IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,370

GREGORY DIXON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

FLORIDA RULE OF APPELLATE PROCEDURE

INTRODUCTION

The Petitioner, GREGORY DIXON, was the post-conviction movant in the trial court and the Appellant in the Third District Court of Appeal. The Respondent, the State, was the respondent in the trial court and Appellee below. The parties will be referred to as they stood before the trial court or as they stand before this Court.

STATEMENT OF THE CASE AND FACTS

After jury trial, the defendant was convicted of lesser included offenses of attempted manslaughter with a firearm (Count I) and aggravated battery with a firearm (Count II), and was sentenced on April 23, 1991 as an habitual felony offender to thirty years imprisonment on Count I, and a consecutive thirty years imprisonment on Count II. (R. 115-18,[1] 121.) [A third conviction, under Count IV for carrying a firearm in the commission of a felony, resulted in a concurrent (fifteen year) sentence (R. 115, 117) and is not at issue in this proceeding.]

On direct appeal, conducted pursuant to *Anders v. California*, 386 U.S. 738 (1967), an affirmance was entered. *Dixon v. State*, 605 So. 2d 179 (Fla. 3d DCA 1992). In a decision issued October 13, 1993, rehearing of which was denied on February 9, 1994, this Court ruled that imposition of consecutive habitual offender sentences for offenses arising out of a single criminal episode is impermissible. *Hale v. State*, 630 So. 2d 521 (Fla. 1993). By Rule 3.850 post-conviction motion filed in August, 1994, which was within a year of *Hale* being decided, the defendant asserted a *Hale*-violative sentence in consecutive habitual offender sentencing for offenses arising out of a single criminal episode, which the trial court summarily denied on November 18, 1994. (Attachments "A" 6-7, "B" and "C" following pages 165-71 of the record.) At the time of that denial by the trial court, *Callaway v. State*, 642 So. 2d 636 (Fla. 2d DCA 1994), which, notwithstanding that it was from another district, was binding on the trial court, *Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992), had held *Hale* to be retroactive under this Court's prevailing analysis

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[1] As they appear in the record before this Court, the pages of the sentencing order are reversed in sequence.

and had held such claims to be cognizable by Rule 3.850 motion. The Second District *Callaway* was issued on September 14, 1994. *Id.* On April 5, 1995, the Third District entered a summary affirmance of Dixon's Rule 3.850 motion denial. *Dixon v. State*, 652 So. 2d 827 (table) (Fla. 3d DCA 1995).[2] Although not constituting an express and direct conflict within this Court's discretionary review jurisdiction because of the summary nature, the Third District's decision either disregarded, or was not cognizant of, the cited decision in *Callaway* and was directly contrary to it. Additionally, the defendant was, indigent, without counsel, and proceeding pro se.

On July 20, 1995, this Court affirmed the Second District decision in *Callaway*, responding to the certified questions therein, holding *Hale*-claims cognizable by Rule 3.850 motion and providing a "two-year window following . . . *Hale* . . . for criminal defendants to challenge the imposition of consecutive habitual felony offender sentences for multiple offenses arising out of a single criminal episode." *State v. Callaway*, 658 So. 2d 983, 987 (Fla. 1995). This Court's *Callaway* decision itself post-dated *Hale* by approximately a year-and-a-half.

By renewed Rule 3.850 motion, filed in August of 1996, that is, within two years of *Callaway* but beyond two years from *Hale*, the defendant again presented his *Hale* claim, again unsuccessfully, and appealed to the Third District Court of Appeal. (R. 1, 2, 10, 14, 43-45.)

That court, with the defendant again without counsel, initially affirmed on the basis of untimeliness of the motion. *Dixon v. State*, 684 So. 2d 345 (Fla. 3d DCA 1996). However, by corrected order issued February 28, 1997, recognizing that its opinion had not reached the

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[2] This actually consisted of an initial affirmance on March 8, 1995, a pro se rehearing motion, and denial of that motion. (Attachments "D", "E", "F", following pages 165-71 of the record.)

(imprisoned) defendant in time to allow for a timely motion for rehearing, the lower court recalled its mandate and first appointed the Public Defender to represent the defendant for purposes of rehearing. (R. 183.) In accordance with the terms of that order, a memorandum in support of rehearing was filed by counsel, resulting in a second opinion, holding that the defendant had raised his *Hale* claim "both too early and too late[,]" and certifying to this Court the following question:

> WHETHER APPELLANT'S RULE 3.850 MOTION SEEKING RETROACTIVE BENEFIT OF *HALE v. STATE*, 630 So. 2d 521 (Fla. 1993), SHOULD BE DEEMED TIMELY FILED WHERE: (1) APPELLANT SOUGHT *HALE* RELIEF PRIOR TO THE ANNOUNCEMENT OF *CALLAWAY*, AND RELIEF WAS DENIED; AND (2) APPELLANT FILED ANOTHER MOTION FOR POSTCONVICTION RELIEF, BASED ON *HALE*, WITHIN TWO YEARS AFTER *CALLAWAY* WAS ANNOUNCED.

Dixon v. State, 697 So. 2d 966 (Fla. 3d DCA Aug. 6, 1997). Notice to invoke the discretionary review jurisdiction of this Court was timely filed on September 4, 1997.

SUMMARY OF ARGUMENT

Hale v. State, 630 So. 2d 521 (Fla. 1993), prohibited consecutiveness of habitual offender sentencing for offenses arising out of a single criminal episode. *Callaway v. State*, 642 So. 2d 636 (Fla. 2d DCA 1994), *approved*, 658 So. 2d 983 (Fla. 1995), held the *Hale* rule to be constitutional in nature and of fundamental significance, and therefore retroactive and collaterally cognizable on Rule 3.850 motion. The two-year time limit for Rule 3.850 motions should be held to run from this Court's *Callaway* decision, and not from *Hale* itself, for otherwise the available time period would only have been approximately six months. The second certified question should be answered in the affirmative.

The first certified question mistakes the relevant legal facts of this case and should be reframed. Because the defendant's first *Hale* claim was *adjudicated* subsequent to the Second District Court of Appeal decision in *Callaway*, but inconsistently therewith, the claim should be recognized as timely and not premature. It should further be held that the "law of the case" doctrine should not be applied where to do so would create a manifest injustice directly contrary to this Court's own decision in *Callaway* which approved the Second District decision.

ARGUMENT

THE LOWER COURT INCORRECTLY HELD THE DEFENDANT, WHO CHALLENGED CONSECUTIVENESS OF HABITUAL OFFENDER SENTENCING ARISING OUT OF THE SAME EPISODE, NOT ENTITLED TO THE BENEFIT OF *STATE v. CALLAWAY*, 658 So. 2d 983 (Fla. 1995), WHICH HELD SUCH CLAIMS COLLATERALLY COGNIZABLE. EACH OF THE DEFENDANT'S TWO RULE 3.850 MOTIONS, WITHIN THE RELEVANT AND OPERATIVE LEGAL EVENTS, WAS TIMELY.

In *Hale v. State*, 630 So. 2d 521 (Fla. 1993), this Court held that imposition of consecutive habitual offender sentences for offenses committed during a single criminal episode was impermissible. *Hale* was decided on October 14, 1993, and rehearing was denied on February 9, 1994. Well within two years of *Hale*, that is, within approximately six months, the defendant filed a Rule 3.850 motion post-conviction motion, asserting the impermissibility of the consecutive habitual offender sentences imposed in his case. The trial court summarily denied the motion. That denial was itself contrary to the extant, controlling decision of *Callaway v. State*, 642 So. 2d 636 (Fla. 2d DCA 1994), which both held *Hale* retroactive and held *Hale* claims to be cognizable on Rule 3.850 motion. In affirming the trial court's summary denial in 1995, itself by summary affirmance, *Dixon v. State*, 652 So. 2d 827 (table) (Fla. 3d DCA 1995), the lower court placed itself in de facto conflict with the Second District, a conflict which, of course, would not have been cognizable within this Court's limited discretionary review jurisdiction.

In concluding below, upon the denial of the defendant's second Rule 3.850 motion (the post-*Callaway* motion), that the defendant raised the *Hale* issue both "too early and too late[,]" *Dixon v. State*, 697 So. 2d 966, 967 (Fla. 3d DCA 1997), the lower court, as to the "too early" aspect, utterly miscomprehended the pertinent relevant events. This is reflected in its first certified question as to

whether the defendant's [first] Rule 3.850 motion should be deemed timely filed where it "sought *Hale* relief prior to the announcement of *Callaway*[.]" *Id.* at 967. While the defendant's first motion was undoubtedly filed and resolved prior to *this Court's Callaway* decision, it was *denied* by the trial court *subsequent to the Second District's Callaway decision. Callaway v. State*, 642 So. 2d 636 (Fla. 2d DCA 1994). That district court of appeal decision (there was no conflicting district court of appeal case law) was binding on all trial courts throughout the State. *Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992). Therefore, that original trial court denial of the defendant's post-conviction *Hale* claim was erroneous, and the lower court's certification of its first question to this Court miscomprehends the issue. The defendant's claim was not raised "too early," because the then-binding on the trial court Second District *Callaway* [which, of course, was subsequently approved by this Court] *at the time of trial court ruling* mandated relief.[3]

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[3] The State, responding to the Third District Court of Appeal in opposition to the defendant's appeal from the denial of his second Rule 3.850 motion, forthrightly conceded the operative *Hale* operative event that the defendant's offenses arose out of a single criminal episode. (R. 168-70), but misconstrued *Hale* to prohibit only consecutiveness of minimum mandatory sentences. *Id.* That is an utterly incorrect construction of *Hale*, in which this Court held that the overall sentencing structure had to run concurrently. *See Hale, id.* at 524-25. This is, further, precisely what *Callaway* signifies. Callaway received two consecutive ten-year sentences as a straight, (i.e., non-violent) habitual felony offender; no mandatory minimums were involved at all. *Callaway, id.* at 985. This Court, in pertinent part, approved remand for an evidentiary hearing (under Rule 3.850) to substantiate whether the sentences arose out of a single criminal episode. *Id.* at 985, 988. This was necessarily a recognition that, if factually supported, Callaway had pled a legally sufficient claim that his sentences (which did *not* involve mandatory minimums) as enhanced *could not* be imposed to run consecutively.

Subsequent to counsel being appointed by the lower court and filing a memorandum on the defendant's behalf, the State changed position and asserted the intervening decision of *State v. Christian*, 692 So. 2d 889 (Fla. 1997) for the proposition that consecutive firearm mandatory minimums were permissible where there were multiple victims. (R. 205-06.) That proposition is correct, however, as noted in *Christian* itself, the permissibility of stacking of firearm mandatory

Thus, in affirming the trial court's original denial of the defendant's initial Rule 3.850 *Hale* claim, the lower court either failed to take cognizance of the Second District *Callaway* decision or implicitly disregarded it. While, obviously, the Second District Court of Appeal *Callaway* was not binding on the Third District, it was binding upon the trial court and, therefore, either the trial court's original denial was incorrect when made, or, alternatively, if the Third District would not have found the Second District Court of Appeal *Callaway* decision persuasive, it should originally have adjudicated the case in a non-summary way and recognized conflict. Its failure to do so is most likely explainable by the Rule 3.850 summary appeal provision of Florida Rule of Appellate Procedure 9.140(i) and the defendant not having had counsel. Thus, although in this proceeding appropriately sympathetic to the defendant's circumstance as it perceived it below, the lower court was erroneous in concluding it could not have granted the defendant relief. That error should, obviously, be corrected by this Court by recognizing that, in the first instance, the defendant's claim was not made too early, because it was adjudicated post-Second District *Callaway,* incorrectly. This

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minimums out of a single criminal episode where multiple victims are involved does *not* suggest permissibility of stacking either maximum or minimum habitual offender terms, for the habitual offender sentencing structure is distinct. *State v. Christian*, *id.* at 891 n.3.

The State's further implicit suggestion to the lower court that "the law of the case" should have applied from the earlier affirmance of the first Rule 3.850 motion denial was correctly rejected by the lower court, *Dixon v. State*, 697 So. 2d at 967 n.1, although the court (as described herein) otherwise miscomprehended the relevant legal events. The "law of the case" doctrine does not apply when the original pronouncement was erroneous and resulted in manifest injustice. *Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965); *Beverley Beach Properties, Inc. v. Nelson*, 68 So. 2d 604, 607-08 (Fla. 1953). Inapplicability of a "law of the case" doctrine is the very essence of *Callaway*, which, in concluding a *Hale* claim to be retroactive, i.e., to be collaterally cognizable on Rule 3.850 motion, recognized that the habitual offender sentence consecutiveness prohibition originated from this Court; was constitutional in nature; and had fundamental significance. *Callaway,* 658 So. 2d at 986. *See also* the Second District *Callaway*, 642 So. 2d at 641-42.

type of temporal decisional non-uniformity is the very reason for the *Callaway* decision.

As to the second question certified, the lower court was properly sympathetic. The lower court recognized that the literal language of *Callaway* "left only a sixth and one-half-month interval after *Callaway* for the filing of Rule 3.850 motions." *Dixon,* 697 So. 2d at 967. It further recognized, again properly, that this "calculation of the window may be frustrating the intent, owing to the short window period[.]" *id.*

Hale claims, like similar antecedent *Palmer v. State*, 438 So. 2d 1 (Fla. 1983) claims, were regarded as cognizable under Rule 3.800, *see, e.g., Young v. State*, 638 So. 2d 532 (Fla. 2d DCA 1994); *Gates v. State*, 633 So. 2d 1158 (Fla. 1st DCA 1994), which vehicle had *no* time limit, *e.g., Young, id.; Gates, id., Crabtree v. State*, 624 So. 2d 743 (Fla. 5th DCA 1993); *Gardner v. State*, 515 So. 2d 408 (Fla. 1st DCA 1987); *Cofield v. State*, 602 So. 2d 586 (Fla. 1st DCA 1992), and therefore *Callaway* -- in restricting *Hale* claims to Rule 3.850 because of evidentiary implications -- applied a time limit for the first time. As a matter of basic fairness, because there was no pre-*Callaway* time limit for *Hale* claims, a two year limit should properly run from the date of *Callaway*, not *Hale.*

Therefore, under a fair and reasonable construction of *Callaway* and the purpose of having a two-year time limit, any *Hale* claim raised within two years of this Court's decision in *Callaway*, rather than two years from *Hale*, should be deemed timely. Even if that were not the rule adopted, the defendant's own *Hale* claim in this case was first adjudicated incorrectly at a time when the Second District *Callaway* decision was extant, was binding on the trial court, and which decision was in fact subsequently approved by this Court.

The decision of the lower court should be quashed, the first certified question should be reframed to recognize that the defendant's first claim for *Hale* relief was timely when adjudicated,

and the second certified question should be answered in the affirmative.

Respectfully submitted,

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By: _____
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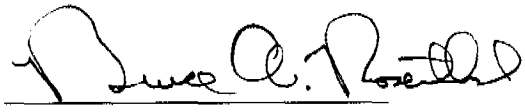
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Roberta G. Mandel, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite #950, Miami, Florida 33131, this 21st day of November, 1997.



BRUCE A. ROSENTHAL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,370

GREGORY DIXON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

_____/

APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

missed the petition as an abuse of the writ. Appellant already had filed a petition for a writ of mandamus in the Circuit Court of Leon County, challenging his presumptive parole release date. The petition had been denied on the merits. The court below ruled that the matters raised in this case could have and should have been raised in the mandamus action.

[2] That ruling is incorrect because appellant was required to file separate actions. As noted above, a habeas petition challenging a parole revocation must be filed in the county where the prisoner is incarcerated. On the other hand, the proper method of challenging a presumptive parole release date is by a petition for a writ of mandamus, filed in the Circuit Court of Leon County. *See Porter v. Florida Parole & Probation Comm'n*, 603 So.2d 31 (Fla. 1st DCA 1992).

[3] The Parole Commission argues that the issue of venue is moot because appellant did not appeal the change of venue to the Second Judicial Circuit in the Second District Court of Appeal. Even were we to accept this argument, however, we find that the order below must be reversed because the Circuit Court of Leon County does not have territorial jurisdiction over this action. *See Campbell v. Florida Parole Comm'n*, 630 So.2d 1210, 1211 (Fla. 1st DCA), rev. *denied*, 639 So.2d 976 (Fla.1994), *vacated*, 514 U.S. 1094, 115 S.Ct. 1819, 131 L.Ed.2d 742, *reinstated*, 657 So.2d 67 (Fla. 1st DCA), *cert. denied*, — U.S. —, 116 S.Ct. 533, 133 L.Ed.2d 438 (1995). As long as appellant is incarcerated in the Tenth Judicial Circuit, only a court in that circuit has the power to entertain a petition for writ of habeas corpus, and therefore is the only court with territorial jurisdiction to adjudicate the merits of his claim.

For that reason, we decline to address the merits of appellant's claim, and thus reject the Parole Commission's request that we engage in a harmless-error analysis. As this is a matter for the courts of another district, we believe it would be improper for this court to in any way comment on the meritoriousness of appellant's claim.

Likewise, we reject the Parole Commission's fallback position that the matter be remanded with instructions to dismiss the petition without prejudice to refile in the appropriate court. As appellant already filed the matter in the proper court, and the Parole Commission improperly moved to change venue, we feel that result is unjust and inappropriate.

For the reasons expressed herein this matter is remanded to the Circuit Court of Leon County with instructions that the court transfer the petition back to the Tenth Judicial Circuit.

MINER, ALLEN and LAWRENCE, JJ., concur.

Gregory E. DIXON, Appellant,

v.

The STATE of Florida, Appellee.

No. 96–2721.

District Court of Appeal of Florida, Third District.

Aug. 6, 1997.

An appeal from the Circuit Court for Dade County; Lauren Levy Miller, Judge.

Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Roberta G. Mandel, Assistant Attorney General, for appellee.

Before JORGENSON, COPE and FLETCHER, JJ.

On Motion for Rehearing

COPE, Judge.

On consideration of the motion for rehearing, we amplify our opinion and certify a question to the Florida Supreme Court.

Defendant was given consecutive habitual offender sentences in 1991 and his conviction

was affirmed in 1992. *Dixon v. State*, 605 So.2d 179 (Fla. 3d DCA 1992). After the decision in *Hale v. State*, 630 So.2d 521 (Fla. 1993), *cert. denied*, 513 U.S. 909, 115 S.Ct. 278, 130 L.Ed.2d 195 (1994), defendant filed a motion for postconviction relief under Rule 3.850, contending that he was entitled to have his consecutive habitual offender sentences modified to be concurrent. The Rule 3.850 motion was denied and the denial was affirmed on appeal. *Dixon v. State*, 652 So.2d 827 (Fla. 3d DCA 1995).

On July 20, 1995, the Florida Supreme Court announced *State v. Callaway*, 658 So.2d 983 (Fla.1995), which held that *Hale* would be applied retroactively. 658 So.2d at 987. *Callaway* provided that relief must be sought under Rule 3.850, and that the two-year period for seeking such relief would run from the decision in *Hale*. 658 So.2d at 987–88. Counting the time from the denial of rehearing in *Hale* on February 9, 1994, the two-year period ran until February 9, 1996. *See Lock v. State*, 668 So.2d 1081, 1081 n. 1 (Fla. 2d DCA 1996).

Defendant filed his post-*Callaway* Rule 3.850 motion on August 11, 1996. The motion was therefore untimely because it was filed more than two years from the *Hale* decision—although it was within two years after the date of *Callaway*.

Defendant is thus in the position of having raised the *Hale* issue both too early and too late. His initial Rule 3.850 motion raised the *Hale* issue, but did so at a time when *Hale* had not been held to be retroactive. The 3.850 motion was denied without opinion, and the most reasonable explanation for that denial is the assumption that *Hale* would not be retroactive.

Thereafter, *Callaway* held that *Hale* would be applied retroactively. However, since the two-year time interval was established to run from the date of the *Hale* decision, rather than *Callaway*, this left only a six and one-half-month interval after *Callaway* for the filing of Rule 3.850 motions. Defendant's August 1996 motion therefore came too late.

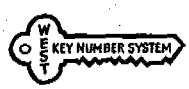
The *Callaway* decision itself stated that the purpose of allowing retroactive treatment was to allow correction of sentences for those "sentenced during the six-year window between the amendment of section 775.084 and the decision in *Hale* . . . ." 658 So.2d at 987. *Callaway*'s calculation of the window may be frustrating the intent, owing to the short window period following the announcement of *Callaway*.

Because *Callaway* is clear, we adhere to our previous ruling denying defendant's Rule 3.850 motion. We certify the following question of great public importance:

> WHETHER APPELLANT'S RULE 3.850 MOTION SEEKING RETROACTIVE BENEFIT OF *HALE V. STATE*, 630 So.2d 521 (Fla.1993), SHOULD BE DEEMED TIMELY FILED WHERE: (1) APPELLANT SOUGHT *HALE* RELIEF PRIOR TO THE ANNOUNCEMENT OF *CALLAWAY*, AND RELIEF WAS DENIED; AND (2) APPELLANT FILED ANOTHER MOTION FOR POSTCONVICTION RELIEF, BASED ON *HALE*, WITHIN TWO YEARS AFTER *CALLAWAY* WAS ANNOUNCED.

Because under *Callaway* the 3.850 motion is time-barred, we do not reach the merits of the parties' respective positions.

Rehearing denied; question certified.[1, 2]



1. The State argues that the pre-*Callaway* denial of defendant's Rule 3.850 motion bars defendant from again raising the claim. We do not think that such a bar can reasonably be applied where, as here, the most likely explanation for the denial was the belief that *Hale* was not retroactive and where, subsequent to the denial of 3.850 relief, the Florida Supreme Court announced in *Callaway* that the *Hale* decision would be made retroactive. *See State v. Owen*, 696 So.2d 715 (Fla. 1997).

2. Defense counsel advised this court that, while the state of the trial court record is unclear, defendant may have another postconviction *Hale*-based motion which would be timely under *Callaway* and has not yet been finally ruled upon. The present opinion is without prejudice to such