

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

**Mark Elliott**

Petitioner,

Vs.

Supreme Court Case No.: SC09-1165

Mandamus Case No.: SC09-358

DCA No.: 5D08-3465

L.T. Case No.: 06-CF-2064

**STATE OF FLORIDA**

Respondent.

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ON DISCRETIONARY REVIEW  
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT  
PETITIONER'S JURISDICTIONAL BRIEF



Mark Elliott; Pro-se

D.C. #: 893477; Dorm C2-20-L

Quincy Annex

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## STATEMENT OF THE CASE AND FACT'S

### A) Procedural History

On October 30, 2006, petitioner was charged with **count one: armed robbery**; and **count two: possession of a hoax weapon of mass destruction**.

On September 27, 2007, petitioner was found to be a Habitual Offender and sentenced to the custody care and control of the Florida Department of Corrections as A Habitual Felony Offender. The Sentencing breakdown is as follows:

**Count I:** Robbery, Fla. Stat. 812.13(2)(c) as a Habitual Offender – 5 (Five) years in the Department of Corrections, with 10 (Ten) years of Supervised Probation

**Count II:** Possession of a Hoax Bomb in the Commission of a Felony, Fla. Stat. 790.165(3) as a Habitual Offender – 5 (Five) years in the Department of Corrections Concurrent with 10 (Ten) years of Supervised Probation [The **Count II** sentence is consecutive to the **Count I** sentence]

On or about April 4<sup>th</sup>, 2008, petitioner filed and lodged a Motion to Correct an Illegal Sentence with the 5<sup>th</sup> Judicial Circuit of Hernando County in case no. 06-CF002064 before the Honorable Judge Stephen Rushing.

The motion was denied June 6<sup>th</sup>, 2008.

Petitioner filed for a Rehearing on June 26<sup>th</sup>, 2008.

On September 18<sup>th</sup>, 2008, Petitioner's Rehearing Motion was denied.

On October 1<sup>st</sup>, 2008, Petitioner filed a Notice of Appeal. On October 5<sup>th</sup>, 2008, the District Court of Appeals Clerk ordered the Record on Appeal from the Clerk of the Hernando County Clerk.

On October 10<sup>th</sup>, 2008, the 5<sup>th</sup> District Court of Appeals issued an Order to Show Cause to Petitioner.

On October 20, 2008, Petitioner filed a SHOW GOOD CAUSE BY APPELLANT TO EXCUSE DEFAULT motion in the 5<sup>th</sup> District Court of Appeals in response to its October 10<sup>th</sup>, 2008 Show Cause order.

On April 3, 2009, the District Court of Appeals issued a 7 (seven) page opinion affirming the trial court's denial.

**B) Issues Giving the Court Jurisdiction**

Petitioner asserts that, under the facts of this case; the sentences being both Habitual Felony Offender sentences [Sentencing and Judgment Papers: **special provisions** section marked Habitual Offender Adjudication and Sentence for both counts one and two], and imposed consecutively [Sentencing and Judgment Papers Consecutive/Concurrent section marked that the sentence for count two is consecutive to count one]; is unlawful, improper, and unconstitutionally excessive in violation of Florida Statute § 775.084, the Supreme Court's holdings in *Hale* and *Hill*<sup>1</sup>, and the long line of District Court cases that interpret and apply the

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<sup>1</sup> Hale v State, 630 So 2d 521 (Fla. 1993); Hill v State, 660 So. 2d 1384 (Fla. 1995).

Supreme Court's holdings in *Hale* and *Hill*. (holding that the imposition of consecutive habitual offender sentences rising from a single criminal episode are precluded under all circumstances).

The decision of the 5<sup>th</sup> District Court of Appeal to be reviewed directly and expressly conflicts with the decision of the Supreme Court, the 5<sup>th</sup> District Court of Appeal's own holdings, and the decisions in every other District Court of Appeals, in a long line of case decisions interpreting the legal principles identical and identified in the petitioner's case at bar.

Hence, under the current provisions of Article V § 3 (b) (3), of the Florida Constitution, the Supreme Court has "conflict jurisdiction" when the District Court of Appeal's decision expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law.

## SUMMARY OF ARGUMENT

THE DECISION OF THE 5<sup>TH</sup> DISTRICT COURT OF APPEALS, IN THIS CASE, IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE SUPREME COURT OF FLORIDA IN *HALE AND HILL*; AND THE DIRECT PROGENIES DERIVING FROM ALL OF THE DISTRICT COURT OF APPEALS IN FLORIDA.

### Argument and Authorities

Once a defendant is adjudicated a habitual offender pursuant to the provisions of Florida Statute § 775.084, on charges arising from a single criminal episode, the courts have no authority to increase the sentences further by imposing them consecutively.

In the case at bar, the petitioner was convicted with a robbery of a Bank and a possession of a hoax bomb in the commission of the robbery of the Bank arising out of one continuous and single criminal episode perpetrated upon one victim, at one location and with no temporal break.

The petitioner was adjudicated as a Habitual Offender on both counts. After being *adjudicated* as a Habitual Offender *on both counts*, the court further sentenced petitioner, as a Habitual Offender, to consecutive sentences.

The *legal principles*, applied to petitioner's cause, are *legally indistinguishable* from the *legal principles* and respective holdings in this court's

decisions in *Hale* (where a Habitual Offender sentence cannot be further enhanced by imposing sentences consecutive for criminal charges arising out of one criminal episode); and *Hill* in which in which the district court certified the following question as being one of great public importance:

WHETHER *HALE V. STATE*, 630 SO.2D 521 (FLA.1993), CERT. DENIED, 513 U.S. 909, 115 S.CT. 278, 130 L.ED.2D 195 (U.S.1994) PRECLUDES UNDER ALL CIRCUMSTANCES THE IMPOSITION OF CONSECUTIVE SENTENCES FOR CRIMES ARISING FROM A SINGLE CRIMINAL EPISODE FOR HABITUAL FELONY OR HABITUAL VIOLENT FELONY OFFENDERS.

The court answered in the affirmative and noted that the District Court of Appeal in *Hill* properly found that *Hale* stood for the rule that a Habitual Offender, could receive only concurrent – not consecutive – sentences where the offenses arose from the same criminal episode *under all circumstances*.



### Conclusion


The petitioner has received a sentence that is unlawful, improper and unconstitutionally excessive. He has been adjudicated a Habitual Felony Offender. He has been sentenced as a Habitual Felony Offender – **on both counts**. He has received consecutive sentence Habitual Felony Offender sentences for offenses arising out of a single criminal episode.

The petitioner is lawfully entitled to concurrent sentences. This court has jurisdiction, pursuant to the Florida Constitutional Art. V § 3 (b) (3), to determine whether the majority decision in the opinion of the 5<sup>th</sup> District Court of Appeal is in express, and direct conflict with the previous holdings of this court by misapplying, mis-employing the legal principles to the case at bar.

Certificate of Service

**I Hereby** certify that a true and correct copy of the foregoing: **Petition On Discretionary Review From The District Court Of Appeal, Fifth District**


**Petitioner's Jurisdictional Brief**, has been furnished to: The Office of The Attorney General – 444 Seabreeze Blvd., Ste 500, Daytona Beach, Fl. 32118; by placing a copy in the possession of the Quincy Correctional Mailroom Staff prepaid to be placed in the U.S. mail on this 29<sup>th</sup> day of June 2009, at Quincy, Fl. Gadsden County 32351.

  
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**CERTIFICATE OF COMPLIANCE  
FONT CERTIFICATION**

I HEREBY CERTIFY, that this petition complies with the font requirements of rule 9.100(l) of the Florida Rules of Appellate Procedure: Times New Roman 14-Point font.

Respectfully Submitted:

  
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