

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1277

DCA NO. 3D10-3418

JOSUE COTTO,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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**BRIEF OF RESPONDENT ON JURISDICTION**

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

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## **INTRODUCTION**

The Petitioner, JOSUE COTTO, was the Appellee in the district court of appeal, and the Defendant in the Circuit Court. Respondent, the State of Florida, was the Appellant in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the parties will be referred to as they appear before this Court.

## STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of carrying a concealed firearm, aggravated assault with a firearm, and possession of a firearm by a convicted felon. Petitioner was sentenced as a prison release reoffender for the charge of aggravated assault with a firearm to a minimum mandatory term of five years and as a habitual felony offender for the charges of carrying a concealed firearm and possession of a firearm by a convicted felon to ten years and thirty years, respectively. The two habitual offender sentences were concurrent with each other and consecutive to the prison release reoffender sentence. On appeal from the denial of 3.850 motion for post conviction relief, Petitioner argued, inter alia, that the trial court erred in imposing the enhanced habitual offender sentences to run consecutive to the prison release reoffender sentence. Petitioner argued that, pursuant to Hale v. State, 630 So.2d 521 (Fla. 1994), a habitual offender sentence cannot be ordered to run consecutively to a prison release reoffender sentence, where the charges arose from a single criminal episode.

On May 30, 2012, the lower court acknowledged that this Court's opinion in Hale provided that the legislature did not empower the trial courts to run enhanced sentences consecutively to one another when the charges arise out of the same criminal episode. However,

the court reasoned that a sentence imposed under the prison release reoffender statute is not an enhanced sentence pursuant to Hale because, unlike habitual felony sentencing, it does not provide for sentencing in excess of the statutory maximum as contained in F.S. section 775.082. Instead, the prison release reoffender statute provides that the only lawful sentence for such an offender is the statutory maximum, which must be served in its entirety.

Accordingly, the lower court held that, pursuant to Hale, sentences imposed pursuant to the prison release reoffender statute are not enhanced beyond the statutory maximum, they may be imposed consecutively to one another and to sentences imposed under the habitual felony offender statute, the habitual violent felony offender statute, and the violent career criminal statute, even if the offenses were committed during the course of the same criminal episode. In so holding, the lower court acknowledged that its holding is in direct conflict with the Fifth District's opinion in Williams v. State, 10 So.3d 1116 (Fla. 5<sup>th</sup> DCA 2009). In Williams, the Fifth District reversed the trial court's imposition of a sentence enhanced under the habitual violent felony offender statute consecutive to prison release reoffender sentence arising from the same criminal episode. Thus, the lower court certified direct conflict with the Fifth District. Cotto v. State, 2012 WL 1934438 (Fla. 3<sup>rd</sup> DCA 2012).

Based on such certified conflict, Petitioner then sought review in this Court.

#### **SUMMARY OF THE ARGUMENT**

Based on a conflict between the lower court and the Fifth District Court of Appeal, in Williams v. State, 10 So.3d 1116 (Fla. 5<sup>th</sup> DCA 2009), the Court does have discretion to review the decision of the lower court. However, the Third District's decision reflects that it applied this Court's decision in Hale, properly, and, as a result, this Court should therefore decline review of the instant case.

## ARGUMENT

THIS COURT HAS DISCRETIONARY JURISDICTION BASED UPON A CERTIFIED CONFLICT FROM THE THIRD DISTRICT COURT OF APPEAL.

The State agrees that this Court has discretionary jurisdiction based upon the certified conflict between the lower court's decision and that of the Fifth District, in Williams v. State, 10 So.3d 1116 (Fla. 5<sup>th</sup> DCA 2009). Rule 9.030(a)(2)(A)(vi), Fla. R. App. P.(2010).

In Williams, the Fifth District reversed the trial court's imposition of a sentence enhanced under the habitual violent felony offender statute consecutive to prison release reoffender sentence arising from the same criminal episode. While the State agrees that there is a conflict with the Fifth District's decision in Williams, the State does not agree that the sentence in Williams was improper under Hale v. State, 630 So.2d 521 (Fla. 1994). Instead, the State maintains that, pursuant to Hale, sentences cannot be imposed consecutively to each other if each sentence has already been enhanced and arose from the same criminal episode. However, sentences imposed pursuant to the prison release reoffender statute do not constitute an enhanced sentence for purpose of the prohibition set forth in Hale because the sentences are not enhanced beyond the statutory maximum. Thus, prison release reoffender sentences may be imposed consecutively to one another and to sentences imposed under

the habitual felony offender statute, the habitual violent felony offender statute, and the violent career criminal statute, even if the offenses were committed during the course of the same criminal episode.

Although there is a conflict between the lower court's opinion and the decision of the Fifth District, this Court has the discretion to decline review. The Third District clearly followed the dictate of Hale and concluded that it was not improper to impose a prison release reoffender sentence consecutive to a habitual offender sentence. Based on the proper application of Hale, the Court could exercise its discretion and decline review of the instant case.

#### **CONCLUSION**

While an express and direct conflict among district courts of appeal exists and this Court has discretion to accept the case for review, as the Third District followed the mandate of Hale, this Court should decline further review.

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 to Daniel Tibbitt, Assistant Public Defender, Office of the Public Defender, 1320 No.W. 14<sup>th</sup> Street, Miami, Florida, on this 20th day of July, 2012.

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LINDA S. KATZ  
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**CERTIFICATION OF TYPE SIZE AND STYLE**

Pursuant to the Court's Administrative Order regarding the type size of briefs filed in the Supreme Court of Florida, Respondent hereby certifies that the subject brief was typed in font Courier New, 12 point.

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