IN THE SUPREME COURT OF FLORIDA

CARLOS J. ACEVEDO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

Case No. SC15-1873
L.T. Case Nos.: 4D14-3124
06-002820CF10A

REPLY BRIEF OF PETITIONER

On Review from the District Court of Appeal
Fourth District, State of Florida

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ARGUMENT

The issue before this Court is straightforward – how courts are to determine whether one criminal statute is "similar in elements" to another. In his Initial Brief, Acevedo cited no fewer than nine cases from this Court and others that conducted a "similarity" analysis just like the one conducted by the Fifth District in the case certified to conflict with this one, *Durant v. State*, 94 So. 3d 669 (Fla. 5th DCA 2012).

The State completely ignores almost all of the on-point cases cited by Acevedo and, instead, asserts mere conclusions with no support in the law. Indeed, the State does not cite one case, other than the decision below, that conducts a similarity analysis simply by considering whether two statutes have one or more elements in common, while ignoring the ways in which the statutes are dissimilar.

Simply put, the State offers no credible explanation as to why the Fourth District's decision below is correct and the Fifth District's analysis in *Durant* – a decision supported by legal precedent – is not.

I. ACEVEDO'S CLAIM IS COGNIZABLE UNDER RULE 3.800(a).

The State incorrectly asserts that Acevedo's claim is not cognizable under Florida Rule of Criminal Procedure 3.800(a). As discussed in the Initial Brief and below, the sentencing court impermissibly designated Acevedo a DSFO. "A sentence that patently fails to comport with statutory or constitutional limitations is

by definition 'illegal.'" *State v. Mancino*, 714 So. 2d 429, 433 (Fla. 1998). Because this sentencing error "'may be identified on the face of the record,'" it is cognizable under rule 3.800(a). *Plott v. State*, 148 So. 3d 90, 93 (Fla. 2014) (quoting *Williams v. State*, 957 So. 2d 600, 602 (Fla. 2007)).

II. THE PLAIN LANGUAGE OF THE STATUTE CONTROLS ITS INTERPRETATION.

The State urges this Court to ignore the plain language of section 794.0115(2)(e); focus narrowly on that statute's supposed "purpose" of punishing a specific set of qualifying defendants; and ignore the rule of lenity because it is a canon of last resort. (AB:13-17). The State is wrong. The plain language of the statute dictates that courts must consider **both** similarities **and** dissimilarities, and the inquiry should end there. Even if this was not the case, however, normal principles of statutory interpretation, including the rule of lenity, would compel the same conclusion – a court must evaluate statutory offenses in their entirety in determining whether they are "similar in elements."

If a statute is clear and unambiguous, the analysis stops – "courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005). Where a word in a statute is undefined, its plain and obvious meaning may be determined from a dictionary. *Townsend v. R.J. Reynolds Tobacco Co.*, 192 So. 3d 1223, 1228 (Fla. 2016).

Merriam-Webster's Dictionary defines "similar" as "almost the same as someone or something else." *See* http://www.merriam-webster.com/dictionary/similar (last visited Aug. 21, 2016). Likewise, the Cambridge Dictionary defines "similar" as "looking or being almost the same, although not exactly." *See* Cambridge Dictionary, http://dictionary.cambridge.org/us/dictionary/english/similar (last visited Aug. 21, 2016). Thus, while "similar in elements" may not require elements that are **exactly** the same, it requires something close to that, and certainly more than a passing resemblance.

It necessarily follows, then, that in determining whether two statutes are "almost the same," courts must consider **both** similarities **and** dissimilarities, as similarities paint only half the picture. Looking only at similarities, for example, one might conclude that a new car and an old lawn mower are "almost the same" because both have wheels, tires, and gas engines. Yet, considering the many dissimilarities – including their very dissimilar purchase prices – it is apparent that they are far from "almost the same." The plain meaning of the text is clear, and the Court should go no further.

In fact, the State does not contend that section 794.0115(2)(e), Florida Statutes (2005), is ambiguous. Nonetheless, ignoring the plain meaning of the text conveyed by the words used, the State focuses entirely on what it claims is "the

obvious intent" of the statute – to provide enhanced sentences for repeat sex offenders. From this, it concludes that a court may consider only similarities in determining whether a defendant qualifies for DSFO sentencing. And it does so simply by repeating the Fourth District's analysis in this case, not by providing any analysis of its own as to why that decision could possibly be correct.

As noted, this Court should look no further than the plain meaning of the text. Should it consider it necessary to look further to divine intent, however, the Court must consider the statute as a whole, giving "'effect to every clause in it, and . . . accord[ing] meaning and harmony to all of its parts.'" *Acosta v. Richter*, 671 So. 2d 149, 153-54 (Fla. 1996) (quoting *State ex rel. City of Casselberry v. Mager*, 356 So. 2d 267, 269 n.5 (Fla. 1978)). Doing so makes clear that courts must consider both similarities and dissimilarities.

The statute explicitly imposes enhanced punishment only on defendants convicted of listed offenses who have also previously been convicted of an offense "similar in elements" to one of those listed offenses. § 794.0115(2)(e), Fla. Stat. (2005). Thus, while the statute enhances the punishment of **certain** repeat sex offenders, it clearly does not enhance the punishment of **all** repeat sex offenders. Yet, adopting the State's argument would necessarily lead to the conclusion that **all** repeat sex offenders are subject to enhanced punishment. In short, the State's analysis would treat omitted offenses as if they were listed. Such a result would be

at odds with the established rule of statutory construction that courts lack the "'power to construe an unambiguous statute in a way which would extend, modify or limit, its express terms or its reasonable and obvious implications'" because "'[t]o do so would be an abrogation of legislative power.'" *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (quoting *Am. Bankers Life Assurance Co. of Fla. v. Williams*, 212 So. 2d 777, 778 (Fla. 1st DCA 1968)); *accord Villanueva v. State*, SC13-1828, 2016 WL 4168765, at *5 (Fla. July 7, 2016) ("[W]e are not at liberty to add to a statute words that the Legislature itself has not used in drafting that statute").

As Acevedo's Initial Brief makes clear, the plain language and structure of the statute as a whole, as well as the many cases cited that consider whether certain things are similar or analogous, establish that the only reasonable construction of the 2005 version of section 794.0115(2)(e) is to compare statutory offenses under which a defendant was convicted – past and present – looking at **both** similarities **and** dissimilarities to determine whether they are "similar in elements."

Even if it were somehow not clear, however, such a result would be required by section 775.021(1), Florida Statutes (the "rule of lenity"), which states that the Florida Criminal Code (of which section 794.0115 is a part) "shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." As this Court has recognized, "th[is]

rule is not just an interpretive tool, but a statutory directive." *Kasischke v. State*, 991 So. 2d 803, 814 (Fla. 2008).

III. THE FOURTH DISTRICT ERRONEOUSLY CONSIDERED "UNDERLYING FACTS."

In affirming the trial court, the Fourth District said that, "[i]n 1981, the defendant was charged with coercing an 11-year-old boy to allow the defendant to perform oral sex on him. That conduct is proscribed by subsection (4)(b) of the 2005 statute. Thus, had the same crime been committed in 2005, it would have satisfied the similar elements of section 800.04(4)(b)." (Op. at 3). The court does not identify where in the appellate record it found the information regarding the 1981 charge. The State, however, suggests that it comes from the arrest affidavit. (AB:2).

Of course, information in an arrest affidavit is not true simply because it is recited there. It is more important, however, that both the Fourth District and the State have overlooked some very pertinent facts that **are** apparent from the record.

First, the arrest affidavit charges a sexual battery in violation of section 794.011(2), Florida Statutes (1981) (R:69), which was a **capital felony**. In fact, the narrative portion of the arrest affidavit describes actions that would still have been a **capital felony** in 2005. *See* § 794.011(2)(a), Fla. Stat. (2005). Yet, Acevedo ultimately pled guilty to a lewd assault in violation of section 800.04, which is only a second-degree felony. (R:71). In part because it would deprive a

defendant of the benefit of a plea bargain, the United States Supreme Court has rejected the practice of looking beyond the elements of an offense to "legally extraneous statements found in the old record" in an effort to determine whether a prior conviction was for a "violent felony" as defined in the Armed Career Criminal Act, so to permit an enhanced sentence. *Descamps v. United States*, 133 S. Ct. 2276, 2289 (2013). This Court should likewise reject the State's argument here.

A. The State's Argument Is Contrary To Florida Law.

The State argues that it was entirely appropriate for the Fourth District to consider the "underlying facts" to determine whether the offenses of which Acevedo was convicted in 1982 and 2008 were "similar in elements." (AB:17-24). In doing so, it makes a singularly unconvincing effort to distinguish two of the many state and federal cases cited in the Initial Brief (IB:8-12) for the proposition that, in such circumstances, courts look only to the legal elements of the offenses, **not** underlying "facts" that might be gleaned from the record. (AB:19-20).

According to the State, *Dautel v. State*, 658 So. 2d 88 (Fla. 1995), is distinguishable because, here, the statutory focus is on "similarity of elements, rather than 'convictions'"; and *Montgomery v. State*, 183 So. 3d 1042 (Fla. 4th DCA 2015), "is different because the statute [here] focuses on similarity of elements, rather than a 'similar law.'" (AB:20). Even the most cursory reading of

those cases will reveal that the State's supposed distinctions are illusory.

Both cases clearly hold that, in determining whether offenses are similar, one is limited to a comparison of the elements of the offenses – it is **not** permissible to look to "underlying facts." In fact, in *Montgomery*, rejecting an argument like that made by the State here, the court observed that, "[i]f the legislature intended for courts to look to the underlying facts of the foreign conviction, it would have expressed that intent in the statute." 183 So. 3d at 1045.

B The State's Argument Would Impose An Additional Burden On Trial Courts, And Would Often Be Impracticable, If Not Impossible.

In addition to constituting a clear departure from established precedent from this Court, the State's argument that it is appropriate to consider the "underlying facts" to determine whether the current and prior offenses are "similar in elements" would impose a further burden on already over-taxed trial courts because in a great many cases it would require an evidentiary hearing to attempt to determine what the "underlying facts" of the prior offense were. *See Dautel*, 658 So. 2d at 90 (rejecting the position that courts should be able to consider "underlying facts" in determining whether an out-of-state conviction is analogous to a Florida statute for purposes of scoresheet calculations in part because it would require evidentiary hearings).

The approach advocated by the State would also be impracticable – or an

exercise in futility – in many cases. Obtaining records of a prior conviction that might have occurred many years ago in a different jurisdiction is no small task. One would expect it to prove to be an impossible task as often as not. In part because of such "'daunting' difficulties," the United States Supreme Court has rejected the practice of looking beyond the elements of an offense to "legally extraneous statements found in the old record" in an effort to determine whether a prior conviction was for a "violent felony" as defined in the Armed Career Criminal Act, so to permit an enhanced sentence, noting that

> sentencing courts . . . would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense. The meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense–and may have good reason not to.

Descamps, 133 S. Ct. at 2289.

IV. THE ERROR IS NOT HARMLESS.

The State argues that imposition of the illegal DSFO sentences was harmless error. Not so. Where a rule 3.800(a) motion establishes a sentencing error, the harmless error doctrine applies only "if the trial court could have imposed the same sentence using a correct scoresheet." *Brooks v. State*, 969 So. 2d 238, 243 (Fla. 2007). Here, the trial court could not.

In *Carter v. State*, 786 So. 2d 1173 (Fla. 2001), this Court said that habitualization – which is similar to the DSFO designation here in that it enhances a sentence – "may have collateral consequences that could ultimately increase the length" of a sentence beyond the years designated. *Id.* at 1180 n.6. As a result, even though the length of the sentence imposed on the defendant was the same as it would have been without the improper habitual offender designation, the Court treated it as a **different** sentence because of the habitual offender designation. *Id.*

The same is true here. Not all life sentences are created equal. The DSFO statute provides for a mandatory minimum of 25 years, whereas a life sentence without a DSFO designation is not accompanied by a mandatory minimum. Further, a person sentenced as a DSFO "is not eligible for statutory gain-time under s. 944.275 or any form of discretionary early release, other than pardon or executive clemency, or conditional medical release under s. 947.149, before serving the minimum sentence." § 794.0115(7), Fla. Stat. (2008).

The gain-time statute provides that prisoners sentenced to life "shall be incarcerated for the rest of their natural lives, unless granted pardon or clemency." *See* § 944.275(4)(b)3, Fla. Stat. (2008). It does not, however, provide that such prisoners are not eligible to accumulate statutory gain-time, as does the DSFO statute.

While this may seem to be a distinction without a difference, it is not. A

Department of Corrections regulation provides that "any inmate serving a death or life sentence will be considered for incentive gain time and the gain time will be posted so that in the event the death or life sentence is commuted to a number of years, the accumulated incentive gain time will be applied to the inmate's sentence." Fla. Admin. Code R. 33-601.101(6)(c) (2016).

Thus, if a prisoner serving a life sentence has his sentence commuted to a term of years, that prisoner would be able to apply accumulated incentive gain-time for early release. *See Burdick v. State*, 584 So. 2d 1035, 1038 (Fla. 1st DCA 1991), *approved in part and quashed in part on other grounds*, 594 So. 2d 267 (Fla. 1992). Because a prisoner sentenced to life as a DSFO is ineligible for gain-time, however, his sentence could not be reduced because of gain-time even if it was commuted to a term of years. Thus, a life sentence as a DSFO is more restrictive, and potentially could lead to longer incarceration, than a life sentence without a DSFO designation. *See Carter*, 786 So. 2d at 1180 n.6 (sentences with the same term are not the same when one has "collateral consequences that could ultimately increase the length of" the sentence).

Because the trial court could not have imposed the same sentences on counts 1-4 without the DSFO designation, the error is not harmless.

CONCLUSION

This Court should approve the similarity analysis conducted by the Fifth

District in *Durant v. State*, 94 So. 3d 669 (Fla. 5th DCA 2012); disapprove the analysis conducted by the Fourth District below; and remand the case for resentencing on counts 1-4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following via e-mail on August 22, 2016.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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