IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

V.

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

ALBERT CALLAWAY, Jr.,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

THe question certified by the Second District Court of Appeals should be answered in the affirmative. **Hale v. State**, should be applied retroactively.

The Hale decision does qualify for retroactive application under **Witt v. State, 387 So. 2d. 922 (Fla. 1980), 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).** The Hale decision represents due process and equal protection of the law which is constitutional in nature. Although this 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 punishemnt clearly could not withstand due process analysis in the absence of an empowering statute. Thus, while the decisions not directly a new rule of constitutional law, it is based primarly upon constitutional analysis, as compared to common law analysis or statutory interpretation. It is constitutional in nature under the analysis of Witt and therefore qualifies for retroactive application. If there has never been statutory authority for consecutive habitual offender sentencing as this Court decided in Hale and pre Hale decisions, then no such consective sentence would have been authorized when imposed. Pre Halesentences were illegal at the time they were imposed and, therefore, they do qualify for correction under Rule 3.800(a). Finally, the retroactive application of Hale will have no serious effect upon the administration of justice. The administration of justice might be more adversely affected if Haleis not given retroactive application, some prisoners will have sentences twice as long as the maximum sentences that could be lawfully imposed under statute for the same offenses on other prisoners with comparable criminal histories.

ARGUMENT

THIS COURTS DECISION IN HALE V. STATE, 630 SO. 2D. 521 (FLA.1993) SHOULD BE APPLIED RETROACTIVELY AS IN PALMER V. STATE, 438 SO. 2D. 1 (FLA. 1983) BECAUSE HALE LIKE PALMER ARE JUDICIAL UPHEAVALS AND NOT EVOLUTIONARY REFINMENTS WHICH WAS CONCLUDED UNDER A CONSTITUTIONAL ANALYSIS, AS COMPARED TO COMMON LAW ANALYSIS THEREFORE, HALE DOES QUALIFY FOR RETROACTIVE APPLICATION UNDER THE ANALYSIS OF WITT V. STATE, 387 SO. 2D. 922 (FLA.1980), LINKLETTER V. WALKER, 381 U.S. 618, 85 S.Ct. 1731, 14 L.ED.2D 601 (1965), AND STOVALL V. DENNO, 388 U.S. 293, 87 S.Ct. 1967, 18 L.ED.2D. 1199 (1967).

Respondent, Albert Callaway, Jr., strongly urges this Honorable Court to apply **Hale v. State, 630 So. 2d. 521 (Fla.1993)** retroactively to cases imposed after the 1988 amendment to Section 775.084, Florida Statutes (Supp. 1988).

And further request the Court to answer the certified questions in the affirmative. Petitioner suggest that the COurt was simply performing its routine judicial function of discerning legislative intent in Hale. 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. This Court in Witt reiterated its adherence to the very limited role for postconviction proceedings even in death cases.

The Court held that only major constitutional changes of law which constitute a development of fundamental significance are cognizable under a motion for postconviction relief.

Most such "judrisprudential upheavals" in the law fall within two broad categories, i.e. decisions such as **Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d. 982 (1977)** (death penalty inappropriate in rape cases), which place beyond the authority of the state the power to regulate certain conduct "or impose certain penalties, and decisions such as **Gideon v. Wainwright, 372 U.S. 355, 83 S.Ct. 792, 9 L.Ed.2d. 799 (1963)** (state must provide adequate counsel for indigent criminal defendants in felony cases) **State v. Glenn, 558 So. 2d. at 6 (Fla. 1990).** This Court held in Hale that there is nothing in the habitual offender statute, Section 775.084, that expressly permits a habitual offender sentence to be imposed consecutivley, thus, Hale falls within such "juris-prudential upheavales" as Coker. Legislature intended to accomplish goal of providing for incarceration of repeat offenders for longer periods of time by enlarging maximum sentences that can be imposed when a defendant is found to be habitual felon, not by permitting stacking of consecutive mandatory minimum sentences where penal statute does not provide for minimum mandatory sentence constitutes enhancement of underlying offense. **Daniels v. State, 595 So. 2d. at 954 (Fla.1992).**The state contends that this instant case, as in Glenn, court's will be forced to reexamine previously final and fully adjudicated cases. Also, that the Court's would be faced in many cases with the problem of making dif-ficult and time-consuming factual determinations based on stale records.

Retroactive application of Hale will have no serious effect upon the sd-ministration of justice. It will take some time to handle these postconviction motions, but not an unreasonable amount of time. The new rule in Hale does not reverse convictions or require extensive testimony.

The cases that will be most affected by Hale will involve sentences imposed after the 1988 amendment to Section 775.084, FLorida Statutes.[1] The state relies on **Whitehead v. State, 498 So. 2d. 863 (Fla.1986)** as an evolutionary refinement in the law trying to make a relationship between Whitehead and Hale.

Whitehead was based on guideline issues as in **Ree v. State, 565 So. 2d. 1329 (Fla.1990)** and not statutory errors as in Hale:

> **We find nothing in the language of the habitual offender statute which suggest 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.**

Hale, 630 So. 2d. at 524.

The three-prong test in Stovall [2] and Linkletter, [3] 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 retroactive application of the new rule. **Witt, 387 So. 2d. at 926.** 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 if the cimmission of the offense. This purpose has long 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. Most of the cases affected by Hale will involve sentences imposed after the 1988 amendment to Section 775.084, Florida Statutes.

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1. Prior to 1988, habitual offender sentencing was intermingled in guidelines sentencing and was not affected by Whitehead v. State, 498 So. 2d. 863 (Fla.1986) 2. 388 U.S. 618, 87 S.Ct.1967, 18 L.Ed.2d. 1199(1967) 3. 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d. 601 (1965).

Thus, the old rule was not entrenched in judicial process. The finality of judgments would not be weakened if the District and Circuit Court's corrected the sentencing errors that accurred primarily in this time frame.

Third, the retroactive application of Hale will have no serious effect upon the administration of justice. [4] The Second District Court has recently applied Hale in a direct appeal in **Dietrich v. State, 635 So. 2d. 148 (Fla. 2d. DCA 1994).** Other districts have applied Hale to sentences that were not habitual violent offender sentences. **See, Goshav 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), Brooks v. State, 605 So. 2d. 874 (Fla. 1st. DCA 1992).**The Griffith [5] rule is consistent with many decisions of this Court. In **Bundy v. State, 471 So. 2d. 9 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d. 269 (1986),** this Court held that hypnotically refreshed testimony is per se inadmissible in criminal trials in state. The Court expressly concluded that the new rule would be prospestive only. Nonetheless, this Court applied that rule retrospectively to Bundys direct appeal and ruled that it would be applied retrospectively to "any conviction presently in the appeals process." **See also, Wheeler v. State, 344 So. 2d. 244, 245 (Fla. 1977)** (reversing conviction where standard jury instructions had changed subsequent to trial because "decisional law in effect at the time an appeal is decided governs the issues raised on appeal, even when there has been a change of law since the time of trial.")

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4. Respondent hereby adopts and incorporates by reference the analysis of Witt applied to Hale in the Second District Court's opinion filed September 14, 1994.5. 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d. 649 (1987).

This Court was persuaded under the principles of fairness and equal treatment underlying Griffith, which are embodied in the due process and equal protection provisions of Article I, Sections 9 and 16 of the Florida Constitution, to adopt a similar evenhanded approach to the retrospective application of the decisions of this Court with respect to all nonfinial cases. **Smith v. State, 598 So. 2d. at 1066 (Fla. 1992)**[6] As this Court applied "fairness" and "equal teratment" to Smith consistent with Griffith, **Adams v. State, 543 So. 2d. 1244 (Fla. 1989),** should be applied with a two-year window to rule 3.850 appling to convictions preceding Hale to all similar cases such as Mr. Callaway's imposed after the 1988 amendment to Section 775.084, Florida Statutes. In **Palmer v. State, 438 SO. 2d. 1 (Fla. 1983),** this COurt held that the three-year minimum mandatory sentences described by Section 775.021(4), Florida Statutes (1983), could not be imposed consecutively for separate offenses arising from a single criminal thransaction or episode. [7] At that time this Court did not state whether or not the Palmer rule would have retroative application. Upon consideration, this Court concluded as a matter of policy that the principles of Palmer should be applied retroactively. This Court further held in Palmer that it would be manifestly unfair for prisoners (in the case at bar, such as Mr. Callaway's), who recived consecutive habitual offender sentences prior to Hale to be treated differently from those who had the good fortune of being sentenced for similar conduct after that dicision was rendered. **See, Bass v. State, 530 So. 2d. at 283 (Fla. 1988).**

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6. See also, Crenshaw v. State, 620 So.2d. 1288 (Fla. 4th. DCA 1993)
7. Mr. Callaway received two consecutive 10-year sentences under Section 775.084, F.S. for burglary and grand theft arising from single criminal episode at Creasy's Lawn and Tractor Equipment on January 10, 1990.

Thus, if the allegations of Callaway's motion are correct, the consecutive imposition of habitual offender sentences are illegal and, as such, subject to collateral attack under Florida Rule of Criminal Procedure 3.850. **See, Dowdell v. State, 500 So. 2d. 594 (Fla. 1st. DCA 1986).** The First District Court of Appeal 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 Bookers motion as a rule 3.800(a) motion, but arguably permits such review under the exception to the two-year limitation contained in Witt. **See also, Young v. State, 638 So. 2d. 532 (Fla. 2d. DCA 1994), Brown v. State, 633 So. 2d. 112 (Fla. 2d. DCA 1994), Poiter v. Stat, 627 So. 2d. 526 (Fla. 2d. DCA 1993).** Under this Court's analysis of **Palmer v. State, 438 So. 2d. 1 (Fla. 1983), Bass v. State, 530 So. 2d. 282 (Fla. 1988), Daniels v. State, 595 So. 2d. 952 (Fla. 1992),** and **Hale v. State, 630 So. 2d. 521 (Fla. 1993),** made a legal determination that consecutive sentences for single criminal episode was an "illegal" sentence. Therefore, if there has never been statutory authority for consecutive habitual offender consecutive sentence as the aforesaid cases decided, then no such consecutive sentence would have been authorized when imposed. The Second District Courts analysis and the Respondents is completely compatible with this Court's decision to apply retroactively the rule in **Palmer v. State, 438 So. 2d. 1 (Fla. 1983).** Hale should be made retroactive in the instant case and all similar cases from the 1988 amendment to Section 775.084, Florida Statutes, (Supp.1988). **Adams v. State, 543 So. 2d. 1244 (Fla. 1989), Rodriquez v. State, 637 So. 2d. 934 (Fla. 2d. DCA 1994).**

Respondent respectfully request the Court to answer the Second District's certified questions of great public importance in the affirmative.

CONCLUSION

WHEREFORE, based on the foregoing facts, arguments, and cited authorities, the questions certified by the Second District as being of great public importance should be answered in the affirmative and Mr. Callaway's remand should not be altered.

Respectfully submitted,

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