IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-842
Lower Tribunal No.: 4D04-4009

JOSEPH KELLY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

# ***REPLY BRIEF***

[On certified conflict from the District Court of Appeal of Florida, Fourth District]

FRED HADDAD, P.A.
One Financial Plaza
Suite 2612
Fort Lauderdale, Florida 33394
Tel: (954) 467-6767
Fax: (954) 467-3599

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## STATEMENT OF THE CASE AND FACTS ON REPLY

Petitioner adopts his Statement of the Case and Facts in his Brief on the Merits.

## POINTS INVOLVED ON REPLY

### POINT ONE

WHETHER THE CONFLICTING DECISION OF THE FOURTH DISTRICT COURT OF APPEALS SHOULD BE REJECTED AND THE DECISIONS OF THE FIRST AND SECOND DISTRICT COURTS OF APPEAL BE ADOPTED

## SUMMARY OF THE ARGUMENT ON REPLY

Governing case law, including decisions of this Court and the Fourth District Court of Appeal, establish that sentences for convictions on trafficking and conspiracy to traffick arising from the same criminal episode may not be imposed consecutively.

The analysis performed by the State in its Answer Brief on the Merits, like that of the Fourth District below, turned on the decisions in *Daniels v. State*, 595 So.2d 952 (Fla.1992) and *Hale v. State*, 630 So.2d 521 (Fla.1993), two "non-trafficking" decisions wherein this Court, in the final analysis, denied the imposition of consecutive sentences. Petitioner argues that this singular focus is an incomplete accounting of the relevant principles of law at best or, at worst, an overly facile adherence to statutory nomenclature, the inevitable conclusion of which is an impermissible sentence.

## ARGUMENT ON REPLY

### POINT ONE

THE CONFLICTING DECISION OF THE FOURTH DISTRICT COURT OF APPEALS SHOULD BE REJECTED AND THE DECISIONS OF THE FIRST, SECOND, AND FIFTH DISTRICTS BE APPROVED

The sole issue before the Court is whether sentences including the "mandatory minimums" for trafficking and conspiracy convictions arising out of a single episode can be stacked. The State's Reply Brief to Petitioner's Brief on the Merits is limited to the logic employed by the Fourth District below and is based on the application of this Court's decisions in *Daniels*, supra and *Hale*, supra to the case at bench. The Petitioner argues that, while *Daniels* and *Hale* addressed the issue of the propriety of consecutive sentences, their applicability is compromised by their dissimilarity to the case at bench. Moreover, a *Daniels/Hale* analysis provides an insufficient rendering of applicable precedent as handed down by the First, Second and Fifth District Courts of Appeal.

At a factual level, neither *Daniels* nor *Hale* was a trafficking case. Instead, both concerned the stacking issue within the context of the habitual felony offender

statute. In addition, this Court struck down the imposition of consecutive sentences in both cases and conceded the illegality of consecutive sentences for statutory enhancements.

In its reply Brief, the State abandons the applicability of the "one criminal episode" test which has been held repeatedly to preclude the imposition of consecutive sentences. See *Boom v. State*, 538 So.2d 476 (Fla. 2d DCA 1989); *Berrio v. State*, 518 So.2d (Fla. 2d DCA 1988). *Contra Short v. State*, 572 So.2d 1007 (Fla. 3d DCA 1991). Indeed, the Fourth District in this case and in *Daniels* and *Hale* specifically recognized the importance of this timing concern in the consideration of consecutive mandatory sentences. (See also *Johnson v. State*, 695 So.2d 861 (Fla. 2d DCA 1997); *Vickery*, supra; *Frazier v. State*, 630 So.2d 1237 (Fla. 2d DCA 1994)).

Likewise, the Fifth District in *Ibarro v. State*, 588 So.2d 334 (1991) followed this logic in allowing for the imposition of consecutive sentences for conspiracy and trafficking given the fact that, in that case, the conspiracy was sufficiently "separate and distinct from the trafficking." Similarly, the Third District in *Contra Short*, supra reversed the lower court's decision to impose consecutive sentences for conspiracy and trafficking given that the convictions arose "from a single criminal incident" and were "not sufficiently distinct as to permit consecutive mandatory sentences."

Directly on point is a very recent decision of the Fourth District in it *per curiam* decision in *Hope v. State*, 927 So.2d. 1042 (2006) wherein the Court highlighted the centrality of the offenses in question being part of "one criminal episode" to the analysis of whether mandatory minimum sentences can be imposed consecutively. In reversing the trial court's imposition of consecutive life sentences for attempted robbery with a deadly weapon and aggravated battery with a deadly weapon, the Fourth District again re-affirmed the validity the principle articulated by this Court in *State v. Christian*, 692 So.2d 889 (2002) that "the stacking of minimum mandatory terms of imprisonment is impermissible where the offenses arise from a single criminal episode."

Given that the *Hope* decision was handed down after the decision in this case, in addition to the case law cited above, the State's summary rejection of the applicability of the "one criminal episode test" to this case is in error. It would seem, given the obvious conflict between the Districts on this issue, that if the Fourth District wished to differentiate between trafficking cases and other crimes, it would have taken that opportunity to do so in *Hope*. Instead, the Fourth District reiterated the applicability of the "one criminal episode" test without qualification.

The facts of this case as set forth in Petitioner's Brief on the Merits demonstrate that the conspiracy in question was not separate in time and scope from the substantive offense of trafficking. Petitioner, therefore, argues that in no

way can *Daniels* and *Hale* be seen as abrogating the "separate episodes" requirement for the imposition of consecutive sentences. The conspiracy to traffick in this case was not so broad in scope as to allow for the imposition of consecutive sentences. (See *Berrio*, supra).

Clearly, "nothing in Section 893.135 requires the imposition of consecutive mandatory sentences" in any case. (See *Ibarro*, supra; *Contra Short*, *supra*; *Barry v. State*, 654 So.2d 1229 (Fla. 2d DCA 1995)). Even if the Petitioner were to concede that conspiracy the traffick carried a mandatory minimum, a sentencing court is not legally obligated to impose a sentence stacked with that of the actual offense. On the contrary, in the case at bench, the extensive precedent cited above argues for the opposite outcome, i.e., the imposition of concurrent terms where the conspiracy and the trafficking arose out of the same incident as is the case here.

Moreover, Petitioner asserts that Fla. Statute 893.135 does not proscribe a minimum mandatory sentence for conspiracy to traffick, but that it functions as an enhancement statute for amounts allegedly trafficked. Thus, it follows pursuant to *Daniels* and *Hale*, that conspiracy to traffick cannot carry with it the imposition of consecutive sentences in the event of conviction on the substantive offense of trafficking. Generations of jurisprudence related to inchoate crimes supports this position. Conspiracy generally, much like attempt and solicitation, are crimes that reduce the category of the intended crime, when completed, one degree.

For example, attempted trafficking under Florida law is a second degree felony with no minimum mandatory penalty regardless of amount attempted to be trafficked. Similarly, it should be noted that attempted burglary or sexual battery with a deadly weapon, and armed robbery, for example, (the crimes involved in *Daniels*), could not have been punished as was the commission of the intended crimes.

There can be no doubt that, given the frequency of conspiracy in trafficking, the legislature elected to punish conspiracy to traffick as if the actual crime has been committed, this does not abrogate the underlying nature of conspiracy as an inchoate crime. Consequently, it logically follows that while the language of the trafficking statute may contain the label "minimum mandatory," in reality, it was intended as an enhancement, much like attempt and solicitation. It follows, then, that the punishment for conspiracy to traffick in cocaine must be imposed concurrent with the actual crime.

Clear support for this approach to interpretation lies in the Fourth District's opinion in *Gonzalez v. State*, 617 So.2d 847(1993) wherein the Court explicitly recognized that conspiracy to traffick is a lesser included offense of trafficking. Accordingly, it should not be heard now to say that conspiracy to traffick is of the same statutory caliber as the substantive offense of trafficking for sentencing purposes. On the contrary, the status of conspiracy to traffick status as a lesser

included offense buttresses its treatment as a statutory enhancement. Indeed, the Fourth District in *Gonzalez* referred to the family of trafficking offense as "enhancements." While *Gonzalez* dealt with the propriety of jury instructions, the logic employed by the Fourth District in that case is particularly compelling in the case at bench.

The platform for the Petitioner's argument to this Court lies in the very precedent cited by the Fourth District in it decision upholding the denial of Petitioner's motion for post-conviction relief. Petitioner asserts that *Daniels* and *Hale* are consonant with Petitioner's position, not opposed. Specifically, the State's categorization of crimes into two discrete groups, i.e., those with mandatory minimums versus those without. While elegant, this is a false dichotomy, one bogged down in statutory nomenclature as opposed to the underlying nature of the crimes at issue.

While the legislature saw fit to punish a conspiracy to traffick in cocaine or any drug the same as if the actual crime had been committed, the Courts uniformly have held that consecutive sentences may be imposed (including the stacking of mandatory minimums), only if the conspiracy is broader than the substantive offense or if there is a difference in time and place and, thus, a separate and distinct offense has occurred. This is not the case at bench.

## CONCLUSION

The decision of the District Court of Appeals is in conflict with the other decisions mentioned, and further the decision is contrary to the established law.

This Court should find that the Appeals Court erred in holding that consecutive mandatories could be imposed upon Mr. Kelly and quash that opinion.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was E-Filed to the Clerk of the Court [e-file@flcourts.org] and was furnished by email to Celia A. Terenzio, Esq., and to Melynda L. Melear, Esq., Office of the Attorney General, 1655 Palm Beach Lakes Blvd, West Palm Beach, Florida 33401-2299, this 19th day of July, 2006.

By:_____

FRED HADDAD

Florida Bar No. 180891

## CERTIFICATE OF TYPEFACE

Counsel for the Petitioner hereby certifies, in accordance with Rule 9.210, Florida Rules of Appellate Procedure, that the instant Brief has been typed using Times New Roman 14pt.

FRED HADDAD, P.A.
One Financial Plaza, Suite 2612
Fort Lauderdale, Florida 33394
Tel: (954) 467-6767
Fax: (954) 467-3599

By:_____

FRED HADDAD

Florida Bar No. 180891