4th DCA 1996)).

Many district courts of appeal decisions applying this principle to post-sentencing written imposition of minimum mandatory provisions that had not been pronounced have ruled consistently. Included among such cases are those that follow: *Williams v. State*, 35 So. 3d 165, 167 (Fla. 3d DCA 2010) ("reverse the appellant's sentence and remand for the trial court to conform its oral pronouncement to its written sentence and strike the three-year minimum mandatory term."); *Delemos v. State*, 969 So. 2d 544, 551 (Fla. 2d DCA 2007) ("reverse[d] the sentence on count 5 and remand with directions to strike the minimum mandatory term on that sentence, effectively reinstating the sentence originally orally pronounced and imposed."); *Felton v. State*, 939 So. 2d 1159, 1159 (Fla. 4th DCA 2006) ("the 10-year minimum mandatory provision on the robbery charge in the second case (number 2002-2571 CF) was not pronounced at sentencing, and consequently the written sentence is in error. We strike the minimum mandatory provision from the written sentence."); *Allmond v. State*, 933 So. 2d 1250 (Fla. 1st DCA 2006) ("Appellant's third claim, however, which is that his written sentence is illegal because the trial court failed to orally pronounce the imposition of a minimum mandatory 15 years' imprisonment for each count

pursuant to section 775.084(4)(b)(1), Florida Statutes (1995), is facially sufficient."); *Regino v. State*, 921 So. 2d 845, 845 (Fla. 2d DCA 2006) (citation omitted) ("We are compelled to reverse the postconviction court's denial of Mr. Regino's second claim because the trial court did not orally pronounce a minimum mandatory term for Mr. Regino's HVFO sentence."); *Cooley v. State*, 901 So. 2d 271, 272 (Fla. 1st DCA 2005) ("Generally, the oral pronouncement of sentence prevails over the written judgment. *See Ashley v. State*, 850 So. 2d 1265, 1268 (Fla. 2003)); *Turner v. State*, 875 So.2d 731, 731 (Fla. 2d DCA), *cause dismissed*, 900 So. 2d 556 (Fla. 2005) ("remanded with instructions to the trial court to sentence Turner consistent with its oral pronouncement and strike the minimum mandatory sentence."); *Gonzalez v. State*, 854 So. 2d 847, 847-848 (Fla. 3d DCA 2003) ("since a 'written sentencing order must conform to the trial court's oral pronouncement of sentence,' the order under review must be reversed and remanded for deletion of the PRR sentence and concomitant minimum mandatory term as to Count II.") (*citing Brimage v. State*, 745 So. 2d 340 (Fla. 3d DCA 1999); *Lemar v. State*, 751 So. 2d 603 (Fla. 2d DCA 1999) ("we reverse the three-year minimum mandatory term that was not orally pronounced at sentencing.") (*citing Kendrick v. State*, 591 So. 2d 671 (Fla. 2d DCA 1991); *Moore v. State*, 708 So. 2d 301, 302 (Fla. 1st DCA 1998) ("the trial court had the discretion to enter the

orally pronounced sentence with no minimum mandatory term, and, therefore, it was error to enter a written sentence which departed from the oral pronouncement.") (*citing Moody v. State*, 699 So. 2d 1009 (Fla. 1997)).

Parenthetically, also included among such cases are the following from the Fifth District Court of Appeal. The case mentioned in *Dunbar* was *Salyer v. State*, 951 So. 2d 68, 69 (Fla. 5th DCA 2007) (*citing State v. Jones*, 753 So. 2d 1276, 1277, n. 2 (Fla. 2000)) ("Oral pronouncements of sentence control over the written sentencing document. Accordingly, on remand, the three-year minimum mandatory term shall be stricken ..."). Also an on-point case from the Fifth District is *Gray v. State*, 915 So. 2d 254, 256 (Fla. 5th DCA 2005) (*citing Ashley, supra*., 850 So. 2d at 1268; *State v. Jones*, 753 So. 2d 1276, 1277 (Fla. 2000); *State v. Williams*, 712 So. 2d 762 (Fla. 1998)) ("in *Ashley*, the court reaffirmed the principle that a court's oral pronouncement of sentence controls over the written document."); *Highberger v. State*, 863 So. 2d 1256, 1257 (Fla. 5th DCA 2004) ("the trial court's oral pronouncement that 'there is no minimum mandatory' as to count three is clear and unambiguous. Accordingly, we reverse the sentence imposed for count three and remand this matter to the trial court with instructions that the written sentence be modified to conform with the oral pronouncement.").

The Fifth District Court of Appeal, which *sua sponte* chose to sit *en banc* in this case, also raised the issue of double jeopardy *sua sponte*. Paradoxically perhaps, in *Gray*, *supra.*, 915 So. 2d 256, the district court acknowledged that "in *Ashley v. State*, 850 So. 2d 1265, 1267 (Fla. 2003), the Florida Supreme Court held that 'once a sentence has been imposed and the person begins to serve the sentence, that sentence may not be increased without running afoul of the double jeopardy principles.'"). District courts of appeal have so held consistently, even when a minimum mandatory is later added to a sentence. *See, e.g.*, *Gardner v. State*, 30 So. 3d 629, 632 (Fla. 2d DCA 2010) (*citing Ashley*, *supra*., 850 So. 2d at 1267); *Gonzalez v. State*, 596 So. 2d 711, 711 (Fla. 3d DCA 1992); *Macias v. State*, 572 So. 2d 22 (Fla. 4th DCA 1990); *contra*., *Gibbs v. State*, 804 So. 2d 456 (Fla. 4th DCA 2001).

Another potential conflict with decisions of this Court can be found in the *Dunbar* conclusion. There is nothing remarkable about the first part. However, the second part of the conclusion is quite remarkable. The district court in this case concluded that were it to let the law stand as it was stated in its *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*., 2010 WL 3515566

at 2. This Court, on the other hand, observed in a different case that "[t]here 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)). "[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).

In sum, this Court should exercise its discretionary conflict jurisdiction. The Fifth District Court of Appeal decided in *Dunbar* that a judge may add a minimum mandatory provision to the written sentence despite the fact that there had been no minimum mandatory provision pronounced at sentencing. This holding expressly and directly conflicts with cases from this Court and all of the district courts of appeal. Not only does the decision conflict with the well established principle of law that the oral pronouncement controls over the written sentence, it also conflicts in the regard that it holds that such a post-sentencing enhancement of the sentencing does not violate double jeopardy. Review is necessary to bring the decisions into conformity.

CONCLUSION

This Court should exercise its discretionary jurisdiction and review the petitioner's case.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____

David S. Morgan
Assistant Public Defender
Florida Bar No. 0651265
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
(386) 254-3758

COUNSEL FOR THE PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of this brief and contemporaneously filed appendix have been hand delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Andre Dunbar, Inmate # X34150, Lower L4213, Santa Rosa Correctional Institution - Annex, 5850 East Milton Road, Milton, Florida 32583-7914, this ____ day of November 2010.

_____
David S. Morgan
Assistant Public Defender

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14pt.

_____
David S. Morgan
Assistant Public Defender