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IN THE SUPREME COURT OF FLORIDA

SIDNEY NORVIL, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-746

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Sidney Norvil, Jr., the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name. Petitioner's Initial Brief on Jurisdiction will be designated as "IB." That symbol is followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, Norvil v. State, __ So. 3d __, 39 Fla. L. Weekly D520, 2014 WL 940724 (Fla. 4th DCA March 12, 2014). (See appendix) Respondent accepts Petitioner's statement of the case and facts but only insofar as the facts which are drawn from within the four corners of the opinion.

SUMMARY OF ARGUMENT

The appropriate focus upon the operative facts, as contained within the "four corners" of the DCA's decision, reveals no express and direct conflict with the opinion of another DCA. Therefore, this Court must dismiss this case for lack of jurisdiction.

ARGUMENT

WHETHER THE FOURTH DISTRICT'S OPINION IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL? (RESTATED)

Petitioner contends that this Court has jurisdiction pursuant to Article V, §3(b)(3), of the Florida Constitution, which parallels Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). The Constitution, and the rule, provide: "The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves; Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a dissenting or concurring opinion"). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that

supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether the District Court's decision reached a result opposite that of the cases Petitioner cites, Yisrael v. State, 65 So. 3d 1177 (Fla. 1st DCA 2011), Mirutil v. State, 30 So. 3d 588 (Fla. 3d DCA 2010), and Gray v. State, 964 So. 2d 884 (Fla. 2d DCA 2007). Here, the decision rendered by the Fourth District in Norvil v. State, __ So. 3d __, 39 Fla. L. Weekly D520, 2014 WL 940724 (Fla. 4th DCA March 12, 2014), is not in "express and direct" conflict with the cases cited by Petitioner.

The Fourth District issued the Norvil opinion en banc to clarify their earlier opinion in Seays v. State, 789 So. 2d

1209, 1210 (Fla. 4th DCA 2001). The Fourth District stated, "to the extent that Seays can be interpreted as prohibiting consideration of subsequent arrests in sentencing, we clarify that a sentencing court may properly consider subsequent arrests and related charges, if relevant, in determining an appropriate sentence." Norvil, 2014 WL 940724 at *5. The Fourth District explained that they were upholding consideration of the Petitioner's subsequent arrest and charges because of the following factors:

> (1) the new charge was relevant; (2) the allegations of criminal conduct were supported by evidence in the record; (3) the defendant had not been acquitted of the charge that arose from the subsequent arrest; (4) the record does not show that the trial court placed undue emphasis on the subsequent arrest and charge in imposing sentence; and (5) the defendant had an opportunity to explain or present evidence on the issue of his prior and subsequent arrests.

Id.

Thus, Yisrael is distinguishable, because in Yisrael, the allegations were not supported by evidence in the record, as they were here where "[t]he state presented reports of two separate fingerprints found on CD cases in the victim's burglarized car that matched the defendant's fingerprints and the victim's statement that the defendant did not have permission to enter his car." Id.

Mirutil is distinguishable because, in that case, the judge clearly placed undue emphasis on the new offenses. Mirutil, 30

SO. 3d at 591 ("…testimony regarding the new offenses was the central feature of the sentencing hearing. Discussion of the new offenses comprised forty-eight pages of the transcript, or eighty-five percent of the sentencing hearing… ."). But, in the instant case, the judge did not place undue emphasis on the new offenses. Further, it should be noted that, as Petitioner admits, the Third District allows pending charges to be considered if the evidence is relevant to sentencing and the defendant is given the opportunity to explain or offer evidence. Whitehead v. State, 21 So. 3d 157, 160 (Fla. 3d DCA 2009). (IB 6)

Gray is distinguishable for reasons similar to Mirutil. In Gray, the court reversed because "the State's presentation and argument before the trial judge [at sentencing] **centered** on the new charges." Gray, 964 So. 2d at 885 (emphasis added). But, in the instant case, the judge did not place undue emphasis on the new offenses.

Therefore, there is no express and direct conflict with any of the three cases cited by Petitioner, and this Court must dismiss this case for lack of jurisdiction.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on May 13, 2014: Patrick Burke, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401, at pburke@pd15.state.fl.us, jharring@pd15.state.fl.us, and appeals@pd15.state.fl.us.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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