IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,727

DCA NO. 93-2075

THE STATE OF FLORIDA,

Petitioner,

-vs-

JONATHAN HILL,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

REPLY BRIEF ON THE MERITS

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ARGUMENT

In his answer brief Respondent bluntly states the question to be decided by this court as "whether the court really meant what it said in its unanimous opinion in Hale [v. State, 630 So. 2d 521 (Fla. 1983), cert. denied, ___ U.S. ___, 115 S.Ct. 278, 130, L.Ed. 2d 195 (1994)]."[1]

In point of fact, this is precisely what the state and the Third District seeks to have answered in this appeal. Respondent presumably argues that the pronouncement in *Hale* unequivocally and unambiguously restricts the stacking of any habitual felony offender sentences whether they are minimum mandatories or the maximum permissible sentences set forth in the habitual offender

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[1] The relevant language of Hale referred to is:

> 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.
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> * * *
>
> [T]he trial court is not authorized, in our view, to both enhance Hale's sentence as a habitual offender and make each of the *enhanced habitual offender sentences* for the possession and the sale of the same identical piece of cocaine consecutive, without specific

statute. In support of his argument, he refers to the fact that 50 some odd district court decisions have construed the language in cognizance with this interpretation and indeed, so has the District Court in this case.

This inevitable construction of the *Hale* language, however, which the state contends may not have been and should not have been intended, is precisely what prompted the Third District to certify the question of great public importance in this case. It is precisely the incongruous and illogical effects of the language of *Hale*, as it has been interpreted, which have had such a deleterious effect on the sentencing scheme of this state and which are utterly incompatible with the purpose of the habitual felony offender sentencing act, which have troubled the Third District as well as state attorney and other law enforcement officials throughout the state which creates the most compelling of reasons for this court to answer the certified question.

As pointed out in the state's initial brief, the *Hale* language, as it has been interpreted, has the effect, in many cases, of the imposition by a trial court of a downward departure sentence from the guidelines <u>despite</u> the fact that the particular defendant is being sentenced as a habitual felony offender. This frustration was expressly recognized by the Third District prompting it to certify the question and implicitly concluding thereby, that these negative reverberations of the *Hale* language was something this court may not have intended.

Indeed, the *Hale* language could and should be limited to the facts of that case which dealt with the issue of consecutive minimum mandatories not consecutive maximum habitual offender sentences. The latter are merely substitutes for the standard maximum permissible sentences. If this court meant *Hale* to prevent the stacking of habitual felony offender maximums and not just the minimum mandatory portions of these sentences then it is the state's position that the court has engaged in the proverbial mixing of apples and oranges.

A standard (non-habitual) statutory maximum sentence may always be imposed to run consecutive to another such sentence pursuant to §§ 775.021 (4)(a) & 4(b) Fla. Stat. (1993). Finding a defendant a habitual offender, an obligatory and purely administrative act, *see* King v. State, 597 So. 2d 309 (Fla. 2d DCA) rev. denied, 602 So. 2d 942 (Fla. 1992) and determining that imposition of such a sentence is necessary for the protection of the public[2] simply results in the supplantation of the standard statutory maximum with the one set forth in the habitual offender statute. However, its essential character as a statutory maximum remains the same and, therefore, warrants a consistent application of the rules of construction with that which applies to standard maximum sentences. There is no valid reason to treat the replaced maximum sentences any differently as far as

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legislative authorization in the habitual offender statute.

application of the rules of construction and the policies underlying them is concerned.

The *Hale* rule is grounded on the belief that the legislature did not intend that the enhanced sentences be further enhanced by permitting them to run consecutively. However, allowing these sentences to run consecutively is not a further enhancement any different from that which is permitted with standard sentences. The enhancement in sentencing which the legislature has provided by enacting the habitual offender sentencing statute, *Hale* has taken away by prohibiting these sentences from running consecutively, effectively eviscerating the habitual felony offender scheme in many cases.

As the state noted in its initial brief preventing the stacking of habitual offender sentences often results in a sentence which is a downward departure from the guidelines. This is precisely what occurred in this case. The irony and illogic of this is made more apparent when one considers the rule which requires that regular statutory maximums be imposed consecutively where the sentences, if imposed concurrently, would be less than the guidelines. See Branam v. State, 554 So. 2d 512 (Fla. 1990). Therefore, *Hale* as interpreted, precludes the stacking of habitual offender maximums to reach a guidelines range but at the same time the law requires a regular maximum to be so stacked. The result, of course, is that many defendant's, as was the case

here, receive a lower sentence as a habitual felony offender than they would otherwise. This clearly and directly contravenes the expressed purpose of the habitual felony offender sentencing scheme. The legislature not only intended to provide for greater sentencing under that scheme but expressly stated that the guidelines limitations do not apply[3] so that defendants could be sentenced to a greater term than the guidelines permit.

A further unacceptable bi-product of Hale is that courts will be forced to compare a guidelines sentence with a habitual felony offender sentence in every case. Afterward, despite the fact that a trial judge may determine sentencing as a habitual felony offender is necessary for the protection of the public, (See sec. 775.084(4)(c) Fla. Stats. (1993)) he or she will choose not to sentence the defendant as a habitual offender simply because the standard guidelines sentence is greater than the habitual offender sentence.[4] Thus, ironically, it will be "necessary for the protection of the public" to sentence the defendant as a regular offender rather than as a habitual felony offender. This result is patently unreasonable and is a direct result of the various district court's interpretation of *Hale*.

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[3] See Sec. 775.084(4)(e) Fla. Stat. (1993)

[4] This indeed is the procedure respondent prosposes beliving it to be both a logical response to, and the one which avoids, the *Hale* limitations.

In summary, the state urges the court to limit the *Hale* rule to its particular facts and thereby only prohibit the imposition of consecutive minimum mandatory sentences for each offense committed during a single criminal episode under § 775.084, Florida Statutes, the same restriction placed on non-habitualized sentences. Alternatively, an exception to the application of the rule must be created where prohibition of consecutive sentences will result in a downward departure from the permitted guidelines sentence. See *Branam, supra*.

CONCLUSION

Based on the foregoing arguments and citations of authority the State of Florida respectfully requests that this Honorable Court limit *Hale* to the facts of that case or alternatively carve out an exception which requires that habitual offender sentences be imposed consecutively where they would otherwise fall below the guidelines range.

Respectfully submitted,

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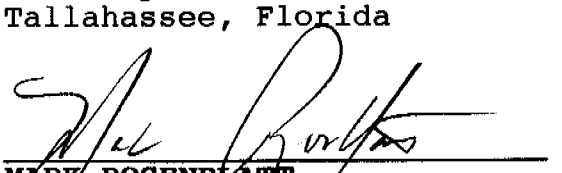

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **REPLY BRIEF ON MERITS** was furnished by mail to **JULIE M. LEVITT, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida 33125** on this 24 day of March, 1995.

MARK ROSENBLATT
Assistant Attorney General

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