IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,368

THE STATE OF FLORIDA,

Petitioner,

vs.

JULES BOIVIN,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's statement of the case and facts as correct.

ARGUMENT

NO DECISIONAL CONFLICT HAS BEEN SHOWN, AND THIS COURT SHOULD THEREFORE DENY THE REQUESTED EXERCISE OF ITS DISCRETIONARY JURISDICTION

As noted in the Petitioner's jurisdictional brief, the dissent below agreed that the sentences for the two lesser crimes had to be vacated under the controlling case law. The only question, therefore, presented by the Petitioner is the propriety of separate convictions.

In Borges v. State, 415 So.2d 1265 (Fla. 1982), this Court noted that: "The explicit exclusion of lesser included offenses in section 775.021(4) makes clear that the legislature does not intend separate convictions and punishments for two or more statutorily defined offenses when in fact only one crime has been committed." Id. at 1267. Relatedly, in State v. Carpenter, 417 So.2d 986 (Fla. 1982), this Court recognized that even where separate sentencing did not violate section 775.021(4) because two crimes carried the same penalty, double jeopardy would nevertheless bar multiple punishments if the crimes were the same. Id. at 987. Finally, in Bell v. State, 437 So.2d 1057 (Fla. 1983), after carefully considering its prior pertinent decisions as well as the history of the double jeopardy clause, this Court articulately reaffirmed that the permissibility of multiple convictions or punishments could not hinge on the mere happenstance of a prosecutor's charging decision. As stated in Bell:

> The fact that a single indictment or information charges both the greater and the lesser included offenses should not change the result regarding the propriety of multiple

> convictions. To hold otherwise would allow prosecutors to obtain multiple convictions based on a charging decision, an unjust result which we decline to legitimize.

Id. at 1061.

Bell recognized that because at the time the double jeopardy clause was framed, joinder of causes was impermissible, multiple punishment questions necessarily entailed multiple convictions, and thus there was no reason for the early case law to separately address the question of permissibility of multiple convictions. Based on this important historical circumstance, Bell further recognized that, despite the resultant short-sightedness of more recent case law, where double jeopardy barred separate punishment for lesser included offenses separate convictions for those offenses were thereby also barred. Id. at 1059. Thus, because the defendant in Bell had been convicted and sentenced for the offense of trafficking in narcotics, separate convictions and sentences for the lesser offenses of sale and possession, respectively, were disallowed. Id. at 1058, 1061.

The relationship among the charges in Bell is precisely analogous to the relationship that the charges in the instant case bear to each other. If this Court accepts the Petitioner's requested exercise of jurisdiction, upon review of the record it will find that all three counts of the information (respectively charging the defendant with the offenses of attempted first-degree murder, aggravated battery, and possession of a firearm in the commission of a felony), charge the defendant with the single act of shooting the victim, Stephen Koch, with a rifle. This falls squarely within the holding of Borges and Bell that "the

legislature does not intend separate convictions and punishments for two or more statutorily defined offenses when in fact only one crime has been committed." Borges, 415 So.2d at 1267; Bell, 437 So.2d at 1058. It is further consistent with the recognition of double jeopardy principles, apart from the statute, found in Carpenter. Id. at 987.

Lastly, the only remaining asserted 'conflict', with Hawkins v. State, 436 So.2d 44 (Fla. 1983), is inconsequential. In Hawkins, the defendant was convicted and sentenced both for felony-murder and for the underlying felony of robbery. This Court vacated the robbery sentence under State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), but indicated the separate conviction for robbery was proper. It is fairly evident from a comparative reading of Hawkins and Bell that Bell involved considered attention to this issue, whereas Hawkins, a capital case involving other far more pressing issues, passed only summarily upon the question at hand. That Hawkins was decided subsequent to Bell, which apparently influenced the dissent below, certainly can not be read to affect the detailed discussion and consideration given this issue by Bell.

In summary, the District Court correctly resolved this case under the principles set forth in Bell, and jurisdiction should therefore be declined.

CONCLUSION

Based upon the foregoing argument and authorities cited, the Respondent respectfully requests this Court to decline the requested exercise of its discretionary jurisdiction.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 22nd day of November, 1983.

BRUCE A. ROSENTHAL
Assistant Public Defender