

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

FSC CASE NO: SC19-2155

DCA CASE NO: 5D18-3264

RIDGE GABRIEL,

Respondent.  
\_\_\_\_\_ /

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

**RESPONDENT'S ANSWER BRIEF ON THE MERITS**

JAMES S. PURDY  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

Scott G. Hubbard  
Assistant Public Defender  
Florida Bar No. 1004159  
444 Seabreeze Boulevard, Suite 210  
Daytona Beach, Florida 32118  
(386) 254-3758  
[Hubbard.scott@pd7.org](mailto:Hubbard.scott@pd7.org)

COUNSEL FOR APPELLANT

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## **PRELIMINARY STATEMENT**

In this brief, Ridge Gabriel will be referred to as “Respondent” or “Gabriel”; the Petitioner, the State of Florida, will be referred to as “State” and the following letters refer to the Record on Appeal:

“IB” refers to Petitioner’s initial brief

## **STATEMENT OF THE CASE AND FACTS**

The Respondent accepts the Petitioner's statement of the case and facts.

## **SUMMARY OF THE ARGUMENT**

Chapter 921 of the Florida Statutes, the Criminal Punishment Code (CPC), is ambiguous with respect to the maximum permissible punishments for “additional offenses” when the Lowest Permissible Sentence (LPS) exceeds their respective maximums. The language of the statute at issue, §921.0024, is subject to multiple interpretations that consequently results in conflicting outcomes throughout the State. Applying the canons of statutory construction to effectuate the intent of the legislature, where an “additional offense” that is not the “primary offense” a defendant is sentenced on, the maximum sentence that can be imposed for an “additional offense” is limited to the statutory maximum unless the LPS exceeds the collective statutory maximum of all charged offenses before the Court for sentencing. Therefore, the certified question should be answered in the negative.



## ARGUMENT

### THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE LOWEST PERMISSIBLE SENTENCE IS A COLLECTIVE MINIMUM SENTENCE UNDER THE CRIMINAL PUNISHMENT CODE

The certified question from the Fifth District Court of Appeal before this Court is one of statutory interpretation and construction. In [\*Gabriel v. State\*, 44 Fla. L. Weekly D2913 \(Fla. 5th DCA Dec. 6, 2019\)](#), the District Court held that because the lowest permissible sentence (LPS) may only be imposed where it exceeds the collective maximum sentence of all charges pending before the Court for sentencing, the trial Court erred in holding that the LPS as calculated on the scoresheet must be imposed on Mr. Gabriel's additional offenses.

The question presented to this Honorable Court from the Fifth District Court of Appeal should be answered in the negative. The LPS is a collective minimum sentence as evidenced by the legislative intent, legislative history, and supported by the holding in [\*Moore v. State\*, 882 So.2d 977, 985 \(Fla.2004\)](#).

### Standard of Review

The question before the Court as certified by the Fifth District Court of Appeal is one seeking an interpretation of statutory provisions therefore the standard of review is *de novo*. [\*Jimenez v. State\*, 246 So. 3d 219, 225 \(Fla. 2018\)](#) (citing [\*Borden v. East-European Ins. Co.\*, 921 So.2d 587, 591 \(Fla. 2006\)](#)).

“Where legislative intent is unclear from the plain language of the statute, we look to canons of statutory construction.” [\*Kasischke v. State\*, 991 So.2d 803, 811 \(Fla. 2008\)](#) (citing [\*Joshua v. City of Gainesville\*, 768 So.2d 432, 435 \(Fla.2000\)](#)).

“As with all cases of statutory construction, it is the Court's purpose to effectuate legislative intent.” [\*Polite v. State\*, 973 So.2d 1107, 1111 \(Fla. 2007\)](#) (citing [\*Bautista v. State\*, 863 So.2d 1180, 1185 \(Fla.2003\)](#)). “[I]f the language is unclear or ambiguous, then the Court applies rules of statutory construction to discern legislative intent.” [\*Id\*](#) (citation omitted).

As acknowledged in the *Gabriel* opinion, the conclusion of the 5th District Court of Appeal that the requirement of §921.0024(2) to impose the LPS is triggered only if exceeds that collective statutory maximum, conflicts with the 2nd District Court of Appeal opinion in [\*Champagne v. State\*, 269 So. 3d 629 \(Fla. 2d DCA 2019\)](#), that held that the LPS is an individual minimum sentence that applies to each felony at sentencing and must be imposed where the LPS exceeds a felony's statutory maximum sentence. [\*Gabriel v. State\*, 44 Fla. L. Weekly D2913 \(Fla. 5th DCA Dec. 6, 2019\)](#) Further, the analysis of the statute in *Champagne* analyzed several cases demonstrating the inconsistent application of the statute's LPS exception and case law holdings. [\*Champagne v. State\*, 269 So. 3d 629, 634-636 \(Fla. 2d DCA 2019\)](#).

Where the plain language of the statute is susceptible to more than one interpretation, to discern the legislative intent the principles of statutory construction are to be considered and “must consider the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute.” [\*State Farm Mutual Automobile Insurance Company v. Shands Jacksonville Medical Center, Inc.\*, 210 So.3d 1224, 1228-1229 \(Fla. 2017\)](#) (citations omitted).

A subsection must be read in the context of the whole. See [\*Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC\*, 986 So.2d 1260, 1264–65 \(Fla. 2008\)](#). See also [\*Borden v. East-European Ins. Co.\*, 921 So.2d 587, 595 \(Fla. 2006\)](#) (“[i]t is a well-settled principle of statutory construction that ‘all parts of a statute must be read together in order to achieve a consistent whole.’” (citation omitted)).

Read in isolation (and as analyzed in *Champagne*), §921.0024(2) is an unclear statute subject to multiple interpretations that has been applied inconsistently across the State since the passage of the CPC. Language from other sections from Chapter 921 and the legislative history provide the insight to the legislature’s intent on the sentencing framework of the CPC, coupled with this Honorable Court’s holding in *Moore v. State*, the conclusion is that the LPS is a collective minimum sentence and does not apply to each additional offense individually.

## Florida Statutes, Chapter 921

The statute at issue, [§921.0024\(2\) \(2012\)](#) reads in its entirety:

The lowest permissible sentence is the minimum sentence that may be imposed by the trial court, absent a valid reason for departure. The lowest permissible sentence is any nonstate prison sanction in which the total sentence points equals or is less than 44 points, unless the court determines within its discretion that a prison sentence, which may be up to the statutory maximums for the offenses committed, is appropriate. When the total sentence points exceeds 44 points, the lowest permissible sentence in prison months shall be calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent. The total sentence points shall be calculated only as a means of determining the lowest permissible sentence. 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. The sentencing court may impose such sentences concurrently or consecutively. However, any sentence to state prison must exceed 1 year. If 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. If the total sentence points are greater than or equal to 363, the court may sentence the offender to life imprisonment. An offender sentenced to life imprisonment under this section is not eligible for any form of discretionary early release, except executive clemency or conditional medical release under s. 947.149.

[Fla. Stat. §921.0024 \(2012\)](#).

[§921.002 \(1\) \(c\) & \(d\) \(2012\)](#), respectively, state: “(c) The penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense; (d) – The severity of the sentence increases with the length and nature of the offender's prior record.”

[§921.0021\(4\) \(2012\)](#), defines “Primary offense” as “the offense at conviction pending before the court for sentencing for which the total sentence points recommend a sanction that is as severe as, or more severe than, the sanction recommended for any other offense committed by the offender and pending before the court at sentencing.”

[§921.0021\(1\) \(2012\)](#) defines an “Additional offense” as “any offense other than the primary offense for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.”

[§921.0021 \(5\) \(2012\)](#), defines a “prior record” as a conviction for a crime committed by the offender, as an adult or a juvenile, prior to the time of the primary offense.

The points assigned in the CPC scoresheet (including victim injury and legal status) are added together and, after additional calculations, the resulting score (represented in months) establishes a defendant's ‘lowest permissible sentence’ which “is assumed to be the lowest appropriate sentence for the offender being sentenced.” [Fla. Stat. § 921.00265\(1\) \(2012\)](#).

The limiting statute, [§921.002\(g\) \(2012\)](#), requires that a judge “may impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation or community control.”

And from a different section, but important nonetheless, as part of the overhaul of sentencing for the CPC a provision was added to 924.06, subsection (e), allowing for a defendant to appeal “[a] sentence imposed under s. 921.0024 of the Criminal Punishment Code which exceeds the statutory maximum penalty provided in s. 775.082 for an offense at conviction, or the consecutive statutory maximums for offenses at conviction, unless otherwise provided by law.” [Fla. Stat. §924.06\(e\) \(2012\)](#).

Taken in context, the CPC is designed and concerned with sentencing a criminal defendant for the primary offense before the Court for sentencing and the consideration of where the LPS exception of §921.0024(2) applies is where the LPS exceeds the collective statutory maximum for all offenses before the Court for sentencing. The LPS is collective because the scoresheet takes into consideration all the relevant factors; the primary offense, additional offenses, legal status, victim injury, and multipliers.

As discussed in *Moore v. State*, “under the CPC, together the individual offenses 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.” [\*Moore v. State\*, 882 So.2d 977, 985 \(Fla.2004\)](#).

This view was shared by Judge Warner in her dissent in *Dennard v. State* where it was argued that “the LPS is the collective total minimum sentence for all offenses, but each has its own statutory maximum. The LPS is not the sentence which must be applied to each offense at sentencing.” [\*Dennard v. State\*, 157 So.3d 1055, 1060 \(Fla. 4th DCA 2014\)](#) (see also [\*Colon v. State\*, 199 So.3d 960, 962-964 \(Fla. 4th DCA 2016\)](#) (J. Warner, concurring specially)(arguing that where the LPS directive is met for the primary offense the sentences for additional offenses should not exceed the statutory maximum for each crime)).

The opinion in Gabriel cited to the *Dennard* dissent as well, holding that “when applying the provision of section 921.0024(2), which requires the trial court to impose the LPS if it exceeds the statutory maximum sentence, the LPS must exceed the collective statutory maximum, not each individual statutory maximum, before such exception is triggered.” [\*Gabriel\*, 44 Fla. L. Weekly at D2916](#).

The legislative history of the sentencing framework in Florida, demonstrates that after the introduction of sentencing guidelines in 1983, amendments and revisions to sentencing in Florida, culminating in the adoption of the CPC, kept the collective ‘floor’ concept of guidelines as the LPS but removed the collective

‘ceiling’ of the sentencing range and replaced it with any offense’s statutory maximum penalty.

Part of this was to punish the offender by ensuring minimum sentences, hence the ‘floor’. Another other component was a return to ‘pre-1983’ judicial discretion. The State’s interpretation of §921.0024(2) constrains the discretion of sentencing judges, in opposition to the legislature’s intent in developing and enacting the CPC.

A brief look at the legislative history of sentencing in Florida, coupled with this Court’s opinion in *Moore* and the *Gabriel* opinion shows that the intent of the legislature in designing the LPS exception was not intended to apply individually to additional offenses and rather, is a collective statutory maximum.

### **Legislative History of Sentencing Preceding the CPC**

Prior to 1983, Florida employed a sentencing framework where a sentencing judge’s discretion was limited only by the statutory maximum of a given offense and constitutional requirements. (Fla. S. Comm. Crim. Just., Review the Criminal Punishment Code and Sentencing Judges’ Assessment, The Florida Senate (Nov. 2005), 2, (available at [http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim\\_reports/pdf/2006-112cj.pdf](http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-112cj.pdf))).



In the 1970s and 1980s, there were growing concerns with disparities in sentencing, particularly as it relates to disparate impact based on geographical (similarly situated defendants were being sentenced differently by different judicial circuits or judges within the same circuit) and racial components. (Fla. S. Comm. Crim. Just., Review the Criminal Punishment Code and Sentencing Judges' Assessment, The Florida Senate (Nov. 2005), 3, (available at [http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim\\_reports/pdf/2006-112cj.pdf](http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-112cj.pdf))).

Further, there were “concerns regarding actual and percent of time served as well.” (Fla. Dept. of Corr., Florida’s Criminal Punishment Code: A Descriptive Assessment, (Sept. 2018), 6, (available at <http://www.dc.state.fl.us/pub/scoresheet/Criminal%20Punishment%20Code%202019.pdf>) [hereinafter Fla. Dept. of Corr., Florida’s Criminal Punishment Code]).

In 1978, the Florida Supreme Court established a Sentencing Study Committee with a stated goal of “devis[ing] a system in which individuals of similar backgrounds would receive roughly equivalent sentences when they commit similar crimes, regardless of the differing penal philosophies of legislators, correctional authorities, parole authorities, or judges.” *Alfonso-Roche v. State*, 199 So. 3d 941, 946 (Fla. 4th DCA 2016) (Gross, J. concurring) (citing *In re Rules of Crim. Proc. (Sent'g Guidelines)*, 439 So.2d 848 (Mem)(1983)).

Another concern prior to the passage of the sentencing guidelines of 1983 was the overcrowding of Florida prisons. (See [\*Costello v. Wainwright\*, 397 F. Supp 20 \(M.D. Fla. 1975\)](#), *affirmed* as modified, [525 F.2d 1239 \(5th Cir. 1976\)](#), *affirmed* in relevant part on rehearing *en banc*, [539 F.2d 547 \(5th Cir. 1976\)](#)(a class action lawsuit brought by Florida prisoners due to conditions of overcrowding)).

The guidelines passed by the legislature in 1983 created a uniform sentencing framework:

The 1983 Sentencing Guideline structure was comprised of nine separate worksheets for specified offense categories such as murder, sexual offenses, drug offenses, etc. All offenses were contained in one of these categories.

Within each worksheet, points were assessed for offenses to be sentenced and prior record offenses based on the number of offenses and each offense's felony degree. Assessments were made for legal status and victim injury. Total scores fell into sentencing ranges or cells, for each worksheet. The least severe cell provided for a non-state prison sanction and the most severe cell provided for 27 years to life in prison. Departure sentences were permissible, as long as, written reasons were provided.

(Fla. Dept. of Corr., Florida's Criminal Punishment Code, 6).

The guidelines framework was adjusted and amended such that by 1994, the scoresheet calculated a "sentencing range" that a sentencing Court could deviate 25% downwards or upwards without any written findings and in the event of a

departure, enumerated aggravating and mitigating factors were codified.

[§921.0014\(2\) \(1997\)](#) (repealed by Laws 1997, C. 97-194).

Further changes to the 1983 guidelines passed the legislature in 1994 (“Safe Streets Act”) and 1995 (“Crime Control Act”), as well as further amendments in 1996 and 1997. (Fla. Dept. of Corr., Florida’s Criminal Punishment Code, 7-8).

Many of the amendments to the sentencing guidelines would be incorporated into the CPC: utilizing a single scoresheet; assigning a rank level of severity to enumerated offenses; assigning level rankings to additional and prior offenses; point multipliers and enhancements; creating three (3) categories of sanction based off the total point score (mandatory non-state prison sanction, discretionary prison, and mandatory prison); requiring written reasons for departure; and bilateral appellate rights if the sentence exceeded the guidelines range. (Staff of Fla. S. Comm. on Crim. Just., Review the Criminal Punishment Code and Sentencing Judges’ Assessment, (Nov. 2005), 5, (available at [http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim\\_reports/pdf/2006-112cj.pdf](http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-112cj.pdf))).

Criticism of the guidelines and their amendments argued that “they weren’t tough enough, especially regarding prior record; they were too complex; they gave judges little real discretion, such as imposing prison sentences on nonviolent offenders where appropriate; and they reduced sentencing to a mathematical

computation.” (Staff of Fla. S. Comm. on Crim. Just., Review the Criminal Punishment Code and Sentencing Judges’ Assessment, (Nov. 2005), 5, (available at [http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim\\_reports/pdf/2006-112cj.pdf](http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-112cj.pdf))).

The changing circumstances surrounding Florida prisons, including the end of federal oversight on prisons, adjustments to the maximum legal capacity of prisons, appropriation of government funds for the development of more prison beds, and growing opposition to the early release of prisoners, among other reasons, led to the passage of the Criminal Punishment Code. *See generally* [Chet Kaufman, A Folly of Criminal Justice Policy-Making: The Rise and Demise of Early Release in Florida, and Its Ex Post Facto Implications](#), 26 Fla. St. U. L. Rev. 361 (Winter 1999).

## **The Criminal Punishment Code**

The legislature determined that it was “in the best interest of the state to develop, implement, and revise a sentencing policy.” [§ 921.002\(1\) \(1998\)](#).

In the annual report required by the CPC, the Department of Corrections noted that the CPC “contains features of both structured and unstructured sentencing policies. It maintains many of the goals of guidelines sentencing.

Compared to the guidelines however, the Code allows for greater upward discretion in sentencing, provides for increased penalties, and lowers mandatory prison thresholds.” (Fla. Dept. of Corr., Florida’s Criminal Punishment Code, 8).

Many of the goals of the sentencing guidelines remained in place under the CPC. See [§921.002 \(a\)-\(i\) \(2012\)](#).

In the senate staff analysis of the bill that would amend the chapter on the CPC (Laws 1998, c. 98-204), SB 1522, the section detailing the situation leading to the passage of the CPC noted that “For many years, the sentencing guidelines have been criticized for curbing the discretion of the sentencing judge, who is closer to the individual facts of his or her cases before the court. The sentencing guidelines have also been criticized as levying ‘calculator justice.’” Staff of Fla. S. Comm. on Crim. Just., CS for SB 1522 (1998) Staff Analysis, 1 (April 2, 1998) (on file with comm.) [hereinafter S. Comm. on Crim Just., SB 1522 Staff Analysis].

Continuing, the analysis detailed there is “very little flexibility is provided to the sentencing court and the assistant state attorney prosecuting the case as to the type and length of the sentence imposed.” (S. Comm. on Crim Justice, SB 1522 Staff Analysis, 2). Notably, the analysis provided a partial history of sentencing revision and that:

[a]fter previous failed attempts to abolish the sentencing guidelines and return to the pre-1983 days of total court discretion, the legislature passed CS/HB 241. The legislative intent of the 1997 bill was to abolish the

applicability of the sentencing guidelines...The Criminal Punishment Code, codified in ss. 921.002-921.0026, F.S., essentially authorizes the discretion of the court to impose a sentence for each crime that is committed, which could be up to the statutory maximum for each offense. However, the punishment code *establishes a “floor”* or minimum threshold sentence that is *the minimum sentence that a court may impose for the offenses before the court*, absent a departure reason authorized by statute.

(S. Comm. on Crim Justice, SB 1522 Staff Analysis, 2) (emphasis added).

Further, the analysis noted the technical change in terminology associated with the CPC: “such as ‘permissible sentence range,’ which is the lowest permissible sentence up to the statutory maximum for each offense committed, instead of ‘maximum recommended sentence range,’ which is used under the sentencing guidelines.” (S. Comm. on Crim Justice, SB 1522 Staff Analysis, 11).

Absent from the analysis is consideration on how to apply the LPS to additional offenses before the Court for sentencing in the limited circumstance where the LPS exceeds the statutory maximum of an additional offense. As detailed above, the Legislature crafted the CPC with a mind toward increasing judicial discretion while keeping the collective minimum ‘floor’ of the former sentencing guidelines.

In the “Effect of Proposed Changes” section of the senate analysis, the effect of section six (6) is designed to clarify that “if the lowest permissible *sentence* under the code exceeds the statutory maximum for the *offenses* committed, the

sentence under the code must be imposed. (S. Comm. on Crim Justice, SB 1522 Staff Analysis 7) (emphasis added). While not the ‘Rosetta Stone’ of legislative intent, it is arguable that the legislature still thought of the sentencing range in a collective sense and intended for the LPS to be imposed where it exceeded the collective statutory maximum of the offenses committed.

### **The Instant Case**

As referenced in *Champagne* and *Gabriel*, the Moore Court described the differences between the sentencing guidelines prior to enactment of the CPC as follows:

[U]nlike application of CPC sentencing, the offenses were factors that were jointly considered to establish a sentencing range. Offenses were required to be addressed as interrelated until all sentences and probationary terms were satisfied because the offenses together created the initial sentencing range-the minimum and maximum permissible sentence. While one scoresheet may still be utilized in CPC sentencing, a sentencing range is not established under the CPC; only a minimum permissible sentence is determined. The maximum sentence for each offense is determined solely by the statutory maximum for the individual offenses.

[Moore v. State, 882 So.2d 977, 985 \(Fla. 2004\).](#)

The opinion seems to implicitly acknowledge that the CPC’s use of a scoresheet to calculate the LPS is collective. The difference between the prior sentencing guidelines and the CPC is that the upper range calculated under the

guidelines was removed and replaced with offense's statutory maximums. However, the lower bounds of the sentencing range under the sentencing guidelines remained as the LPS.

This was designed to return discretion to sentencing judges, as Justice Pariente agreed in quoting the decision of the DCA opinion below in his concurrence, that “the CPC ‘was intended to return to trial judges most of the discretion regarding sentencing that they had traditionally enjoyed prior to the adoption of the sentencing guidelines.’” [\*Id.\* at 986](#)(J. Pariente, concurring).

In the instant case, the State argued in the initial brief that the clause “for the primary offense and any additional offenses before the court for sentencing” modifies “[t]he permissible range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum.” (IB 8). In conjunction with the subsequent sentence, “[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,” the State contends that this results in a sentencing scheme that the LPS is the floor for the primary offense and the floor for each additional offense before the Court for sentencing. (IB 8).

The State suggests in the initial brief that the legislature could have provided for the phrase “for the primary offense and any additional offenses before the court for sentencing” in the LPS exception clause as follows: “If the lowest permissible



sentence under the code exceeds the statutory maximum sentence as provided in s. 775.082, [for the primary offense and any additional offenses before the court for sentencing] the sentence required by the code must be imposed” and because the legislature did not do so it demonstrates an intent to have the LPS apply to each offense before the Court for sentencing. (IB 8). The respondent respectfully asserts that even if the phrase were included it provides no further clarity. It does not answer whether the LPS is the collective statutory minimum that must be imposed, whether the LPS is to be applied individually to each offense before the Court for sentencing, or some other scheme.

Further, the State contends that §775.082’s “subsections only refer to felonies, not primary or additional offenses.” (IB 7). The reason §775.082 has no reference to primary or additional offenses is that any offense can be a primary offense or additional offense and only receives the designation when a scoresheet is being compiled. See §921.0021(4) (2012) and §921.0021(1) (2012).

In the initial brief an illustration is presented where a hypothetical defendant’s scoresheet reflects an LPS of 61 months, for two third degree felony charges. (IB 11). The State supposed that the sentencing Court would not be able to sentence the hypothetical defendant to concurrent 61 month terms as that sentence would not exceed the ten (10) year collective statutory maximum (implying that a 61 month sentence exceeds a third degree felony’s statutory

maximum). (IB 11). The State argued that the Court could “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” to meet the LPS of 61 months. (IB 11).

Respectfully, the Courts are already without discretion to sentence a defendant to a sentence below the LPS, absent a valid reason for downward departure. They are also already without discretion to sentence a defendant above the statutory maximum absent a valid reason for upward departure, such as the Violent Career Criminal/Habitual Felony Offender/Habitual Violent Felony Offenders/Three-time Violent Felony Offender of §775.084 (although a defendant’s offenses found eligible for this scheme are not included on the LPS scoresheet) or under [§775.082\(10\)](#) that allows for an upward departure where the total sentence points are twenty-two (22) or fewer if the Court makes written findings that a nonstate prison sanction could present a danger to the public. Courts are routinely under the obligation to follow the will of the legislature through statutes and a holding that the LPS is a collective minimum would as easily be incorporated into jurisprudence as any other mandate guiding the capable Courts of this State. While the Court may be required to impose consecutive sentences outside of its discretion to meet the LPS, the alternative is even more restrictive and limiting in discretion of the Courts.

If the State's proposed interpretation on §921.0024(2) in the present case is to be adopted, the Court in this hypothetical scenario would only be able to sentence the defendant to either two (2) 61 month terms to be served concurrently or sentence or two (2) 61 month terms to be served consecutively.

Judge Conner recognized this potential limiting proposition in in *Dennard v. State*, noting that “one could argue that the trial court had only two choices for sentencing Dennard: impose a total of 16.15 years in prison (by imposing the sentences concurrently) or a total of 32.3 years in prison (by imposing the sentences consecutively).” [\*Dennard v. State\*, 157 So.3d 1055, 1056 \(Fla. 4th DCA 2014\)](#) (J. Conner, concurring).

This outcome would undermine sentencing Court's discretion in contravention of the intent of the legislature in adopting the CPC. Under the State's theory in this hypothetical scenario, the Court has no discretion to craft a sentence with a probationary component or an incarcerative sanction anywhere between the 61-122 month timeframe. Sentencing will return to calculated justice.

There is no concern that the LPS represents a general sentence or that a sentence would not be imposed for each offense. Rather, each offense is considered individually at sentencing and the LPS must only be reached collectively among the individual offenses to effect the intent of the LPS component of the CPC. In the instant case, it follows, that it would have been a

legal sentence within the Court's discretion to sentence Gabriel to 83.25 months on count two (2) and twelve (12) months on counts three (3) and four (4), consecutive to count two (2) and consecutive to each other to reach the LPS of 107.25 – or any other combination therein, as long as the collective LPS was met (and the CPC's requirement that any prison sentence be at least one (1) year) – up to the statutory maximum for all offenses, twenty-five (25) years. Alternatively, if the LPS must be imposed on the primary offense, the Court would retain the discretion to impose up fifteen (15) total years for the primary offense as well as up to an additional ten (10) years of incarceration on the additional offenses, should the Court elect to impose the sentences consecutively. This interpretation harmonizes the sections of the CPC and provides the most discretion for sentencing Courts as was the intent of the legislature in passing the CPC.

## **CONCLUSION**

Based upon the arguments and authorities presented herein, the respondent respectfully submits that the certified question should be answered in the negative, the decision of the Fifth District Court of Appeal should be approved, and the sentences entered in the trial Court should be reversed and remanded.

Respectfully submitted,

JAMES S. PURDY  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

/s/ Scott G. Hubbard  
Scott G. Hubbard  
Assistant Public Defender  
Florida Bar No. 1004159  
444 Seabreeze Boulevard, Suite 210  
Daytona Beach, Florida 32118  
(386) 254-3758  
[Hubbard.scott@pd7.org](mailto:Hubbard.scott@pd7.org)

COUNSEL FOR APPELLANT

## **CERTIFICATE OF FONT**

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

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing has been filed electronically with the Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, Florida 32114, at <https://edca.5dca.org>; delivered electronically to the Office of the Attorney General, 444 Seabreeze Boulevard, fifth floor, Daytona Beach, Florida 32118, at [crimappdab@myfloridalegal.com](mailto:crimappdab@myfloridalegal.com); and a true and correct copy thereof delivered by mail to Mr. Ridge Gabriel, #X86623, Hamilton Correctional Institution, 10650 S.W. 46th Street, Jasper, FL, 32052-1360 on this 21st day of July, 2020.

/s/ Scott G. Hubbard  
Scott G. Hubbard  
Assistant Public Defender