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IN THE SUPREME COURT OF FLORIDA

WILLIE FRANK HALE,

Petitioner,

v. CASE NO. 80,242

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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REPLY BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner files this brief in reply to the arguments made by respondent in Issue III. Petitioner will rely on his initial brief as to Issues I and II.

ARGUMENT

ISSUE III
ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT THE LOWER COURT ERRED IN IMPOSING CONSECUTIVE MANDATORY MINIMUM SENTENCES.

Respondent asserts that this Court's decision in Daniels v. State, 595 So.2d 952 (Fla. 1992) -- which was unanimous, and is only six months old -- was wrongly decided and should be overruled. In Daniels, this Court held

> Because the statute prescribing the penalty for Daniels' offenses does not contain a provision for a minimum mandatory sentence, we hold that his [habitual violent offender] minimum mandatory sentences imposed for the crimes he committed arising out of the same criminal episode may only be imposed concurrently and not consecutively.

Id. at 954. The same is true with regard to petitioner's crimes, sale and possession of cocaine, and his habitual violent offender mandatory minimum sentences.

Daniels distinguished the prior decisions in State v. Enmund, 476 So.2d 165 (Fla. 1985), and State v. Boatwright, 559 So.2d 210 (Fla. 1990), which held consecutive 25 year mandatory minimum sentences were permitted for capital crimes, but only because the statute prescribing the penalty for capital crimes required a separate mandatory minimum for each.

Respondent asserts and hopes that this Court will have the opportunity to overrule Daniels when it reviews Downs v. State, 592 So.2d 762 (Fla. 1st DCA 1992), review pending, case no. 79,322, oral argument set for January 6, 1993. Respondent is mixing apples and oranges. The issue in Downs is whether a

three year minimum mandatory for a firearm used in an aggravated assault may run consecutively with a 25 year mandatory minimum for a capital crime.

Downs has absolutely nothing to do with habitual violent offender mandatory minimum sentences. No matter which way this Court decides Downs, it will have no effect on the instant case or on Daniels, notwithstanding respondent's wishful thinking to the contrary.

Section 775.021(1), Florida Statutes, the statutory rule of lenity, contains no exceptions for habitual offenders. As this Court recently noted, in deciding that the mandatory minimum sentences called for when one conducts a drug transaction within 1000 feet of a school need not be imposed if the defendant is referred for drug treatment:

> In construing these statutes, we begin with the principle that, where criminal statutes are susceptible to differing constructions, they must be construed in favor of the accused. See §775.021, Fla. Stat. (1989); Lambert v. State, 545 So.2d 838, 841 (Fla. 1989).

Scates v. State, 17 FLW S467 (Fla. July 23, 1992).

This Court has strictly construed the habitual offender statute. See, e.g., State v. Barnes, 595 So.2d 22, 24 (Fla. 1992) (allowing prior convictions to be non-sequential):

> While we agree that the underlying philosophy of a habitual offender statute may be better served by a sequential conviction requirement, we agree with the district court that the current statute is clear and unambiguous and contains no sequential conviction requirement. Under these circumstances, this Court has no authority to change the plain meaning of a

> statute where the legislature has unambiguously expressed its intent. emphasis added).

Using the Barnes language as applied to habitual violent offenders, state prisoners, while the "underlying philosophy" of the habitual offender statute is to punish repeat offenders, "the current statute is clear and unambiguous" and contains no provision to punish someone in petitioner's position with consecutive mandatory minimum sentences.

Also please note this Court's admonition in Perkins v. State, 576 So.2d 1310, 1312-13 (Fla. 1991):

> As we have stated,
>
> > The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary. See, Article II, Section 3, Florida Constitution.
>
> Brown [v. State], 358 So.2d [16] at 20 [(Fla. 1978)]; accord Palmer [v. State], 438 So.2d [1] at 3 [(Fla. 1983)]. This principle can be honored only if criminal statutes are applied in their strict sense, not if the courts use some minor vagueness to extend the statutes' breadth beyond the strict language approved by the legislature. To do otherwise would violate the separation of powers. Art. II, §3, Fla. Const. (emphasis added).

To judicially rewrite the statute to make it fit respondent's position violates all principles of statutory construction and this Court's admonitions in State v. Barnes and Perkins.

It is up to the legislature, if it so chooses, and not to the courts, to correct this purported defect in the statute.

It would be very easy for the legislature to add another sentence to the statute to say: "However, any mandatory minimum sentence imposed under the section may be ordered to be served consecutively." But in the meantime, petitioner's consecutive mandatory minimum habitual violent offender sentences must be reversed.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as well as that contained in the initial brief, petitioner requests that the habitual violent offender sentences be vacated and guidelines sentences be ordered. In addition, petitioner requests that this Court reverse the consecutive mandatory minimum sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Reply Brief of Petitioner has been furnished by hand delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, #055265, P.O. Box 500, Olustee, Florida 32072, this 4th day of September, 1992.

P. DOUGLAS BRINKMEYER