IN THE SUPREME COURT OF FLORIDA

CASE NO. 06-1762

JESSIE LEVON DYSON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

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

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INTRODUCTION

Petitioner, Jessie Levon Dyson, was the appellant in the district court of appeal and the defendant in the Circuit Court. Petitioner, State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal, the symbol "TR" will be used to designate the transcripts of proceedings, and the symbol AA@ will be used to designate the Appendix to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Jessie Levon Dyson was charged with first degree murder of Otis Ridley, and attempted first degree murder of Tangela Wooden (R. 20-22). The evidence presented by the State at trial established that shots were fired at Ridley and Wooden as they were driving on a street in Northwest Miami shortly after midnight (TR. 397-399). The shots shattered the glass in the front passenger door (TR. 403). Ridley suffered a single gunshot wound to the chest which caused his death (TR. 891, 894).

A jury subsequently returned verdicts finding Dyson guilty as charged of first degree murder and attempted first degree murder (R. 210-211). The court entered adjudications of guilt based on the jury's verdicts (R. 212). Over the objection of defense counsel, the court sentenced Dyson to life imprisonment for first degree murder of Ridley, and a consecutive sentence of life imprisonment as a habitual felony offender for attempted first degree murder of Wooden (R. 219-222, 226-229, 247-250, 275-281). Notice of appeal was filed (R. 225).

The Third District Court of Appeal affirmed the trial court's imposition of a habitual felony offender sentence based on Dyson's commission of attempted first degree murder of Wooden, consecutive to a mandatory life imprisonment sentence for the first degree murder of Ridley in the same shooting spree:

> 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.

(A. 2).

A motion for rehearing was filed on June 19, 2006, and denied on August 18, 2006. Notice of invocation of this Court's discretionary jurisdiction was filed August 31, 2006. On October 31, 2006, this Court accepted jurisdiction and dispensed with oral argument.

SUMMARY OF ARGUMENT

In its decision in this case, the Third District Court of Appeal affirmed the trial court's imposition of a habitual felony offender sentence based on the defendant's conviction of attempted first degree murder, consecutive to a mandatory life imprisonment sentence for the first degree murder of another victim in the same shooting spree. This Court squarely held in *Pangburn v. State*, 661 So.2d 1182 (Fla.1995) that a sentence imposed under the habitual offender statute cannot run consecutively to a sentence imposed on a first degree murder conviction. Accordingly, the decision of the district court of appeal in this case approving the imposition of such consecutive sentences must be quashed.

ARGUMENT

THE TRIAL COURT ERRED IN IMPOSING A HABITUAL OFFENDER SENTENCE FOR ATTEMPTED FIRST DEGREE MURDER CONSECUTIVE TO A SENTENCE FOR FIRST DEGREE MURDER WHERE BOTH CRIMES AROSE FROM THE SAME CRIMINAL EPISODE.

In *Hale v. State*, 630 So.2d 521, 524 (Fla.1993), *cert. denied*, 513 U.S. 909 (1994), this Court held that sentences for multiple crimes arising from a single criminal episode cannot be both enhanced under the habitual felony offender statute and imposed consecutively. The defendant in *Hale* was convicted of sale of cocaine and possession of cocaine with intent to sell based on his sale of a small quantity of cocaine to a confidential informant. At sentencing the defendant was found to qualify for sentencing as a habitual violent felony offender. The trial judge sentenced the defendant to two consecutive twenty-five year habitual violent felony offender terms, one term for the conviction on the charge of sale of cocaine and another term for the conviction on the charge of possession of the same cocaine, with each sentence carrying a ten-year minimum mandatory sentence.

On review by this Court, the defendant asserted that this Court’s prior decision in *Daniels v. State*, 595 So.2d 952 (Fla.1992) required a reversal of the trial court's imposition of consecutive minimum mandatory sentences. This Court agreed with the defendant’s assertion:

> For the same rationale set out in *Daniels* we find that Hale's enhanced maximum sentences must run concurrently. In *Daniels* we recognized that
>
>> by enacting sections 775.084 and 775.0841, Florida Statutes (Supp.1988), the 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.* Thus, the legislative intent is satisfied when the maximum sentence for each offense is increased. 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.
>
> *   *   *   *   *
>
> We conclude that, under the statutory penalty for each offense, the trial court may sentence this defendant separately for possession, and sentence him separately for the sale, and make each sentence consecutive to the other. However, the 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 legislative authorization in the habitual offender statute.

630 So.2d at 524-525.

In *State v. Hill*, 660 So.2d 1384 (Fla.1995), the defendant was convicted of burglary of an unoccupied vehicle, grand theft of a motor vehicle, and possession of burglary tools. The trial judge sentenced the defendant as a habitual violent felony offender to ten years on each conviction with the sentences to run

consecutively. On appeal, the district court of appeal reversed the consecutive sentences. This Court approved the decision of the district court of appeal, and held that *Hale* precludes under all circumstances the imposition of consecutive sentences for crimes arising from a single criminal episode for habitual felony offenders. In so holding, this Court rejected the State's argument that an exception to *Hale* should be made where the resulting sentence is clearly less than the sentence provided in the sentencing guidelines:

> We issued *Hale* in 1993. *Daniels* was issued in 1992. To date, the legislature has not enacted legislation modifying the statute upon which the holding in those cases was based. Until it does so, we find that a trial court is without authority to enhance sentences from multiple crimes committed during a single criminal episode by both sentencing a defendant as a habitual offender and ordering that the sentences be served consecutively. As to the State's request that we create an exception to this rule for the circumstances presented here, we find that such an exception is not within our authority and that any change in the law regarding enhanced sentences is solely within the province of the legislature.

660 So.2d at 1386 (footnotes omitted).

Finally, in *Pangburn v. State*, 661 So.2d 1182 (Fla.1995), this Court addressed the issue of the imposition of consecutive sentences under circumstances nearly identical to those in the case at bar. The trial judge in *Pangburn* sentenced the defendant to death for one count of first degree murder, to life imprisonment with a minimum mandatory sentence of twenty-five years for a second count of first degree murder, and to life imprisonment for the robbery conviction with a

minimum mandatory sentence of fifteen years, with the sentences to run consecutively. This Court held that the habitual offender sentence for robbery was required to run concurrently with the sentences imposed for the first degree murder convictions:

> [A]ppellant contends that the trial judge erred in imposing a minimum mandatory sentence for the robbery conviction to run consecutively to the two murder sentences. As the State concedes, this was reversible error under our decision in *Hale v. State*, 630 So.2d 521 (Fla.1993) (minimum mandatory sentences resulting from enhancement under habitual offender statute and imposed for crimes arising out of same criminal episode may only be imposed concurrently, not consecutively), *cert. denied*, 513 U.S. 909, 115 S.Ct. 278, 130 L.Ed.2d 195 (1994). Although we affirm the minimum mandatory sentence of fifteen years on the robbery charge, we hold that the sentence must run concurrently rather than consecutively to the sentences imposed on the two first-degree murder convictions.

661 So.2d at 1187. *See also State v. Ferreira*, 840 So.2d 304 (Fla. 5th DCA 2003)(*Hale* barred the imposition of consecutive sentences of life in prison without parole for first degree murder and a thirty year prison term as a habitual offender for attempted armed robbery); *Parks v. State*, 701 So.2d 653 (Fla. 4th DCA 1997)(habitual violent offender sentences on three robbery convictions were required to run concurrently with life sentence with twenty-five year mandatory minimum for first degree murder).

In the present case, the defendant was sentenced on a first degree murder conviction to life in prison without parole, and was also classified as a habitual offender and sentenced to a consecutive term of imprisonment on a conviction for

an attempted murder committed in the same criminal episode. The decision of the Third District Court of Appeal in the present case affirming the imposition of these consecutive sentences is directly contrary to this Court's holding in *Pangburn* that *Hale* requires that a habitual offender sentence must run concurrently with, rather than consecutively to, a sentence imposed on a first degree murder conviction.[1]

The district court of appeal based its ruling in this case upholding the imposition of consecutive sentences on a finding that its prior decision in *Cheatham v. State*, 659 So.2d 287 (Fla. 3d DCA 1994) "is exactly on point and mandates this result." (A. 2). In *Cheatham*, the defendant was convicted of first degree murder, armed burglary of an occupied conveyance and armed robbery. The crimes were all part of the same transaction. The defendant was sentenced to consecutive minimum mandatory terms of twenty-five years of a life sentence for the murder charge and fifteen years as a habitual violent felony offender on the armed burglary and armed robbery convictions. The district court of appeal upheld the imposition of consecutive sentences because the mandatory minimum term for first degree murder and the mandatory minimum term under the habitual offender statute addressed "separate and distinct evils":

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[1] The legality of a sentence is a question of law and is subject to de novo review. *Stoute v. State*, 915 So.2d 1245 (Fla. 4th DCA 2005); *Flowers v. State*, 899 So.2d 1257 (Fla. 4th DCA 2005).

> 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. *See Downs*, 616 So.2d at 444 (consecutive minimum mandatory sentences for first degree murder and using a firearm in the commission of aggravated assault permissible); *Bonaventure v. State*, 637 So.2d 55 (Fla. 5th DCA 1994) (consecutive minimum mandatory sentences for first degree murder and possession of a firearm by a convicted felon permissible).

659 So.2d at 288.

The decision of the Third District in *Cheatham*, like the decision of that court in the present case, cannot be reconciled with the decision of this Court in *Pangburn*.[2] This Court squarely held in *Pangburn* that a sentence imposed under the habitual offender statute cannot run consecutively to a sentence imposed on a first degree murder conviction.

This Court's decision in *Downs v. State*, 616 So.2d 444 (Fla.1993) does not support the imposition of consecutive sentences for first-degree murder and a sentence enhanced under the habitual offender statute. In *Downs*, this Court approved the imposition of consecutive mandatory minimum sentences imposed for first degree murder and for a non-capital felony committed with the use of a firearm. Neither of the sentences imposed in *Downs* were enhanced under the

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[2] This Court issued its decision in *Pangburn* after the Third District issued its decision in *Cheatham.* The decision of the Third District in the case at bar does not mention *Pangburn*.

habitual offender statute. That being the case, the rationale of this Court's decision in *Hale* did not apply to preclude the imposition of consecutive sentences in *Downs*. As this Court explained in *Boler v. State*, 678 So.2d 319 (Fla.1996), whether a minimum mandatory sentence contained in an enhancement statute and a statutorily-required minimum mandatory sentence can be imposed consecutively is a different question than whether two different statutorily-required minimum mandatory sentences can be imposed consecutively. In *Boler*, this Court held that the defendant's statutorily required mandatory minimum sentence of 25 years for first-degree murder had to run concurrently with his three-year minimum mandatory term under the enhancement statute for use of a firearm during the commission of a felony.

The case at bar, as well as the prior decision of the Third District in *Cheatham*, involve the question of whether a sentence enhanced under the habitual offender statute and a life sentence for first degree murder with a statutorily-required minimum mandatory sentence can be imposed consecutively. This Court answered this question in *Pangburn* and held that such sentences cannot be imposed consecutively. Accordingly, the decision of the district court of appeal in this case approving the imposition of such consecutive sentences must be quashed.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal affirming the consecutive sentences imposed by the trial court and remand this case with instructions that the defendant's sentences be ordered to run concurrently.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this 27th day of November, 2006.

____
HOWARD K. BLUMBERG
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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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