IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-842
L.T. CASE NO. 4D04-4009

JOSEPH KELLY,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Petitioner was the defendant and respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County. On appeal to the Fourth District Court of Appeal, petitioner was the appellant and respondent was the appellee. In this brief, the parties will be referred to as they appear before this court, except that respondent may also be referred to as "the state."

The following references will be used in this brief:

[A.] Petitioner's Appendix to Initial Brief on the Merits

STATEMENT OF THE CASE AND FACTS

This case is before the court pursuant to conflict certified by the Fourth District Court of Appeal. In Kelly v. State, 924 So. 2d 69 (Fla. 4th DCA 2006), the district court certified conflict with Johnson v. State, 695 So. 2d 861 (Fla. 2d DCA 1997), Frazier v. State, 630 So. 2d 1237 (Fla. 2d DCA 1994), and Vickery v. State, 515 So. 2d 396 (Fla. 1st DCA 1987), regarding the imposition of consecutive mandatory minimum sentences.

On January 11, 2000, petitioner Joseph Kelly was charged with (I) trafficking in cocaine; (II) conspiracy to traffic in cocaine; (III) possession of cannabis. [A.1] Petitioner entered into a substantial assistance agreement on January 13, 2000. [A.2] He then entered an open plea of guilty on January 20, 2000. [A.3, pp. 23-24]

The factual basis for the plea was that petitioner and a co-defendant, Mr. Crossin, engaged in a drug transaction of one kilogram of cocaine. [A.3, pp. 8-9] Petitioner acted as the middle-man, setting up the transaction between Mr. Crossin—a friend's uncle—and a confidential informant. [A.3, p.9] A series of telephone conversations between petitioner and the confidential informant led to consummation of the deal on December 21, 1999. [A.3, p.9] On that day, Mr. Crossin handed over $17,500.00, tested the cocaine for quality, and proceeded to put it into the trunk of his car when

he and petitioner were arrested. [A.3, p.9] Cannabis was found in petitioner's sock. [A.3, pp.10-11] During the plea colloquy, petitioner agreed that these facts were accurate. [A.3, pp. 10-11]

At the plea hearing, the prosecutor stated that he had explained to petitioner that "he could get thirty year mandatory minimum due to the fact that there's fifteen mandatory on count one and fifteen mandatory on count two. And you could stack them if you wanted." [A.3, p.12] Petitioner's attorney agreed that the prosecutor "was very thorough and included everything." [A.3, p.24] The trial court told petitioner that he had heard the penalties from the prosecutor, who was "essentially correct" that petitioner could face a maximum of almost sixty-one years in prison, based on the two felony counts carrying a thirty-year maximum and the misdemeanor cannabis charge carrying a 364 day jail sentence. [A.3, pp. 28-29]

On October 26, 2000, a hearing was held on new charges as the result of petitioner being arrested on September 10, 2000, for possession of cocaine, possession of drug paraphernalia, driving under the influence, resisting arrest without violence, driving on a suspended or revoked license, and failure to register a vehicle. [A.4, p.5] Petitioner pled no contest. [A.4, p.5] At the hearing, Detective Capo, from the Plantation Police Department, testified that police did not hear from petitioner during the first two months

of his substantial assistance agreement period. [A.4, p.16] No investigation was successfully completed and no arrests were made as a result of efforts by petitioner, although he did attempt "to set up a crack dealer." [A.4, p.16] The prosecutor told the court that petitioner "didn't do a thing for the State of Florida" as to substantial assistance, and also violated the agreement by being involved in more crime. [A.4, p.21]

The trial court noted that it had "more than ample reason on this record to aggravate this man's sentence," and that it had sentencing concerns because "for two months after the agreement he went into hibernation. The detective didn't know where he was." [A.4, p.24] Petitioner did not lead officers to any investigations and was arrested on the new charges, so the court was of the opinion that "he knows where to find it on the streets somewhere, but he just wasn't leading the law enforcement to it." [A.4, p.25]

Petitioner was adjudicated guilty on all counts in his original case. He was sentenced to twenty (20) years in prison on counts I and II, trafficking in cocaine and conspiracy to traffic, "to run concurrent with the 15-year minimum mandatory sentence having to be served on those two counts," and to time served as to count III, possession of cannabis. [A.4, p.49] As to petitioner's new case, he was sentenced to five (5) years in prison as to the

possession of cocaine charge, six (6) months in jail as to the driving under the influence charge—both to run concurrent to the sentence imposed in the original case—and to time served as to the remaining counts. [A.4, pp. 49-53]

Petitioner's motion to correct sentencing error was denied; that appeal to the district court was affirmed with a written opinion, and his subsequent petition to this court was denied. Kelley [sic] v. State, 821 So. 2d 1255 (Fla. 4th DCA 2002), *review denied*, Kelley [sic] v. State, 842 So. 2d 844 (Fla. 2003).

Petitioner filed a motion for post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850. [A.5] He sought to set aside his plea based, in part, on being misadvised that his minimum mandatory sentences could be imposed consecutively. [A.5, p.6] Petitioner appealed the summary denial of that motion, and the Fourth District issued the opinion that is now before this court. [A.6; A.7] In its opinion, the district court affirmed, finding that pursuant to prior cases from this court, petitioner was not misadvised that "[t]he trial court could have ordered consecutive minimum mandatory sentences for his crimes." Kelly, 924 So. 2d at 71. While denying rehearing, the Fourth District certified conflict. *Id*. at 72.

SUMMARY OF THE ARGUMENT

Prior decisions from this court clearly support the analysis of the Fourth District Court of Appeal in the opinion at issue. A principle contained within this court's cases is that minimum mandatory sentences for crimes arising from the same criminal episode may be imposed consecutively where the statute prescribing the penalty contains a minimum mandatory provision.

This court has made a clear distinction between a statute that prescribes a penalty for an offense and contains a minimum mandatory sentence, as opposed to a statute that prescribes a penalty but contains no minimum mandatory sentence, even though a minimum mandatory sentence may be imposed through an enhancement statute such as the habitual violent felony offender statute. The former may be used to impose consecutive sentences; the latter may not.

Based on this court's analysis, the Fourth District's opinion should be affirmed.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL PROPERLY FOLLOWED PRINCIPLES SET FORTH BY THIS COURT, WHEREBY MINIMUM MANDATORY SENTENCES FOR CRIMES ARISING OUT OF THE SAME CRIMINAL EPISODE MAY BE IMPOSED CONSECUTIVELY WHERE THE STATUTE PRESCRIBING THE PENALTY CONTAINS A MINIMUM MANDATORY PROVISION. [Restated]

When, as here, "the conflict issue is a question of law, the standard of review is *de novo*." Wade v. Hirschman, 903 So. 2d 928, 932 (Fla. 2005).

Petitioner argues that the Fourth District Court of Appeal's decision should be rejected, and two decisions issued by the Second District, which rely on an older case from the First District, should be approved. However, the Fourth District was correct in its ruling.

The essence of petitioner's argument is that because his convictions arose out of the same transaction, his sentences could only be imposed concurrently and not consecutively, contrary to the ruling of the Fourth District. In arriving at this conclusion, petitioner primarily focuses on the aspect of convictions arising out of the same transaction. The Fourth District acknowledged this argument, but determined that because of this court's prior decisions, and the specific statute at issue, petitioner could receive consecutive sentences.

As pointed out by the Fourth District in its opinion, petitioner was sentenced pursuant to section 893.135, Florida Statutes (1999), which states:

> (1) Except as authorized in this chapter or in chapter 499 and notwithstanding the provisions of s. 893.13;
>
> . . .
>
> > (b)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in s. 893.03(2)(a)4, or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:
> >
> > . . .
> >
> > > c. Is 400 grams or more, but less than 150 kilograms, such person **shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years** and pay a fine of $250,000.
> >
> > . . .
>
> (5) Any person who agrees, conspires, combines, or confederates with another person to commit any act prohibited by section (1) commits a felon of the first degree and is punishable as if he or she had actually committed such prohibited act. **Nothing in this subsection shall be construed to prohibit separate convictions and sentences for violation of this subsection and any violation of subsection (1).**

[Emphasis supplied]

As correctly noted by the Fourth District Court of Appeal—and not contested by petitioner—this "statute authorizes convictions and sentences,

with mandatory minimums for both the trafficking and conspiracy, even though they may arise out of the same transaction." Kelly v. State, 924 So. 2d 69, 70 (Fla. 4th DCA 2006). Further, the statute "specifically requires a mandatory minimum sentence for each separate crime," so the trial court "could impose consecutive mandatory minimum sentences for both conspiracy and trafficking in the same cocaine . . . ." *Id*. at 71.

This court's prior cases support the Fourth District's analysis. In Daniels v. State, 595 So. 2d 952, 954 (Fla. 1992), this court held that consecutive minimum mandatory sentences could not be imposed "because the statute prescribing the penalty for [the defendant's] offenses does not contain a provision for a minimum mandatory sentence . . . ." In that case, the defendant was convicted of several offenses arising out of the same criminal episode, but the penalty-prescribing statute did not contain a minimum mandatory sentence. *Id*. The defendant's minimum mandatory sentences had been designated to run consecutively based on the habitual violent felony offender statute—which is an enhancement statute. *Id*. This court rejected the imposition of consecutive sentences "because the statute prescribing the penalty . . . does not contain a provision for a minimum mandatory sentence . . . ." *Id*. Based on this holding, consecutive minimum

mandatory sentences would have been upheld if minimum mandatories had been contained within the statute prescribing the penalty.

In Daniels, this court made a clear distinction between a statute that prescribes a penalty for an offense and contains a minimum mandatory sentence—such as the statute involved here—and a statute that prescribes a penalty but contains no minimum mandatory sentence. Later, in Hale v. State, 630 So. 2d 521, 524 (Fla. 1993), *cert. denied*, 513 U.S. 909, 115 S. Ct. 278 (1994), this court noted that distinction: "In doing so [ordering concurrent sentences in Daniels] we distinguished statutory sentences in which the legislature had included a minimum mandatory sentence, such as the sentences for capital crimes, from sentences in which there is no minimum mandatory penalty, although one may be provided as an enhancement through the habitual violent offender statute." This court then pointed out the principle to be gleaned from Daniels—where "'the statute prescribing the penalty for [the defendant's] offenses does not contain a provision for a minimum mandatory sentence, we hold that his minimum mandatory sentences imposed for the crimes he committed arising out of the same criminal episode may only be imposed concurrently and not consecutively.'" Hale, 630 So. 2d at 524 (citations omitted). Thus, if the statute prescribing the penalty for the offense does contain a minimum

mandatory sentence, such sentences for crimes committed arising out of the same criminal episode may be impose consecutively.

In Hale, the defendant was charged with the sale of cocaine and possession with the intent to sell, but "[n]one of the statutes under which Hale was sentenced contained a provision for a minimum mandatory sentence." Hale, 630 So. 2d at 524. This court reasoned that, pursuant to Daniels, "once the sentences from multiple crimes committed during a single criminal episode have been enhanced through the habitual offender statutes, the total penalty" cannot "then be further increased by ordering that the sentences run consecutively." *Id*.

It is interesting to note that an opinion from the Second District—the district in conflict with the Fourth District in this case—succinctly explained the principle of Daniels and Hale. In Young v. State, 631 So. 2d 372 (Fla. 2d DCA 1994), the Second District detailed the process for determining whether consecutive minimum mandatory sentences may be imposed:

> Before "stacking" minimum mandatories, the court **must first ascertain** whether the minimum mandatories are imposed **pursuant to a statute of enhancement** or as **part of the statute prescribing the crime itself.** *Daniels v. State*, 595 So. 2d 952 (Fla. 1992). If all the minimum mandatories originate from a **statute of enhancement**, such as firearm possession or qualifying as a violent habitual felony offender, **then** they may not run consecutively unless separate and distinct crimes have occurred.

Young, 631 So. 2d at 373 (emphasis supplied).

This court has affirmed this principle of Daniels and Hale in other cases. For example, in Jackson v. State, 659 So. 2d 1060, 1063 (Fla. 1995), this court determined, in accord with Daniels, that because the statutes prescribing the crimes for which the defendant was convicted did not contain provisions for minimum mandatory sentences, the defendant's sentences could not be made to run consecutively through the use of two different enhancement statutes. There the defendant's convictions for felony murder and attempted armed robbery had been enhanced by the habitual offender statute and the firearm enhancement statute. *Id*. at 1060; s*ee also* Boler v. State, 678 So. 2d 319, 322 (Fla. 1996) (noting that "enhancement sentences arising out of a single criminal episode may not be imposed consecutively," but that the court had "distinguished statutory sentences in which the legislature ha[s] included a minimum mandatory sentence . . . from sentences in which there is no minimum mandatory penalty although one may be provided as an enhancement through [another statute]"); Brooks v. State, 630 So. 2d 527, 527 (Fla. 1993) (pointing out that in Hale "[w]e noted that the habitual offender statute constitutes an enhancement statute and that *because the original statutory provisions governing the crimes of which Hale was convicted contain no provision authorizing the imposition of*

punishment his sentences cannot be served consecutively, under the reasoning of *Daniels* . . . .") (emphasis supplied).

Other district courts—including the Second District now apparently in conflict with the Fourth District—have affirmed this Daniels/Hale principle. In addition to the case of Young, 631 So. 2d at 373, previously noted as to the Second District's summarization of this principle, in Davis v. State, 630 So. 2d 595, 595 (Fla. 2d DCA 1993), the Second District relied upon Daniels and Hale to determine that consecutive sentences could not be imposed because the minimum mandatory sentences "were not required by the statues prescribing penalties for the offenses of which [the defendant] was convicted." The Second District explained that in Daniels, "The supreme court held that the sentences could only be imposed concurrently because the statutes prescribing penalties for those offenses do not require minimum mandatory sentences." *Id*.

The First District Court of Appeal recognized the principle of Daniels in Penton v. State, 605 So. 2d 1319 (Fla. 1st DCA 1992), *approved by* 630 So. 2d 526 (Fla. 1993). There the First District held that, pursuant to Daniels, the trial court could not impose consecutive sentences for aggravated battery and attempted aggravated battery on a law enforcement officer, where there was "a single victim during a single criminal episode."

Id. at 1320. This was because the minimum mandatory sentences were imposed under the habitual violent felony offender statute, "and not the statute which prescribes the penalty for the offenses." *Id*.

Prior to the decision now before this court, the Fourth District recognized the Daniels/Hale principle in Talley v. State, 877 So. 2d 840 (Fla. 4th DCA 2004). In that case, consecutive sentences for fleeing, aggravated assault on a law enforcement officer, aggravated battery on a law enforcement officer, and battery on a law enforcement officer were found to be legal. *Id*. at 842. The district court reasoned that consecutive sentences were permitted because the defendant had been sentenced pursuant to a "reclassification" statute rather than an enhancement statute. *Id*. at 841. The Talley court looked to the language in Hale, where this court "recognized that it 'distinguished *statutory sentences* in which the legislature ha[s] included a minimum mandatory sentence, such as the sentences for capital crimes, from sentences in which there is no minimum mandatory penalty although one may be provided as an enhancement through [another statute].'" Talley, 877 So. 2d at 841-842 (emphasis in original) (quoting Hale, 630 So. 2d at 524). Just as is true here, the Talley court found that "the statute prescribing the penalty" for the offenses "includes the

mandatory minimum sentence, without resorting to a separate enhancement statute." Talley, 877 So. 2d at 842.

In the opinion at issue, the Fourth District has certified conflict with three cases. However, as pointed out by the Fourth District in its opinion, one case predates Daniels, and the other two do not contain a Daniels analysis.

The certified conflict case of Vickery v. State, 515 So. 2d 396 (Fla. 1st DCA 1987) was issued five years before Daniels. The only analysis done in Vickery related to whether the multiple offenses occurring during a single criminal episode were separate and distinct. *Id*. at 397. Such an analysis would be proper where the statute prescribing the penalty for the offenses does not contain any minimum mandatory sentence. Daniels, 595 So. 2d at 954 n.2 (rejecting alternative argument that crimes arose from separate incidents, at separate times and places). Regardless, as noted by the Fourth District, it would appear that Vickery has been superseded by Daniels and Hale. Kelly, 924 So. 2d at 71.

The certified conflict case of Frazier v. State, 630 So. 2d 1237 (Fla. 2d DCA), *review denied*, 639 So. 2d 978 (Fla. 1994), issued after Daniels and Hale, did not perform an analysis pursuant to either of those cases. Instead, it relied upon Vickery and—just as Vickery did—discussed only whether the

convictions arose out of the same criminal episode, and whether they were separate and distinct. *Id*. at 1237. The Second District's analysis as to consecutive sentences did not even touch on whether the statute prescribing the penalty contained a minimum mandatory sentence, nor did it rest upon any Supreme Court of Florida case.

In the certified conflict case of Johnson v. State, 695 So. 2d 861, 861 (Fla. 2d DCA 1997), the Second District relied upon its case of Frazier to again analyze consecutive minimum mandatory sentences pursuant to whether the offenses arose out of the same criminal episode and involved the same contraband. Again, the Second District did not recognize Daniels and Hale—or any other Supreme Court of Florida case—and did not perform any analysis as to whether a minimum mandatory sentence was contained within the statute prescribing the penalty for the offenses.

As previously discussed, the Second District precisely delineated the Daniels/Hale principle in Young, 631 So. 2d at 373:

> Before "stacking" minimum mandatories, the court must first ascertain whether the minimum mandatories are imposed pursuant to a statute of enhancement or as part of the statute prescribing the crime itself. *Daniels v. State* . . . . If all the minimum mandatories originate from a statute of enhancement . . . then they may not run consecutively unless separate and distinct crimes have occurred.

It would appear that, in Frazer and Johnson, the Second District failed to follow its own opinion detailing that a trial court "must first ascertain whether the minimum mandatories" have been imposed as part of a "statute prescribing the crime itself." Young, 631 So. 2d at 373.

Petitioner's argument focuses on whether the offenses arose from a single transaction. This argument ignores the fact that section 893.135(5) authorizes "separate convictions and sentences" for both trafficking and conspiracy, even if they arise out of the same transaction. The argument also ignores the principle set forth in Daniels and Hale, and recognized by the Fourth District: if a minimum mandatory sentence is part of the statute that prescribes the crime, those minimum mandatory sentences may be imposed consecutively even if the crimes arise out of the same transaction.

Petitioner also briefly mentions that he believes Brothers v. State, 577 So. 2d 701 (Fla. 4th DCA 1991) is in conflict. However, that case was not certified as being in conflict and, like Vickery, is not relevant because it was decided **prior** to Daniels and Hale. There is no direct and express conflict, as the case stands only for the proposition that consecutive minimum mandatory sentences were properly imposed where the drug conspiracy counts and the trafficking counts occurred on separate days. Brothers, 577 So. 2d at 702.

The Fourth District Court of Appeal was correct in its analysis of this court's prior cases, and correctly ruled that petitioner's minimum mandatory sentences could be imposed consecutively. Its decision in Kelly v. State, 924 So. 2d 69 (Fla. 4th DCA 2006) should be affirmed by this court.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities cited herein, respondent respectfully requests that this court affirm the decision of the Fourth District Court of Appeal in Kelly v. State, 924 So. 2d 69 (Fla. 4th DCA 2006).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded via U.S. mail to counsel for petitioner: Fred Haddad, One Financial Plaza, Suite 2612, Fort Lauderdale, Florida 33394 on June 27, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Times New Roman 14-point type and complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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