

IN THE SUPREME COURT OF FLORIDA

CASE NO. 06-1762

**JESSIE LEVON DYSON,**

Petitioner,

-vs-

**STATE OF FLORIDA,**

Respondent.

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**REPLY BRIEF OF PETITIONER ON THE MERITS**

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

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**INTRODUCTION**

In this reply brief of petitioner on the merits, as in the initial brief of petitioner on the merits, all emphasis is supplied unless the contrary is indicated.

## 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.**

The State argues in its answer brief on the merits that the imposition of a life sentence as a habitual offender for attempted first degree murder consecutive to a sentence for first degree murder is not prohibited by this Court's decisions in *Hale v. State*, 630 So.2d 521 (Fla.1993), *cert. denied*, 513 U.S. 909 (1994), and *Pangburn v. State*, 661 So.2d 1182 (Fla.1995), because no increased term of incarceration results from habitualizing the life felony of attempted first degree murder. This argument is based on a premise which is both factually and legally incorrect.

Petitioner Jesse Levon Dyson was convicted of attempted first degree murder *without a firearm* (R. 211). Attempted first degree murder without a firearm is a first degree felony under §§ 782.04(1) and 777.04(4)(a), Fla. Stat. (2001),<sup>1</sup> not a life felony. *Gamez v. State*, 944 So.2d 1253 (Fla. 2d DCA 2006); *Shabazz v. State*, 931 So.2d 224 (Fla. 1st DCA 2006); *Bailey v. State*, 877 So.2d 836 (Fla. 4th DCA 2004). A first degree felony is punishable by a maximum term of imprisonment of 30 years. *Adams v. State*, 901 So.2d 275 (Fla. 5th DCA 2005);

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<sup>1</sup>The offenses in this case were committed in 2001 (R. 20-22).

*Allen v. State*, 771 So.2d 1245 (Fla. 2d DCA 2000); § 775.082(3)(b), Fla. Stat. (2001). However, based on the habitual offender statute, the trial judge in this case enhanced the conviction for attempted first degree murder from a first degree felony to a life felony, and imposed a sentence of life imprisonment which exceeds that 30-year maximum sentence for a first degree felony, but does not exceed the statutory maximum sentence of life imprisonment for a life felony. See § 775.082(3)(a), Fla. Stat. (2001).

Thus, the trial judge in this case did precisely that which this Court prohibited in *Hale* and *Pangburn*. The judge first enhanced the attempted first degree murder conviction from a first degree felony to a life felony under the habitual offender statute so that the maximum sentence was increased from 30 years to life, and then further enhanced the life sentence imposed by ordering that the sentence be served consecutive to the life sentence imposed for first degree murder.<sup>2</sup> Accordingly, the State's claim that the sentences imposed in this case fall outside the scope of *Hale* and *Pangburn* must be rejected.

*Pangburn* also refutes the State's contention that the consecutive sentences imposed in this case fall outside the scope of *Hale* and *Daniels v. State*, 595 So.2d 952 (Fla.1992) because the sentence for first degree murder contains a mandatory minimum sentence. This Court held in *Pangburn* that a sentence for robbery

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<sup>2</sup> Petitioner's guideline scoresheet did not authorize a sentence in excess of the statutory maximum (R. 215-216).

enhanced under the habitual offender statute could not be ordered to run consecutively to a sentence of life imprisonment with a minimum mandatory sentence of twenty-five years for first degree murder.

*Pangburn* also disproves the State's "separate evils" argument. The State argues that consecutive sentences are proper for a mandatory minimum sentence for first degree murder and a sentence enhanced under the habitual offender statute because the first degree murder sentence "seeks to punish individuals who commit murder" and the habitual offender sentence "seeks to punish repeat criminal conduct." (Answer Brief of Respondent on the Merits at 9). However, in *Pangburn*, this Court specifically held that under *Hale* a sentence enhanced under the habitual offender statute could not be ordered to run consecutively to a mandatory minimum sentence imposed for first degree murder.

The State's "separate evils" argument is also refuted by *Boler v. State*, 678 So.2d 319 (Fla.1996). In *Boler*, this Court held that the defendant's statutorily required mandatory minimum sentence of 25 years for first-degree murder could not be ordered to run consecutively to his three-year minimum mandatory term under the enhancement statute for use of a firearm during the commission of a felony. Clearly, using the State's analysis, the two mandatory minimum sentencing provisions in *Boler* address separate evils--- the first degree murder mandatory minimum sentence sought to punish individuals who commit murder

and the mandatory minimum term for use of a firearm sought to punish individuals who use weapons to commit crimes. Notwithstanding these separate evils, this Court held in *Boler* that the sentences could not be ordered to run consecutively because the lack of specific legislative authorization in the enhancement statute precludes running a minimum mandatory sentence contained in that enhancement statute consecutively to another mandatory minimum sentence. *Compare Downs v. State*, 616 So.2d 444 (Fla.1993)(approving imposition of consecutive mandatory minimum sentences imposed for first degree murder and for a non-capital felony committed with the use of a firearm where neither sentence enhanced under the habitual offender statute); *State v. Whitehead*, 472 So.2d 730 (Fla. 1985)(approving both reclassification of offense based on use of a firearm and imposition of minimum mandatory term for possession of firearm for the same offense).

Finally, the State argues that the trial judge in this case properly both enhanced the sentence for attempted first degree murder and then further enhanced petitioner's sentence for attempted first degree murder by running that sentence consecutive to the sentence for first degree murder because the two crimes were committed against two different victims. Once again, the State overlooks the fact that further enhancement of a sentence by running it consecutively to another sentence after first enhancing the sentence under the habitual offender sentence is a



discrete area of the law of consecutive sentencing which this Court has repeatedly addressed and repeatedly found to be contrary to legislative intent. Indeed, one of the cases upon which the State relies, *State v. Christian*, 692 So.2d 889 (Fla.1997) expressly notes that the principles established by the decisions in *Hale* and *Daniels* are different from the principles which allowed for the imposition of consecutive sentences in *Christian*:

As a general rule, for offenses arising from a single episode, stacking is permissible where the violations of the mandatory minimum statutes cause injury to multiple victims, or multiple injuries to one victim. The injuries bifurcate the crimes for stacking purposes.FN3

FN3. *Cf. Hale v. State*, 630 So.2d 521 (Fla.1993) (disapproving stacking of two maximum habitual offender terms); *Daniels v. State*, 595 So.2d 952 (Fla.1992) (disapproving stacking of three habitual offender mandatory minimum terms). A violation of the habitual offender statute is procedural (i.e., it results from the accumulation of offenses) and does not itself cause injury to any victim.

*Christian*, 692 So.2d at 890-891 (some footnotes omitted).

As is often the case with sentencing issues, legislative intent is the determinative factor in this case. In *Hale*, this Court determined that when the legislature enacted the habitual offender statute, it did not intend that a sentence could be enhanced under that statute and then further enhanced by running the already enhanced sentence consecutive to another sentence imposed based on the same criminal episode:

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.

630 So.2d at 524. Subsequently, in *State v. Hill*, 660 So.2d 1384, 1386 (Fla.1995), this Court held that *Hale* precludes under all circumstances the imposition of consecutive sentences for crimes arising from a single criminal episode for habitual felony offenders, and noted that its holding was bolstered by the failure of the legislature to modify the habitual offender statute in response to this Court's finding of legislative intent in *Hale* and *Daniels*:

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.

(footnotes omitted).

In the present case, the legislative intent to provide for incarceration of repeat felony offenders for longer periods of time was accomplished by the enlargement of the maximum sentence which could be imposed for the attempted first degree murder conviction from 30 years to life imprisonment. Accordingly, further enhancement of the sentence of life imprisonment imposed for the attempted first degree murder conviction by running that sentence consecutively to life sentence imposed for first degree murder is prohibited.

## 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 26th day of February, 2007.

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HOWARD K. BLUMBERG  
Assistant Public Defender

**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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HOWARD K. BLUMBERG  
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