

IN THE SUPREME COURT OF
FLORIDA,

CASE NO. 64,884

JOSE MANUAL GARCIA,
Petitioner,

-vs-

STATE OF FLORIDA,
Respondent.

FILED

SID J. WHITE

MAR 8 1984 ✓

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk *pl*

PETITIONER'S BRIEF ON THE MERITS

Edward R. Kirkland, P.A.
126 East Jefferson Street
Orlando, Florida 32801
(305) 843-4310
Attorney for Petitioner

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Citations	i
Preliminary Statement	1
Statement of Case	2
Point of Appeal	3
Argument	4 - 7
Conclusion	7
Certificate of Service	8
Appendix	9

TABLE OF CITATIONS

	<u>PAGE</u>
<u>Bell -vs- State</u> No. 62,002 (Fl June 9, 1983)(8 FLW 199)	5
<u>Blockburger -vs- U.S.A.</u> 384 US 299, 1983	4
<u>Hawkins -vs- State</u> So 2d 436, 44 (Fl 1983)	5
<u>State -vs- Gibson</u> No. 61,355 (Fl Feb. 17, 1983)(8 FLW 199)	5
<u>State -vs- Hegstrom</u> 401 So 2d 1343 (Fl 1981)	5
<u>State -vs- Monroe</u> 406 So 2d 1115	4, 5
<u>Whalen -vs- U.S.A.</u> 445 US 684, 100 Sup. Cr. 1342, 63 Led 2d 715 (1980)	6
 <u>OTHER AUTHORITY</u>	
<u>Florida Statute</u> Section 775.021(4)	5, 7

IN THE SUPREME COURT OF
FLORIDA,

Case No. 64,884

JOSE MANUEL GARCIA,

Petitioner

-vs-

STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

The Petitioner, herein referred to as Appellant is JOSE MANUEL GARCIA, defendant in CR 81-3177 in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida.

The Respondent, herein referred to as Appellee is the State of Florida, The parties will be referred to in this brief as they appear before this Court.

References to the transcript will designated (T-). References to the record on Appeal will be designated (R-).

STATEMENT OF CASE

The Appellant, JOSE MANUEL GARCIA, was charged by information CR 81-3177 dated August 31, 1981, under F.S.,- 790.97(2) for Possession of a Firearm in Commission of a Felony and F.S. 812.13(2)(a), Armed Robbery. (R-326).

The Appellant was adjudged guilty in a jury trial on December 16, 1981 on both counts. (R-327-328)

The Appellant was sentenced to imprisonment for twenty (20) years on March 12, 1982. (R-334)

A Notice of Appeal was timely filed. (R-336)

The Fifth District Court of Appeal issued a mandate on December 8, 1983 affirming the Lower Court's rulings but certifying as a question of Great Public interest the question of whether one can be convicted, although not sentenced, of a lesser included offense after one has been convicted of the greater crime.*

Petition for Certiorari was filed by Appellant on February 13, 1984.*

Certiorari was granted on February 16, 1984.*

* Record to be filed on or before April 16, 1984

POINT ON APPEAL

POINT I

WHETHER ONE CAN BE CONVICTED, ALTHOUGH NOT SENTENCED, OF A
LESSER INCLUDED OFFENSE AFTER ONE HAS BEEN CONVICTED OF THE
GREATER CRIME.

POINT I

WHETHER ONE CAN BE CONVICTED, ALTHOUGH NOT SENTENCED, OF A LESSER INCLUDED OFFENSE AFTER ONE HAS BEEN CONVICTED OF THE GREATER CRIME.

A R G U M E N T

Although Appellant did not raise at the trial level the question of double jeopardy the Fifth District Court of Appeals certified this point as being one of great public interest.

This point on appeal addresses the fundamental right of all citizens to be placed in jeopardy only once for the same offense.

For double jeopardy purposes lesser included offenses are tantamount to greater offense charge if all the constituent essential elements of such offenses are included within the elements of such greater offense.

Blockburger v. U.S.A 384 US
299 1983.

It has already been determined that possession of a firearm in the commission of a felony is a lesser included offense of armed robbery. State v. Monroe 406 So2d 1115.

The law on this issue in Florida is anything but clear. This Court, over a short span of time has ruled that separate sentences for the offense of robbery with a firearm and possession of a firearm were not authorized even though separate convictions were proper. State v. Gibson No. 61,355 (Fla. February 17, 1983) (8 FLW 199). State v. Monroe, supra and State v. Hegstrom 401 So2d 1343 (Fla. 1981) say one can be convicted but not sentenced for the lesser included offense.

Then this Court announced in Bell v. State No. 62,002 (Fla. June 9, 1983) (8 FLW 199) that sentences and convictions for both a greater and lesser included offense arising out of the same occurrence are prohibited.

After Bell, the Court in Hawkins v. State (So2d 436) 44 (Fla 1983) held that the Defendant could not be separately sentenced for both first degree murder on a felony murder theory as well as the underlying robbery but allowed the conviction for the underlying robbery to remain intact.

Although this Court held that Section 775.021(4) F.S. expressly bars only multiple sentences and that the legislature did not intend to prohibit multiple convictions, the court has also stated that " at issue here is the constitutionality of multiple punishments in a single trial setting for discrete crimes arising out of the same offense." State v. Hegstrom, supra at Pg. 1344

In Whalen v. U.S.A. 445 U.S. 684, 100 Sup. Ct. 1342, 63 L.Ed. 2d 715 (1980) the Supreme Court reestablished that double jeopardy protects "not only against a second trial for the same offense, but also against multiple punishments for the same offense." ID at 688, 100 Sup.Ct. at 1436

If the true issue is one of punishment then multiple convictions are as prohibited as multiple sentences. It would be closed to absurd to contend that because a conviction was had, but no sentence imposed, no punishment attached to that conviction.

As can be seen in the reasoning used by this Court in Bell Supra;

"Arguments that multiple convictions in a single trial setting do not produce detrimental effects, and therefore do not punish multipliciously, are misplaced unless we are willing to close our eyes to the realities of the criminal justice system. Conviction for lesser included offenses clearly have detrimental effects on the person convicted.

Parole dates are adversely affected due to consideration based on the number of convictions. Also, the multiple convictions on the lesser included offenses may be used as impeachment evidence in subsequent criminal proceedings. Finally, further conviction of crime would expose the defendant to enhanced sentence under habitual offender status."
ID at 200

Appellant would also point out that convictions for lesser included offenses would also adversely affect the defendant under the newly instituted sentencing guidelines.

In that this Court has held that sentencing on a lesser included offense is prohibited when sentence is imposed on the greater offense, then a conviction for the lesser included should not lie as well.

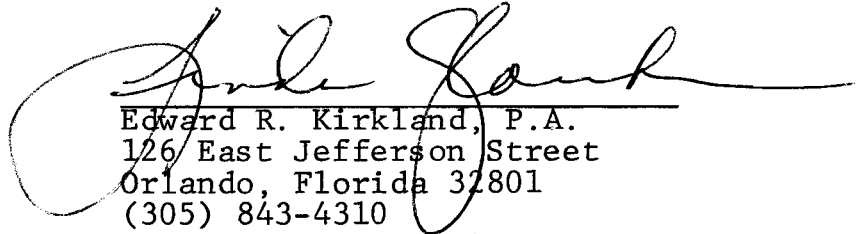
CONCLUSION

The Florida Legislature by way of Section 775.021(4) F.S. cannot abrogate the Fifth Amendment Prohibition against double jeopardy as contained in the United States Constitution. Clearly, multiple convictions amount to multiple punishment, for the reasons stated above. It is not only unlawful but unfair to impose multiple convictions for the same behavior.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished to Office of Attorney General, The Capitol, Tallahassee, Florida 32301, by mail this 6th day of March, 1984.

Respectfully submitted,


Edward R. Kirkland, P.A.
126 East Jefferson Street
Orlando, Florida 32801
(305) 843-4310
Attorney for Petitioner