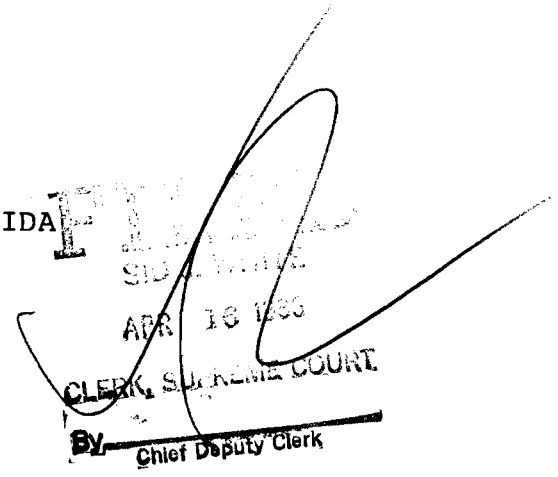
IN THE SUPREME COURT OF FLORIDA



ROBERT LEE HALL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 67,355
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENT TO ARGUMENT

In this case, this Court has the opportunity to clarify and settle the long-standing confusion in the law of multiple convictions and sentences. The revised version of Section 775.021 (4), Florida Statutes (1985), which became effective in June, 1983, has not been focused upon with precision in this Court's cases on this issue. This case appears to be this Court's first opportunity to apply the new statute.

The new statute eliminates two sticking points which have led this Court astray in its decisions of the last several years. But because these decisions were based upon the former statute, or on other decisions based upon it, this Court should not have to overrule the earlier decisions in order to make a fresh start under the new statute.

A.

The first sticking point arose from the language of the old statute. The version of Section 775.021(4) repealed in 1983 provided for separate sentences for acts constituting violations of two or more criminal statutes, excluding lesser included offenses. Determining what is a lesser included offense was always difficult, as shown by Brown v. State, 206 So.2d 377 (Fla. 1968) and its progeny, and by the eventual adoption of the schedule of lesser included offenses in the standard jury instructions. But the task was made still more difficult when

this Court decided in State v. Baker, 452 So.2d 927 at 929 (Fla. 1984), that the legislature intended separate convictions and punishments for any offenses which were not necessarily lesser included. Rotenberry v. State, 468 So.2d 971 at 975 (Fla. 1985), elevated this pronouncement to an "expres[s] limit[ation]."

The continuing uncertainty engendered by this approach (and reflected in the many dissents and special concurrences in this Court's recent decisions) may be laid completely to rest by application of the new statute without the baggage of the case law decided under the old statute. The new statute has entirely eliminated any reference to lesser included offenses. With these words from the statute should go all the case law decided from that approach.

B.

The second sticking point in the case law arose from this Court's misinterpretation of the Blockburger rule, whose language is now embodied in the new statute. Blockburger v. United States, 284 U.S. 299 (1932). The focus here must be on the word "requires." The statute now provides for separate sentences for separate offenses, and states that "offenses are separate if each requires proof of an element that the other does not" (emphasis added). Since this language comes directly from the Blockburger rule, this Court should continue to apply Blockburger. However, this Court's cases have overlooked the significance of the crucial word "requires." Moreover, while Blockburger itself is a common law rule to determine legislative intent, the rule itself

is now embodied in our statute and therefore the rule is the legislature's expressed intent. Contrast, Missouri v. Hunter, 459 U.S. 359 (1983).

The single word "requires" is vitally important because it mandates how statutory elements must be compared in order to determine whether two offenses are separate. Such comparison is simple if the elements are listed in columns, with any alternative proof elements indicated by the word "or." The following example uses the two offenses involved in this case. (Of course, brief reference must be made to the charging document to see which statutory elements are involved).

Robbery - 812.13(2)(a)	Firearm in Felony-790.07(2)
A. Taking	A. Felony
B. Force, violence, etc.	B. Display, use, etc. firearm
C. Carry firearm	-or-
-or-	C. Carry concealed firearm
D. Other deadly weapon	

In the example, elements A and B of robbery obviously match up with element A of firearm in felony. However, C and D of robbery and B and C of firearm in felony are alternatives and therefore may or may not match. C of robbery matches C of firearm in felony, but there are other possible combinations involving D of robbery and B of firearm in felony which do not match. These other possible combinations leave an unmatched

element. The possibility of an unmatched element could be mistakenly viewed as making the offenses "separate" under Blockburger and the statute.

However, the mere possibility of an unmatched element is not sufficient to make the offenses separate because of the crucial word "requires." On the contrary, "requires" means that if there is any way that the elements may match completely, then the offenses are not separate. The word "requires" makes an unmatched element a necessary, not a sufficient, condition for finding separate offenses to exist in a particular case.

As clear as this seems, this Court in its recent decisions has mistakenly taken the opposite interpretation and held, often almost sub silentio after having correctly quoted Blockburger, that the mere possibility of an incomplete match-up of elements, among several possible combinations of alternative elements, is sufficient to make the offenses involved separate. See, Rotenberry v. State, supra, in which this Court held two offenses to be separate because the state "need not" prove each alternative element, but only one. 468 So.2d at 977. That is, there was one way, out of several possible combinations, that an element in each statute could be left unmatched. In this context, "need not" is the direct opposite of "requires."

Rotenberry shows how this Court has misinterpreted the meaning of the word "requires" in Blockburger. The majority opinion quotes the dissenting lower court opinion of Judge Cowart holding that two offenses are distinct "if each offense can possibly be committed without necessarily committing the other."

Id. at 976 (emphasis added). See also, Mills v. State, 476 So.2d 172, at 177 (Fla. 1985) ("possible" to commit one crime without committing the other); Vause v. State, 476 So.2d 141 at 142 (Fla. 1985) ("possible"); and State v. Boivin, 11 F.L.W. 123 (Fla. March 27, 1986) (each of two offenses involved "can" be committed "without necessarily" committing the other).

This Court in this case should issue an opinion announcing a new beginning under the new statute. To clarify this area of law nothing more is needed than to rely squarely on the new statute's plain language.

Respectfully submitted,

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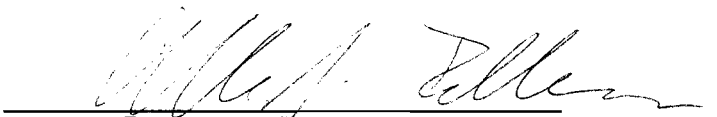

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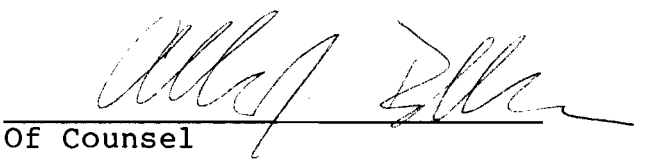
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to GEORGINA JIMINEZ-OROSA, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 15th day of April, 1986.



Of Counsel