IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. SC04-379

STATE OF FLORIDA,
Petitioner,

v.

DAVID ALLEN FULLER
Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
FIFTH DISTRICT

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASE AUTHORITY **Page(s)**

Other Authority

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's statement of the case and facts.

SUMMARY OF THE ARGUMENT

There is no direct conflict among the Fifth District Court of Appeals in *Fuller* and the First District Court of Appeals. The First District rendered a decision directly on point with the *Fuller* court in *Kiedrowski* thus removing any direct conflict. Therefore, this Court does not have jurisdiction.

Furthermore, if this Court were to accept jurisdiction, the *Fuller* opinion is consistent with the holdings in other courts as well as the *Hale* decision that once a sentence has been enhanced the total sentence cannot be increased further by running a count consecutive.

ARGUMENT

THIS COURT SHOULD DENY JURISDICTION SINCE A SUBSEQUENT DECISION BY THE FIRST DISTRICT IS CONSISTENT WITH THE DECISION IN *FULLER* OR IN THE ALTERNATIVE AFFIRM THE FIFTH DISTRICT'S OPINION IN *FULLER* (PETITIONER'S POINT RESTATED.)

A. Jurisdiction Based Upon Conflict

The Petitioner asserts that this Court has jurisdiction based upon article V, section (3)(b)(3) of the Florida Constitution. Under this section, this Court would be able to accept jurisdiction based upon an express and direct conflict between the

decision in *Fuller v. State*, 867 So. 2d 469 (Fla. 5th DCA 2004) rendered by the Fifth District Court of Appeal and the decision in *Davis v. State*, 710 So.2d 1051 (Fla. 1st DCA 1998) rendered by the First District Court of Appeal. (I.B. pg.8)

For this Court to interfere with a decision of a district court of appeal, the issue must be in direct conflict with the pronouncement of another district on *the same point of law*. *South Florida Hospital Corp. v. McCrea*, 118 So.2d 25 (1960). Unless this Court finds a conflict in the decisions of other appellate courts on the same point of law pronounced, the Supreme Court has "no power or jurisdiction in any manner to disturb the judgment of the lower court." *Id.* at 28.

The Respondent respectfully disagrees with the Petitioner that the opinion in *Fuller* is in direct conflict with the First District Court of Appeal. Even though the Fifth District certified conflict with *Davis v. State*, 710 So.2d 1051 (Fla. 1st DCA 1998), the Fifth District subsequently rendered another opinion which is the same factual scenario as *Fuller*.

In *Kiedrowski v. State*, 2004 WL 892451 (Fla. 1st DCA 2004), the First District distinguished its recent opinion from *Davis*. The court found that *Kiedrowski* was originally sentenced to ten years prison as a habitual felony offender followed by two years probation as a habitual felony offender. The trial court granted a motion to correct an illegal sentence pursuant to *Hale* and resentenced *Kiedrowski* striking the

habitual felony offender designation on the probation. However, the trial court still ran the probation consecutive to the prison term. The First District determined that the total sentence was twelve (12) years. They also noted that the decision in *Davis* was silent as to whether the total sentence exceeded the statutory maximum allowed with the habitual offender designation. *Id.* The First District ultimately held that in *Kiedrowski* the total sentence of twelve years exceeded the statutory maximum habitual offender sentence for third degree felonies. The statutory maximum as an habitual offender was only ten years. This, they found, "violates the reasoning and the spirit of *Hale*. We therefore find that *Davis* is not controlling, and we reverse" *Id.* at 2.

The *Fuller* decision by the Fifth District Court of Appeal is indistinguishable from the facts in *Kiedrowski* and therefore there is no direct conflict with the First District Court of Appeal. On March 6, 2003, Fuller was resentenced to thirty years as a habitual felony offender on count one. This count was a second degree felony with the maximum enhanced sentence being thirty (30) years. The lower court then ran count five consecutive to count one. Count five was also a second degree felony and the lower court imposed fifteen years probation. Therefore, Fuller's entire sentence would be forty-five (45) years which exceeds the thirty-year maximum sentence as a habitual felony offender for a second degree felony. Since the combined sentence in

Fuller exceeds the statutory maximum sentence for a habitual felony offender, it violates the decision in *Hale*.

It is clear, from the opinions issued in *Fuller v. State*, 867 So.2d 469 (Fla. 5th DCA 2004) and *Kiedrowski* that the districts are not in direct conflict. The Petitioner correctly states that the conflict must appear within the four corners of the majority decision. (I.B. pg. 8) citing *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986). This Court in *Reaves* further stated that the record may not be used to establish jurisdiction. *Id.* Any reliance by the Petitioner on the record to establish jurisdiction is clearly erroneous.

This Court has also previously held that where there is no conflict there is no jurisdiction when the district court has receded from the conflicting decision. *Bailey v. Hough*, 441 So.2d 614 (Fla. 1983). In *Bailey* the First District certified conflict with the Second District. However, the Second District subsequently receded from its decision and adopted the Fourth District's opinion which the First District had relied upon. *Id.*

Under similar facts as the case sub judice, the First District Court in *Kierdowski* found that the *Davis* case was not controlling. Therefore, this Court should not accept jurisdiction because there is no direct conflict between the decisions rendered by the Fifth District in *Fuller* and the First District. Since there is no direct conflict between

the two districts this Court does not have jurisdiction.

B. *Fuller* Decision Should Be Affirmed

The Petitioner's reliance on *Davis v. State*, 710 So.2d 1051 (Fla. 1st DCA 1998) in support of the argument that the *Fuller* decision violates the mandates of *Hale* is misplaced. The *Davis* decision makes no reference to this Court's decision in *Hale* and fails to make any analysis of its decision with post-*Hale* decisions. The facts given are few and the only case cited is the Second District case of *Benjamin v. State*.

The Petitioner states that the State filed a supplemental brief distinguishing *Canavan* from *Hale*. (I.B. pg. 13) However, the Fifth District found that the supplement was vague but "acknowledged that our disposition of this case is governed by *Canavan.*" *Fuller*, 867 So.2d 469, 470.

This Court in *Daniels v. State*, 577 So.2d 725 (Fla. 1st DCA 1991), *quashed* 595 So.2d 952 (Fla. 1992) stated:

> [T]he legislature intended to provide for the incarceration of repeat felony offenders for longer periods of time. However, this is accomplished by *enlargement of the maximum sentences that can be imposed* when a defendant is found to be an habitual felon or an habitual violent felon.

Id. (Emphasis added.)

Furthermore, in *Hale v. State*, 630 So.2d 521, 524 (Fla. 1994), this Court went on to state:

> 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.

Id. (Emphasis added.)

This language clearly mandates the result the Fifth District reached in *Fuller* and the First District reached in *Kiedrowski*. Once the sentence was enhanced using habitual offender statutes, the total penalty should not be increased any further. Had all counts been enhanced in *Kiedrowski,* the maximum sentence the defendant could have received was ten years as an habitual felony offender. Therefore, the total penalty could not be further increased by running probation consecutive resulting in a total penalty of twelve (12) years. The same reasoning applies in *Fuller*. The maximum penalty that Fuller could have received is thirty years since all the counts arose out of a single criminal episode. This is consistent with *Hale*. The lower court could not then abrogate the holding of *Hale* by running the non-habitual offender probation consecutive. The total penalty became forty-five years by running the probation consecutive. This is clearly against the holding of *Hale.*

This rationale is followed by other cases as well. "Under the habitual offender statute, when the offenses occur in one criminal episode a trial court may not both

enhance the sentence pursuant to the act and then increase the total penalty by ordering that they run consecutively." *Green v. State*, 643 So.2d 1177 (Fla. 2d DCA 1994). "[T]he prohibition against consecutive habitual offender sentences applies to a sentence of imprisonment on one count, followed by a term of probation on another count arising from a single criminal episode." *Benjamin v. State*, 667 So.2d 437 (Fla. 2d DCA 1996). *See also West v. State*, 790 So.2d 513 (Fla. 5th DCA 2001); *Whitfield v. State*, 804 So.2d 1274 (Fla. 5th DCA 2002); *Johnson v. State*, 809 So.2d 892 (Fla. 2d DCA 2002).

The only case that the Petitioner has to support its contention is *Davis*. However, as argued supra, even this decision has been distinguished under these very facts by the First District in *Kiedrowski*.

The holding in *Fuller* is clearly supported by this Court's decisions in both *Daniels* and *Hale*. Once the sentence has been enhanced, thus the maximum sentence has been increased, the total sentence cannot also be increased by running the counts consecutive for offenses arising out of a single criminal episode.

The Petitioner argues that since count five is not in and of itself enhanced *Hale* does not apply. However, the language of this Court clearly states that "the *total penalty* should [not] then be further increased by ordering that the sentences run consecutively." *Hale* at 524. (Emphasis added.) In the case sub judice, the

consecutive probation necessarily increases the total penalty imposed upon Fuller. This is not consistent with the mandate of *Hale* and therefore the *Fuller* decision should be upheld.

CONCLUSION

Based upon the foregoing arguments the Respondent respectfully requests this Court to deny jurisdiction since there is no direct conflict among opinions between the First and Fifth District. In the alternative, the Respondent requests this Court to affirm the holding in *Fuller*.

Respectfully submitted,

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Heather M. Gray

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Pamela J. Koller at the Attorney General's Office, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, and David Allen Fuller, DOC #091489, Apalachee Correctional Institution, 35 Apalachee Drive, Sneads, Florida 32460-0699 by U.S. mail on this 1st day of June 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief conforms with and satisfies the requirements of Florida Rules of Appellate Procedure 9.100(1) and 9.210(a)(2).

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