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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner,	)	
vs.	)	CASE NO. 64,775
RENE RAMOUS RODRIQUEZ, Respondent.	)	5DCA CASE NO 82-570

PETITIONER'S BRIEF ON MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent Rene Rodriquez (herein after referred to as Respondent) was charged by information with the following two counts:

> 1. ROBBERY- ... Rene Ramous Rodriquez...Did in violation of Florida Statutes 812.13(2)(c) by force, violence, assault or putting in fear, take away from the person or custody of Amanda Carter certain property, to wit: a cash register, united states money current, and alcoholic beverages, the property of Amanda Carter, as owner or custodian thereof.
>
> 2. GRAND THEFT SECOND DEGREE... Rene Ramous Rodriquez...did, in violation of Florida Statutes 812.014, knowingly obtain or use, or endeaver to obtain or use a cash register of a value of one hundred dollars ($100) or more, the property of another, to wit: Amanda Carter as owner or custodian thereof with the intent to permantly deprive said owner or custodian of a right to property of benefit there from, and to appropriate the property to their own use or the person not entitled thereto. (R 27).

A jury trial was conducted as to both these counts and the jury returned verdicts of guilty of both counts as charged (R 57-58). The Respondent was adjudicated guilty of both the robbery and the grand theft (R 59). The court sentneced Respondent to a term of five years on count one (the robbery) but specifically stated in its sentence that it would not sentence Respondent as to count two, the grand theft (R 74-75, 77).

Respondent appealed and one of his points presented to the Fifth District was whether or not the trial court could have entered a conviction on the robbery as well as the grand theft where the property in question was both the subject of robbery and grand theft.

The Fifth District in its opinion of Rodriquez v. State, 443 So.2d 236 (Fla. 5th DCA 1983) affirmed the judgment and sentence with the exception of reversing the conviction on count two (the grand theft count). In holding that grand theft was a lesser included offense of robbery, the Fifth District explained:

> In the instant case, we do not find any provision in the robbery or theft statutes to indicate the expression of a legislative intent that punishments therefor are to be cumulative.
>
> ***
>
> Since there was only one taking of property in the instant case, the underlying theft was a necesarily lesser included offense of the charged robbery. Once the underlying theft conviction is used to support Rodriquez' conviction for robbery, that same theft, even in a greater degree, cannot be used for an independant, cumulative conviction and sentence - in the absence of a clear legislative intent to the contrary. (citations omitted) 443 So.2d at 239.

Petitioner after receiving the Fifth District Court Appeal's opinion in Rodriquez, filed a motion for rehearing which was denied. Petitioner then filed a juris-

dictional brief seeking this Honorable Court's review of the case pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv)(express and direct conflict with the decision of another district court of appeal or of the Supreme Court on the same question on law). The cases Petitioner cited conflict with were Borges v. State, 415 So.2d 1265 (Fla. 1982), Ziegler v. State, 385 So.2d 1168 (Fla. 1st DCA 1980), and Haley v. State, 315 So.2d 525 (Fla. 2d DCA 1975). Based upon Petitioner's jurisdictional brief, this Honorable Court granted the relief sought.[1] Petitioner's brief on the merits follows:

[1]As of this date no response was filed to Petitioner's jurisdictional brief to this Honorable Court.

POINT

A SEPARATE JUDGMENT AND SENTENCE MAY BE IMPOSED FOR THE SAME TRANSACTION FOR ROBBERY (SECTION 812.13 (1), FLORIDA STATUTES (1981) AND FOR GRAND THEFT (SECTION 812.014(2) (b), FLORIDA STATUTES (1981) BECAUSE EACH OFFENSE HAS AN ELEMENT THAT THE OTHER DOES NOT AND PURSUANT TO THE STATUTORY SCHEME THE LEGISLATURE INTENDED THAT EACH OFFENSE SHOULD BE PUNISHED SEPARATELY.

ARGUMENT

This Honorable Court has very recently decided two cases which involve the issue of whether separate judgment and sentence may be imposed under different statutes with differing elements where all the criminal offenses were based upon one single transaction. In State v. Baker, ___ So.2d ___(Fla. 1974) [9 FLW 209]-(Supreme Court Case No. 63,807) a defendant plead and was sentenced separately for aggravated assault pursuant to § 784.021(1)(a), Fla. Stat. (9179)(count one), armed robbery pursuant to § 812.13(2)(a), Fla. Stat. (1979) (count two), and attempted murder pursuant to § 777.011, 777.04(1), and 782.04(1)(a), Fla. Stat. (1979) (count three). The defense in Baker maintained that he could be sentenced only on one of the above offenses because these crimes involved only one single transaction. In Baker v. State, 431 So.2d 263 (Fla. 5th DCA 1983), the Fifth District held that the aggravated assault (count one) was indeed a lesser included offense of the armed robbery (count two). The Supreme Court in reversing the Fifth District Court of

Appeal in Baker maintained that the defendant could indeed be sentenced for both the aggravated assault and the armed robbery. This Honorable Court explained:

> For double jeopardy purposes this court is bound to consider only the statutory elements of the offenses, not the allegations or proof in a particular case. Where an offense is not a necessarily lesser included offense, based upon its statutory elements, the intent of the legislature clearly is to provide for separate convictions and punishments for two offenses. [9 FLW at 209-210]

This case, however, was reversed on other grounds (i.e. the trial court could not impose a consecutive mandatory three year sentence for offenses arising out of the same incident).

Again this same issue was addressed in a more recent opinion of this Honorable Court in Gibson v. State, ___ So.2d ___ (Fla. 1984) [9 FLW 234] -(Supreme Court Case No. 61,325). In Gibson the defendant was charged with robbery while armed (§ 812.13(2)(a), Fla. Stat. (1977) and used for display of a firearm during the commission of a felony (§ 790.07(2), Fla. Stat. (1977)). In Gibson this court referred to Borges v. State, 415 So.2d 1265, (Fla. 1982) and reiterated the reasoning of Borges. This reasoning was to the effect that the court must look to the statutory elements of the offense rather than the allegations and the charging instrument or the factual elements or evidentiary proof presented at trial. In Gibson this Honorable Court held that the robbery statute required an element that the accused

carry a firearm or other deadly weapon. But in the count charging use or display of a firearm during a commission of a felony, a crucial element is that the offender display, use, or attempted or threaten to use a firearm during the commission of a felony. Clearly the robbery count did not need to prove these latter allegations; only that the offender was carrying a firearm during the robbery. Therefore each statutory definition contained at least one constituent element that the other did not. Ergo, it was intended by the legislature that each statute could be the basis of a prosecution and subsequent punishment even though both were based on a single act or closely connected group of acts. [9 FLW 235]

Under the reasoning of Gibson, supra and Missouri v. Hunter, ___ U.S. ___ 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) it is clear that double jeopardy does not prohibit the respondent from receiving two separate sentences for two separate offensed where each offense contains an element that the other does not. The United States Supreme Court in Hunter, supra maintained that where the legislature intended that punishments for violations of separate statutes be cumulative, double jeopardy would not be a bar to such a practice. Petitioner submits that although the Fifth District Court of Appeal's opinion in Rodriquez does not put its main emphasis on double jeopardy rather the statutory intention of the legislature, there is no State or Federal Constitutional bar under the double jeopardy clause in having

separate conviction (or sentence) for both offenses (i.e. robbery and grand theft).

In Haley v. State, 315 So.2d 525 (Fla. 2d DCA 1975) the defendant was charged with robbery. The robbery information did not allege value as to the property taken nor was the property designated as a specific type (e.g. a firearm or a fire extinquisher) under the grand theft statute. The jury returned a verdict of grand larceny. The Second District in reversing this conviction acknowledged that the proof showed that a hundred dollars ($100) or more of property was taken from the victim but the information did not allege any specific value. The Second District held that since grand theft was not a necessarily lesser included offense of the robbery the defendant's conviction had to be reversed and reduced to petit larceny, since larceny was a necessarily lesser included element in the robbery information. In contrast to this holding the Fifth District Court in the case at bar (Rodriquez) held:

> Since there was only one taking of property in the instant case the underlying theft was a necessarily lesser included offense of the charged robbery. Once the underlying theft conviciton is used to support Rodriquez' conviction for robbery, that same theft, even in a greater degree cannot be used for an independant cumulative conviction and sentence- in the absence of a clear legislative intent to the contrary. (citations omitted) 443 So.2d at 239.

The rule in Haley is that grand theft is not a necessarily lesser included offense of the robbery in clear contrast to the holding announced in Rodriquez by the Fifth District Court of Appeal. If the Rodriquez case is upheld by this Honorable court it would seriously question the validity of Haley if not implicitly overrule Haley all together. By overruling Haley this Honorable Court would be authorizing a defendant to be convicted of grand theft as a necessarily lesser included offense of robbery even though the robbery information did not allege the value of the property. In other words a defendant could be convicted of an offense which does not contain all the essential elements. Petitioner is confident that this Honorable Court would not allow such a result.

The Fifth District Court in Rodriquez also maintained:

> In the instant case, we do not find any provision in the robbery or theft statutes to indicate expression of a legislative intent that punishments therefore are to be cumulative. 443 So.2d at 236.

In Rife v. State, ___ So.2d ___ (Fla. 2d DCA 1984) [9 FLW 637] the Second District maintained that under § 812.025, Fla. Stat. (1981) a defendant could not be convicted of grand theft and dealing in stolen property based on one scheme or course of conduct. In the case at bar there is no such statutory limitation. Rather the statutory scheme and comensu-

rate penalties would indicate that there indeed is a legislative intent to have separate judgments and sentences imposed for robbery and grand theft.

Judge Cowart in his dissent in Rodriquez supported the latter contention by writing the following:

> The legislative intent is that (1) one may choose to wrongfully take property of little value (petit theft) at a small penalty or (2) property of greater value or of special character a greater penalty (grand theft) or (3) property of less value by force (robbery) at an even greater penalty and that (4) when one wrongfully takes property of greater value or of special character by force the wrongful act is doubly aggravated and the offender should face the penalties provided for both aggravated offenses (robbery and grand theft) because of the value or special character of the property involved and because of the force involved in its taking. (emphasis not supplied) 443 So.2d at 248.

Petitoner would make one more addition to this legislative scheme as delineated in the quote above. Section 812.014(2)(a), Fla. Stat. (1981) makes the theft of property of twenty thousand dollars ($20,000) or greater a felony of the second degree. By the majority reasoning in the Rodriquez opinion this offense (grand theft of the first degree) is likewise a lesser included offense of strong armed robbery whether or not any value is alleged in the strong armed robbery information. Following this same logic a perpetrator who desires to obtain property of twenty thousand dollars

($20,000) or greater and who is considering either stealing that property or commiting a robbery to obtain that property would face no greater penalty under each illegal option. It is inconceivable that the mere theft of property that has a value of twenty thousand dollars ($20,000) or greater would be tantamount to robbery of that same property vis a vis legislative penalties. Surely the legislature intended for a perpetrator to receive a greater penalty for robbing a victim of property as opposed to merely stealing that same property.

As Judge Cowart noted in his dissent in Rodriquez robbery contains the element of force, violence, assault, or putting in fear. The "force element" is not an essential element of grand theft. On the other hand, statutory grand theft has an element of a greater value or specific charater which is not an element of robbery. Judge Cowart concluded:

> Therefore each offense does have at least one element the other offense does not have. Accordingly, neither is a true or necessarily lesser included offense of the other. (footnotes omitted) 443 So.2d at 246.

Judge Cowart's analysis has been adopted by this Honorable Court in Baker, supra [9 FLW 209]. It is clear that the analysis and reasoning of Judge Cowart's dissent is now the law in the State of Florida. Accordingly this Honorable Court should reverse the majority opinion in Rodriquez and reinstate the conviction for count two, the grand theft

in this cause.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully prays this Honorable Court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Merits has been furnished by mail to Bruce A. Nants, Esquire, 13 South Magnolia Avenue, P.O. Box 1191, Orlando, Florida 32802, Attorney for Respondent, this 12th day of July, 1984.

W. BRIAN BAYLY
Of Counsel