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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. TOM ALEX O'HARA, Respondent.	)	CASE NO. 65,116

RESPONDENT'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. TOM ALEX O'HARA, Respondent.	)	CASE NO. 65,116

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

The Respondent again accepts the Petitioner's statement of the case and facts; yet continues to take exception to Petitioner's assertion therein that the Fifth District Court of Appeal employed a single transaction analysis to reach its decision to reverse his grand theft conviction.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY REVERSED RESPONDENT'S CONVICTION FOR GRAND THEFT IN VIEW OF THE FACT THAT HE ALREADY STOOD CONVICTION OF TAKING THE SAME SUM OF MONEY FROM THE SAME VICTIM BY MEANS OF EXTORTION.

In its brief the State/Petitioner has contended that the court below was bound to conduct a statutory-element analysis to determine whether double jeopardy considerations would allow separate convictions and punishments for extortion and grand theft. The Respondent contends that the Blockburger test is not applicable to the case at bar.

The offense of extortion is defined in Section 836.05, Florida Statutes (1983), which provides as follows:

> 836.05 Threats; extortion.- Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his will, shall be guilty of a felony of the second degree, punishable ...

The offense of theft is defined in Section 812.014(1)(a)(b), Florida Statutes (1983) as:

> 812.014 Theft. -
> (1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
> (a) Deprive the other person of a right to the property or a benefit therefrom.
> (b) Appropriate the property to his own use or to the use of any person not entitled thereto.

As the Petitioner has correctly noted, this Court has adopted the test announced in Blockburger v. United States, 284 U.S. 299 (1932), for determining when two statutory offenses, violated by a single act, are intended to be separately prosecuted and punished. Borges v. State, 415 So.2d 1265 (Fla. 1982). Also, there can be no doubt but that Florida no longer recognizes the "single transaction rule" as a limitation on multiple punishments. Borges, Id.; Section 775.021(4), Florida Statutes (1983).

Notwithstanding the "bright-line" usefulness of the Blockburger test, the Respondent contends that to apply its analysis blindly to all situations, (where one conviction is reversed because of its relationship to another conviction,) is to sanction absurdity in the law and the allowance of multiple convictions based on an arbitrary charging decision. In particular, the Respondent contends the case sub judice is the kind of case where use of the Blockburger test does nothing to clarify or point toward legislative intent.

In recent opinions this Court has alluded to policy considerations which influence the propriety of multiple convictions. For example in Bell v. State, 437 So.2d 1057,1060 (Fla. 1983), it was noted:

> The fact that a single indictment or informtion 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 obbain multiple convictions based on a charging decision, an unjust result which we decline to legitimize.
>
> * * * *
>
> The mere existence of two statutory offenses does not establish that the legislature intended each to be independently convictable and punishable when both are committed in a single course of conduct. In the present case, the legislature has codefied the distinctly different statutory offenses of sale of illegal drugs and possession of illegal drugs. Also it has determined that another offense, trafficking in illegal drugs, is committed when either or both of the offenses of sale or possession of a certain amount of illegal drugs is effected. By including sale and possession of drugs within the trafficking statute, it is apparent that the legislature intended to facilitate trafficking prosecutions through the use of alternative methods of proof rather than attempting to provide for multiple convictions and punishments for criminal conduct which is basically unitary.

Then on rehearing in State v. Gibson, ___ So.2d ____, 9 FLW 234 (Fla. Case No. 61,325 Opinion rendered June 14, 1984), the Blockburger test was discussed, to-wit:

> It should be noted that the Blockburger test is not of constitutional stature, but, rather, is a rule of statutory construction. Albernaz v. United States, 450 U.S. 333 (1981). The opinion in Blockburger did not once mention the double jeopardy clause, and the decision was grounded purely on legislative intent that the two statutory offenses in question there be separately prosecuted and cumulatively punished even though based on a single act or factual event. Blockburger does not provide a constitutionally binding test for determining when an offense is a lesser included offense of another and therefore the "same offense" for double jeopardy purposes. Therefore, Blockburger should be used if it helps to determine legislative intent and discarded when it does not or where the element is already clear.

The lower court's majority opinion in O'Hara v. State, 448 So.2d 524 (Fla. 5th DCA 1984), examined the respective statutory sections of 836.05 and 812.014 and found them to merely describe alternative acts within the Florida Legislatures' more general proscription against the wrongful taking of another's property. See, Bartee v. State, 401 So.2d 890 (Fla. 5th DCA 1981). In support of its conclusion that the Florida Legislature did not intend cumulative punishment for taking (by extortion) and taking (by theft), the Fifth District bottomed its decision

to reverse Respondent's grand theft conviction on the proposition that one cannot be convicted of two crimes for the singular taking of a sum of money from one victim. See, Rodriquez v. State, 443 So.2d 236 (Fla. 5th DCA 236).

By analogy, the Respondent contends the lower court's decision is no more based on the single transaction rule than the line of cases holding that where there is only one homicide, there can only be one murder conviction. Thomas v. State, 380 So.2d 1299 (Fla. 4th DCA 1980); Brown v. State, 371 So.2d 161 (Fla. 2d DCA 1979); Phillips v. State, 289 So.2d 769 (Fla. 2d DCA 1974); Goss v. State, 398 So.2d 998 (Fla. 5th DCA 1981); Muszynski v. State, 392 So.2d 63 (Fla. 5th DCA 1981).

CONCLUSION

BASED UPON the foregoing argument, policies, and authorities, the Respondent requests this Honorable Court to affirm the decision of the Fifth District Court of Appeal which reversed his grand theft conviction.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32015; and mailed to Tom Alex O'Hara, Inmate No. A-018102, #62-122, Union Correctional Institute, P.O. Box 221, Raiford, Florida 32083, on this 7th day of August, 1984.

David A. Henson

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