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IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,726

**STATE OF FLORIDA**

Petitioner,

-vs-

**JONATHAN HILL**

Respondent.

**********
**ON PETITION FOR DISCRETIONARY REVIEW**
**********

**********
**BRIEF OF PETITIONER ON THE MERITS**
**********

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## STATEMENT OF THE CASE AND FACTS

On October 27, 1992, Jonathan Hill was charged by information with burglary, grand theft motor vehicle, and possession of burglary tools in violation of §§ 810.02(3), 812.014(1)(2)(c), and 810.06, Florida Statutes (1991). (R. 1-5). The charges all arose from Hill's taking Louie Cheranfant's car on October 7, 1992. (R. 1-5).

On June 2, 1993, the state filed a Notice of the State's Intention to Seek Enhanced Penalty Pursuant to F.S. 775.084. (R. 26). The case was tried by jury on June 7 and 9, 1993, and the jury found Hill guilty as charged. (R. 28-30). On June 9, 1993, the trial court adjudicated Hill guilty of the charges, and ordered a Pre-Sentence Investigation report. (R. 22, 31-32).

On July 29, 1993, the trial court conducted a sentencing hearing at which testimony was heard from both state and defense witnesses. (R. 41-64). At the end of the evidence and counsel's argument, the trial court found that Hill qualified as a Habitual Violent Felony Offender. (R. 62). The trial court then sentenced Hill to ten (10) years on each f the three counts with a minimum mandatory term of five (5) years. (R. 62). The ten (10) year sentences were to run consecutively. (R. 34-36, 62). At the time of sentencing a Sentencing Guidelines Scoresheet was filled out. (R. 37). Due to his substantial prior record, Hill scored three hundred forty-two (342) points. (R. 37). This score corresponds with a recommended sentence of twenty-two (22) to twenty-seven (27) years with a permitted sentence of seventeen (17) to forty (40) years. (R. 37).

Hill timely appealed his convictions and sentence to the Third District Court of Appeal. (R. 39-40). On appeal, Hill raised the following issues: 1) that he was entitled to a new trial

due to the state's exercise of a peremptory challenge to excuse an African-American juror; 2) that he was improperly sentenced pursuant to §775.087, Fla. Stat.; and 3) that the trial court improperly imposed consecutive sentences under the Habitual Violent Felony Offender Statute. (R. 69-73). The Third District Court of Appeal found no merit in Hill's first issue, and the state conceded error on Hill's second issue. (R. 70). However, the Third District reversed Hill's consecutive sentences on the basis of *Hale v. State*, 630 So. 2d 521 (Fla. 1993) *cert.denied* Case No. 94-5612 (U.S. Oct. 3, 1994). (R. 70). Additionally, the Third District certified the following as a question of great public importance:

> Whether *Hale v. State*, 630 So. 2d 521 (Fla. 1993) *cert.denied* Case No. 94-5612 (U.S. Oct. 3, 1994) precludes under all circumstances the imposition of consecutive sentences for crimes arising from a single criminal episode for habitual felony or habitual violent felony offenders?

Subsequent to the certification of the above question, the state filed a Notice to Invoke Discretionary Jurisdiction, thereby commencing the instant proceeding.

## SUMMARY OF THE ARGUMENT

The Florida Legislature intended that separate sentences be given for each offense committed regardless of whether they arose from a single criminal episode or not, and authorized the trial court to impose consecutive or concurrent sentences at its discretion. Additionally, the Legislature has provided for enhanced penalties for Habitual Felony Offenders and Habitual Violent Felony Offenders.

This Court prohibited the imposition of consecutive minimum mandatory sentences when the offenses were committed during a single criminal episode. This Court's rationale has focused on the denial of eligibility for parole during those periods, and absence of specific language authorizing such a sentence. This principle is now being extended to prohibit any consecutive sentences pursuant to the Habitual Felony Offender and habitual Violent Felony Offender statute for offenses committed during a single criminal episode.

Application of this principle to the case at bar renders the habitualization statute meaningless. Instead of preventing excessive enhancement, application of the principle results in a downward departure from the recommended and permitted sentence under the Sentencing Guidelines. Thus, this Court should limit the principle to only prohibit consecutive mandatory sentences. Alternatively, this Court should recognize an exception to the principle whenever prohibition of consecutive sentences results in a downward departure from the permitted sentence under the Sentencing Guidelines.

## ARGUMENT

### I.

**_HALE v. STATE_, 630 So. 2d 521 (Fla. 1993) _cert. denied_ Case No. 94-5612 (U.S. Oct. 3, 1994) SHOULD BE INTERPRETED TO ONLY PROHIBIT THE IMPOSITION OF CONSECUTIVE MINIMUM MANDATORY SENTENCES FOR EACH OFFENSE COMMITTED DURING THE COURSE OF A SINGLE CRIMINAL EPISODE UNDER § 775.084, FLORIDA STATUTES.**

The Florida Criminal Code provides the following language under the subsection entitled "Rules of Construction",

> Whoever, ***in the course of one criminal transaction or episode***, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, ***shall be sentenced separately for each criminal offense***; and ***the sentencing judge may order the sentences to be served concurrently or consecutively***.

§ 775.021(4)(a), Fla. Stat. (1993). The section later reads,

> The intent of the legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent.[1]

§ 775.021(4)(b), Fla. Stat. (1993).[2] Thus, the legislature was explicit in its intent to punish for

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[1] Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.

2. Offenses which are degrees of the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

§ 775.021(4)(b), Fla. Stat. (1993).

[2] Subsection (1) of the statute in turn provides,

each offense committed, regardless of whether they were the result of a single criminal episode or committed at separate times and places.

However, this Court prohibited the imposition of consecutive minimum mandatory terms of imprisonment when the sentence was already enhanced pursuant to § 775.087, Florida Statutes, if the offenses charged arose out of a single criminal episode. *Palmer v. State*, 438 So. 2d 1 (Fla. 1983). This Court reasoned,

> Nowhere in the language of section 775.087(2) do we find express authority by which a trial court may deny, under subsection 775.087(2), a defendant eligibility for parole for a period greater than three calendar years.

*Id.* at 3. This Court's expressed concern focused on the fact that "Palmer . . . was sentenced to ***thirty-nine years, without eligibility for parole, based upon a statute expressly authorizing denial of eligibility for parole for only three years.***" *Id.*[3] Allowing the trial court to impose consecutive sentences in *Palmer* resulted in an exponential increase in the defendant's actual sentence served.

In *Daniels v. State*,[4] this Court extended this principle and held, in the context of minimum mandatory sentences imposed through § 775.084, Florida Statutes, the Habitual Felony

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> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorable to the accused.

§ 775.021, Fla. Stat. (1993).

[3] Statutes specifically denying eligibility for parole for a prescribed period of time have survived numerous constitutional attacks. *See*, *Scott v. State*, 369 So. 2d 330 (Fla. 1979); *Sowell v. State*, 342 So. 2d 969 (Fla 1977); *Owens v. State*, 316 So. 2d 537 (Fla 1975); *Dorminey v. State*, 314 So. 2d 134 (Fla. 1975); *Owens v. State*, 300 So. 2d 70 (Fla. 1st DCA) *appeal dismissed*, 305 So. 2d 203 (Fla. 1974).

[4] 595 So. 2d 952 (Fla. 1992).

Offender and Habitual Violent Felony Offender statute, that:

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

*Id.* at 954. Again, this Court's reasoning centered upon denial of eligibility for parole. Thus, a common thread emerged: if the statute proscribing the conduct the defendant was charged with expressly provided for a minimum mandatory term, then the principle stated under "Rules of Construction" prevailed. Namely, the discretion to impose concurrent or consecutive sentences remained within the province of the trial court. However, if the statute proscribing the conduct the defendant was charged with did not provide for a minimum mandatory portion (and the defendant's sentence was enhanced pursuant to a statute which did provide for a minimum mandatory portion) then the minimum mandatory portions could not be "stacked" if the charges arose out of a single criminal episode.[5]

In *Hale v. State*,[6] this Court reversed Hale's consecutive minimum mandatory sentences imposed pursuant to the Habitual Felony Offender and Habitual Violent Felony Offender Act. *Id.* This Court reasoned as follows:

> 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 episode have been enhanced through the habitual offender states, the total penalty should then be further increased by ordering that the sentences run consecutively.

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[5] Please note that ever since 1983 there has effectively been no parole, since release from incarceration may only occur in a limited number of statutorily described circumstances. § 921.001(10)(a), Fla. Stat.(1993). The circumstances for release are even further limited for offenses committed after January 1, 1994. § 921.001(10)(b), Fla. Stat.(1993).

[6] 630 So. 2d 521 (Fla. 1993) *cert. denied* Case No. 94-5612 (U.S. Oct. 3, 1994).

*Id.* at 524. Thus, it appears that once the Habitual Felony Offender or Habitual Violent Felony Offender statute enhances the penalty which would have been imposed, this Court has precluded the imposition of consecutive sentences if the charges arose out of a single criminal episode. However, this Court's decision in both *Hale* and *Daniels* reversed consecutive minimum mandatory sentences. Both, Hale's and Daniels', sentences were significantly increased as a result of their being made to run consecutively. The resulting sentences were an exponential increase over the statutorily mandated sentences for the actual crimes committed. Moreover, since it was the minimum mandatory portion that was consecutive, the sentences resulted in a denial of any form of, or consideration for, early release during that time.

However, if *Hale* is interpreted to prohibit consecutive sentences for crimes committed during a single criminal episode in all circumstances, as done by the Third District, it would render the habitualization statute meaningless. In other words, habitualizing Hill and similarly situated defendants, would result in a downward departure from the Sentencing Guidelines permitted sentence. In effect, habitualization, under this interpretation of *Hale*, would accomplish the opposite effect of the Legislature's intent behind habitualization statutes. It would result in the imposition of a diminished sentence. Surely, this Court could not have intended such a result.

Allowing *Hale* to prevent consecutive sentences in this case thwarts the legislative intent behind §775.0841, Fla. Stat. (1993), by causing a sentence which is a downward departure from the Sentencing Guidelines.[7] If Hill's ten (10) year sentences are made to run concurrently, Hill,

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[7] Section 775.0841, Fla. Stat.(1993) in pertinent part states,

The Legislature hereby finds that a substantial and disproportionate number of

in effect, will receive the equivalent of a substantial downward departure sentence instead of the enhanced sentence the State sought. According to the Sentencing Guidelines Scoresheet which was filed along with the judgment and sentence, Hill scored three hundred and forty-two (342) points. (R. 37). Under the Sentencing Guidelines, this makes Hill eligible for a recommended sentence of twenty-two (22) to twenty-seven (27) years and a permitted sentence of seventeen (17) to forty (40) years in prison. However, the State filed a Notice of State's Intention to Seek Enhanced Penalty Pursuant to F.S. 775.084 (R. 26), in order to seek incarceration of Hill for an extended term. *See*, §775.0841, Fla. Stat. (1993). Therefore, it is clear that the State intended to pursue the maximum allowable sentence.

Having been habitualized, under §775.084, Fla. Stat. (1993), on each third degree felony, Hill was subject to a ten (10) year sentence, with a five (5) year minimum mandatory. *See*, §775.084(4)(b)(3), Fla. Stat. (1993). As *Daniels*, *supra*, precludes stacking of the minimum mandatory provisions, only one minimum mandatory sentence is effective. Thus, if *Hale* is interpreted to preclude consecutive ten (10) year sentences, Hill could receive at most, concurrent ten (10) year sentences on the three offenses with a minimum mandatory of five (5) years. This is, actually, the sentence allowed under § 775.084, Florida Statutes, for a single of these third degree felonies. This result is substantially different from the permitted sentence of seventeen (17) to forty (40) years under the Sentencing Guidelines.

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> serious crimes is committed in Florida by a relatively small number of multiple and repeat felony offenders, commonly known as career criminals. . . The Legislature intends to initiate and support increased efforts by state and local law enforcement agencies and state attorneys' offices to investigate, apprehend, and prosecute career criminals to ***incarcerate them for extended terms.***

Furthermore, the concurrent five (5) year minimum mandatory sentences which Hill would receive will not suffice to compensate for the changing of three consecutive ten (10) year sentences to three concurrent ten (10) year sentences. Under the Sentencing Guidelines, Hill could have received three consecutive five (5) year sentences, without any minimum mandatory provision. It has been widely reported that, as a result of recent statutory amendments regarding gain time, and increases in prison capacity, a typical defendant can now be expected to serve seventy-five percent of his sentence, compared to perhaps less than one-third (⅓) of his sentence in 1990.[8] Thus, on a non-habitualized, regular guidelines sentence of fifteen (15) years, Hill could expect to serve close to twelve (12) years. By contrast, with a habitualized sentence, pursuant to *Hale* as interpreted by the Third District, of three (3) concurrent ten (10) year sentences, with a five (5) year minimum mandatory, Hill, even with the minimum mandatory, can reasonably expect to be released in seven and a half (7 ½) years, and certainly within ten (10) years, even without any gain time reductions. This allows Hill, a Habitual Violent Felony Offender, to leave prison a full two years earlier than if he had been sentenced as a regular defendant under the Sentencing Guidelines. Thus, the concurrent minimum mandatory provisions, as far as Hill is concerned, are utterly meaningless if *Hale* is applied in such a way. This type of mechanical application of *Hale*, without any regard to practical considerations, effectively serves to render habitualization little more than a Christmas Bonus for defendants in situations similar to that of Hill. The trial court would have fared better by simply ignoring the habitualization statute and sentencing Hill under the sentencing guidelines.

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[8] *See*, attached Appendix A, "State prisons halt accelerated early releases: Prisons' revolving door grinds to a halt", The Miami Herald, December 9, 1994.

In view of the foregoing, such an application of *Hale* to the instant case would render habitualization virtually meaningless, as the trial court would be prohibited, by *Hale*, from doing anything of significance which could not have been done otherwise. As it can generally be presumed that the legislature intends that its pronouncements have some effect, such an application of *Hale* would be very questionable. The underlying premise of *Hale* is that consecutive minimum mandatory sentences are improper when the offenses are committed during the course of a single criminal episode. Accordingly, this Court should interpret *Hale* to only prohibit the imposition of consecutive minimum mandatory sentences for each offense committed during the course of a single criminal episode under § 775.084, Florida Statutes. Alternatively, this Court should recognize an exception to the principle whenever prohibition of consecutive sentences results in a downward departure from the permitted sentence under the Sentencing Guidelines.

## CONCLUSION

Based on the foregoing, the decision of the lower Court should be quashed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to JULIE LEVITT, Special Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this 19th day of December, 1994.

**LUCRECIA R. DIAZ**

IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,726

THE STATE OF FLORIDA,

Petitioner,

vs.

**APPENDIX TO PETITIONER'S BRIEF ON THE MERITS**

JONATHAN HILL,

Respondent.
_____/

Appendix A "State prisons halt accelerated early releases: Prisons' revolving door grinds to a halt", The Miami Herald, December 9, 1994.

Respectfully submitted,
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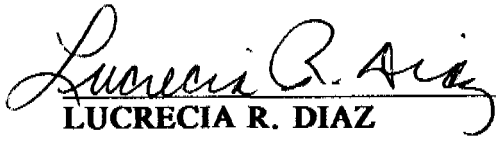

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# State prisons halt accelerated early releases

By MARK SILVA
Capital Bureau Chief

TALLAHASSEE — After nearly eight years of early releases of convicts from Florida's crowded prisons, the turnstile that set them free has stopped.

Gov. Lawton Chiles, who won re-election this fall despite scathing criticism over early release, called a news conference Thursday to announce the end of a program that enabled prisoners to serve less than half of their sentences.

"It's history," he said.

Prison crowding forced the state into the unpopular program that allowed nearly 200,000 inmates to get drastic reductions in time served. Record prison construction and a decline in convictions appear to have solved the problem.

Thursday's announcement closes one of Florida's most embarrassing chapters. A firestorm over the issue was ignited by a 220-pound convict named Charlie Street, who 10 days after his early release in 1988 overpowered and killed two Metro-

PLEASE SEE **PRISONERS, 32A**

# Prisons' revolving door grinds to a halt

PRISONERS, FROM 1A

Dade police officers.

"I'm giving myself a gift for being the secretary of corrections, instead of the secretary of release," said Harry Singletary, state secretary of corrections. "Santa Claus is giving us the end of early release as we know it."

Singletary was wearing a Santa Claus tie Thursday, but the mood at Columbia Correctional Institution near Lake City was less celebratory. Michael Jones, serving his third prison term for burglary, has already had his date with freedom changed to Feb. 13 — after serving nearly six years of a 15-year sentence for burglary in Jacksonville. He hoped to leave sooner.

"This is my third trip," said Jones, 33, the father of two. "I'm ready to go home. To me, it means getting back to my family. I feel, if a man served his time, he should be through with it."

Early releases were controlled by the state Parole Commission, which monitors the prison population weekly and granted time off to inmates to avoid crowding. Since the Street incident, early releases were granted to a select group of low-risk inmates to avoid unlawful prison crowding.

The practice of shaving sentences because of the crowding stopped two weeks ago, Parole Commission Chairman Judith Wolson says. And this week, commissioners even started taking back some of the time off they already had awarded to about 3,000 of the state's 56,000 inmates.

Associated Press

**'IT'S HISTORY':** Gov. Lawton Chiles, right, and Corrections Secretary Harry Singletary at news conference.

Commissioners on Tuesday revoked 40 days off that had been granted to 3,000 low-risk inmates eligible for early release.

The 3,000 convicts, who already have had months shaved from their sentences, still will leave prison before their time. But Wolson says she is confident commissioners won't have to award prisoners any more time off because of crowding.

The commission's weekly awards of time off ran as high as 180 days during the most crowded times a few years ago.

The era of early releases began in February 1987, with an admission by the Legislature and newly elected Gov. Bob Martinez that the state could not hold all the people sentenced to its prisons.

In an agreement with Martinez, lawmakers authorized early release of thousands of inmates to avoid violating a federal court-ordered cap on the prison population. Between 1987 and 1990, the state released 110,000 inmates early because of crowding. Though the Legislature restricted eligibility for early release in 1990, another 70,000 have left early.

At its worst, in 1990, the average inmate in Florida served less than one-third of a sentence.

That prompted a construction binge, started by Martinez and continued by Chiles. The state doubled its prison capacity to 56,500 inmates. Florida will add space for another 22,000 beds by mid-1997.

Together, the 46 major prisons and 38 work and forestry camps and road prisons that make up the penal system are allowed to hold 33 percent more inmates than they were designed for, under a federal court order that settled an inmate lawsuit over prison conditions in the early 1970s.

Now, the average inmate leaving a state prison has served about 45 percent of his or her sentence.

But inmates entering the system today will serve about 75 percent of their sentences. Inmates will still get time off for good behavior, but not because of crowding.

During the recent governor's race, Republican challenger Jeb Bush pledged to ensure that all inmates would serve at least 85 percent of their sentences. That would have required even more prison construction.

The bill for the current buildup is coming due. Lawmakers this spring will have to find additional money to operate all the new cells, which are coming on line faster than expected. The prison budget will grow again in 1995.

Already, the current buildup will add $400 million a year to the $1.4 billion already being spent to operate prisons. That $1.4 billion is what the state spends on its 10 universities.

Chiles says he isn't worried about finding the money. "This is kind of a happy problem to have."

## GLOSSARY

**Early release:** Since February 1987, Florida has gone through three generations of plans aimed at easing the crowding of prisons by releasing inmates early.

**Administrative gain time** — This was the relief valve for crowding first authorized by the Legislature in 1987. Applied to a broad category of convicts, it enabled the governor to approve a general shaving of time from many inmates' sentences to avoid overcrowding. Charlie Street, released early in November 1988 only to murder two Miami-Dade police officers within 10 days of release, had been awarded 610 days of administrative gain time to reduce his 15-year sentence for attempted murder.

**Provisional release credits** — This was the next generation of early releases because of crowding, refined by lawmakers after the Street shooting to prevent hard-core convicts — murderers, sex offenders, people with records of assault on police — from winning early release because of crowding.

**Control release** — Since 1990, this has enabled the state Parole Commission to grant time off to select inmates to avoid overcrowding. About 20,000 of Florida's 56,000 inmates are eligible, under the law, for this. But the Parole Commission has awarded time off to only about 3,000 of those it considers the lowest-risk inmates. This is the early release now ended.

**Basic gain time** — Until last year, this was awarded to almost everyone entering prison — automatically. For each month of a sentence, 10 days off was awarded. Charlie Street, originally sentenced to 15 years, automatically was awarded 1,800 days of gain time. At the urging of Gov. Lawton Chiles, the Legislature has abolished basic gain time for all crimes committed since Jan. 1, 1994.

**Incentive gain time** — This is what's known as time off for good behavior. It's the only form of early release still granted to a large group of inmates. For each month of a sentence, good behavior behind bars can earn an inmate time off — as much as 25 days a month for those convicted of less serious crimes, up to 20 days a month for more serious crimes. Charlie Street earned 41 days off under this; he had racked up 968 days off under this plan, but lost 955 of those days for bad behavior.