IN THE SUPREME COURT OF FLORIDA

Case No. SC06-1762
Lower Case No. 3D04-1034

JESSIE LEVON DYSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON CERTIFIED QUESTIONS OF GREAT PUBLIC IMPORTANCE FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

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Introduction

The Appellant, JESSIE LEVON DYSON, was the defendant below, and the Appellee, THE STATE OF FLORIDA, was the prosecution below.

The symbol "R." and "T." refer to the record on appeal and transcript of the trial respectively. Reference to the Record on appeal shall be referred to by "R" followed by a page number. Reference to the transcript shall be referred to by "T." followed by a page number.

Statement of The Case And Facts

On February 27, 2002, Appellant was charged by indictment with first degree murder for the murder of Otis Ridley, attempted first degree murder for the shooting of Tangela Wooden, and possession of a firearm by a convicted felon. (R. 20-22). Prior to trial, the trial court granted Appellant's motion to sever the charge possession of a firearm by convicted felon from the first two counts. (R. 134).

On January 26, 2004, Appellant=s trial began. (T. 1). The surviving victim, Ms. Wooden, testified that on the night of Saturday, September 30, 2001 Ms. Wooden and Mr. Ridley went to the movies. (T. 391). After the movie, Ms. Wooden and Mr. Ridley drove to a friend=s house. (T. 391). Ms. Wooden, Mr. Ridley, and the friend went to., Aan open lot where people hang out@ at 11 p.m. (T. 393).

Just past midnight, Ms. Wooden and Mr. Ridley left the lot. (T. 397). Ms. Wooden and Mr. Ridley were turning onto 151st Street when Asomeone started shooting at us, just shooting so hard.@ (T. 398). When the bullets began striking the car, Ms. Wooden got down on the floor in the front seat of the car. (T. 399). Ms. Wooden said the shots were being fired from a Asilver light sports vehicle.@ (T. 399). While Ms. Wooden did not actually see the shooter or who was driving the Asilver light sports vehicle,@ she felt confident the shots came from the Asilver

light sports vehicle@ because there were no other cars in the area. (T. 399-400). As a result of the shooting, the passenger side window to Mr. Ridley=s car was shattered. (T. 403). Ms. Wooden received small cuts from the shattered glass. (T. 403). After the shooting, Mr. Ridley=s car came to a stop after crashing into a fence. (T. 405-406). Prior to exiting the car, Ms. Wooden noticed Mr. Ridley Awas sitting straight up with his feet on the gas in the car and he was like gagging for his life, making sound.@ (T. 405). Once the police arrived, Ms. Wooden told them about the incident and about the silver SUV she had seen. (T. 408). Later, the police took Ms. Wooden to see a silver SUV and she said it was similar to the silver SUV from the shooting. (T. 408).

After considering the evidence and testimony, the jury returned verdicts of guilty for first degree murder and attempted first degree murder. (T. 1167-1168, R. 210-214). On April 8, 2004, Appellant was sentenced to life imprisonment for the first degree murder count and to life imprisonment for the attempted first degree murder count as a habitual felony offender. (T. 226-229). Over the objection of defense counsel, each count was to run consecutively with the other. (R. 226-229). Appellant received 793 days credit for time served. (T. 226-229). The firearm possession charge count was nolle prossed. (R. 284).

Appellant appealed his judgment and sentence. (R. 225). The Third District Court of Appeal affirmed Appellant's judgment and conviction. In its entirety, the

Third District's decision below stated:

> Neither error nor harmful effect has been demonstrated in the points alleging trial error on this appeal.
>
> We also reject the claim that the court improperly imposed a habitual felony offender sentence, based on defendant's commission of attempted first degree murder occurring in the same shooting spree, consecutive to, rather than concurrent with, a mandatory life in prison sentence for the first degree murder of another victim. *Cheatham v. State*, 659 So. 2d 287 (Fla. 3d DCA 1994), is exactly on point and mandates this result. *See Downs v. State*, 616 So. 2d 444 (Fla. 1993); *see also Roberts v. State*, 923 So. 2d 578 (Fla. 5th DCA 2006); *cf. State v. Ferreira*, 840 So. 2d 304 (Fla. 5th DCA 2003).
>
> Affirmed.
>
> *Dyson v. State*, 934 So.2d 548 (Fla. 3d DCA 2006)

A motion for rehearing was filed on June 19, 2006 and denied. Appellant filed a notice of invocation of this Court's discretionary jurisdiction on August 31, 2006. On October 31, 2006, this Court accepted jurisdiction and dispensed with oral argument. The state's response follows.

Summary of the Argument

The trial court did not err when it sentenced Appellant consecutively to life imprisonment for first degree murder and to life imprisonment for attempted first degree murder as a habitual felony offender when Appellant shot into a car causing injuries to multiple victims in a single criminal episode. The reasoning of *Palmer, Hale* and *Daniels* does not proscribe the imposition of a single habitual offender life sentence for attempted murder to run consecutive to a non-habitual life sentence because no increased term of incarceration or minimum mandatory term results from habitualizing a life felony. In addition, the separate evils doctrine allows for stacking of consecutive mandatory sentences when the sentences address separate evils. Here, the sentences addressed the separate evils of killing a person and recidivism. Furthermore, the sentences are permitted because Appellant committed two separate and distinct crimes with two separate victims. Consecutive sentences have been found permissible under similar facts in *State v. Christian* and *Sousa v. State.* Finally, the consecutive sentences should be affirmed because there was no actual effect caused by habitualizing the life sentence for attempted first degree murder under Fla. Stat., §775.084(4)(a)(1). Appellant received no enhancement beyond the maximum sentence which could have been imposed on a non-habitual offender.

Argument

The trial court did not err when it imposed a habitual offender sentence for attempted first degree murder consecutive to a mandatory life sentence for first degree murder when there were two victims in the same criminal episode.

A. Palmer, Hale and their progeny

This Court first addressed stacking a three year minimum mandatory sentences in *Palmer v. State*, 438 So. 2d 1 (Fla. 1983). In *Palmer*, the defendant had robbed 13 people at gunpoint and received 13 consecutive minimum mandatory sentences. *Id.* at 2. In striking down the consecutive portion of the sentence, this Court reasoned that the rule of lenity prohibited the imposition of consecutive minimum mandatory sentences for crimes which occurred in a single criminal episode when there was no explicit statutory authorization to do so. *Id.* at 3. The minimum mandatory statute did not give the trial court the authority to deny a defendant the eligibility for parole for a period greater than the statute permitted. *Id.*

This Court addressed the issue of whether trial courts could impose consecutive life sentences with 15 year minimum mandatory terms for first degree felonies committed by habitual violent felony offenders in *Daniels v. State*, 595 So. 2d 952 (Fla. 1992). This Court wrote:

> As in *Palmer*, the punishment for the crimes committed by Daniels as specified in section 775.082, Florida Statutes (1987), contains no authorization for minimum mandatory penalties. However, the State argues that because Daniels was found to be an habitual violent felony offender, the statute setting the punishment for his crimes is section 775.084, Florida Statutes (Supp. 1988), which authorizes minimum mandatory sentences. This is a close call, but we believe that Daniels' sentences more nearly fall within the principle of *Palmer* than they do *Enmund* and *Boatwright.* 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 imposed for the crimes he committed arising out of the same criminal episode may only be imposed concurrently and not consecutively. *Id.* at 953-954.

Relying upon *Daniels*, the *Hale* Court wrote:

> We find that the same principle applies in the instant case. None of the statutes under which Hale was sentenced contain a provision for a minimum mandatory sentence. *Id.* at 524.

In the instant case, Appellant was convicted of first degree murder and attempted first degree murder. The first degree murder statute requires a defendant be sentenced either to death or life imprisonment without the eligibility for parole. Fla. Stat., §775.082(1). Therefore, unlike in *Daniels* and *Hale*, Appellant was sentenced under a statute that contained a provision for a minimum mandatory sentence, i.e., life imprisonment without parole. Appellant's consecutive sentences were outside the scope of *Daniels* and *Hale.*

However if this Court finds that *Daniels* and *Hale* apply to the instant case,

it should still affirm the district court. This Court's reasoning in *Hale* was that the legislative intent to provide enlarged sentences to habitual offenders. *Id.* at 524 citing §775.084. This Court reasoned that the legislative intent was satisfied when the maximum sentence was increased and that there was nothing in the habitual offender statute that suggested that the legislature intended that total penalty should be increased by ordering the sentences run consecutively. *Id.* See also *Kiedrowski v. State*, 876 So. 2d 692, 694 (Fla. 1st DCA 2004).

Under the reasoning in *Hale*, Appellant's sentence should be affirmed. There is no increased term of incarceration nor is there a minimum mandatory sentence which results from habitualizing a life felony. Therefore, the reasoning of *Hale* does not proscribe the imposition of a single habitual offender life sentence for attempted murder to run consecutive to a non-habitual offender life sentence for first degree murder.

Appellant asserts that this Court addressed a "nearly identical" sentence in *Pangburn v. State*, 661 So. 2d 1182, 1187 (Fla. 1995). Appellant misreads *Pangburn*. In *Pangburn*, the defendant was sentenced to life imprisonment with a minimum mandatory sentence of twenty-five years for a murder conviction, and to life imprisonment for a robbery conviction with a minimum mandatory sentence of fifteen years, with all sentences to run consecutively. *Id.* at 1185. He contended that the trial court erred in imposing a ***minimum mandatory sentence*** for a robbery

conviction to run consecutively to two murder sentences. *Id.* at 1187. This Court affirmed the minimum mandatory sentence of fifteen years on the robbery charge, but held that the sentence must run concurrently rather than consecutively to the sentences imposed on the two first-degree murder convictions. *Id.*

The facts in the instant case are distinguishable from those in *Pangburn*. Here, the habitualization did not trigger a minimum mandatory sentence for attempted 1st degree murder or otherwise change the sentence which a similarly situated non-habitualized defendant could have received. This Court in *Pangburn* held that the imposition of consecutive sentences was impermissible because of the minimum mandatory portion of the sentence. The habitual offender enhancement for a life felony carries no minimum mandatory sentence: "in the case of a life felony or a felony if the first degree, [imprisonment] for life." The statute only provides a ceiling not a floor. Fla. Stat., §775.084(4)(a). Therefore, *Pangburn* cannot support overturning Appellant's sentence.

B. Separate Evils

This Court first utilized the separate evils doctrine to permit reclassification of 2nd degree murder with a firearm as a life felony and to impose a minimum mandatory sentence in *State v. Whitehead,* 472 So. 2d 730, 731 (Fla. 1985). In *Whitehead,* a district court had ruled that to do so was an impermissible double

enhancement. This Court disagreed. *Id.*

The *Whitehead* court examined the subsection of §775.087 that permitted reclassification of 1st degree felony to a life felony when a defendant possessed a firearm and the subsection that imposed a three year minimum mandatory sentence. *Id.* This Court found that there was nothing in the statute to indicate that the legislature intended the two subsections to be mutually exclusive. *Id* at 732. The Court reasoned that different purposes were being served by the two subsections. *Id*. One subsection allowed for increased punishment and the other ensured that a defendant would serve at least three years of his sentence. *Id.* The Court ruled that:

> "the determination of punishment for crimes is a legislative matter. Because the legislature has provided both subsections, both are to be followed. Absent an indication from the legislature that these subsections are an either/or proposition, both subsections are to be followed." *Id.*

Appellant's sentence is permitted because the legislature has not indicated that provisions he was sentenced under are mutually exclusive. Each statute serves a distinctly separate purpose. One seeks to punish individuals who commit murder; the other seeks to punish repeat criminal conduct. In the absence of a contrary legislative intent, two statutory provisions should be read *in pari materia*. The legislature provided punishments under two separate sections. Statutes which

relate to the same or closely related subjects should be read *in pari material.* See generally *State v. Fuchs*, 769 So. 2d 1006, 1009 (Fla. 2000).

Furthermore, this Court has addressed the question of whether a court could stack minimum mandatory sentences of capital felonies with non-capital felonies committed with a firearm which occurred during the same criminal episode. *Downs v. State*, 616 So. 2d 444 (Fla. 1993). This Court reasoned that rather than being an enhancement, the capital felony minimum mandatory sentence Ais the statutorily required penalty for each capital felony.@ *Id.* at 446 citing *State v. Boatwright*, 559 So. 2d 210, 213 (Fla. 1990).

The *Downs* court applied the rationale of *Boatwright* and held that the applicable minimum mandatory sentences, twenty-five years for the former crime and three years for using a firearm during the commission of the latter, address two separate and distinct evils--***killing someone and using a firearm***. *Id.* The *Downs* court focused on the fact that the defendant had committed two separate and distinct criminal acts and that, therefore, two separate and distinct penalties could be imposed. *Id.* The *Downs* court then stated that it would have been improper to add a three year minimum for using a firearm to the already imposed capital minimum mandatory. This Court also distinguished the facts in *Downs* from those in *Daniels* by recognizing the separate and distinct crimes that both required a minimum mandatory sentence. *Id.*

Like the defendant in *Downs,* Appellant committed two separate and distinct crimes with two separate victims. Like the sentence in *Downs,* the sentence that Appellant received addresses separate evils: killing someone and recidivism. Because the statutory provisions that the sentences are based upon address two separate evils, Appellant's consecutive sentences are permitted.

Relying upon *Downs,* the Third District Court of Appeal issued *Cheatham v. State,* 659 So. 2d 287 (Fla. 3d DCA 1994):

> In our view, the consecutive minimum mandatory terms were permissible under *Downs v. State,* 616 So. 2d 444 (Fla. 1993) because the statutory provisions in question address "separate and distinct evils." *Downs,* 616 So. 2d at 446--that is, "killing someone," 616 So. 2d at 446, as to the murder conviction, and recidivism, *see Hicks v. State,* 595 So. 2d 976 (Fla. 1st DCA 1992), as to the defendant's status as a habitual offender. *Id*. at 288.

Here, the issue is identical to the issue in *Cheatham.* Appellant's consecutive sentences are appropriate because his convictions also address separate and distinct evils, i.e. "killing someone" and "recidivism." Because *Downs* and *Cheatham* closely mirror the sentence here and because the rule established in *Hale* and *Daniels* applies only to cases that have been enhanced beyond the statutory maximum, Appellant's consecutive sentences are appropriate. In the instant case, the district court used the doctrine of separate evils as discussed in *Cheatham* and *Downs* as the basis for its ruling. *Dyson*, 934 So. 2d 548 (Fla. 3d DCA 2006).

C. Separate Victims, One Criminal Episode

Florida Statute ' 775.021(4)(a) expressly permits consecutive sentences:

> 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. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) 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. 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.

Appellant=s consecutive sentences here complied with the statutory provisions above. He committed 1st degree murder against Otis Ridley and attempted 1st murder against Tangela Wooden; two separate and distinct crimes with two separate victims.

Florida case law also supports the consecutive portion of the sentence. This Court has found that consecutive enhanced sentences arising from a single episode. Appellant cites *State v. Hill*, 660 So. 2d 1384 (Fla. 1995), for the proposition that *Hale* precludes the imposition of consecutive sentences for crimes arising from a single criminal episode for habitual offenders; however, Appellant overlooks both *State v. Christian*[1] and *Sousa v. State*[2].

In *Christian*, this Court reviewed the sentence of a defendant who had shot two victims in a single criminal episode. 692 So. 2d at 890. The trial court sentenced the defendant to concurrent 25 and 15 year terms of imprisonment with three year firearm minimum mandatory sentences consecutively. *Id.* This court held there was a general rule that stacking was permissible for offenses arising from a single episode where the firing of a weapon, a violation with a mandatory minimum, causes injury to multiple victims. *Id.* The *Christian* court reasoned that the injuries bifurcate the crimes for stacking purposes. *Id.*

This Court held that stacking of firearm mandatory minimum terms was permissible where the defendant shoots at multiple victims and impermissible where the defendant does not fire the weapon. *Id.* at 891. This rule is in

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[1] 692 So. 2d 889 (Fla. 1997)

[2] 903 So. 2d 923 (Fla. 2005)

accordance with the rule in *Palmer* where the defendant did not fire his weapon but merely brandished it during the robbery. Furthermore, this Court specifically distinguished its holding from those in *Hale* and *Daniels*. *Id*. at n3.

Additionally, in *Sousa* this Court examined the imposition of consecutive sentences with minimum mandatory sentences where the defendant shot several victims in rapid succession during a single criminal episode. 903 So. 2d at 924. This Court affirmed the consecutive sentences and held that the sentences were proper when two victims were injured in a single episode. *Id.* This Court relied on its ruling in *Christian* and found that the plain meaning of §775.087 permitted consecutive sentences where the defendant shot multiple victims. *Id*. at 928. See also, *Lifred v. State*, 643 So. 2d 94 (Fla. 4th DCA 1994) ("In the case of multiple discharges of a firearm at multiple victims, there are, by definition, separate violations of each victim's rights. . . . The primary factor triggering the imposition of consecutive mandatory minimums is whether the firearm has been discharged more than once to shoot those victims.")

In addition, this Court in *Downs* cited to *State v. Thomas*, 487 So. 2d 1043 (Fla. 1986), where it examined the trial court=s imposition of two consecutive three-year minimum mandatory sentences for using a firearm in committing both attempted murder and aggravated assault. Although the defendant in *Thomas* argued that *Palmer* should apply, this Court concluded that he committed two

separate and distinct offenses and upheld the sentence.

Reading the holdings of *Downs*, *Christian* and *Sousa* together permits the imposition of consecutive life sentences for a capital felony and a life sentence for a habitualized life felony. The victims were shot at multiple times in a single criminal episode. Their injuries were two separate and distinct offenses; therefore, stacking is permissible.

D. Effect of habitualization did not enhance Appellant's sentence

In *Hale*,[3] this Court found that there was no statutory authority which allowed trial courts to impose consecutive habitual felony offender sentences for multiple offenses arising out of the same criminal episode. 630 So.2d at 524. This Court reasoned:

> 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. (Emphasis supplied).

The underlying reasoning of *Hale* is that once the habitual offender sentencing scheme is utilized to enhance a sentence ***beyond*** the statutory maximum

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[3] *Hale v. State*, 630 So. 2d 521 (Fla. 1993), cert. denied, 130 L. Ed. 2d 195, 115 S. Ct. 278, 130 L. Ed. 2d 195 (1994).

on multiple counts arising from a single criminal episode, consecutive sentencing may not be used to further lengthen the overall sentence. *Fuller v. State*, 867 So. 2d 469, 470 (Fla. 5th DCA 2004).

Here, Appellant was convicted of a capital felony and a life felony and sentenced to life incarceration. The penalty for 1st degree murder, a capital offense, is death or life imprisonment without the possibility of parole. Fla. Stat., §775.082(1) (2001). The maximum penalty for attempted 1st degree murder committed after July 1, 1995, a life felony, is a term of imprisonment for life or by imprisonment for a term of years not to exceed life imprisonment. Fla. Stat., §775.082(3)(a)(3) (2001).

When a defendant is designated a habitual felony offender, a court may impose an extended term of imprisonment as provided by the habitual felony offender statute. Fla. Stat., §775.084(1)(a) (2001). A sentencing court may sentence a habitual offender in the case of a life felony or a felony of the first degree, to life. Fla. Stat., §775.084(4)(a)(1) (2001). Unlike the enhancements of the habitual violent felony offender, three time violent felony offender or violent career criminal schemes, the enhancement for habitual felony offenders does not mandate minimum mandatory sentences. See Fla. Stat., §§775.084(4)(b)(1), (c)(1), (d)(1) (2001).

Furthermore, Florida law expressly permits the imposition of consecutive

sentences for criminal offenses committed during one criminal transaction. Fla. Stat., §775.021(4)(a) (2001). A sentencing judge may order the sentences to be served concurrently or consecutively. *Id*.

In the instant case, had the sentencing judge refrained from uttering the magic words of "habitual offender," Appellant could not argue that he was sentenced illegally. The maximum sentence for a non-enhanced life felony is imprisonment for life. It is completely lawful for the sentencing judge to give the maximum sentence and make each sentence consecutive.

In Appellant's case, there is no practical effect from the sentencing as a habitual offender designation because the sentence does not exceed the maximum sentence allowable for a similarly situated non-habitualized defendant. In contrast, Appellant might have a viable argument and could claim a detrimental effect from habitualization if he had been charged with a 1st degree felony which generally carries a maximum penalty of 30 years imprisonment. Fla. Stat., §775.082(3)(b). In addition, Appellant would have been required to serve his entire sentence because defendants sentenced to life imprisonment are not entitled to gain-time and, according to statute, shall be incarcerated for the rest of their natural lives. Fla. Stat., §944.275(4)(b)(3) (2001); *Tal-Mason v. State*, 700 So. 2d 453 (Fla. Dist. Ct. App. 4th Dist. 1997).

The First District held that when a sentencing court uses the habitual

offender statute to enhance sentences for offenses that occur during a single criminal episode, the court may not further enhance the penalties by ordering that the individual sentence be served consecutively. *Goshay v. State*, 646 So. 2d 213 (Fla. 1st DCA 1995). Appellant received no enhancement beyond the maximum sentence which could have been imposed on a non-habitual offender and therefore should be entitled to no relief.

Appellant has not shown that he has been subjected to any enhancement because of his designation as a habitual offender. Appellant's sentence can be distinguished from a case were a defendant was sentenced to a term beyond the un-enhanced statutory maximum and then stacked consecutively. For example, the defendant in *Kiedrowski v. State* was charged with two 3rd degree felonies and sentenced on one count as a habitual offender to 10 years and consecutively on the second count to two years. 876 So. 2d 692 (Fla. 1st DCA 2004). The court reasoned that because 12 years exceeded the statutory maximum if both sentences had been enhanced under §775.084 and run concurrently or if neither statute had been enhanced and run consecutively. *Id* at 694. In the instant case, Appellant could have received life imprisonment on both counts even if he had not been habitualized and been sentenced consecutively. Therefore, the sentence does not violate the dictates of *Hale*.

Conclusion

For the foregoing reasons, this Court should affirm Appellant's conviction and sentence.

Respectfully submitted,
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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner was mailed this 2nd day of Feburary 2007, to Howard Blumberg, Office of The Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

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Certificate of Compliance

I hereby certify that this brief is typed in Times New Roman 14-point font.

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LAURA MOSZER
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