IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 84,525
2DCA No. 94-01645

ALBERT CALLAWAY, JR.,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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COUNSELS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner, the State of Florida, seeks review of a decision of the Second District Court of Appeal filed September 14, 1994 in which the court certified the following questions:

> 1. WHETHER A SENTENCE THAT ALLEGEDLY VIOLATES THE RULE ANNOUNCED IN HALE MAY BE CORRECTED UNDER RULE 3.850 WHEN THE SENTENCE HAS BEEN FINAL FOR MORE THAN TWO YEARS.
>
> 2. IF NOT, WHETHER AN UNSWORN MOTION UNDER RULE 3.800 THAT ALLEGES A HALE SENTENCING ERROR AND REQUESTS A FACTUAL DETERMINATION OF THE NUMBER OF CRIMINAL EPISODES ALLEGES AN "ILLEGAL" SENTENCE THAT MAY BE RESOLVED AT ANY TIME.

This Honorable Court has jurisdiction pursuant to article V., §3(b)(4), Florida Constitution. This court has postponed its decision on jurisdiction and has directed petitioner to serve the merits brief on or before November 14, 1994.

The pertinent facts of the case are summarized in the Second District's opinion. See Callaway v. State, 19 Fla. L. Weekly D1976 (Fla. 2d DCA, Sept. 14, 1994). The respondent was convicted of burglary and grand theft and sentenced on July 5, 1990 as a habitual offender to two (2) consecutive 10-year sentences for his involvement in, apparently, one criminal episode. On January 27, 1994, the respondent filed a motion to correct sentence pursuant to Florida criminal procedure rule 3.800 (a). Callaway, 19 Fla. L. Weekly at D1977, D1979 n.1.

The trial court denied relief without attaching any documents to its order. It concluded that the respondent should have raised the instant sentencing issue under Florida criminal procedure rule 3.850 since the matter can be resolved only after

a factual, rather than a legal, determination. Consequently, the trial court treated the motion as if it were filed under rule 3.850 and denied it as successive because an earlier motion under the rule had been filed in July, 1992 and denied. In addition, the trial court also reasoned that Hale v. State, 630 So. 2d 521 (Fla. 1993) only applies to habitual violent felony offenders and not to all habitual felony offenders. Callaway, 19 Fla. L. Weekly at D1977.

On review, the Second District first held that the trial court erroneously failed to apply Hale to a habitual felony offender sentence. Id. at D1977. The Second District next found that the determination of whether a prisoner's consecutive sentence is the result of a single criminal episode is appropriately resolved under rule 3.850. The court recognized that, for many prisoners, including the respondent, relief under rule 3.850 would be problematic because the rule 3.850 two (2) year limitation, if applicable, would bar relief. Id.

Accordingly, Judge Altenbernd, writing for the court, did an analysis under Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980) to determine if Hale is retroactive. The Witt court held that a change of law would not be considered retroactive under rule 3.850 unless: (1) it emanated from the United States Supreme Court or the Florida Supreme Court; (2) it was constitutional in nature; and (3) it constituted a development of fundamental significance. Callaway, 19 Fla. L. Weekly D1977, D1978. Following the Witt analysis of Hale, the Second District concluded that Hale is retroactive, although the

court expressed uncertainty in light of its review of prior precedent applying Witt. After expressing reservations in light of prior precedent, the Second District reversed the trial court's order and certified the two (2) questions of great public importance.

The state invokes the court's discretionary review pursuant to the certification of questions of great public importance and requests this Honorable Court to answer said questions in the negative.

SUMMARY OF THE ARGUMENT

The questions certified by the Second District Court of Appeal should be answered in the negative. Hale v. State, infra, should not be applied retroactively. The Hale decision does not qualify for retroactive application under Witt v. State, infra. The Hale decision did not represent a constitutional change in the law. The Hale court was simply performing the routine judicial function of discerning legislative intent. In addition, the Hale decision was not a "sweeping change of law" of drastic proportions or a "jurisprudential upheaval." In actuality, Hale is nothing more than an evolutionary refinement in the criminal law of sentencing. Under Witt, evolutionary refinements are not to be applied retroactively. Finally, pre-Hale sentences were legal at the time they were imposed and, therefore, they do not qualify for correction under rule 3.800.

ARGUMENT

THIS COURT'S DECISION IN HALE V. STATE, 630 SO. 2D 521 (FLA. 1993) SHOULD NOT BE APPLIED RETROACTIVELY BECAUSE THE COURT'S DECISION IN HALE WAS NOT CONSTITUTIONAL, NOR DID IT AMOUNT TO A MAJOR CONSTITUTIONAL CHANGE IN THE LAW OF DRASTIC PROPORTIONS; HALE ONLY REPRESENTS AN EVOLUTIONARY REFINEMENT IN THE CRIMINAL LAW OF SENTENCING AND, THEREFORE, DOES NOT QUALIFY FOR RETROACTIVE APPLICATION.

The State of Florida strenuously objects to retroactive application of Hale v. State, 630 So. 2d 521 (Fla. 1993) and requests the court to answer the certified questions in the negative. The Hale decision does not represent a major constitutional change in the law; the Hale court was simply performing the routine judicial function of discerning legislative intent. Additionally, Hale does not represent a "sweeping change of law" of drastic proportions or a "jurisprudential upheaval". In fact, Hale is nothing more than an evolutionary refinement in the criminal law.

The cornerstone in any discussion of retroactivity for purposes of post-conviction relief is this court's seminal decision in Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980). In Witt, the court recognized that the doctrine of finality should be abridged only in cases in which sweeping changes of law so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Id. at 925.

The court emphasized that only major constitutional changes of law may be applied retroactively. Id. at 929. However, every change in decisional law does not require retroactive application:

> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgment of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.

Id. at 929, 930 (Footnote omitted). The Witt court emphatically rejected the use of post-conviction relief proceedings to correct individual miscarriages of justice or to permit roving judicial error corrections, in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding.[1] Id. at 929.

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[1] In the context of subsequent favorable but evolutionary changes in decisional law, the state submits that its interest in finality outweighs concerns of fairness and uniformity in the criminal justice system. As stated by the Witt court:

> the importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no

Retroactivity is the exception and not the rule. In State v. Glenn, 558 So. 2d 4 (Fla. 1990) this court refused to find that the decision in Carawan v. State, 515 So. 2d 161 (Fla. 1987), holding that multiple convictions for a single criminal act violated the prohibitions against federal and state double jeopardy, applied retroactively. In refusing to apply Carawan retroactively this court recognized:

> In practice, because of the strong concern for decisional finality, this Court rarely finds a change in decisional law to require retroactive application. See State v. Washington, 453 So. 2d 389 (Fla. 1984). Accord McCuiston v. State, 534 So. 2d 1144 (Fla. 1988)(declined to retroactively apply Whitehead v. State, 498 So. 2d 863 (Fla. 1986), which held that finding a defendant to be an habitual offender is not a legally sufficient reason for departure from sentencing guidelines); Jones v. State, 528 So. 2d 1171 (Fla. 1988)(declined to retroactively apply Haliburton v. State, 514 So. 2d 1088 (Fla. 1987), which held that police failure to comply with attorney's telephonic request not to question a defendant further until that attorney could arrive was a violation of due process); State

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> evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

Id. at 925 (Footnote omitted). Hale should not be made retroactive in the instant case because constitutional due process concerns are satisfied by the application of Hale to every case pending on direct review or not yet final. Smith v. State, 598 So. 2d 1063 (Fla. 1992).

> v. Safford, 484 So. 2d 1244 (Fla. 1986)(declined to retroactively apply State v. Neil, 457 So. 2d 481 (Fla. 1984), which changed the long-standing rule in Florida that a party could never be required to explain the reasons for exercising preemptory challenges); State v. Statewright, 300 So. 2d 674 (Fla. 1974)(declined to retroactively apply Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), which established that police must warn arrested persons of their right to remain silent before questioning those persons).

Glenn, 558 So. 2d at 7. In holding that Carawan was an evolutionary refinement, rather than a judicial upheaval, the court stressed the strong policy interests of decisional finality.

In the instant case, as in Glenn, courts will be forced to reexamine previously final and fully adjudicated cases. Also, courts would be faced in many cases with the problem of making difficult and time-consuming factual determinations based on stale records. As in Glenn, the trial court's time is better spent on current caseloads rather than on cases which were proper at the time they became final.

The Glenn court cited McCuiston v. State, 534 So. 2d 1144 (Fla. 1988) as an example of the limited role of rule 3.850 and the proper approach to be used in determining whether a change in decisional law should have retroactive application. As noted, supra, McCuiston considered whether Whitehead should be applied retroactively. In Whitehead the court addressed the interplay between the habitual offender statute and the sentencing guidelines. In Whitehead the court held that sentencing as a habitual offender, by itself, was not a legally sufficient reason

for departing from a recommended guidelines sentence. Id. at 864.

In McCuiston, the court recognized Witt as the controlling case by which to determine whether a change in decisional law should be applied retroactively. Following analysis under the principles of Witt, the court concluded that Whitehead was merely an evolutionary refinement in the law and not one which required retroactive application. 534 So. 2d at 1146. In concluding that Whitehead was not retroactive, the court relied in part on Winters v. State, 522 So. 2d 816 (Fla. 1988). Winters clarified the effect of Whitehead on the relationship between the habitual offender statute and the sentencing guidelines. The Winters court held that the habitual offender statute could still be employed to raise the maximum statutory penalty as long as the sentence imposed did not exceed the recommended guideline sentence. An examination of Whitehead in light of Winters revealed that Whitehead was an evolutionary refinement in the law because of the further refinement by Winters. 534 So. 2d at 1146, 1147.

In accordance with the Glenn and McCuiston precedents, this court should refuse to apply Hale retroactively. Hale is not of constitutional import. It is constitutional only in a marginal sense. It is not within the purview of Witt. In Witt, the court refused to apply Davis v. United States, 417 U.S. 333, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974) to Florida post-conviction proceedings. As the Witt court stated, "[t]o allow non-constitutional claims as bases for post-conviction relief is to

permit a dual system of trial and appeal, the first being tentative and nonconclusive." Id. at 928. The Hale case is similar to Davis, in that the Hale court simply found that the stacking of consecutive habitual offender sentences was not authorized by statute.

It can also be seen that Hale is simply an evolutionary refinement of Palmer v. State, 438 So. 2d 1 (Fla. 1983) and its progeny. See e.g. McGouirk v. State, 493 So. 2d 1016 (Fla. 1986); Kelly v. State, 552 So. 2d 206 (5th DCA), review denied, 563 So. 2d 632 (Fla. 1990); Brown v. State, 543 So. 2d 1295 (Fla. 2d DCA 1989); Klein v. State, 498 So. 2d 625 (Fla. 1st DCA 1986); James v. State, 462 So. 2d 858 (Fla. 2d DCA 1985).

Hale relied upon Daniels v. State, 595 So. 2d 952 (Fla. 1992) which in turn was an evolutionary refinement in reliance upon Palmer. In Daniels, the court analogized mandatory minimum sentences imposed under the habitual violent felony offender statute to sentences imposed under section 775.087, Florida Statutes, requiring a three-year minimum mandatory sentence for the use of a firearm during the commission of certain enumerated crimes and ruled that the principle of Palmer applied to preclude stacking minimum mandatory sentences for crimes which arose out of a single criminal episode. 595 So. 2d at 953, 954.

Evolutionary refinement is demonstrated by the Palmer, Daniels, Hale progression. In fact, Hale quoted Daniels to the effect that:

> by enacting sections 775.084 and 775.0841, Florida Statues (Supp. 1988), the legislature intended to provide for the incarceration of repeat felony offenders for longer periods of

> time. However, this is accomplished by enlargement of the maximum sentences that can be imposed when a defendant is found to be an habitual felon or an habitual violent felon.

630 So. 2d at 524. Thus, Hale is not a major change in constitutional law amounting to a "judicial upheaval" but is more akin to an evolutionary refinement of the law which, under Witt, should not be applied retroactively.

The instant situation is no more unjust than that in McCuiston where the court refused to apply Whitehead retroactively. As the Fifth District recently recognized in Sloan v. State, 19 Fla. L. Weekly D1846 (5th DCA, Sept. 2, 1994), the respondent's position would be the same as that adopted by the court in Hall v. State, 511 So. 2d 1038 (Fla. 1st DCA 1987), quashed, 534 So. 2d 1144 (Fla. 1988):

> it would be inherently unjust to allow the imposition of an illegal sentence without providing a mechanism to attack that sentence, simply because courts were unaware of its illegality at the time of the imposition of sentence.

Hall, 511 So. 2d at 1041. The Sloan opinion points out that this position was rejected by this court in McCuiston.

Such a position should also be rejected in the instant case. Respondent will likely argue that the Second District's Callaway decision should be retroactive because it would be manifestly unfair for individuals such as himself to be treated differently from those who had the good fortune of being sentenced for similar conduct after Hale, relying on Bass v. State, 530 So. 2d 282 (Fla. 1988). Bass, however, appears to be a judicial anomaly. In Glenn, this court found that Bass should be given

limited weight in determining the types of cases which require retroactive application, since the opinion on rehearing did not discuss the principles of Witt. The state submits that, under the appropriate Witt analysis, Hale is not retroactive.

Finally, Hale should not be applied retroactively under rule 3.800 because consecutive habitual offender sentences for crimes committed in the same episode were legal prior to this court's determination of legislative intent. See Edler v. State, 616 So. 2d 546 (1st DCA), quashed, 630 So. 2d 528 (Fla. 1993); Brown v. State, 599 So. 2d 132 (2d DCA), rev'd, 630 So. 2d 596 (Fla. 2d DCA 1993); Highsmith v. State, 595 So. 2d 1072 (Fla. 2d DCA 1992). See also Sloan, 19 Fla. L. Weekly D1846 (reason for departure acceptable at time of sentence). Rule 3.800 (a) is only appropriate for issues that can be resolved without an evidentiary determination. Judge v. State, 596 So. 2d 73 (Fla. 2d DCA 1991), review denied, 613 So. 2d 5 (Fla. 1992).

The state respectfully requests the court to answer the Second District's certified questions of great public importance in the negative.

CONCLUSION

In light of the foregoing facts, arguments, and authorities the questions certified by the Second District as being of great public importance should be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Albert Callaway Jr., Pro Se, DC# 846279 (Slot 101), Avon Park Correctional Institution, P. O. Box 1100, Avon Park, Florida 33825-1100, on this 14th day of November, 1994.

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 84,525
2DCA No. 94-01645

ALBERT CALLAWAY, JR.,

Respondent.

_____/

APPENDIX

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COUNSELS FOR PETITIONER

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ALBERT CALLAWAY, JR.,

Appellant,

v.

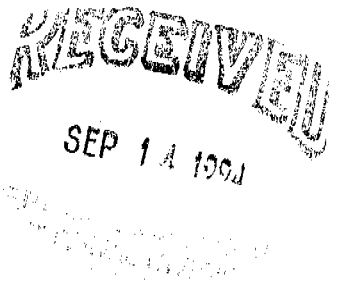
STATE OF FLORIDA,

Appellee.

Case No. 94-01645

Opinion filed September 14, 1994.

Appeal pursuant to Fla. R. App. P. 9.140(g) from the Circuit Court for Polk County; Robert A. Young, Judge.



ALTENBERND, Judge.

Albert Callaway appeals the summary denial of his motion seeking postconviction relief. He claims that his consecutive habitual felony offender sentences are impermissible under the rule announced in Hale v. State, 630 So. 2d 521 (Fla. 1993). We conclude that Hale applies to both habitual violent felony and habitual felony sentences. Even though Mr. Callaway's sentences became final more than two years ago, he is entitled to challenge

his consecutive habitual felony offender sentences during the two-year period following the issuance of Hale. Accordingly, we reverse and remand for further proceedings.

I. THE RULE IN HALE APPLIES TO BOTH TYPES OF HABITUAL FELONY OFFENDER SENTENCES

On January 27, 1994, Mr. Callaway filed a motion to correct sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). In the motion, he explains that he had been sentenced on July 5, 1990, as a habitual offender to two consecutive 10-year sentences for his involvement in one criminal episode. This court affirmed those sentences in June 1991. His motion points out that the supreme court in Hale recently held there is no statutory authority for consecutive habitual offender sentences for offenses committed during a single criminal episode. He maintains that he is entitled to concurrent sentences, as a matter of law, because his sentences arose from a single criminal episode.

The trial court denied relief without attaching any documents to its order. It concluded that Mr. Callaway should have raised this sentencing issue under Florida Rule of Criminal Procedure 3.850 because the matter can be resolved only after a factual, rather than a legal, determination. Accordingly, the trial court treated the motion as if it were filed under rule 3.850, but denied it as successive because an earlier motion under rule 3.850 had been filed in July 1992 and denied. If the trial court is correct, the earlier denial was not appealed to

this court, and we have no documentary support for its ruling. Moreover, the earlier motion was denied more than a year before the supreme court's decision in Hale. This is the first time that Mr. Callaway has had an opportunity to raise this issue since Hale was decided.[1]

In addition to denying the motion as successive, the trial court also reasoned that Hale only applies to habitual violent felony offenders and not to all habitual felony offenders. It is true that Hale involved a habitual violent felony sentence. On the other hand, the court's reasoning appears to apply equally to both habitual and habitual violent felony sentencing:

> 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.

630 So. 2d at 524. There is nothing in the statute that expressly permits either variety of habitual offender sentence to be imposed consecutively. While not fully explained in the opinion, this court has recently applied Hale in a direct appeal

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[1] This court's records include Mr. Callaway's direct appeal from these convictions and sentences and a 1991 appeal from the summary denial of a rule 3.800 motion. These records indicate that Mr. Callaway was convicted of burglary and grand theft, both third-degree felonies, and that he received consecutive habitual felony offender sentences in this case. Our records suggest that the two convictions may have arisen out of a single criminal episode at Creasy's Lawn and Tractor Equipment on January 10, 1990, but we have no ability or authority to make a factual determination on this issue.

involving a habitual offender sentence, as compared to a habitual violent offender sentence. See Dietrich v. State, 635 So. 2d 148 (Fla. 2d DCA 1994). Two other districts appear to have applied Hale to sentences that were not habitual violent offender sentences. See Goshay v. State, 19 Fla. L. Weekly D1715 (Fla. 1st DCA Aug. 12, 1994); Sirmans v. State, 638 So. 2d 576 (Fla. 1st DCA 1994); Anderson v. State, 637 So. 2d 971 (Fla. 5th DCA 1994). In accordance with the above reasoning and authorities, we hold the trial court erred in failing to apply Hale to a habitual felony offender sentence.

II. THE NEW RULE IN HALE APPLIES RETROACTIVELY UNDER WITT

Because the trial courts in this district will undoubtedly receive many postconviction motions based on Hale, we discuss whether such motions may be filed unsworn under rule 3.800(a) or whether they must be filed pursuant to rule 3.850. There is analogous precedent that would support or counter almost any resolution of this issue. For the reasons stated below, we conclude that rule 3.850 applies to any conviction preceding Hale and that a two-year window exists after Hale in which to address this issue. See Adams v. State, 543 So. 2d 1244 (Fla. 1989); Rodriguez v. State, 637 So. 2d 934 (Fla. 2d DCA 1994).

Rule 3.800(a) allows an unlimited period in which to address "illegal" sentences. Thus, it is generally reserved for issues that can be resolved as a matter of law and without an

evidentiary determination.[2] Judge v. State, 596 So. 2d 73 (Fla. 2d DCA 1991), review denied, 613 So. 2d 5 (Fla. 1992). Nevertheless, this district has, in analogous cases, permitted prisoners to present factual challenges to consecutive minimum mandatory sentences under rule 3.800(a) at any time. See Young v. State, 638 So. 2d 532 (Fla. 2d DCA 1994); Brown v. State, 633 So. 2d 112 (Fla. 2d DCA 1994); Poiter v. State, 627 So. 2d 526 (Fla. 2d DCA 1993). Other districts have taken different approaches. See Young v. State, 616 So. 2d 1133 (Fla. 3d DCA 1993); Nowlin v. State, 19 Fla. L. Weekly D1518 (Fla. 1st DCA July 12, 1994).

As a general rule, a postconviction issue that requires an evidentiary hearing must be resolved under rule 3.850. See Judge, 596 So. 2d 73. Whether a prisoner's consecutive sentences arise from a single criminal episode is not a pure question of law. Resolution of this issue depends upon factual evidence involving the times, places, and circumstances of the offenses. See, e.g., Blount v. State, No. 92-02872 (Fla. 2d DCA Aug. 12, 1994) (theft and battery on law enforcement officer are one episode); Willis v. State, No. 92-03272 (Fla. 2d DCA Aug. 5, 1994) (drug paraphernalia discovered during arrest for robbery is separate from robbery episode); Houise v. State, 638 So. 2d 622 (Fla. 1st DCA 1994) (possession of firearm and assault with that

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[2] Former Federal Rule of Criminal Procedure 35 provided relief for illegal sentences similar to our rule 3.800(a). Generally, the federal rule was limited to sentencing errors apparent from the face of the record. See Hill v. United States, 368 U.S. 808, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962); Heflin v. United States, 358 U.S. 415, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959); Petro v. United States, 368 F.2d 807 (6th Cir. 1966).

firearm are part of single episode); Parker v. State, 633 So. 2d 72 (Fla. 1st DCA 1994) (crimes inside and outside a house are two episodes); Scott v. State, 627 So. 2d 72 (Fla. 5th DCA 1993) (offenses arising from attempted prison escape deemed one episode).

If a prisoner seeking postconviction relief pleaded to the charges, the recorded plea colloquy may not address whether the offenses occurred in one or more episodes. Additionally, those circumstances may not be apparent on the face of the information. It is also unlikely that the documents in the remainder of the prisoner's court file will, as a matter of law, determine whether the offenses arose from a single episode. Cf. Parker, 633 So. 2d 72 (relying on arrest report in record on appeal to determine these issues without evidentiary hearing).

If a prisoner seeking postconviction relief from consecutive sentences was convicted by a jury and has already lost his appeal, the court files available after conviction may contain a transcript of the trial, but even that evidence may not resolve whether all of the offenses were committed in a single episode. Before the decision in Hale, this was not a factual issue that a prosecutor would have emphasized.

Although the issue may not always involve a complex factual question, the postconviction determination of the number of criminal episodes considered at any prior sentencing hearing will usually, if not always, require an evidentiary determination. Thus, a sworn motion filed pursuant to rule 3.850 is the appropriate method for resolution of this issue.

For many prisoners, including Mr. Callaway, the problem with seeking such postconviction relief under rule 3.850 is that the normal two-year limitation, if applicable, would bar the motions. Nevertheless, a two-year window following Hale is available if this new rule is retroactive under Witt v. State, 387 So. 2d 922 (Fla. 1980).

In Witt, the court held that a change of law would not be considered under rule 3.850 unless: (1) it emanated from the United States Supreme Court or the Florida Supreme Court; (2) it was constitutional in nature; and (3) it constituted a development of fundamental significance. Our supreme court's decision in Hale clearly passes the first prong of this three-prong test.

The second prong requires that the new rule be constitutional in nature. This requirement seems to overlap with the third requirement that the new rule be a development of fundamental significance. We rely to some extent upon the reasoning for the third prong in deciding that the new rule in Hale is constitutional in nature. Although the supreme court did not declare any law unconstitutional in Hale, it invalidated consecutive habitual offender sentences arising from the same criminal episode because no statute expressly authorized such punishment. The punishment clearly could not withstand due process analysis in the absence of an empowering statute. Thus, while the decision is not directly a new rule of constitutional law, it is based primarily upon constitutional analysis, as compared to common law analysis or statutory interpretation. It is "constitutional in nature."

Turning to the third prong, a change in the law is of "fundamental significance" if it fits within one of two "broad categories." 387 So. 2d at 929. The rule in Hale must be either (1) a change that places the power to impose a certain penalty beyond the authority of the state, or (2) it must pass another three-prong test described in Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), and Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965). This third prong of the Witt test clearly restricts the retroactive application of new rules to changes that are significant "jurisprudential upheavals," as compared to "evolutionary refinements."

We are uncertain that Hale fits within the first broad category of changes of fundamental significance. Although the Hale rule limits the state's power to impose a certain penalty, it does so because the relevant statute fails to expressly authorize such a penalty, not because the constitution bars such a statutory penalty. Cf. Meek v. State, 605 So. 2d 1301 (Fla. 4th DCA 1992) (new rule concerning immunity statute fits within this category).

The three-prong test in Stovall and Linkletter requires an examination of: (1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; and (3) the effect on the administration of justice of a retroactive application of the new rule. Witt, 387 So. 2d at 926. We conclude that the rule in Hale passes this test.

First, the purpose of the new rule is to impose only those statutory penalties of which citizens have legal notice at

the time of the commission of the offense. This purpose has strong due process and equal protection implications.

Second, the old rule was relied upon by many, if not most, circuit judges, but only for a few years. We believe that most of the cases affected by Hale will involve sentences imposed after the 1988 amendment to section 775.084. See Ch. 88-131, Laws of Fla.[3] Thus, the old rule was not entrenched in our judicial process. The finality of judgments will not be weakened if we correct the sentencing errors that occurred primarily in this limited period.

Third, the retroactive application of Hale will have no serious effect upon the administration of justice. Admittedly, it will take some time to handle these postconviction motions, but not an unreasonable amount of time. This new rule does not reverse convictions or require extensive testimony. Cf. State v. Austin, 532 So. 2d 19 (Fla. 5th DCA) (change in drug trafficking jury instruction not retroactive), review denied, 537 So. 2d 568 (Fla. 1988). In many cases, the number of criminal episodes may be subject to stipulation. The administration of justice might be more adversely affected by permitting some prisoners to serve 10-year terms at the same time other similar prisoners serve 20-year terms because of an issue that prisoners will perceive to be a legal technicality.

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[3] Prior to 1988, habitual offender sentencing was intermingled in guidelines sentencing and was affected by Whitehead v. State, 498 So. 2d 863 (Fla. 1986).

We conclude that this sentencing issue may be raised under oath pursuant to rule 3.850 during the two-year period following Hale. Consequently, in this case, we do not need to determine whether it could also be raised under rule 3.800(a) after the expiration of the two-year window.[4]

Although we decide that the new rule in Hale passes the Witt test for retroactive application under rule 3.850, we must confess that our review of prior precedent applying Witt is not entirely reassuring. Our analysis in this case appears to be consistent with the First District's decision to retroactively resentence prisoners whose guideline sentences were affected by Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987). See Brown v. State, 535 So. 2d 332 (Fla. 1st DCA 1988). See also Nilio v. State, 601 So. 2d 646 (Fla. 4th DCA 1992) (retroactive application of rule preventing departure from guidelines for violation of probation); Tafero v. State, 459 So. 2d 1034 (Fla. 1984) (elimination of death penalty for felony murder is retroactive). On the other hand, our analysis seems facially at odds with the supreme court's decision in McCuiston v. State, 534 So. 2d 1144 (Fla. 1988). McCuiston held that the

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[4] Recently, the First District allowed the Hale issue to be raised in a postconviction proceeding more than two years after sentencing. Booker v. State, 19 Fla. L. Weekly D1399 (Fla. 1st DCA June 29, 1994). The opinion describes the prisoner's motion as a rule 3.800(a) motion, but arguably permits such review under the exception to the two-year limitation contained in Witt. Because an illegal sentence can be challenged under rule 3.800 at any time, we doubt the need to apply a Witt analysis to review a sentence that was truly "illegal" from its inception. If there has never been statutory authority for consecutive habitual offender sentencing as Hale decided, then no such consecutive sentence would have been authorized when imposed.

rule announced in Whitehead v. State, 498 So. 2d 863 (Fla. 1986), should not apply retroactively. Whitehead prohibited the use of the habitual offender statute as a reason for departing from the sentencing guidelines. To the extent that Whitehead involved a lengthened sentence under the habitual offender statute, it is similar to this case. As explained in McCuiston, however, that change had more limited significance. If Hale is not given retroactive application, some prisoners will have sentences twice as long as the maximum sentence that could be lawfully imposed for the same offenses on other prisoners with comparable criminal histories.

Our analysis is completely compatible with this court's decision to apply retroactively the rule in Palmer v. State, 438 So. 2d 1 (Fla. 1983), prohibiting consecutive minimum mandatory sentences arising from one criminal episode. See Cisnero v. State, 458 So. 2d 377 (Fla. 2d DCA 1984). However, the supreme court engaged in a different analysis of the same subject in Bass v. State, 530 So. 2d 282 (Fla. 1988), leaving in doubt the correctness of the reasoning in Cisnero.

In Bass, the supreme court issued an initial decision expressly holding that the new rule in Palmer did not pass the Witt test. See Bass v. State, 12 Fla. L. Weekly 289 (Fla. 1987) (withdrawn on rehearing). The initial decision declared that such "illegal" sentences should be corrected, even though they did not pass the Witt analysis, because they were "inherently unjust." Justice Ehrlich dissented, arguing that the majority erred in ruling that pre-Palmer consecutive sentences were

illegal and in using "inherently unjust" as an escape valve from the rigid requirements protecting finality in Witt. Bass, 12 Fla. L. Weekly at 289.

On rehearing in Bass, the court issued a shorter final opinion, allowing review of a prisoner's consecutive minimum mandatory sentences by a motion that was filed under rule 3.850 after the expiration of the usual two-year period. The revised opinion gives this relief because it would be "manifestly unfair" to do otherwise. 530 So. 2d at 283. While this reason may seem sufficient to any fair-minded person, it is not an analysis recognized by Witt.

When the supreme court issued this revised opinion, it omitted the discussion of Witt. It did not explain (1) whether the new phrase, "manifest unfairness," was intended as an abbreviated explanation that the Palmer rule passed the Witt test, or (2) whether it intended to hold that a sentence now could be determined "illegal" through a postconviction factual examination of circumstances creating "manifest unfairness."[5] Some of the explanation of Bass in McCuiston suggests that the court intended the opinion on rehearing in Bass to be an application of Witt, but many subsequent cases have interpreted Bass as a determination that such manifestly unfair sentences are, under a factual analysis, illegal. With all due respect to the supreme court and

[5] The supreme court explains some of the basis for its rehearing of Bass in State v. Glenn, 558 So. 2d 4 (Fla. 1990). The explanation, however, does not resolve our concerns in this case. Neither does the additional discussion of Bass in Smith v. State, 598 So. 2d 1063 (Fla. 1992).

with full recognition that these issues involve a difficult balance of finality and due process, the reliance on "manifest unfairness" in Bass has caused repetitive difficulties for the trial and appellate courts as they confront postconviction motions seeking correction of sentences for reasons that require new evidentiary hearings to determine old factual questions.

With these reservations, we reverse the trial court's order. On remand, if the court again denies relief, it must attach portions of its records that refute Mr. Callaway's allegations. Anyone aggrieved by subsequent action of the trial court must file a timely notice of appeal to obtain further appellate review.

Because trial courts in Florida need a uniform statewide rule concerning the proper roles of rules 3.800 and 3.850 when faced with this issue, we certify the following questions of great public importance:

> **1. WHETHER A SENTENCE THAT ALLEGEDLY VIOLATES THE RULE ANNOUNCED IN HALE MAY BE CORRECTED UNDER RULE 3.850 WHEN THE SENTENCE HAS BEEN FINAL FOR MORE THAN TWO YEARS.**
>
> **2. IF NOT, WHETHER AN UNSWORN MOTION UNDER RULE 3.800 THAT ALLEGES A HALE SENTENCING ERROR AND REQUESTS A FACTUAL DETERMINATION OF THE NUMBER OF CRIMINAL EPISODES ALLEGES AN "ILLEGAL" SENTENCE THAT MAY BE RESOLVED AT ANY TIME.**

Reversed and remanded.

PARKER, A.C.J., and LAZZARA, J., Concur.