IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No. 64,985
GEORGE WICKER, JR.,	:	
Respondent	:	

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RESPONDENT'S BRIEF ON JURISDICTION

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

By: Deborah K. Brueckheimer
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TOPICAL INDEX

	PAGE
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
ISSUE I	
WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEALS IN Wicker v. State, __So.2d__ (Fla. 2d DCA 1983)(Case No. 83-246, opinion filed November 4, 1983, and amended on rehearing on February 8, 1984), CREATES CONFLICT WITH THE FIRST DISTRICT COURT OF APPEALS AND THE FLORIDA SUPREME COURT? (As restated by Respondent.)	3-6
ISSUE II	
WHETHER THE LOWER COURT'S DECISION CONFLICTS WITH Faison v. State, 426 So.2d 963 (Fla. 1983); Monarca v. State, 412 So.2d 443 (Fla. 5th DCA 1982); McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982); Moore v. State, 414 So.2d 261 (Fla. 1st DCA 1982); and Bell v. State, 437 So.2d 1057 (Fla. 1983)?	7-8
CONCLUSION	9
CERTIFICATE OF SERVICE	9

CITATION OF AUTHORITIES

	PAGE
Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)	4
Bell v. State, 437 So.2d 1057 (Fla. 1983)	4-8
Davis v. State, 371 So.2d 721 (Fla. 1st DCA 1979)	3
Faison v. State, 426 So.2d 963 (Fla. 1983)	7
McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982)	7
Monarca v. State, 412 So.2d 443 (Fla. 5th DCA 1982)	7
Moore v. State, 414 So.2d 261 (Fla. 1st DCA 1982)	7
Wicker v. State, ___So.2d___(Fla. 2d DCA 1983)(Case No. 83-246, opinion filed November 4, 1983, and amended on February 8, 1984)	3

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PRELIMINARY STATEMENT

Respondent, George Wicker, Jr., was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Petitioner in this case is the State of Florida.

STATEMENT OF THE CASE AND FACTS

In Petitioner's Statement of the Case and Facts, Petitioner erroneously cites from the wrong information. Although the State did file an information charging Mr. Wicker with Armed Burglary Assault, this information was filed on July 19, 1982. On November 16, 1982, the information was amended; and on December 8, 1982, the information was amended again. In this final amendment, the State deletes all reference to a firearm being used in either the burglary or sexual battery. Petitioner did attach the December 8, 1982, amended information to its jurisdictional brief. Thus, any reference to a firearm being used in this case is erroneous and should be disregarded.

Respondent agrees to the remaining facts in Petitioner's jurisdictional brief unless otherwise noted in the body of the Respondent's brief.

ISSUE I

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEALS IN Wicker v. State, __So.2d__ (Fla. 2d DCA 1983)(Case No. 83-246, opinion filed November 4, 1983, and amended on rehearing on February 8, 1984), CREATES CONFLICT WITH THE FIRST DISTRICT COURT OF APPEALS AND THE FLORIDA SUPREME COURT?
(As restated by Respondent.)

Respondent replies to this issue under protest. As was admitted by Petitioner, this particular issue was never raised before the Second District Court of Appeals. Thus, the issue has not been preserved and should not now be argued before this Honorable Court. In addition, there is no conflict on this issue that would allow discretionary review.

The State argues that the Second District Court of Appeals erred in considering the entire information in determining whether or not Mr. Wicker had been convicted and sentenced for two separate offenses when, in actuality, only one offense had been charged. The State then cites Davis v. State, 371 So.2d 721 (Fla. 1st DCA 1979), for the proposition that separate counts of an information must be separately considered and not by reference to the other. Davis, however, applies to whether or not the State has sufficiently alleged a crime in a count of an information. The court held that one must look only to that count to see if it completely charges a crime. The State is not

allowed to reach down into another count on the same information to supply missing allegations.

Such an argument has nothing to do with the issues at hand. What the Second District Court of Appeals did in Mr. Wicker's case was to examine Counts 1 and 2 of the information to see if double jeopardy had been violated. Under Bell v. State, 437 So.2d 1057 at 1059 (Fla. 1983), this court noted several methods or tests to see if offenses charged are "the same" and thereby prohibited under double jeopardy from having more than one conviction and sentence:

> Under the required evidence, or statutory elements test, offenses are "the same" if elements constituent in one statute are sufficiently similar to elements of another. This test describes a labeling under different statutory sections of essentially the same crime. Such legislative legerdemain surely cannot be employed to contravene a constitutional right not to be twice placed in jeopardy for the same offense. See Stewart, J. in Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).
> Under the alleged evidence test, offenses are "the same" if there is sufficient similarity between allegations of two indictments or informations or even two counts within a single indictment or information. This test necessitates scrutiny of the charging instruments to determine if repetitious charges have been brought.
> Finally, under the actual evidence or same evidence test, offenses are "the same" if there is sufficient similarity in the evidence actually presented either at two trials or among two or more counts

in a single trial. (Emphasis added.)

The court then stated that "when one statutory offense includes all of the elements of the other, those two offenses are constitutionally 'the same offense' and a person cannot be put in jeopardy as to both such offenses unless the two offenses are based on two separate and distinct factual events." Bell, supra at 1060.

In our case the Second District Court of Appeals examined the charges against Mr. Wicker and found that Count II was a lesser of Count I. This does not conflict with the First District Court of Appeals or the Florida Supreme Court decision in Bell. The passage from Bell cited in Petitioner's brief [2] that each count in an information must be considered separately is not stating that a court cannot look at two counts of an information to see if double jeopardy is being violated. That quote simply means that since each count is a different charge, double jeopardy can be violated by two counts in the same information. The court concluded by saying:

> We hold that once it has been established that an offense, whether charged or not, and whether in single or separate proceedings, is a lesser included offense of a greater offense also charged, then the double jeopardy clause proscribes multiple convictions and sentences for both the greater and lesser included offenses.

Bell, supra at 1061.

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2. Petitioner erroneously refers to page 1040 when, in actuality, the quoted passage is at Bell, 1060.

Inasmuch as the Second District Court of Appeal's examination of Counts I and II was for purposes of determining whether or not double jeopardy had been violated, such an examination was not prohibited under Bell or the cases cited by Petitioner from the First District Court of Appeals. Thus, there is no conflict allowing jurisdiction in this issue.

ISSUE II

WHETHER THE LOWER COURT'S DECISION CONFLICTS WITH Faison v. State, 426 So.2d 963 (Fla. 1983); Monarca v. State, 412 So.2d 443 (Fla. 5th DCA 1982); McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982); Moore v. State, 414 So.2d 261 (Fla. 1st DCA 1982); and Bell v. State, 437 So.2d 1057 (Fla. 1983)?

The first set of cases Petitioner cites are all pre-Bell cases. Even the Second District Court of Appeals admitted that it had to recede from its pre-Bell cases when it threw out Mr. Wicker's conviction for sexual battery based on double jeopardy (see footnote 1. on page six of the Second District Court of Appeals opinion in Wicker). The question is not whether or not there is conflict with the pre-Bell decision from the District courts but whether the Second District Court of Appeal's opinion conflicts with Bell. If the Second District Court of Appeals properly interpreted Bell, then all the other cases were in error, the Second District Court of Appeals is correct, the Florida Supreme Court overcomes all of the pre-Bell cases and there is no conflict.

The State argues that the Second District Court of Appeals improperly expanded Bell because under the Blockburger test burglary and sexual battery are not the same offense due to the fact that each have separate elements of proof. There is no argument with the fact that simple burglary has different

elements from sexual battery. However, in this case Mr. Wicker was not charged and convicted for simple burglary. Mr. Wicker was charged and convicted of first-degree burglary assault. It is the assault that increased the sentence and the degree of the crime, and it is the assault that is identical to the sexual battery. In Bell, supra at 1060, this court stated:

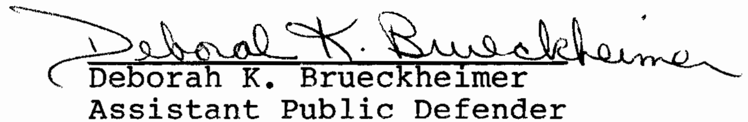
> If two statutory offenses have the exact, same essential constituent elements, or when one statutory offense includes all of the elements of the other, those two offenses are constitutionally "the same offense" and a person cannot be put in jeopardy as to both such offenses unless the two offenses are based on two separate and distinct factual events. (Emphasis added.)

In Mr. Wicker's case the sexual battery was a lesser-included offense of the assault part of the burglary. The Second District Court of Appeals followed Bell and threw out the lesser-included conviction. Thus, the Second District Court of Appeals did not conflict with Bell and there is no jurisdictional question upon which to allow cert.

CONCLUSION

On the basis of the foregoing facts, case law, and arguments the Petitioner has failed to demonstrate an express conflict and this Honorable Court should refuse discretionary review.

Respectfully submitted,



Deborah K. Brueckheimer
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert J. Landry, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, and to George Wicker, No. 088158, Florida State Prison, PO Box 747, Starke, FL 32091, this 22d day of March, 1984.

Deborah K. Brueckheimer
Assistant Public Defender