

**FILED**

SID J. WHITE

MAY 15 1995

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT  
By *[Signature]*  
Chief Deputy Clerk

CASE NO. 85,444

**JONATHAN SIMMONS,**

Petitioner,

-vs-

**STATE OF FLORIDA,**

Respondent.

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

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RESPONDENT'S BRIEF ON THE MERITS

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## INTRODUCTION

Petitioner (hereinafter Defendant) seeks review of the district court opinion based on this courts conflict jurisdiction. Respondent will be referred to herein as the State. The symbol "App." refers to the appendix to the state's response in the district court.

## STATEMENT OF THE CASE AND FACTS

This cause which originated as an appeal to the Third District Court of Appeal from an order denying a motion to correct an illegal sentence pursuant to Fla. R. Crim. P. 3.800 is now before this court based on the following certified question of great public importance.<sup>1</sup>

Whether Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 115 S. Ct. 278, 130 L. Ed. 2d 195 (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?

The State initiated review of the question by this court by filing a notice to invoke discretionary jurisdiction in the Third District Court of Appeal on March 28, 1995. That cause was assigned case no. 85,458 with the State as petitioner. At approximately the same time (March 23, 1995) the Defendant also filed a notice to invoke discretionary jurisdiction, this time, based on this courts conflict jurisdiction. The state having addressed the certified question in case no. 85,458 will not address it here and refers this court to the states brief filed in that case.

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<sup>1</sup> For a thorough discussion of the procedural history of this case see the states response in the district court below.

In this case the Defendant claims conflict between the decision below and this court's decision in Washington v. State, 19 Fla. L. Weekly S647 (Fla., Dec. 8, 1994) with regards to the nature of prior convictions which will support habitualization. The opinion of the district court does not address this issue in any specific terms.

Petitioner also raises the same claim he raised below, namely, that his Confrontation Clause rights were violated during the sentencing hearing. He does not allege a basis for jurisdiction regarding this claim. This issue is, likewise, not addressed in the district court opinion except in general terms.

POINT ON APPEAL

I

WHETHER THE DEFENDANT HAS FAILED TO ESTABLISH A BASIS FOR THE EXERCISE OF THIS COURTS CONFLICT JURISDICTION WITH REGARD TO THE DENIAL BY THE DISTRICT COURT OF HIS CLAIM THAT THE STATE IMPROPERLY RELIED ON AN ARMED ROBBERY CONVICTION TO SUPPORT HABITUALIZATION.

II

WHETHER HALE V. STATE, 630 So. 2d 521 (Fla. 1993), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 115 S. Ct. 278, 130 L. Ed. 2d 195 (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?

III

WHETHER THE DEFENDANT HAS FAILED TO ESTABLISH CONFLICT JURISDICTION WITH REGARD TO A CLAIMED VIOLATION OF THE SIXTH AMENDMENT CONFRONTATION CLAUSE AS A RESULT OF LIMITATIONS ON CROSS EXAMINATION DURING DEFENDANT'S SENTENCING.

SUMMARY OF THE ARGUMENT

The Defendant has failed to establish a basis to invoke this courts conflict jurisdiction as to claims I and III. The opinion of the Third District Court of Appeals fails to specifically address those claims except to state simply that they are without merit.

Defendant's second claim which involves the question certified by the district court as one of great public importance has been briefed by the state in case no. 85,458. The state asks this court to take judicial notice of that case file. The arguments raised there are adopted in this case as if fully set forth herein.

## ARGUMENT

### I

WHETHER THE DEFENDANT HAS FAILED TO ESTABLISH A BASIS FOR THE EXERCISE OF THIS COURTS CONFLICT JURISDICTION WITH REGARD TO THE DENIAL BY THE DISTRICT COURT OF HIS CLAIM THAT THE STATE IMPROPERLY RELIED ON AN ARMED ROBBERY CONVICTION TO SUPPORT HABITUALIZATION.

Under Article V Section 3(b)(3) of the Florida Constitution in order for this court to exercise its conflict jurisdiction, the conflict in decisions must be express or direct and must be contained within the four corners of the court's majority decision. Reaves v. State, 485 So. 2d 829 (Fla. 1986).

The Defendant claims that the district court's decision conflicts with this court's decision in Washington v. State, 19 Fla. L. Weekly S647 (Fla. Dec. 8, 1994) on the issue of which prior convictions will support habitualization. However, the opinion below does not expressly address this issue except to summarily deny it in general terms by simply stating "[t]he remaining points raised by the Defendant lack merit." Since there is no express statement regarding the rationale behind the courts denial of this claim, any conflict not being apparent within the four corners of the opinion, there is no basis for the exercise of this courts conflict jurisdiction. Reaves, *supra*.

Notwithstanding the lack of jurisdiction, briefly stated, the courts decision to deny the claim involving the prior use of an armed robbery conviction to support habitualization was correct. Robbery is one of the enumerated felonies in §775.084 Fla. Stat. (1989) and armed robbery is an enhanced form of simple robbery. See §812.13(2)(a) (1989). The reason for this courts reversal of the habitual offender sentence in Washington, *supra* was because a lesser form of the particular offense listed in the habitual offender statute was relied upon to support habitualization i.e. burglary used to habitualize where statute lists only armed burglary. However in this case, simple robbery is an enumerated felony which certainly includes all enhanced forms of robbery including armed robbery to support habitualization. To conclude otherwise would require an unreasonable and illogical interpretation of the habitual offender statute and would authorize habitualization where one commits a prior robbery but not a prior armed robbery.

It is evident that where the statute lists a more serious form of an offense the lesser form, as in Washington, *supra*, will not support habitualization. Where, however, the opposite is true the greater 'or heightened' form of the offense from that which is enumerated in the statute must be deemed to support habitualization.

This is the approach taken by various district courts in this state and as such the opinion below is in cognizance with the other district courts not in conflict with any of them or with this court. See e.g. Woods v. State, 596 So. 2d 156 (Fla. 4th DCA 1992) and Johnson v. State, 564 So. 2d 1124 (Fla. 4th DCA 1990).

ISSUE II

WHETHER HALE V. STATE, 630 So. 2d 521 (Fla. 1993), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 115 S. Ct. 278, 130 L. Ed. 2d 195 (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?

As previously stated the state has briefed this question in case no. 85,458. The state respectfully asks this court to take judicial notice of that case file.

In its opinion the district court held that all of the habitual offender sentences should run concurrently except Count XII. The Defendant argues that the sentence as to count XII should not run consecutively because he claims it did not involve a separate criminal episode. However, the trial court determined that this count involved a separate criminal episode. Count XII charged the Defendant with the second degree murder of his accomplice in a home invasion robbery, who was killed by the police while fleeing from the scene of the crime. The trial court found this to be a separate criminal episode since it was removed in time and distance from the other charges stemming from the home invasion robbery. (App. N).

In addition, there is no basis for jurisdiction in this court to entertain the issue as to whether count XII did or did not involve a separate criminal episode. This is because there

are no facts set forth in the district court opinion which address this claim, and which are thereby subject to review.

### ISSUE III

WHETHER THE DEFENDANT HAS FAILED TO ESTABLISH  
CONFLICT JURISDICTION WITH REGARD TO A  
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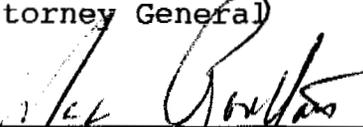
As previously stated, conflict must be express and direct and contained within the four corners of the district court's opinion. Reaves, *supra*. The Confrontation Clause claim raised below was summarily denied as being without merit. There was no further discussion regarding the issue. Therefore, Defendant has failed to establish jurisdiction in this court to entertain the Confrontation Clause claim.

CONCLUSION

Based on the foregoing arguments and citations of authority the State of Florida respectfully requests that this Court determine that it lacks jurisdiction to review Issues I and III. The State of Florida also requests that this Court limit the rule enunciated in Hale to minimum mandatory portions of habitual felony offender sentences, the particular facts of that case, or alternatively, carve out an exception to the Hale rule which would require that habitual offender sentences be imposed consecutively where they would otherwise fall below the guidelines range which would apply in the absence of a habitual offender sentence.

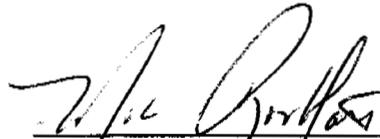
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS were furnished by mail to JONATHAN SIMMONS, Pro Se, #084722/A-202, Glades Correctional Institution, 500 Orange Avenue Circle, Belle Glade, Florida 33430 on this 11 day of May, 1995.



\_\_\_\_\_  
MARK ROSENBLATT  
Assistant Attorney General

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