IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1762

JESSIE LEVON DYSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

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, 31 Fla. L. Weekly D 1580 (Fla. 3d DCA June 7, 2005).

SUMMARY OF ARGUMENT

The decision below does not expressly or directly conflict with the Fifth District's decision in Ferreira. The issue which was addressed in the lower court was not even raised in Ferreira. Further, the Ferreira Court failed to account for this Court's decision in Downs and relevant precedent of the Third District in Cheatham. And, Petitioner will be imprisoned for the rest of his natural life without the possibility of parole whether or not the challenged consecutive sentence was overturned.

ARGUMENT

THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THIS MATTER AS THERE IS NO EXPRESS OR DIRECT CONFLICT WITH A DECISION FROM THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW, AND EVEN IF A CONFLICT DID EXIST BETWEEN THE DECISION BELOW AND THE DECISION OF ANOTHER COURT OF APPEAL, THE LOWER COURT PROPERLY APPLIED THE CORRECT PRECEDENT FROM THIS COURT.

This Court has jurisdiction to review a decision from a district court of appeal which expressly or directly conflicts with a decision from this Court or from another district court of appeal on the same question of law. *See* Rule 9.030(a)(2)(iv), Fla.R.App.Pro. (2004). "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." Reeves v. State, 485 So. 2d 829, 830 (Fla. 1986). The lower court's decision does not expressly and directly conflict with the decision in State v. Ferreira, 840 So. 2d 304 (Fla. 5th DCA 2003). Therefore, this Court lacks jurisdiction here.

The issue which was addressed in the lower court was not raised in Ferreira. In the instant case, the lower court held that the two mandatory minimum provisions could run consecutively because they addressed separate

and distinct evils—recidivism and murder. That argument was neither raised nor addressed in Ferreira. Thus, there is no express and direct conflict.

In Ferreira, the Fifth District wrote:

> In this "much ado about nothing" case, the State appeals contending the court erred in correcting its previous sentence which made an [sic] habitual offender sentence run consecutively with a sentence imposed for another conviction arising out of one criminal incident. In this case, Ferreira was sentenced on a first degree murder conviction to life in prison without parole. He was also sentenced on an attempted armed robbery conviction as an habitual offender to a consecutive thirty year prison term. Our supreme court held in Hale v. State, 630 So. 2d 521 (Fla. 1993), that sentences for multiple crimes committed during a single incident which are enhanced through classifying the defendant as an habitual offender may not be increased further by imposing consecutive sentences. The State urges that Hale should not apply because Ferreira was classified as an habitual offender on only one of the convictions, attempted armed robbery. However, it seems axiomatic that whether the first degree murder sentence runs consecutive to the armed robbery sentence or whether the armed robbery sentence runs consecutive to the first degree murder sentence, the overall sentence has been enhanced twice because of the classification as an habitual offender. We agree with the trial court that Hale applies and affirm.

Id. at 305.

The State did not argue and therefore the Ferreira Court did not confront the issues presented in Cheatham v. State, 659 So. 2d 287, 288 (Fla. 3d DCA 1994). In Cheatham, the Third District wrote:

> 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. The State in Ferreira only argued that Hale should not apply because the defendant was classified as a habitual offender on only one of the convictions, attempted armed robbery. However, the Ferreira Court failed to address or consider the "separate and distinct evils" argument that the Third District relied upon in Cheatham.

The Third District's decision below cited the correct case law from this Court. In Downs v. State, 616 So. 2d 444 (Fla. 1993), this Court wrote:

> When the same crime is committed in a nonsimultaneous manner or when different crimes are committed in the same episode, however, minimum mandatory sentences can be consecutive. For example, in State v. Thomas, 487 So. 2d 1043 (Fla. 1986), we upheld the trial court's making consecutive two three-year minimum mandatory sentences for using a firearm in committing both attempted murder and aggravated assault. Although Thomas argued that Palmer should apply, we concluded that he committed two separate and distinct offenses. Likewise, in Murray v. State, 491 So. 2d 1120 (Fla. 1986), we approved the district court's affirmance of consecutive minimum mandatory sentences for use of a firearm during a sexual battery and robbery of a single victim because the crimes were committed at

> both different times and different locations. McDonald v. State, 564 So. 2d 523, 525 (Fla. 1st DCA 1990), affirmed the trial court's stacking a five year minimum mandatory sentence on a drug-trafficking charge with a three-year minimum for using a firearm during an aggravated assault because, "although appellant's separate crimes occurred in a single criminal episode, the nature of his crimes subjected him to the imposition of mandatory minimum sentences under two separate and distinct statutes."
>
> Regarding capital felonies, on the other hand, we have held that a "trial judge has the discretion to stack minimum mandatory sentences in all cases concerning capital felonies." State v. Boatwright, 559 So. 2d 210, 210 (Fla. 1990) (emphasis supplied); *cf.* State v. Enmund, 476 So. 2d 165 (Fla. 1985). Rather than being an enhancement, the capital felony minimum mandatory sentence "is the statutorily required penalty for each capital felony." Boatwright, 559 So. 2d at 213. Thus, we approved the trial court's making the mandatory portions of Boatwright's life sentences for two convictions of capital sexual battery consecutive.
>
> In the instant case we have a capital felony, first-degree murder, and a noncapital felony, aggravated assault. 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. We see no reason why a trial court cannot, in its discretion, stack those minimum mandatory sentences.

Id. at 445-446. The Downs precedent is well established and was correctly applied by the lower court.

In addition, prior to Hale v. State, 630 So. 2d 521 (Fla. 1993), this Court issued its decision in Daniels v. State, 595 So. 2d 952 (Fla. 1992). The Daniels 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 n2 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. Petitioner 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. Therefore, unlike in Daniels and Hale, Petitioner was sentenced under a statute

that contained a provision for a minimum mandatory sentence, i.e. life imprisonment without parole.

Lastly, Petitioner was sentenced to life imprisonment for the first degree murder count and life imprisonment for the attempted first degree murder count as a habitual felony offender with the sentences to run consecutively. Petitioner's life sentence to the first degree murder count was imposed without the possibility of parole. *See* Fla. Stat. § 775.082(1) (2006) ("A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole."). And, Petitioner does not challenge the imposition of that sentence. Therefore, there is no reason why this Court should exercise its discretionary jurisdiction since Petitioner cannot claim he suffers any harm or prejudice by his life sentences running consecutively. Whether or not Petitioner's sentences were to run consecutively or concurrently, Petitioner will still remain in prison for the remainder of his natural life. There is no need for this Court review this matter.

CONCLUSION

Based on the foregoing argument and cited authorities, this court should decline to exercise its discretionary jurisdiction to review the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was mailed this ____ day of September, 2006, to HOWARD K. BLUMBERG, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

_____
MICHAEL E. HANTMAN
Assistant Attorney General

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney certifies that the foregoing Answer Brief of Appellee has been typed in Times New Roman, 14-point type.

_____
MICHAEL E. HANTMAN
Assistant Attorney General