

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, )  
Petitioner, )  
 )  
v. )  
 )  
ROBERT LEE DIXON, )  
Respondent. )  
 )  
 )  
 )

CASE NO: 66,405

**FILED** ✓  
SID J. WHITE  
MAR 4 1985  
CLERK, SUPREME COURT  
By *[Signature]*  
Chief Deputy Clerk

---

RESPONDENT'S BRIEF ON THE MERITS

---

JERRY HILL  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

BY: Douglas S. Connor  
Assistant Public Defender  
Courthouse Annex  
Tampa, Florida 33602

TOPICAL INDEX AND STATEMENT OF ISSUES

	<u>PAGE</u>
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	1
ARGUMENT	
WHEN A DEFENDANT IS CONVICTED OF FELONY MURDER, CAN HE BE CONVICTED OF, ALTHOUGH NOT SENTENCED FOR, THE UNDERLYING FELONY? (as certified by the Second District Court of Appeal)	2-6
CONCLUSION	7
CERTIFICATE OF SERVICE	7

CITATION OF AUTHORITIES

	<u>PAGE</u>
<u>Bell v. State,</u> 437 So.2d 1057 (Fla. 1983)	2, 3, 4, 5
<u>Blockburger v. United States,</u> 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)	6
<u>Borges v. State,</u> 415 So.2d 1265 (Fla. 1982)	2
<u>Copeland v. State,</u> 457 So.2d 1012 (Fla. 1984)	3, 4
<u>Harris v. Oklahoma,</u> 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977)	4
<u>Hawkins v. State,</u> 436 So.2d 44 (Fla. 1983)	5
<u>Missouri v. Hunter,</u> 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983)	5
<u>Payne v. Virginia,</u> 468 U.S. ____, 104 S.Ct. ____, 82 L.Ed.2d 801 (1984)	4
<u>Portee v. State,</u> 447 So.2d 219 (Fla. 1984)	3
<u>Snowden v. State,</u> 449 So.2d 332 (Fla. 5th DCA 1984), <u>pet. for rev. pending, Fla. Case.</u> No. 65, 176	5
<u>State v. Baker,</u> 456 So.2d 419 (Fla. 1984)	3
<u>State v. Gibson</u> 452 So.2d 553 (Fla. 1984)	2, 3, 4, 5

State v. Hegstrom,  
401 So.2d 1343 (Fla. 1981) 3, 4, 5

Whalen v. United States,  
445 U.S. 684, 100 S.Ct. 1432,  
63 L.Ed.2d 715 (1980) 2, 3

OTHER RESOURCES

Fla.R.Cr.P. 3.701 2, 3

Florida Constitution, Article I, section 9 3

Section 775.021(1), Florida Statutes (1983) 6

Section 775.021(4), Florida Statutes (1983) 2, 5

Section 782.04(1)(a), Florida Statutes (1983) 3

United States Constitution, Fifth Amendment 3

United States Constitution, Fourteenth Amendment 3

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,                    )  
                  Petitioner,            )  
                                          )  
v.                                        )  
                                          )  
ROBERT LEE DIXON,                    )  
                  Respondent.            )  
                                          )  
                                          )  
                                          )  
\_\_\_\_\_ )

CASE NO: 66,405

STATEMENT OF THE CASE AND FACTS

Respondent will rely upon the petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The double jeopardy clauses of the United States and Florida Constitutions protect against multiple punishments for the same offense. Legislative intent determines which punishments are unconstitutionally multiple. The Florida legislature does not intend separate convictions and sentences for necessarily included lesser offenses. In felony murder cases, the underlying felony is a necessarily included lesser offense. Therefore, separate convictions for both felony murder and the underlying felony are not permitted.

## ARGUMENT

WHEN A DEFENDANT IS CONVICTED OF  
FELONY MURDER, CAN HE BE CONVICTED  
OF, ALTHOUGH NOT SENTENCED FOR, THE  
UNDERLYING FELONY? (as certified by  
the Second District Court of Appeal)

In Whalen v. United States, 445 U.S. 684, 688, 100 S.Ct. 1432,  
63 L.Ed.2d 715, 721 (1980), the United States Supreme Court ruled:

The Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also "against multiple punishments for the same offense,"... But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized.

This Court has repeatedly found that the legislature intends separate convictions and sentences only for separate offenses and does not intend separate convictions and sentences for both a greater and a necessarily included lesser offense. State v. Gibson, 452 So.2d 553, 556-558 (Fla. 1984); Bell v. State, 437 So.2d 1057, 1058 (Fla. 1983); Borges v. State, 415 So.2d 1265, 1267 (Fla. 1982). See § 775.021(4), Fla. Stat. (1983). Convictions for lesser included offenses are punitive in effect because they expose the defendant to enhanced sentences under both the sentencing guidelines and habitual offender statutes, they adversely affect parole release dates in those cases where parole remains available, and they may be used as impeachment evidence in subsequent criminal proceedings. Bell v. State, supra 437 So.2d at 1059; Fla.R.Crim.P.

3.701. Since the legislature does not intend separate convictions for necessarily included lesser offenses and separate convictions for such offenses are punitive, separate convictions are proscribed by the multiple punishment protection afforded by the double jeopardy clauses of the United States and Florida Constitutions. Portee v. State, 447 So.2d 219, 220 (Fla. 1984); Bell v. State, supra, 437 So.2d at 1058, 1061. See Whalen v. United States, supra, 445 U.S. at 688-690; U.S. Const., amends. V and XIV; Art. I, §9, Fla. Const.

Whether a lesser offense is necessarily included in a greater offense is determined by examining the statutory elements of the two offenses. The two offenses are separate and may be separately punished only if each offense requires proof of a fact the other does not. Whalen v. United States, supra, 455 U.S. at 691-692; State v. Baker, 456 So.2d 419, 420 (Fla. 1984); Bell v. State, supra, 437 So.2d at 1058; §775.021(4); Fla. Stat. (1983).

In a felony murder case, the underlying felony is a statutory element of the felony murder. Thus, the elements of the underlying felony are wholly included within the elements of felony murder, and the underlying felony is a necessarily included lesser offense. Whalen v. United States, supra, 445 U.S. 693-694; Copeland v. State, 457 So.2d 1012, 1018 (Fla. 1984); State v. Gibson, supra, 452 So.2d at 557 n.6; State v. Hegstrom, 401 So.2d 1343, 1346 (Fla. 1981); §782.04(1)(a), Fla. Stat. (1983). Petitioner argues, at pp. 7, 8 of Petitioner's Brief on the Merits, that the underlying felony is not a necessarily included lesser offense because it is possible to

commit felony murder without committing the particular underlying felony. The same argument was expressly considered and rejected by the United States Supreme Court in Whalen v. United States, supra, 445 U.S. at 694.

Recently, the United States Supreme Court has reaffirmed its holding that the underlying felony is a necessarily included lesser offense to felony murder. In Payne v. Virginia, 468 U.S. \_\_\_, 104 S.Ct. \_\_\_, 82 L.Ed.2d 801 (1984), the Court held that since conviction of the greater offense, murder, could not be had without conviction of the lesser offense, the Double Jeopardy Clause of the Fifth Amendment barred prosecution for the underlying felony following conviction for felony murder. A contrary result would permit multiple prosecutions for the same offense following conviction. See also Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977).

Because the underlying felony is a necessarily included lesser offense to felony murder and the Florida legislature did not intend separate convictions and sentences for necessarily included lesser offenses, the double jeopardy clauses of the United States and Florida Constitutions prohibit the imposition of separate convictions and sentences for the underlying felony. See State v. Gibson, supra, 452 So.2d at 558 n.7;; Bell v. State, supra, 437 So.2d at 1058, 1061. However, this Court has created an anomaly in the law by allowing convictions for the underlying felony while reversing sentences for the underlying felony in Copeland v. State, supra,



457 So.2d at 1018; Hawkins v. State, 436 So.2d 44, 47 (Fla. 1983); and State v. Hegstrom, supra, 401 So.2d at 1346. See Snowden v. State, 449 So.2d 332, 335-337 (Fla. 5th DCA 1984), pet. for rev. pending, Fla. Case No. 65, 176.

This Court recognized the conflict between State v. Hegstrom, supra, and Bell v. State, supra, in State v. Gibson, supra, 452 So.2d at 558 n.7. This conflict should be resolved by holding that separate convictions for felony murder and the underlying felony are not permitted by Section 775.021(4), Florida Statutes (1983), and double jeopardy clause. Id.

Petitioner contends that Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) supports his view that multiple punishments for felony murder and the underlying felony are warranted.

The Missouri statute implicated in Hunter provided:

"[A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years."

459 U.S. at 362 (emphasis supplied)

As the Hunter Court noted, the Missouri legislature made its intent to impose a multiple punishment on the necessarily included offense "crystal clear".

By contrast, as presented above, the Florida legislature had indicated the contrary intent - ie. not to impose multiple punishments where the offenses are not separate within the Blockburger<sup>1</sup> analysis. But should this Court find that the intent of the Florida legislature is not clear as to whether cumulative punishments for felony murder and the underlying felony are authorized, then the rule of lenity should be applied. As indicated in Section 775.021(1), Florida Statutes (1983), penal statutes must be strictly construed and "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."

---

1) Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.306 (1932)

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, the decision of the Second District Court of Appeal should be affirmed and Respondent's conviction for attempted robbery vacated.

Respectfully submitted,

J. MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

BY: *Douglas S. Connor*  
Douglas S. Connor  
Assistant Public Defender  
Courthouse Annex  
Tampa, Florida 336092

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida and to the Respondent, Robert Lee Dixon, P.O. Box 221, Raiford, Florida this 28th day of February, 1985.

*Douglas S. Connor*  
Douglas S. Connor