

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC19-2155

RIDGE GABRIEL,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

ASHLEY MOODY
ATTORNEY GENERAL

RICHARD A. PALLAS, JR.
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0126163

WESLEY HEIDT
BUREAU CHIEF
Fla. Bar. #773026
444 Seabreeze Blvd.
5th Floor
Daytona Beach, Florida 32118
(386)238-4990
(384)238-4997 (fax)
crimappdab@myfloridalegal.com

COUNSEL FOR PETITIONER

RECEIVED, 06/04/2020 01:56:30 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT.....	5
UNDER THE CRIMINAL PUNISHMENT CODE, THE LOWEST PERMISSIBLE SENTENCE IS AN INDIVIDUAL MINIMUM SENTENCE AND NOT A COLLECTIVE MINIMUM SENTENCE; THE TRIAL COURT THEREFORE PROPERLY IMPOSED SENTENCE.....	5
CONCLUSION.....	12
CERTIFICATE OF SERVICE.....	13
DESIGNATION OF EMAIL.....	13
CERTIFICATE OF COMPLIANCE.....	13

TABLE OF AUTHORITIES

Cases:

<u>Beach v. Great Western Bank,</u> 692 So.2d 146 (Fla. 1997).....	12
<u>Butler v. State,</u> 838 So. 2d 554 (Fla. 2003).....	9
<u>Champagne v. State,</u> 269 So. 3d 629 (Fla. 2d DCA 2019).....	2, 7, 9, 10
<u>City of Parker v. State,</u> 992 So. 2d 171 (Fla. 2008).....	5
<u>Dennard v. State,</u> 157 So. 3d 1055 (Fla. 4th DCA 2014).....	10
<u>Dorfman v. State,</u> 351 So. 2d 954 (Fla. 1977).....	9
<u>Eustache v. State,</u> 248 So. 3d 1097 (Fla. 2018).....	6
<u>Gabriel v. State,</u> 44 Fla. L. Weekly D2913 (Fla. 5th DCA Dec. 6, 2019).....	Passim
<u>Gabriel v. State,</u> 248 So. 3d 265 (Fla. 5th DCA 2018).....	1
<u>Holly v. Auld,</u> 450 So. 2d 217 (Fla. 1984).....	6
<u>Inclima v. State,</u> 570 So. 2d 1034 (Fla. 5th DCA 1990).....	9

<u>M.W. v. Davis,</u>	
756 So. 2d 90 (Fla. 2000).....	6
<u>McCloud v. State,</u>	
260 So. 3d 911 (Fla. 2018).....	5
<u>Moore v. State,</u>	
882 So. 2d 977 (Fla. 2004).....	9, 10
<u>Parks v. State,</u>	
765 So. 2d 35 (Fla. 2000).....	9
<u>Richards v. State,</u>	
288 So. 3d 574 (Fla. 2020).....	5
<u>Russello v. United States,</u>	
464 U.S. 16 (1983).....	12
<u>State v. J.M.,</u>	
824 So. 2d 105 (Fla. 2002).....	6
<u>State v. Peraza,</u>	
259 So. 3d 728 (Fla. 2018).....	6
Statutes:	
Art. V, § 3(b)(4), Fla. Const.....	3
§ 1.01(1), Fla. Stat. (2005).....	9
§ 775.082, Fla. Stat. (2013).....	7, 6, 8, 12
§ 921.0024(2), Fla. Stat. (2013).....	Passim
Rules:	
Fla. R. Crim. P. 3.701(d)(12).....	9

STATEMENT OF THE CASE AND FACTS

After a jury trial, Respondent was convicted of first degree attempted murder of a law enforcement officer with a firearm, resisting an officer with violence, attempted robbery with a firearm, and aggravated assault with a firearm. (R 20-23, 36-38). On June 1, 2018, the Fifth District Court of Appeal reversed the attempted murder conviction for a new trial and the remaining counts for resentencing. (R 102, 137); see also Gabriel v. State, 248 So. 3d 265, 267-68 (Fla. 5th DCA 2018). Upon remand at a status hearing on September 6, 2018, Respondent rejected the State's offer to plead to the reversed conviction in exchange for a twenty-year minimum mandatory sentence, in total, on all counts. (R 110-11, 115-17). Respondent's trial on the attempted murder charge has been continued pending the legality of the sentence currently on review. (R 117-20, 151, 163).

On October 11, 2018, the trial court re-sentenced Respondent on his remaining convictions. (R 76-87, 137, 155-62). The Criminal Punishment Code Scoresheet at the hearing provided a lowest permissible sentence of 107.25 months and a statutory maximum of twenty-five years. (R 88-90, 117, 152). The State posited that the trial court must impose the lowest permissible sentence on both the resisting an officer with violence and aggravated assault with a firearm convictions, which would exceed their statutory maximum as third degree felonies. (R 102-10, 123, 140-44). The trial court

accepted the State's argument and imposed the State's recommended prison sentence: for attempted robbery with a firearm, fifteen years with a ten-year minimum mandatory; for aggravated assault with a firearm, 107.25 months with a three-year minimum mandatory; and, for resisting an officer with violence, 107.25 months. (R 78-87, 153-57). The sentences were to run consecutive in that respective order and also consecutive to an already active ten-year minimum mandatory sentence on unrelated charges. See id.

On October 17, 2018, Respondent timely filed a notice of appeal. (R 91). Ruling that a trial court cannot impose sentences that exceed the statutory maximum sentence unless the lowest permissible sentence exceeds "the *collective* statutory maximum," the appellate court reversed the sentences for aggravated assault with a firearm and resisting an officer with violence for illegally exceeding the statutory maximum sentence. Gabriel v. State, 44 Fla. L. Weekly D2913, D2914-15 (Fla. 5th DCA Dec. 6, 2019). However, the district court in Gabriel certified conflict with the Second District Court of Appeal's decision in Champagne v. State, 269 So. 3d 629 (Fla. 2d DCA 2019), and also joined that court in certifying the following as a question of great public importance:

Is the lowest permissible sentence as defined by and applied in section 921.0024(2), Florida Statutes, an individual minimum sentence and not a collective minimum sentence where there are multiple convictions subject to sentencing on a single scoresheet?

44 Fla. L. Weekly at D2915.

The State timely filed its notice to invoke the discretionary jurisdiction of this Court. On April 16, 2020, this Court entered its order accepting jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

SUMMARY OF THE ARGUMENT

Based on the plain language of the Criminal Punishment Code, the lowest permissible sentence is an individual minimum sentence, instead of a collective minimum sentence. Alternatively, even if the statute was ambiguous, the canons of statutory construction support this interpretation. Because the lowest permissible sentence as defined by and applied in section 921.0024(2), Florida Statutes, is an individual minimum sentence where there are multiple convictions subject to sentencing on a single scoresheet, the certified questions should be answered in the affirmative. The trial court therefore properly sentenced Respondent to 107.25 month's imprisonment on each of his third degree felony convictions.

ARGUMENT

UNDER THE CRIMINAL PUNISHMENT CODE,
THE LOWEST PERMISSIBLE SENTENCE IS
AN INDIVIDUAL MINIMUM SENTENCE AND
NOT A COLLECTIVE MINIMUM SENTENCE;
THE TRIAL COURT THEREFORE PROPERLY
IMPOSED SENTENCE.

The Fifth District Court of Appeal certified the following question as one of great public importance:

Is the lowest permissible sentence as defined by and applied in section 921.0024(2), Florida Statutes, an individual minimum sentence and not a collective minimum sentence where there are multiple convictions subject to sentencing on a single scoresheet?

Gabriel, 44 Fla. L. Weekly at D2915.

As phrased, this question should be answered in the affirmative. Based on the plain language of section 921.0024(2), Florida Statutes (2013), the lowest permissible sentence ("LPS") is an individual minimum sentence. Alternatively, the canons of statutory construction support this interpretation. The trial court therefore properly sentenced Respondent to 107.25 months' imprisonment on his third degree felony convictions.

An issue of statutory interpretation is reviewed *de novo*. Richards v. State, 288 So. 3d 574, 575 (Fla. 2020) (citing City of Parker v. State, 992 So. 2d 171, 175-76 (Fla. 2008)). "The purpose of this endeavor is to effectuate the Legislature's intent because 'legislative intent is the polestar that guides a court's statutory construction analysis.'" McCloud v. State, 260 So. 3d 911, 914

(Fla. 2018) (quoting State v. J.M., 824 So. 2d 105, 109 (Fla. 2002)). “When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, . . . the statute must be given its plain and obvious meaning.” Eustache v. State, 248 So. 3d 1097, 1100 (Fla. 2018) (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)). “Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another.” State v. Peraza, 259 So. 3d 728, 732 (Fla. 2018) (quoting M.W. v. Davis, 756 So. 2d 90, 101 (Fla. 2000)).

The Criminal Punishment Code (“CPC”) defines the LPS as “the minimum sentence that may be imposed by the trial court, absent a valid reason for departure.” § 921.0024(2), Fla. Stat. The LPS is only determined by calculating the total sentence points. See id. “The permissible range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum, as defined in s. 775.082, for the primary offense and any additional offenses before the court for sentencing.” Id. However, “[i]f the lowest permissible sentence under the code exceeds the statutory maximum sentence as provided in s. 775.082, the sentence required by the code must be imposed.” Id.

Notably, when the CPC outlines its sentencing range, it references both the primary offense and additional offenses. See id. But when the CPC defines the exception to this range, where

the LPS exceeds the statutory maximum, it mentions neither the primary offense, nor additional offenses. See id.; see also Champagne, 269 So. 3d at 632-33. The Second and Fifth District Courts have come to opposite conclusions as whether this statutory language defines the LPS as an individual statutory minimum sentence for each offense or a collective minimum sentence. Compare Champagne, 269 So. 3d at 632-33 (holding the LPS is an individual minimum sentence which applies to each felony conviction), with Gabriel, 44 Fla. L. Weekly at D2913 (holding the LPS must exceed the collective statutory maximum).

Notwithstanding these differing opinions, the State asserts that the CPC's language is clear and unambiguous. Both provisions for the CPC's sentencing range and the LPS exception reference section 775.082, Florida Statutes, in defining the statutory maximum sentence. See § 921.0024(2), Fla. Stat. Section 775.082(3)(a)-(e), Florida Statutes (2013), defines the maximum sentences for the degrees of felonies, including fifteen years for second degree felonies and five years for third degree felonies. These subsections only refer to felonies, not primary or additional offenses. See id. Under section 921.0024(2), Florida Statutes, the language dedicated to the CPC's permissible sentencing range expressly includes both the primary offense and additional offenses, yet the language dedicated to the LPS exception does not mention either term.

The lack of this "primary offense and additional offenses" language in the LPS exception to the permissible sentencing range is significant. While the Legislature included this language to establish the statutory maximum sentence in computing the CPC's permissible range, it clearly meant to address each individual minimum sentence for the LPS exception when it omitted this language. The provision for the LPS exception only requires the LPS to exceed "the statutory maximum sentence as provided in s. 775.082," and section 775.082 lists the maximum sentence for all felonies, regardless of a designation as a primary offense or additional offenses; when both sections are read together, this LPS exception therefore applies to the individual minimum sentence on each felony. The Legislature could have provided this "for the primary offense and any additional offenses before the court for sentencing" language after the "the statutory maximum sentence as provided in s. 775.082" language in the provision for the LPS exception similar to the provision for the permissible sentencing range, but the Legislature instead intentionally chose to omit the phrase. As the statute is plainly written, the Legislature intended a different computation for the permissible sentencing range than for the exceptional situations where there are multiple offenses and the LPS exceeds the statutory maximum sentence on individual offenses.

In this case, Respondent was sentenced on resisting an officer

with violence, a third degree felony; attempted robbery with a firearm, a second degree felony; and, and aggravated assault with a firearm, a third degree felony. (R 20-23, 36-38, 78-87, 153-57). Because the LPS of 107.25 months exceeded the maximum penalty for the two third degree felonies, the trial court properly sentenced Respondent to 107.25 months' imprisonment on those two convictions. (R 88-90).

The Second District reached the same conclusion based on the CPC's text and this Court's precedent in Butler v. State, 838 So. 2d 554 (Fla. 2003), and Moore v. State, 882 So. 2d 977 (Fla. 2004):

Based on the language of section 921.0024(2) and bounded by the language of Butler and Moore, we conclude that the LPS is an individual minimum sentence which applies to each felony at sentencing for which the LPS exceeds that felony's statutory maximum sentence, regardless of whether the felony is the primary or an additional offense. See § 1.01(1), Fla. Stat. (2005) ("In construing [Florida] statutes and each and every word, phrase, or part hereof . . . [t]he singular includes the plural and vice versa."); Fla. R. Crim. P. 3.701(d)(12) ("A sentence must be imposed for each offense."); Parks v. State, 765 So. 2d 35, 35 (Fla. 2000) ("[G]eneral sentences have been prohibited in Florida since Dorfman v. State, 351 So. 2d 954 (Fla. 1977)." (quoting Inclima v. State, 570 So. 2d 1034, 1034 (Fla. 5th DCA 1990))). The alternative interpretation, that the LPS is a collective minimum sentence, while seemingly reasonable, is not premised on the statutory language or clearly reconcilable with Butler and Moore.

Champagne, 269 So. 3d at 636. Based on an interpretation of this

Court's language in Moore, the Fifth District conversely concluded that the LPS must exceed the collective statutory maximum, instead of the individual statutory maximum. See Gabriel, 44 Fla. L. Weekly at D2914 (citing Dennard v. State, 157 So. 3d 1055, 1060 (Fla. 4th DCA 2014) (Warner, J., dissenting)).

The State asserts that Moore supports the interpretation that the LPS only needs to exceed the individual statutory maximum to trigger the LPS exception to the permissible sentencing range. This Court previously explained that:

Under the prior guidelines, the individual offenses were considered interrelated because together they were used to establish the minimum and maximum sentence that could be imposed. To the contrary, however, under the CPC, together the individual offense only establish the minimum sentence that may be imposed; *a single maximum sentence is not established—each individual offense has its own maximum sentence, namely the statutory maximum for that offense.* Under the CPC, multiple offenses are not interrelated as they were previously under the guidelines.

Moore, 882 So. 2d at 985 (emphasis added). As indicated by the Second District:

Moore clearly holds that under the CPC there is not a single sentencing range; rather, each offense has its own statutory maximum sentence such that the range may differ for each offense. But where the LPS exceeds the offense's statutory maximum sentence, there is no range; the LPS must be imposed.

Champagne, 269 So. 3d at 637. In this case, because the LPS exceeded the statutory maximum sentence for two third degree

felonies, there was no range and the 107.25-month sentences had to be imposed. See (R 78-90, 153-57). The sentence was therefore proper.

Moreover, the State respectfully asserts that the Fifth District's position that the LPS must exceed the collective statutory maximum would lead to absurd results. Hypothetically, if an offender's LPS was sixty-one months, but he faced two third degree felonies, the sentencing court would be unable to sentence that offender to concurrent sixty-one-month terms, as that sentence would not exceed the ten-year collective statutory maximum sentence. The sentencing court could then ignore the LPS and either sentence this offender to concurrent terms of between zero and sixty months, or be forced to impose a consecutive sentence outside of its discretion, which undercuts the language of the CPC. See § 921.0024(2), Fla. Stat. ("The sentencing court may impose such sentences concurrently or consecutively.") (emphasis added). Meanwhile, another offender who scores fewer months, but only faces one third degree felony, could receive a higher sentence than the offender who scores sixty-one months and faces two third degree felonies. This result illustrates the absurdity of the Fifth District's interpretation as compared to that of Gabriel.

Alternatively, if this Court determines the statute is not clear and unambiguous, the State asserts that the canons of

statutory construction still support the State's interpretation. "As a general rule, '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Beach v. Great Western Bank, 692 So.2d 146, 152 (Fla. 1997) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). As previously mentioned, the Legislature included the phrase, "for the primary offense and any additional offenses before the court for sentencing" when referring to the permissible sentencing range. § 921.0024(2), Fla. Stat. Despite the provision on the LPS exception directly following the provision on the permissible sentencing range, and likewise referencing section 775.082, the Legislature did not include this same qualifying phrase. Because this language pertaining to the primary offense and additional offenses was omitted, the Legislature clearly intended to apply this LPS exception where there are multiple offenses and the LPS exceeds the statutory maximum sentence on individual offenses.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests this Honorable Court quash the lower court's decision and remand with directions to affirm Respondent's sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief of Petitioner has been furnished to counsel for Respondent, Assistant Public Defenders Nancy Ryan and Kevin R. Holtz, 444 Seabreeze Boulevard, Suite 210, Daytona Beach, Florida 32118, via the Florida Courts E-Filing Portal system at `appellate.efile@pd7.org`; `ryan.nancy@pd7.org`; and `holtz.kevin@pd7.org`, this 4th day of June, 2020.

DESIGNATION OF EMAIL

I HEREBY DESIGNATE the following email addresses for purposes of service of all documents, pursuant to Rule 2.516, in this proceeding: `crimappdab@myfloridalegal.com` (primary) and `richard.pallas@myfloridalegal.com` (secondary).

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s Richard A. Pallas, Jr.
Richard A. Pallas, Jr.
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0126163

/s Wesley Heidt
WESLEY HEIDT
BUREAU CHIEF
Fla. Bar. #773026
444 Seabreeze Blvd.

5th Floor
Daytona Beach, Florida 32118
(386) 238-4990
(384) 238-4997 (fax)
crimappdab@myfloridalegal.com

COUNSEL FOR PETITIONER