IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-842
Lower Tribunal No.: 4D04-4009

JOSEPH KELLY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON MERITS

[On certified conflict from the District Court of Appeal of Florida, Fourth District]

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STATEMENT OF THE CASE AND FACTS

This matter is before the Court upon the decision of the District Court of Appeals, Fourth District, in *Kelly v. State*, 31 FLW D.1058 (4 Fla. DCA 2006). That Court held, in affirming the denial of Petitioner's Petition for Relief pursuant to R.Cr.P. 3.850 in the Circuit Court of Broward County that in its interpretation of the Florida drug trafficking statute 813.135:

> "The statute authorizes convictions and sentences with mandatory minimums for both the trafficking and conspiracy even though they may arise out of the same transaction."

Thereafter, upon the Petition and Motion of the Petitioner Kelly the Court has certified that its decision is in conflict with *Johnson v. State*, 695 So.2d 861 (Fla. 2 DCA 1997); *Frazier v. State*, 630 So.2d 1237 (Fla. 2 DCA 1994), and *Vickery v. State*, 515 So.2d 396 (Fla. 1st DCA 1987). Petitioner will also submit it is in conflict with another decision of the Fourth District Court of Appeals, *Brothers v. State*, 577 So.2d 701 (4 Fla. DCA 1991).

This matter was initiated after Mr. Kelly filed, on 1 March 2004, a twenty page Motion for Post Conviction Relief, setting forth his basis for relief, including, particularly, the impropriety of the trial Court and the prosecutor as well as defense counsel advising the Petitioner during his plea negotiations and plea colloquy that he was subject to a thirty year mandatory minimum sentence for conspiracy to traffic and trafficking in the same cocaine arising from a single transaction. The

Motion for Relief and the exhibits are attached in Petitioner's Appendix as A.5 to this Brief and thus the Petitioner would, as he did on appeal, set out the background of the case, taken from the transcripts that were part of the Appellate Court record, and alluded to in the Court's opinion, all of which are attached hereto in the Petitioner's Appendix.

The Petitioner was a small time cocaine user, who had purchased gram quantities of cocaine from an individual who came to be a confidential informant of Plantation, Florida narcotics detective Mike Capo. In fact Detective Capo testified, no information had ever been developed that indicated the Petitioner was ever a dealer of any kind [A4-14-25].

This informant had apparently not had contact with the Petitioner for quite awhile, but in the mid afternoon of 20 December 1999, the informant received a page from Kelly. Kelly told the informant that a friend of his named Michael had an uncle that wanted to purchase some cocaine; Kelly was "put off" and the informant called Detective Capo [A4-14-25].

Later that afternoon, at the direction of Detective Capo, the informant called Kelly, and told Kelly he no longer dealt in small quantities of cocaine. Capo told the informant to push a kilogram, and that he should indicate the deal could not be consummated until the next day were a deal to be made [A4-18-20].

The informant would not do a one ounce deal that day at all as the Petitioner again asked and phone calls began the next morning December 21, 1999, trying to set a time and a place to "do the deal"; the parties eventually met that day to examine the cocaine and the money. At that time the arrest of the Petitioner was made. This was again on 21 December 1999. All agreements and "consummations" were on that date.

The Petitioner was held on a high bail, and an Information was filed on 11 January 2000 charging the Petitioner with trafficking in cocaine over 400 grams and conspiracy to traffic cocaine 400 grams.

On 13 January 2000, some three weeks after his arrest, just two days after an Information was filed, and at least a month before any discovery was received the Petitioner entered into a substantial assistance agreement with the State, and one week thereafter he entered a plea of guilty to the charge [A2, et seq].

The Petitioner violated that agreement and was sentenced to prison. After sentencing, Notice of Appeal was filed and the Petitioner, through new counsel, filed a Motion to Correct Sentencing Error which, upon remand, was heard by the trial Court and denied [A4, et seq].

Those issues were then brought before the Appellate Court, as noted, and the Court set out the circumstances of the substantial assistance agreement, the

violation, the mandatory sentence and the sentencing inducement or entrapment issues.

The Appeals Court affirmed the judgment and sentence, *Kelly v. State*, 821 So.2d 1255 (4 Fla. DCA 2002) and this Court denied a Petition for Writ of Certiorari on 26 March 2003 [*Kelly v. State*, S.C. Case Number 02-1989].

Petitioner, as noted, then filed his 3.850 Motion, and he began by attesting:

> The Defendant entered into a substantial assistance agreement because he was advised by his counsel, the State Attorney, and in actuality the trial Court that he could be sentenced to 30 years mandatory minimum were he to proceed to trial and lose his claims of entrapment. All three were in error and caused the Defendant to enter a plea he would not otherwise have entered.

Mr. Kelly then set forth what was stated by the prosecutor [motion, page 7]:

> MR. GALLAGHER: I told Mr. Kelly he had to plea guilty to everything as he's done here today, plead open to the Court. I told him his maximum sentence on all his charges potentially sixty-one years in Florida State prison because we have two first degree felonies and he had that first degree misdemeanor, so total of sixty-one years.
>
> And I told him potentially 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. [Emphasis by Petitioner].

The prosecutor reiterated this later on in the colloquy:

> I told Mr. Kelly he would be arrested and taken to the Broward County Jail. And he would be held in the Broward County Jail with no bond which means there's

> no bond possible that he could make to get him out of jail. And I told him he would be brought in front of Your Honor for sentencing. And at that time he would be staring at a sentence anywhere from the fifteen year mandatory minimums on count one and two to run concurrent and a one year in the county up to a maximum of what I told him about earlier, sixty-one years in Florida State prison with thirty of those years reflected as mandatory minimum sentences and five hundred thousand dollars in fines. And that would be within your discretion. [Emphasis by Appellant].

The trial Court also advised:

> Further, Mr. Kelly, by law I can tell you what the punishment can be. I know Mr. Gallagher told you what the penalties are. You have to hear it from the Court to make it a valid presentation.
>
> Counts one and two are first degree felonies. The maximum sentence I could impose at sentencing would be thirty years Florida State prison for each count within a fifteen year minimum mandatory and a two hundred and fifty thousand dollar fine for each count. With regard to count three, that's a first degree misdemeanor. The maximum sentence is three sixty-four days in the Broward County jail and a thousand dollar fine.

Thus, the Petitioner was advised by all that he was facing thirty years of mandatory minimum sentences as the trial Court could stack the mandatory minimum sentence on each count. This advice was alleged to be erroneous, and it caused the Petitioner, he swore, to enter a plea he would not otherwise have entered. The Petitioner asserted where he advised that the mandatory had to be fifteen years he would have gone to trial.

The trial Court denied the 3.850 Petition and Petitioner appealed citing not only to *Brothers v. State*, 557 So.2d 334 (Fla. 4 DCA 1991) but also the decisions of the First and Second Districts in *Vickery v. State*, 575 So.2d 396 (Fla. 1 DCA 1987), *Frazier v. State*, 630 So.2d 1237 (Fla. 2 DCA 1994) and *Johnson v. State*, 695 So.2d 861 (Fla. 2 DCA 1997). Those decisions all hold [*Brothers* by implication and analysis] that trafficking and conspiracy to traffick offenses which arise out of a single transaction for the same contraband are not subject to consecutive mandatory minimum sentences.

In rejecting that law, the Appeals Court embraced this Court's decisions in two non trafficking cases, to wit: *Daniels v. State*, 592 So.2d 952 (Fla. 1992) and *Hale v. State*, 630 So.2d 521 (Fla. 1993) [which predates *Frazier* and *Johnson*] and held that "the reasoning of *Vickery*, has been superseded by *Daniels* and *Hale*."

Quite correctly the Fourth District has certified this matter to the Court as the conflict could not be more apparent.

POINTS INVOLVED ON CERTIORARI

WHETHER THE CONFLICTING DECISION OF THE FOURTH DISTRICT SHOULD BE REJECTED AND THE DECISIONS OF THE FIRST AND SECOND DISTRICTS BE APPROVED

SUMMARY OF THE ARGUMENT

The case law has been, including by interpretation in the Fourth District, that consecutive mandatory minimum sentences for trafficking in a controlled substance and an alleged conspiracy to traffick in that same substance, one may not be imposed if it is part of the same transaction.

The Districts that have addressed the issue, the First, Second and, again, the Fourth, by implication, have held just that. The Fourth District in the instant matter, however, determined that this Court's opinions in two "non-trafficking" cases, *Daniels*, *supra* and *Hale*, *supra* have, in essence, overruled the decisions of the District Courts on the point presented. Petitioner will argue that the Fourth District committed error in not following the decisions of the other Districts and in misapplying the inverse results of this Court in the cited cases.

ARGUMENT

THE CONFLICTING DECISION OF THE FOURTH DISTRICT COURT OF APPEALS SHOULD BE REJECTED AND THE DECISIONS OF THE FIRST AND SECOND DISTRICTS BE APPROVED

There have been several cases decided that were directly on point with the issue presented below, that is whether consecutive mandatory minimum sentences could be imposed for a conspiracy to traffic and trafficking arising out of a single episode or, as the Appeals Court below framed the issue, arising "out of the same transaction."

While not cited by the Appeals Court, the Petitioner would open this argument by mentioning a case where the Fourth District Court of Appeals upheld the stacking of mandatory minimums, but the method in reasoning illustrates its consonance with the other Districts.

In its ruling, the Fourth District stated:

> We hold that the trial court permissibly stacked the appellant's consecutive minimum mandatory sentences because the appellant arranged the drug transactions at times different from when he actually executed them. He negotiated the first transaction on April 6 and 7 but did not pick up the cocaine until April 8, and he negotiated the second transaction on June 5 or 6 but did not pick up the cocaine until June 7. Thus, the conspiracies were

> separate and distinct from the trafficking. *See Boom v. State*, 538 So.2d 476 (Fla. 2d DCA 1989); *Berrio v. State*, 518 So.2d (Fla. 2d DCA 1988). *Contra Short v. State*, 572 So.2d 1007 (Fla. 3d DCA 1991).

Thus, the Court recognized that conspiracies that are separate in time and scope from the substantive offense can be the subject of consecutive mandatory sentences despite an argument for concurrent imposition. That is not the case at bench.

Turning to the three cases that are directly on point, the First District Court of Appeals reviewed the convictions of a trafficker in *Vickery v. State*, 515 So.2d 396 (1 Fla. DCA 1987). While there were several conspiracies proven, the Court, concluded that, "[b]ecause the cocaine offenses [trafficking in cocaine and conspiracy to traffick in cocaine] constituted a single criminal episode and were neither separate nor distinct, consecutive mandatory minimum sentences should not have been imposed for both of these offenses."

Relying on a case from this Court, the *Vickery* Court held:

> In *Palmer v. State*, 438 So.2d 1 (Fla.1983), the Florida Supreme Court declined to permit consecutive mandatory minimum sentences for multiple offenses which occurred during a single criminal episode. The court later indicated in *State v. Enmund*, 476 So.2d 165 (Fla.1985), that consecutive mandatory terms may be imposed for multiple offenses which are separate and distinct. *See also, Murray v. State*, 491 So.2d 1120 (Fla.1986); *State v. Thomas*, 487 So.2d 1043 (Fla.1986); *compare Wilson v. State*, 467 So.2d 996 (Fla.1985); *State v. Ames*, 467 So.2d 994 (Fla.1985). While these cases addressed the

> imposition of mandatory minimum sentences for the possession of a firearm during the commission of a felony, the rationale expressed is likewise applicable to mandatory minimum sentences imposed pursuant to section 893.135 for trafficking in contraband narcotics. We find that the cannabis offense in the present case is sufficiently separate and distinct from the other offenses to permit a consecutive mandatory term of imprisonment. However, the offenses of trafficking and conspiracy to traffic in cocaine arose from a single transaction involving the same contraband. These offenses were not sufficiently distinct to permit consecutive mandatory sentences. In accordance with *Palmer, supra,* the mandatory minimum sentences for the cocaine offenses should be concurrent.

On January 28, 1994, after this Court's decisions in *Hale*, *supra* and *Daniels*, *supra*, the cases relied upon by the Fourth District at bench, the Second District authored a decision directly on the issue under consideration.

That the Court, in *Frazier v. State*, 630 So.2d 1237 (2 DCA 1994), stated, regarding Frazier's claims of sentencing error,

> "[h]e first argues that the thirty-year sentences imposed consecutively for each of the cocaine offenses were improperly stacked. Because of the similarity in time, place and amounts of cocaine, the facts show the same criminal episode. Although this court has held in *Berrio v. State,* 538 So.2d 110 (Fla. 2d DCA 1989), that consecutive mandatory-minimum sentences could be imposed for conspiracy to traffic in cocaine and actual trafficking in cocaine, there the conspiracy to traffic was much broader in scope, occurred at a separate time and was not part of the same criminal episode. These facts are not present here. This case is more similar to *Vickery v. State,* 515 So.2d 396 (Fla. 1st DCA 1987). We therefore

> reverse the consecutive sentences for the trafficking convictions and remand for resentencing."

Several years later the Second District again had the change to revisit the point when before it came *Johnson v. State*, 695 So.2d 861 (2 Fla. DA 1997), again the Court held:

> Consecutive minimum mandatory sentences may not be imposed for trafficking in cocaine and conspiracy to traffic in cocaine, when those offenses arise out of the same criminal episode and involve the same contraband. *See Frazier v. State,* 630 So.2d 1237 (Fla. 2d DCA), *review denied,*639 So.2d 978 (Fla.1994); *Drake v. State,* 614 So.2d 24 (Fla. 2d DCA 1993); *Boom v. State,* 574 So.2d 1213 (Fla. 2d DCA 1991). Since the record shows that both the trafficking and the conspiracy in this instance arose out of the same criminal episode and involved the same contraband, the trial court erred in ordering the minimum mandatory sentences for those offenses to be served consecutively. We, therefore, reverse and remand for resentencing. We affirm in all other respects.

The Fourth District upon being presented Mr. Kelly's issues rejected this law, including perforce the reliance by the Courts on this Court's opinion in *Palmer v. State*, 438 So.2d 1 (Fla. 1983), and turned to two unrelated, and Petitioner submits, inapplicable cases uphold the trial Court's decision.

The first case is *Daniels v. State*, 595 So.2d 952 (Fla. 192) where in fact this Court held that the trial Court could not impose consecutive mandatory minimum sentences on that individual.

The facts, as stated by this Court, upon the certified question by the Appeals Court [the First District] were:

> Daniels was convicted of burglary while armed, sexual battery with a deadly weapon, and armed robbery, all of which arose out of a single criminal episode. On each of the charges, he was sentenced to life in prison with a fifteen-year minimum mandatory sentence. The sentences, including the minimum mandatories, were designated to run consecutively with each other. The district court of appeal affirmed the sentences and certified the foregoing question.

Relying on its prior decision in *Palmer*, the Court held that mandatory minimums could only be imposed concurrently. The arguments in the case centered in part upon the habitual or repeat offender statues which provided a certain mandatory minimum sentences.

This Court held, which, parenthetically was the centerpiece of the Fourth District's reasoning, that, "[b]ecause the statute prescribing the penalty for Daniels' 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."

This Court found it to be a close call, but the crucial factor that must be remembered is that Daniels was convicted of burglary, robbery and sexual battery, while armed, all separate and distinct crimes, whether it be a single episode or not,

yet even then the consecutive imposition of mandatory enhancements were rejected.

Reliance and comfort was also found by the Fourth District in the Court's decision in *Hale v. State*, 630 So.2d 521 (Fla. 1994), where again this Court reversed the imposition of consecutive mandatory minimum sentences.

It is interesting to note that Hale was convicted inter alia of possession of cocaine with intent to sell, and sale of cocaine, for in fact the sale of a small quantity of cocaine to a confidential informant. Then this Court observed:

> The court sentenced Hale to two consecutive twenty-five year habitual violent felony offender terms, one term for the conviction on the charge of sale of cocaine and another term for the conviction on the charge of possession of the same cocaine, with each sentence carrying a ten-year minimum mandatory sentence. Accordingly, Hale would serve a minimum of twenty years before being eligible for parole.

The Court held that on the basis of *Daniels*, *supra* it had to reverse that sentence.

One should consider the following as the argument proceeds to the rationale of the Fourth District.

Assume Hale has possessed and then sold 27.7 grams of cocaine. This Court's reasoning would hold that he could only receive concurrent sentences. But, if he sold and possessed 28½ grams then under the logic of the Fourth District, because the drug trafficking statute has enhancements of 3, 5 and 15 years

mandatory minimums for cocaine amounts above twenty eight grams, Hale could then receive the 30 years under the trafficking statute with for over 28 grams, 6 years of mandatories, or double [stacked] mandatories for the same episode as opposed to a three year mandatory.

That would be under the Appellate Court interpretation under review that held:

> Under the *Daniels/Hale* analysis, in this case the court could impose consecutive mandatory minimum sentences for both conspiracy and trafficking of the same cocaine, because section 893.135 specifically requires a mandatory minimum sentence for each separate crime. Paraphrasing *Daniels*, because the statute prescribing the penalty for Daniels' offenses *does* contain a provision for a minimum mandatory sentence, Kelly's minimum mandatory sentences imposed for the crimes he committed arising out of the same criminal episode *may* be imposed consecutively.

One must remember that conspiracy generally [unless otherwise provided], like attempt or solicitation, were crimes that reduced the category of the crime intended one degree. As an example attempted trafficking still becomes or second degree felony with no mandatories for the amounts attempted to be trafficked.

Certainly conspiracy to commit first degree murder is not punished as is the actual commission of first degree murder, nor is solicitation thereof.

However, the legislature saw fit to punish a conspiracy to traffick in cocaine or any drug the same as if the actual crime had been committed. Hence, by the

very import of the intent of the trafficking statute any sentence where the conspiracy is the same episode as the trafficking would have to be concurrent by served.

The Courts that have addressed this have, sub silencio, realized the obvious legislative intent as well as proper statutory interpretation. Buttressing this is the fact that the Courts uniformly have held that if the conspiracy is broader than the substantive offense or if there is a difference in time and place and thus a separate and distinct offense, then consecutive sentences, including the stacking of mandatory minimums may be imposed. The converse has also been held to be true. The decision of the Fourth District turns all of that upside down, it is submitted, and is erroneous.

CONCLUSION

The decision of the District Court of Appeals is in conflict with the other decisions mentioned, and further the decision is contrary to the established law.

This Court should find that the Appeals Court erred in holding that consecutive mandatories could be imposed upon Mr. Kelly and quash that opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was E-Filed to the Clerk of the Court [e-file@flcourts.org] and was furnished by email to Celia A. Terenzio, Esq., and to Melynda L. Melear, Esq., Office of the Attorney General, 1655 Palm Beach Lakes Blvd, West Palm Beach, Florida 33401-2299, this ___ day of June, 20006.

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CERTIFICATE OF TYPEFACE

Counsel for the Petitioner hereby certifies, in accordance with Rule 9.210, Florida Rules of Appellate Procedure, that the instant Brief has been typed using Times New Roman 14pt.

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