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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. SC13-704

FRANK ANDRE MOSLEY,

Respondent.

_________________________________/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent adds the following to the Petitioner's recounting of the proceedings below.

Mosley raised the issue now pending before this Court in a motion to correct sentencing error under Florida Rule of Criminal Procedure 3.800(b)(2). (R-4.493-497) The trial court denied the motion on two grounds. (R-4.504-06) First, the court found that the crimes were not part of the same criminal episode. Second, despite controlling First District precedent, the court opted instead to follow Young v. State, 37 So. 3d 389, 391 (Fla. 5th DCA 2010), an extension of Reeves v. State, 957 So. 2d 625 (Fla. 2007).

Concluding that the crimes were part of the same episode, the First District followed its own precedent and reversed. The court certified conflict with Young. Mosley v. State, 112 So. 3d 538 (Fla. 1st DCA 2013). In this Court, the state has not contested the district court's determination that the crimes occurred in a single episode.

SUMMARY OF THE ARGUMENT

The Fifth District erred in relying on this Court's decision in Reeves v. State, 957 So. 2d 625 (Fla. 2007), to split with the four other district courts on whether a trial court may impose consecutive Prison Releasee Reoffender (PRR) sentences for crimes committed in a single episode. Reeves rests on a questionable finding of a legislative preference for consecutive PRR sentences and an insupportable distinction between sentencing provisions requiring minimum sentences and those increasing maximum authorized sentences. Although the result in Reeves can arguably be justified by the express authorization of consecutive Criminal Punishment Code (CPC) sentences in combination with the statement of legislative intent to punish PRRs to the fullest extent of the law, it should be limited to the scenario it addressed: a PRR sentence for one offense consecutive to a sentence under the Criminal Punishment Code (CPC) sentence on another offense occurring in the same episode.

This Court should approve the First District decision in this case and disapprove the conflicting Fifth District decision in Young v. State, 37 So. 3d 389 (Fla. 5th DCA 2010).

ARGUMENT

CONSECUTIVE PRISON RELEASEE REOFFENDER SENTENCES ARE UNAUTHORIZED FOR CRIMES COMMITTED IN THE SAME EPISODE.

Standard of review: As Petitioner has stated, the standard of review is de novo.

Merits: The First, Second, Third, and Fourth District Courts of Appeal correctly hold that consecutive Prison Releasee Reoffender (PRR) sentences are unauthorized for two offenses committed in a single episode. See Boyd v. State, 988 So.2d 1242, 1244 (Fla. 2nd DCA 2008), abrogated on other grounds, Pifer v. State, 59 So. 3d 225 (Fla. 2d DCA 2011); Gonzalez v. State, 876 So.2d 658, 661-662 (Fla. 3rd DCA 2004); Philmore v. State, 760 So.2d 239, 240 (Fla. 4th DCA 2000). The Fifth District, which had also so held in Williams v. State, 804 So. 2d 572 (Fla. 5th DCA 2002), erred in concluding to the contrary in reliance on Reeves v. State, 957 So. 2d 625 (Fla. 2007). Young v. State, 37 So. 3d 389 (Fla. 5th DCA 2010). Reeves rests on a questionable finding of legislative intent and an insignificant distinction between sentencing provisions requiring minimum sentences and those increasing maximum authorized sentences. It should be limited to the scenario it addressed: a PRR sentence for one offense to be served consecutively to a sentence under the Criminal Punishment Code (CPC) on a second offense occurring in the same episode.

In Reeves, this Court held that a CPC sentence for one crime could be made consecutive to a PRR sentence for a crime committed in the same episode. The specific crimes in Reeves were resisting an officer with violence and battery on a police officer. The PRR Act, now codified at section 775.082(9), Florida Statutes, authorizes a PRR sentence for resisting an officer with violence but not for battery of an officer. State v. Hearns, 961 So. 2d 211 (Fla. 2007); Sheppard v. State, 994 So. 2d 1255 (Fla. 1st DCA 2008). Thus, Reeves could be sentenced only under the CPC for battery on an officer, and on proof by the state that he qualified, could be sentenced only as a PRR for resisting with violence. See § 775.082(9)(a)3, Fla. Stat. (specifying that upon proof by state attorney that defendant is a prison releasee reoffender, he or she "must be sentenced" as such).

Although the result in Reeves can be justified on other grounds, the Court's statutory analysis provides an unstable foundation to extend its holding. The Court based its approval of consecutive PRR and CPC sentences on a perceived legislative directive that a PRR sentence not "serve as the maximum sentence for all crimes arising out the same criminal episode." 957 So. 2d at 629 (emphasis supplied). However, the provisions cited in support are silent on sentences for multiple crimes. Subsection 775.082(9)(c) specifies that nothing in the PRR provisions precludes a greater sentence under section 775.084 (the habitual offender law) or any other provision. Subsection 775.082(9)(d)1 expresses

legislative intent to punish PRR offenders "to the fullest extent of the law." These provisions justify imposing both a PRR sentence and a longer sentence under the CPC or the habitual offender statute for a single offense, as held in Grant v. State, 770 So. 2d 655 (Fla. 2000), and Nettles v. State, 850 So. 2d 487 (Fla. 2003). However, they have no clear bearing on whether consecutive or concurrent sentences for separate crimes committed in the same episode are authorized or required.

Instead, the language of the section 775.082(9), when compared with other sentencing laws, leads to the opposite conclusion: that consecutive PRR sentences for crimes in a single episode are contrary to legislative intent. In the two decades since Hale v. State, 630 So. 2d 521 (Fla. 1993), when the Legislature has wanted to require or permit consecutive sentences, it has said so. Hale's holding that consecutive habitual offender sentences are unauthorized for crimes committed in a single episode rests in part on what the state has termed the habitual offender statute's "apparent silence regarding concurrent/consecutive sentencing." Answer Brief at 22. See Hale, 630 So. 2d at 524 ("We find nothing in the language of the habitual offender statute which suggests that the legislature also intended that, once the sentences from multiple crimes committed during a single criminal episode have been enhanced through the habitual offender statutes, the total penalty should then be further increased by ordering that the sentences run consecutively.") In the

Criminal Punishment Code, enacted in 1998, five years after Hale, the Legislature specified that "[t]the sentencing court may impose such sentences (i.e., those under the CPC) concurrently or consecutively." Ch. 98-204, § 6, Laws of Fla (now codified at § 921.0024(2), Fla Stat. (2013)). In creating the "10-20-Life" law in 1999, six years after Hale, the Legislature specified that "[t]he court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense." Ch. 99-12, § 1, Laws of Fla. (codified at § 775.087(2)(d) and (3)(d), Fla. Stat. (2013)).

In the 10-20-Life law, the Legislature also declared its intent that offenders who use firearms in felonies "be punished to the fullest extent of the law." If the Legislature intended that this language authorize consecutive sentences, as the Court discerned from the same phrase in Reeves, it would not have needed to also explicitly require consecutive sentences. Constructions which render part of a statute superfluous are to be avoided. Koile v. State, 934 So. 2d 1226, 1231 (Fla. 2006).

The Legislature enacted the PRR Act in 1997, four years after Hale. Ch. 97-239, Laws of Fla. As the Court noted in Reeves, the Legislature specified that releasee reoffenders are to be punished to the fullest extent of the law. However, as in the habitual offender law construed in Hale and contrary to the CPC and 10-20-life laws enacted one and two years later, the PRR Act is silent as to

consecutive sentences. Where the Legislature uses the same words in two different statutes, courts assume the same meaning was intended. Goldstein v. Acme Concrete Corp., 103 So. 2d 202 (Fla. 1958). The Court has applied this principle to the PRR law in assigning the same meaning to the term "forcible felony" in both the PRR and Violent Career Criminal sentencing laws. State v. Hearns, 961 So. 2d 211, 217 (Fla. 2007). In this context, the principle of *inclusio unius* (a.k.a. *expressio unius*) also applies: "when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded." Gay v. Singletary, 700 So. 2d 1220, 1221 (Fla. 1997). Further, courts "are not at liberty to add words to statutes that were not placed there by the Legislature." Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999). The conclusion in Reeves that the Legislature intended that PRR sentences be consecutive to other sentences contravenes these principles of statutory construction.

Reeves also inaccurately distinguished both Hale and Daniels v. State, 595 So. 2d 952 (Fla. 1992), which Hale extended, as cases involving enhanced sentences rather than mandatory minimums. Hale concerned an overall habitual offender sentence enhancement, but Daniels involved the mandatory minimum term for habitual violent felony offenders. Of greater significance, Palmer v. State, 438 So. 2d 1 (Fla. 1983), a foundation of both Daniels and Hale, concerned the

mandatory minimum term for firearm possession during a specified felony. Thus, contrary to Reeves, the Court's decisions to that point did not distinguish enhancements from mandatory minimums as grounds to authorize or prohibit consecutive sentences for crimes committed in a single episode.[1]

Further, the distinction between sentence enhancements and mandatory minimums is ephemeral. PRR is a sentence enhancement in the sense that it renders the offender ineligible for gain time and requires that he or she serve 100 percent of the statutorily mandated sentence. § 775.082(9)(b), Fla. Stat. A PRR designation enhances a 4.25-year term (5 years less 15 percent gain time otherwise authorized under section 944.275 Florida Statutes) for a third-degree felony to 5 years, a 12.75-year term for a second-degree felony to 15 years, and a 25.5-year term for a first-degree felony to 30 years. Particularly in light of Alleyne v. United

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1. Less significantly, Reeves is also in error in distinguishing Hale and Daniels as cases arising under the guidelines and "violent career criminal statute," which consequently "have little bearing on the interpretation of the PRR statute." 957 So. 2d at 633. First, the guidelines were irrelevant in Hale and Daniels, because the habitual offender sentences imposed in those cases were exempt from the guidelines. See § 775.084(4)(e), Fla. Stat. (1993) ("A sentence imposed under this section is not subject to s. 921.001."). Second, the Court was mistaken in concluding that both Hale and Daniels arose under the "habitual violent felony offender portion of the violent career criminal statute." Hale involved a habitual offender sentence, not a habitual violent offender sentence. Daniels involved the habitual violent felony offender provisions of the habitual offender law, but it was not then part of any "violent career criminal statute." The Legislature added the violent career criminal designation to section 775.084 in 1995, after both Daniels and Hale. Ch. 95-182, § 2, Laws of Fla.

States, 133 S.Ct. 2151 (2013), which equated mandatory minimums with sentence enhancements for purposes of the Sixth Amendment requirement of a jury finding authorizing a particular sentence, the distinction does not remain viable.

Because of its questionable discernment of legislative intent and its dubious distinction between statutes authorizing mandatory minimums and those creating sentence enhancements, Reeves should not be extended to authorize consecutive prison releasee sentences for crimes in a single episode.

An important factual distinction also weighs against extending Reeves. As noted above, the trial court in Reeves had no choice but to impose a PRR sentence for one of the offenses, resisting with violence, and a CPC sentence for the other, battery on an officer. Under those circumstances, the CPC's grant of discretion to impose consecutive or concurrent sentences, combined with the legislative preference in the PRR law for punishment "to the fullest extent of the law," arguably justifies giving the trial court consecutive sentencing authority. The result in Reeves may remain supportable on this rationale. This case and Young differ in that all offenses qualified for PRR sentencing, and the trial court in each case complied with the legislative mandate in subsection 775.082(9)(a)3 to impose a PRR sentence for each offense that meets the statutory criteria. Young was sentenced for five counts of aggravated assault, enumerated in subsection 775.082(9)(a)1.j. 37 So. 3d at 389. Mosley's offenses, lewd or lascivious

molestation under section 800.04, Florida Statutes, and aggravated stalking under section 784.048, are also enumerated in the PRR law. § 775.082(9)(a)1.*l. and* 1.o, Fla. Stat. Consequently, this case falls under the Palmer/Daniels/Hale line of precedent involving sentences under the same sentencing statute rather than Reeves and other cases involving offenses sentenced under different statutes. See e.g., Mills v. State, 23 So.3d 186, 188 (Fla. 1st DCA 2009) ("[C]onsecutive HFO and non-HFO sentences imposed for crimes committed during a single criminal episode are legal if the aggregate sentence is less than that which could have been imposed if all HFO eligible convictions had been enhanced and ordered to run concurrently.")

For these reasons, Reeves should be limited to its specific holding authorizing imposition of consecutive PRR and CPC sentences for separate crimes committed in a single episode. The Court should approve the First District decision in this case and disapprove the Fifth District decision in Young.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, the Respondent requests that this Honorable Court approve the First District decision.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Trisha Meggs Pate, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, this 28th day of March, 2014. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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