IN THE SUPREME COURT OF FLORIDA

ROBIN EUSTACHE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC16-1712

ANSWER BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

CELIA A. TERENZIO
Senior Assistant Attorney General
Bureau Chief
Fla. Bar. No. 656879

RACHAEL KAIMAN
Assistant Attorney General
Florida Bar No. 44305
Office of the Attorney General
1515 N. Flagler Dr., Suite 900
West Palm Beach, FL 33401
561-837-5000
CrimAppWpb@myfloridalegal.com

Counsel for Respondent

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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 Fifteenth Judicial Circuit, and for Palm Beach County, Florida. Petitioner was Appellant and Respondent was Appellee in the Fourth District Court of Appeal of Florida.

In this brief, the parties shall be referred to as they appear before this Honorable Court, except that Respondent may also be referred to as the State.

The following abbreviations will be used:

IB = Petitioner's Initial Brief on the Merits

R.:PDF = Record number followed by PDF page number of electronic record sent by the Fourth District Court of Appeal.

The Fourth DCA sent the record in two PDF documents:

R.1: PDF with certified copies of appeal papers from Fourth DCA case 4D15-2596 (59 pages)

R.2: PDF of Summary Record from the 15th Judicial Circuit, in and for Palm Beach County, Florida (384 pages)

STATEMENT OF THE CASE AND FACTS

The State generally accepts the Statement of the Case and Facts set forth in Petitioner's Initial Brief, to the extent it represents an accurate, non-argumentative recitation of the procedural history and facts found within the record on appeal, subject to the additions, modifications and/or clarifications below and in the body of this Answer Brief.

Motion for Post-Conviction Relief:

Petitioner's second rule 3.850 Motion to Vacate Plea, Judgment and Sentence, filed by counsel on October 24, 2014, is the motion that underlies the current appeal ("the Motion") (R.2:PDF 4-12). Petitioner raised four claims in the Motion:

(1) Petitioner's counsel was ineffective "for mis-advising him that he would have to receive a ten year minimum mandatory sentence if the Court did not re-instate his probation";

(2) Petitioner's counsel mis-advised the trial court that it had to impose a ten-year minimum mandatory sentence if it did not re-instate Petitioner's probation; and

(3) The trial court imposed an illegal sentence, because the trial court erroneously believed it had no discretion in imposing the ten-year mandatory minimum; and

(4) The trial court "imposed a mandatory minimum sentence that is contrary to law."

(R.2:PDF 6–11).

In support of his claims, Petitioner argued that two cases from the Fourth District Court of Appeal, *Blacker v. State*, 49 So. 2d 785 (Fla. 4th DCA 2010) and *Goldwire v. State*, 73 So. 3d 844 (Fla. 4th DCA 2011), were conflicting as to whether the trial court could impose minimum mandatory sentences once a youthful offender's probation was revoked (R.2:PDF 7–8).

The State responded that both Eustache and the trial court were properly advised that, pursuant to *Goldwire,* once the trial court exercised its discretion to revoke Eustache's probation and impose adult sanctions, it was required to impose at least the minimum mandatory sentence (R.2:PDF 31–36),(*see* R.2:PDF 279–80, 298–301). The trial court denied Petitioner's Motion, adopting and incorporating the State's written response (R.2:PDF 367–68). The trial court also denied Petitioner's motion for rehearing (R.2:PDF 370–72, 377–79, 380).

Opinion from the Fourth District Court of Appeal:

In the *en banc* opinion now before this Court, the Fourth District affirmed the trial court's order denying Petitioner's Motion. *Eustache v. State*, 199 So. 3d 484 (Fla. 4th DCA 2016).

The Fourth District Court of Appeal analyzed one issue that encompassed the multiple issues raised in the Motion: whether minimum mandatory sentencing provisions apply when a youthful offender's probation or community control supervision is revoked

for a substantive violation, and a court chooses to impose a sentence above the six-year cap provided for in section 958.04(2), Florida Statutes (2005). *See id.* at 487-90.

The Fourth District Court of Appeal opined:

> We hold, as we did in *Goldwire*, that upon [a trial court's revocation of probation for] a **substantive violation** of youthful offender supervision, the trial court has the discretion either to **[(1)]** sentence under the cap provisions of section 958.04(2), Florida Statutes (assuming a term for a cap sentence is still available), or **[(2)]** to impose any sentence it could have imposed when the defendant was originally sentenced, regardless of the defendant's youthful offender designation, under section 948.06(2), Florida Statutes. Where the trial court chooses the second option, and the original sentence that could have been imposed was a minimum mandatory sentence, that that sentence must be imposed upon revocation of supervision.

Id. at 489-90 (emphasis and bracketed numbers added) (footnote omitted).

The Fourth District Court of Appeal certified conflict with *Christian v. State*, 84 So. 3d 437 (Fla. 5th DCA 2012), and it certified a question of great public importance. *See id.* at 490.

SUMMARY OF ARGUMENT

Although trial courts are precluded by section 958.04(2), Florida Statutes, from imposing mandatory minimum sentences upon youthful offenders as part of an initial disposition sentence, they are not precluded from imposing such sentences upon revocation of probation for a substantive violation and are instead required to impose minimum mandatory sentences under certain circumstances.

Violations of probation or community control supervision for youthful offenders are governed by section 958.14, which is part of the Youthful Offender Act, and it directs that youthful offenders who commit a substantive violation be sentenced in accordance with section 948.06, which is not part of the Youthful Offender Act.

As set forth in the Fourth District Court of Appeal opinion below, which is consistent with an opinion out of the Second District Court of Appeal, these two provisions clearly provide that if a trial court chooses to revoke a youthful offender's probation or community control supervision for a substantive violation, the trial court has the discretion to either: (1) sentence within the youthful offender cap, if available, or (2) impose any sentence that might have been originally imposed, irrespective of the initial youthful offender designation.

When the court chooses the latter option, if the offense required a minimum mandatory sentence without regard to a youthful offender designation, the trial court must impose such enhancement. The legislature has amended section 958.14, and the amendments clearly indicate the legislature's intent to treat youthful offenders who commit a substantive violation differently from those who commit a non-substantive or technical violation.

Both the Fourth and Second District Courts of Appeal explain that the imposition of a mandatory minimum sentence following a substantive violation does not remove the defendant's original youthful offender "status" for the underlying crime, which provides a defendant with benefits within the prison system.

This Court must affirm the Fourth District Court of Appeal opinion in *Eustache*, which is consistent with the Second District Court of Appeal's opinion in *Yegge v. State*, 173 So. 3d 968 (Fla. 2015), *rev. granted*, 173 So. 3d 968 (Fla. 2015), and *rev. dismissed*, 180 So. 3d 128 (Fla. 2015), holding that youthful offenders who substantively violate probation or community control are subject to minimum mandatory sentence enhancements, if the trial court chooses to revoke probation or community control and to sentence above the youthful offender cap, and the crime requires such enhancement.

ARGUMENT

I: YOUTHFUL OFFENDERS ARE SUBJECT TO MINIMUM MANDATORY SENTENCES, IF A TRIAL COURT EXERCISES ITS DISCRETION TO REVOKE A YOUTHFUL OFFENDER'S PROBATION FOR A SUBSTANTIVE VIOLATION AND CHOOSES NOT TO IMPOSE A YOUTHFUL OFFENDER CAP SENTENCE. (RESTATED).

Standard of Review

"The legality of a sentence is a question of law and is subject to *de novo* review." *Hadley v. State*, 190 So. 3d 217, 218 (Fla. 4th DCA 2016) (quoting *Flowers v. State*, 899 So. 2d 1257, 1259 (Fla. 4th DCA 2005)).

Likewise, judicial interpretations of statutes are "pure questions of law subject to the de novo standard of review." *State v. Sigler*, 967 So. 3d 835, 841 (Fla. 2007)(citations omitted).

Discussion

A. The Governing Statutes Authorize the Imposition of Minimum-Mandatory Sentences for Youthful Offenders Who Substantively Violate Probation, When a Trial Court Revokes Probation and Chooses to Sentence the Offender Above the Youthful Offender Cap.

i. Relevant Statutes:

Chapter 958, Florida Statutes, known as the "Florida Youthful Offender Act," includes sections 958.011-958.15. *See* §958.011, Fla. Stat. (2005). The Act gives trial courts the discretion to sentence adult defendants who are under the age of 21 as "youthful offenders," if the defendants have not previously been classified as youthful offenders and have not

been convicted of a capital or life felony. §958.04(1), Fla. Stat.(2005).

Youthful offender sentencing provisions for the initial disposition of a defendant's case are imposed "[i]n lieu of other criminal penalties authorized by law." §958.04(2), Fla. Stat.(2005). "The most significant benefit to being sentenced as a youthful offender is a cap on the initial sentence of either six years or the maximum sentence of the offense, whichever is less, with regards to incarceration, supervision on probation or community control, or a combination of both." *Eustache*, 199 So. 3d at 487 (citing §958.04(2), Fla. Stat. (2005)).

Based upon the limitations set forth in section 958.04, mandatory minimum sentencing provisions cannot be imposed on a youthful offender's initial sentence. *See id.* (citing *Mendez v. State*, 835 So. 2d 348, 349 (Fla. 4th DCA 2003)); *see also, State v. Wooten*, 782 So. 2d 408, 409-10 (Fla. 2d DCA 2001)(holding that mandatory minimum sentencing provisions of the 10/20/Life statute are not applicable to a youthful offender's initial sentence).

Youthful offenders who commit a substantive violation of probation or community control are subject to sentencing pursuant to section 958.14. Thus, because a youthful offender's sentence for a violation of probation is controlled by a statute

that is separate from the one that governs his or her initial disposition, the legislature has indicated its intent to treat sentencing for probation or community control violations independently of the initial disposition provisions.

Section 958.14, part of the Youthful Offender Act, states:

> A violation or alleged violation of probation . . . **shall subject the youthful offender to the provisions of s. 948.06.** However, no youthful offender shall be committed to the custody of the department for **a substantive violation** for a period longer than the maximum sentence for the offense for which he or she was found guilty, with credit for time served, or for a **technical or nonsubstantive** violation for a period longer than 6 years or for a period longer than the maximum sentence for the offense for which he or she was found guilty, whichever is less, with credit for time served while incarcerated.

§958.14, Fla. Stat. (2005) (emphasis added).

Section 948.06, which is not part of the Youthful Offender Act but instead governs adult violations of probation, provides in relevant part:

> If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, . . ., and impose and sentence which it might have originally imposed before placing the probationer on probation or the offender into community control.

§948.06(2)(b), Fla. Stat. (2005).

ii. Application of Relevant Statutes:

This Court has explained: "[l]egislative intent guides statutory analysis, and to discern that intent we must look first to the language of the statute and its plain meaning." *Tasker v. State,* 48 So. 3d 798, 804 (Fla. 2010) (quoting *Fla. Dep't of Children & Family Servs. v. P.E.,* 14 So. 3d 228, 234 (Fla. 2009)); *see also*, *Consumer Prod. Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.").

The controlling statutes at issue are unambiguous, and the statutes subject a youthful offender to standard adult sanctions, which includes minimum mandatory sentences, under the circumstance where a trial court chooses to revoke a youthful offender's probation or supervision for a substantive violation **and** chooses not to sentence within the youthful offender sentencing cap. Contrary to Petitioner's argument, this Court need not apply the rule of lenity (IB 24-26). *See Fla. Dep't of Children & Family Servs.,* 14 So.3d at 234 ("Where the statute's language is clear or unambiguous, courts need not employ principles of statutory construction to determine and effectuate legislative intent.").

In *Yegge*, the Second District explained:

> A plain reading of section 958.14 leads to the conclusion that the sentencing limitations contained in section 958.04, which preclude sentencing enhancements, do not apply to a sentence imposed after a substantive violation of probation or community control. Section 958.14 states that a violation of community control ***shall* subject the youthful offender to sentencing under the general violation statute, section 948.06,** which states that on revocation of probation or community control the court "*shall*. . . impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control.

186 So. 3d at 556 (emphasis added).

Section 948.06 governs standard adult violations of probation, and therefore, "this unqualified statement of the sanctions to which a youthful offender who commits a substantive violation is exposed reflects the legislature's intent that such offenders lose the benefit of the original sentencing limitations of the Youthful Offender Act." *Id.* at 555.

Similarly, in *Eustache,* the Fourth explained that reading sections 958.14 and 948.06 together:

> mean[s] that, upon revoking the probation or community control supervision of a youthful offender for a substantive violation, the trial court has two choices. First, if an incarcerative sentence is still available under the cap provisions of section 958.04(2), the court may continue to sentence under the cap provisions. Alternatively, the court may impose any sentence that could have been imposed at the

> initial sentencing, regardless of the defendant's youthful offender statutes.

Eustache, 199 So. 3d at 487; *but see, Christian v. State*, 84 So. 3d 437, 444 n.7 (Fla. 5th DCA 2012)(expressing the court's view in dicta that minimum mandatory sentences are not permissible even following a youthful offender's substantive violation of probation).

If a court chooses the latter option – to revoke probation and not sentence within the 6-year cap provision – a minimum mandatory sentence is required if the offense originally required a minimum mandatory sentence irrespective of the youthful offender designation. *See Eustache*, 199 So. 3d at 486-87, 490, 490 n.4 (recognizing that the view was consistent with the Second District's opinion in *Yegge*).

Again, the Youthful Offender Act directs that youthful offenders who substantively violate probation be sentenced pursuant to the statute governing adult violations of probation in section 948.06. *See* §958.14, Fla. Stat. (2005). However, the Youthful Offender Act makes the following qualifications:

> [N]o youthful offender shall be committed to the custody of the department **for a substantive violation** for a period longer than the **maximum sentence for the offense** for which he or she was found guilty, with credit for time served while incarcerated, **or for a technical or nonsubstantive violation for a period longer than 6 years or for a period longer than the maximum sentence for the offense for which he or she**

> **was found guilty, whichever is less,** with credit for time served while incarcerated.

§958.14, Fla. Stat. (2005).

This language clearly indicates the legislature's intent to treat youthful offenders who commit a substantive violation of probation or community control differently from those who commit a technical or non-substantive violation. *See also, infra.*, section iii. (discussing legislative amendments to §958.14).

The legislature created an exception that allows only those youthful offenders who commit a **technical or nonsubstantive violation** to unconditionally retain the benefit of the initial six-year youthful offender cap following a violation; the legislature did not provide any other exceptions from the general adult violation statute. *See* §958.14, Fla. Stat. (2005); *see also, Citizens Prop. Ins. Corp v. Perdido Sun Condo. Ass'n, Inc.*, 164 So. 3d 663, 666 (Fla. 2015)(quoting *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952))("[W]here the legislature made one exception clearly, if it had 'intended to establish other exceptions it would have done so clearly and unequivocally.'").

Likewise, section 958.04(2), which controls the initial judicial disposition of a youthful offender's case, specifies that the section "applies in lieu of other sentencing provisions." In contrast, section 958.14 does not contain a similar clause and instead directs the trial court to apply the

statute governing standard adult violations of probation in section 948.06. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Based on this directive in section 958.14, and contrary to Petitioner's claim, the legislature did not need to include extra language that adult sentencing enhancements apply to youthful offenders who substantively violate probation.

iii. This Court's opinion of Arnette v. State*, 604 So. 2d 482 (Fla. 1982), is not controlling*.

Petitioner argues that *Eustache*, to the extent it allows sentencing enhancements for youthful offenders who substantively violate probation, is not consistent with this Court's opinion in *State v. Arnette*, 604 So. 2d 482 (Fla. 1992)(*see* IB 14-17), based on *Arnette's* statement that, "[u]nless the legislature clearly states otherwise, youthful offenders maintain youthful offender status even when they violate a condition of community control." *Arnette*, 604 So. 2d at 484.

Eustache is not inconsistent with *Arnette*, for two primary reasons: (1) *Arnette* is not controlling because it interpreted section 958.14 under a pre-1985 version of the statute, but the statue has been amended since that time to include additional language that has significance for the analysis here; and (2)

the term "youthful offender status" is not defined by the statute nor has it been interpreted by the courts in a consistent way, and both *Eustache* and *Yegge* recognize that a defendant who receives any sentencing enhancement following a violation of probation still retains his or her youthful offender "status" for purposes of Florida's prison system.

Regarding the first point, the Second District Court of Appeal rejected a claim that mandatory minimums following a youthful offender's substantive violation of probation are not consistent with *Arnette*, stating:

> In *Arnette*, the Florida Supreme Court considered the application of the six-year cap to a youthful offender who committed a substantive violation of community control in 1984. In holding that the cap does apply to youthful offenders sentenced after a violation of probation or community control **under the pre-1985 version of the statute**, the court concluded that the 1985 amendment was evidence of the legislature's prior intent "to limit penalties against youthful offenders to six years." *Id.* The *Arnette* decision does not address the application of mandatory minimums to youthful offender sentences and is thus limited to the application of the sentencing cap; as noted above, **in 1990 the legislature amended that cap to apply to technical violations only.** *Arnette* simply does not support application of the sentencing limitations of section 958.04 to a youthful offender following a substantive violation of probation.

Yegge, 186 So. 3d at 556-57 (emphasis added).

The Second District Court of Appeal reviewed the history of section 958.14, which when it was enacted in 1978 stated only

that "[a] violation or alleged violation of probation or the terms of a community control program shall subject the youthful offender to the provisions of s. 948.06(1). . . ." *Id.* at 555 (quoting Ch. 78-84, §14, at 123, Laws of Fla.).

This section was modified in 1985 with language stating that, "no youthful offender shall be committed to the custody of the department for such violation for a period longer than 6 years or for a period longer than the maximum sentence for the offense for which he was found guilty, whichever is less. . . ." *Id.* (quoting Ch. 85-288, §24, at 1821, Laws of Fla.). This Court agreed with the conclusion in *Watson v. State*, 528 So. 2d 101 (Fla. 1st DCA 1998), as to how to interpret the added language:

> [T]he only logical conclusion is that the legislature intended to change the case law interpretation of §958.14, or in any event to change the law, so that once the circuit court has given a defendant youthful offender status and has sentenced him as a youthful offender, it must continue that status and only resentence the defendant as a youthful offender for a violation of the probation or community control portion of his youthful offender sentence. A youthful offender's sentence after revocation. . .is therefore limited to a maximum of six years less credit for time served.

State v. Watts, 558 So. 2d 994, 997-98 (Fla. 1990) (quoting *Watson*, 528 So. 2d at 102).

Significantly, in 1990, "the legislature further amended the second sentence **to apply the six-year cap only to technical, not substantive, violations of probation.**" *Yegge*, 186 So. 3d at

555 (emphasis added) (citing §958.14, Fla. Stat. (Supp. 1990), *amended by* ch. 90-208, §19, at 1161, Laws of Fla.). The statute has not been substantially altered since that time. *See id.*

Thus, because *Arnette* interpreted section 958.14 under a version prior to the one applicable to the present case, and because the Court did not consider the issue of sentencing enhancements, *Arnette* does not resolve the issue of whether section 958.14 as written following the 1990 amendment requires sentencing enhancements for youthful offenders' substantive violations, when a court revokes probation and sentences above the youthful offender cap.

Again, the 1990 amendment to section 958.14 expressly provided that only a youthful offender who commits a technical or nonsubstantive violation absolutely retains the initial youthful offender sentencing benefit of a 6-year cap, but a youthful offender who commits a substantive violation does not absolutely retain that benefit.

As to the second point, both the Fourth District Court of Appeal and the Second District Court of Appeal are consistent with *Arnette* in that they recognize that that a defendant who was originally sentenced as a youthful offender but subsequently has his probation revoked and receives a sentence above the six-year cap <u>still retains</u> his "status" as a youthful offender. *See*

Eustache, 199 So. 3d at 487 (citing *Christian,* 84 So. 3d at 442); *Yegge*, 186 So. 3d at 555–56.

In *Christian*, the Fifth District Court of Appeal noted there has been "confusion" surrounding the term "youthful offender status," because the term "is not found in the Youthful Offender Act" and it has been used "in differing contexts (to mean different things)." 84 So. 3d at 441, 442–43. However, a defendant's youthful offender "status" that is retained from his or her initial sentence provides the defendant with certain benefits of the Youthful Offender Act, including special programs, privileges, and facilities within the Department of Corrections. *See id.* at 443; *see also, Eustache,* 199 So. 3d at 487; *Yegge*, 186 So. 3d at 555–56.

Based on the foregoing discussion, this Court's statement in *Arnette* that "youthful offenders maintain youthful offender status even when they violate a condition of community control" does not resolve the present issue of whether sentencing enhancements are required when a trial court revokes a youthful offender's probation for a substantive violation and sentences above the youthful offender cap.

iv. There is no distinction between "Maximum Sentence" and "Maximum Exposure"

Section 958.14 provides:

> A violation or alleged violation of probation . . . shall subject the youthful offender to the provisions of s. 948.06.

> However, no youthful offender shall be committed to the custody of the department for **a substantive violation for a period longer than the maximum sentence for the offense** for which he or she was found guilty, with credit for time served, ...

§958.14, Fla. Stat. (2005)(emphasis added).

Petitioner contends that a defendant's "maximum sentence" for an offense is not synonymous with "a defendant's maximum exposure in a criminal case," and the reference to "maximum sentence" does not permit sentencing enhancements (*see* IB 20). He argues (as did the concurring opinion in *Yegge* and the concurring in part, dissenting in part opinion in *Eustache*) that the term "maximum sentence" only authorizes the maximum sentence as determined by the statute "applicable to the substantive offense," whereas "maximum exposure" involves other factors or circumstances of the crime, which would trigger sentencing enhancements like a minimum mandatory sentence (IB 20). *See Yegge*, 186 So. 2d at 560-61 (Davis, J., specially concurring) (finding a distinction between "maximum sentence for the offense" and "a defendant's maximum exposure in a criminal case"); *Eustache*, 199 So. 2d at 491 (Conner & Forst, J.J., concurring in part and dissenting in part) (agreeing with Judge Davis's specially concurring opinion that "maximum sentence" and "maximum exposure" are "not necessarily synonymous" and finding "maximum sentence" to be ambiguous).

The State maintains there is no such distinction, because, as explained by the Second District Court of Appeal, the term "maximum sentence" sentence is "controlled by the charging document" and "necessarily includes any enhancements for which [a defendant] qualifies." *Yegge*, 186 So. 3d at 556 (citing §958.14, Fla. Stat. (2002); *Mendenhall v. State*, 418 So. 3d 740, 750 (Fla. 2010); *Lareau v. State*, 573 So. 2d 813, 815 (Fla. 1991)).

Initially, neither chapter 775, Florida Statutes, governing penalties for crimes, nor chapter 921, governing sentencing under the Criminal Punishment Code, uses the term "maximum exposure" in place of "maximum sentence" or "exposure" in place of "sentence." The legislature has not explicitly made a distinction between the terms "maximum sentence" and "maximum exposure" within the criminal punishment statutes.

Further, the Florida Statutes indicate that a defendant's "maximum sentence" includes any sentence authorized by the relevant statutes, including enhancements. Section 921.002 states: "[t]he trial court judge may impose a sentence up to and including the statutory maximum for any offense . . . ." §921.002(g), Fla. Stat. (2005). There is no breakdown of a sentence into the sentence "applicable to the substantive offense" and the sentence for enhancements, and thus a court's ability to impose a "sentence up to and including the statutory

maximum" implicitly includes any sentencing enhancements required under applicable statutes.

Contrary to Petitioner's claim, section 775.087(2)(c), Fla. Stat. (2005) does not recognize a distinction between "maximum sentence" and "maximum exposure" (IB 20-21). The section uses only the term "maximum sentence," and it is used to direct the trial court to compare the highest sentences allowed under different provisions of the Florida Statues, because the section establishes a limit for a defendant's sentence under a specific circumstance: "If the minimum mandatory terms of imprisonment imposed pursuant to this section exceed the maximum sentence authorized by s.775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the minimum mandatory sentence must be imposed." Notably, section 775.084 provides for certain sentencing enhancements, and thus section 775.087(2)(c) indicates enhancements are included in a defendant's "maximum sentence."

Further, the State submits that case law from this Court implicitly recognizes that a defendant's "maximum sentence" includes sentencing enhancements. *See Alcorn v. State*, 121 So. 3d 419 (Fla. 2013). In *Alcorn,* this Court addressed a defendant's claim of ineffective assistance of counsel arising out of his attorney's failure to advise him of "maximum sentence" he faced based on his charges. *See id.* at 422-23.

The appellant argued he was not informed of the State's plea offer and he did not know the "maximum penalty" he faced because he qualified as a Habitual Felony Offender ("HFO"). *See id.* at 422-23.

This Court used the terms "maximum penalty" and "maximum sentence" interchangeably, and its reference to these terms included the enhanced sentence that resulted from the defendant's HFO qualification. *See, e.g., id.* at 423 (emphasis added) (noting that Count 1, sale of cocaine within 1,000 feet of a church, was a first-degree felony punishable by a maximum thirty-year sentence, but "because Alcorn qualified for HFO sentencing enhancement under section 775.084(1)(a), Florida Statutes (2004), **the maximum sentence for Count 1 as charged was life imprisonment**."). This Court referred to district court opinions addressing similar claims of ineffective assistance of counsel where an attorney failed to advise a defendant of an HFO enhancement and the resulting correct maximum penalty the defendant faced, and this Court used the terms "maximum exposure of incarceration," "maximum sentence exposure," and "statutory maximum sentence" interchangeably with "maximum sentence." *See id.* at 431-33.

In summary, a defendant's "maximum sentence" includes any appropriate sentencing enhancements, and the State respectfully

submits it would not make sense to exclude enhancements from a defendant's "maximum sentence."

B. This case does not need to be remanded for resentencing.

Petitioner argues that, at a minimum, this case should be remanded for the trial court to sentence Petitioner with the correct knowledge regarding its sentencing options (IB 27–29).

In the opinion below, the Fourth District observed that defense counsel did not correctly inform the trial court that it had the option to revoke probation and sentence Petitioner within the youthful offender cap, which would avoid the minimum mandatory sentence, but the Fourth District concluded Petitioner was not entitled to relief "because the trial court imposed a sentence of fifteen years, more than the ten-year minimum mandatory." *Id.* at 490. Thus, "[t]he trial court clearly did not feel constrained by counsel's advice and **was not inclined to impose a sentence within the youthful offender cap** provisions." *Eustache*, 199 So. 3d at 789 (emphasis added).

The record supports the Fourth District Court's conclusion. When Petitioner entered an open plea to his violation of probation, after the court granted his motion to withdraw his first plea, the trial court was not advised about its option to sentence Petitioner within the six-year youthful offender cap (R.2:PDF 279–80, 283). Rather, defense counsel advised the trial court that it could modify Petitioner's probation, but if

the court revoked and terminated his probation, the court had to give Petitioner the 10-year minimum mandatory required for armed robbery (R.2:PDF 279-80). *See* §§812.13(1),(2)(a), 775.087, Fla. Stat. (2005).

Defense counsel asked the trial court to modify Petitioner's probation and give him a split sentence of 102 months, with credit for time served, followed by probation for 15 years (R.2;PDF 280,283-84,300-01). The State recommended at least the ten-year minimum mandatory sentence (R.2;PDF 298-300). The trial court revoked and terminated Petitioner's probation, and it sentenced him a second time to 15 years prison, with the ten-year minimum mandatory and credit for time served (R.2;PDF 259, 301-02).

The Fourth District correctly concluded that "[t]he trial court clearly did not feel constrained by counsel's advice and was not inclined to impose a sentence within the youthful offender cap provisions," *see Eustache*, 199 So. 3d at 789, and the court even went above the minimum the State requested, the ten-year minimum mandatory sentence (R.2:PDF 298-300). Thus, because it is clear the trial court would have imposed the same sentence even if it had been advised of its discretion to sentence within the youthful offender cap, this case does not need to be remanded for sentencing. *See Torres v. State*, 17 So. 3d 1282 (Fla. 2d DCA 2009) (reversing for resentencing where

court was "unable to determine from the record whether the court would have imposed the same sentences" had it understood its proper sentencing discretion).

Goldwire, cited by Petitioner in support of his argument that the case should be remanded for the trial court to be made aware of its options (IB 27) is distinguishable. There, the defendant entered a plea and was sentenced as a youthful offender, and he subsequently committed a substantive violation of probation. *Goldwire*, 73 So. 3d at 844-45. The trial court was erroneously informed that upon the defendant's substantive violation of probation it had no discretion and was "required to use the adult sanctions under Criminal Punishment Code guidelines for sentencing." *See id.* at 844. The trial court was not aware that it had the option to modify or continue the defendant's probation, unlike this case where the trial court was informed of that option (R.2:PDF 279-80). *See id.* at 845-46. The court here was not properly advised of the minimum prison term it could have imposed.

Colleta v. State, 126 So. 3d 1090 (Fla. 4th DCA 2012), is also distinguishable, because there the trial court expressed a desire on the record to grant the defendant a downward departure sentence, but it believed based on the controlling case law at the time of sentencing that it did not have the discretion to do so. *Id.* at 1090-91. After sentencing, this Court addressed the

downward departure issue that arose in *Colletta*, and this Court's opinion clarified that the trial court did have the discretion to grant a downward departure. *See id.* Thus, remand was necessary for the trial court to consider the request for a downward departure with knowledge that it had the discretion to depart. *See id.*

CONCLUSION

The State respectfully requests this Court answer the certified question of public importance in the affirmative, affirm the Fourth District Court of Appeal's opinion, and disapprove of *Christian* to the extent it disagrees with *Eustache*.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing is being served on Peter D. Webster, Esq., David L. Luck, Esq., and Jorge A. Perez Santiago, Esq., counsel for Petitioner, through the Florida Supreme Court's E-filing Portal, on June 12, 2017.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

/s/ Celia A. Terenzio
CELIA A. TERENZIO
Senior Assistant Attorney General
Bureau Chief
Fla. Bar No.656879

/s/Rachael Kaiman
RACHAEL KAIMAN
Assistant Attorney General
Fla. Bar No. 44305
Office of the Attorney General
1515 N. Flagler Drive, Suite 900
West Palm Beach, FL 33401
Tel: 561-837-5000
CrimAppWpb@myfloridalegal.com
Counsel for Respondent