IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,438

THE STATE OF FLORIDA,

Petitioner,

vs.

FLETCHER EMBREY HOLLINGER,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JORGE ESPINOSA
Florida Bar #0779032
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite N-921
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES — PAGE

TABLE OF CITATIONS

INTRODUCTION

This is a criminal prosecution for first degree murder, possession of a firearm during the commission of a felony, shooting into an occupied vehicle and carrying a concealed firearm. The State of Florida, the appellee below, appeals the conflict certified by the Third District Court of Appeal herein with the decision of the First District Court of Appeal in Harper v. State, 537 So.2d 1131 (Fla. 1st DCA 1989) and the apparent conflict with the opinion of this Court in State v. Baker, 456 So.2d 419 (Fla. 1984).[1]

STATEMENT OF THE CASE AND FACTS

Although the issue before this Court is limited to the law concerning multiple convictions and is not specifically influenced by the facts surrounding the crime below, the State, nevertheless, here includes a complete amended reproduction of the Statement of the Case and Facts presented to the lower court.

a. The murder.

---

[1] The following abbreviations will be used throughout this brief:

T. - Transcript of Trial Proceedings
R. - Record on Appeal
App. - Appendix

On October 1, 1987, Fletcher Embrey Hollinger, the defendant, rode on a jitney operated by Samuel Williams. (T. 1526-1527) According to the defendant's own account he boarded the jitney and fell asleep, missing his stop and not waking up until the jitney arrived at its final stop on second avenue and eighth street. Id. The defendant asked Williams for a free ride back to his stop. (T. 1527-1528) Williams refused and, after a struggle with the defendant, expelled the defendant from the jitney. (T. 1528)

Jacques Pierre Pierre, another jitney driver, arrived at Second Avenue and Eighth Street in his jitney between seven (7) and eight (8) p.m. and saw the defendant talking with Williams. (T. 675-676) The defendant walked away from Williams, approached Pierre, asked Pierre to give him a ride and told him he had no money. (T. 679) Williams told Pierre not to give the defendant a ride because he was sleeping in the car; that either he pays or he can walk. Id. The defendant told Williams not to interfere and Williams returned to his jitney counting his money. Id. The defendant then crossed the street and motioned to Williams to come over, however, Williams remained in his jitney. (T. 680)

Sylvester Archiles, another jitney driver, arrived at the jitney station on the evening of the crime, and saw Williams speaking on the telephone. (T. 697) Archiles called out to Williams that it was time for Williams to go on his route. (T.

697-698) Archiles remained standing by his jitney after Williams left. (T. 698) The defendant approached Archilles from the other side of the street and asked him if he was about to leave. (T. 699) Archilles responded that he was not because Williams' jitney, number 6, had just left. (T. 699) The defendant responded that he had missed his ride and that he new that the jitney that left was number 6. Id.

The defendant then told Archilles that he was going to kill Williams; "I'm going to kill him, I have to kill him." (T. 699) The defendant reasoned "if today I ride the jitney and I pay and the following day if I don't have any money, if I catch a jitney the driver is not supposed to put me out of it." Id. Archilles reasoned with the defendant that he was still responsible for paying the fare. Id. The defendant then said that he had his car parked across the street, that he was going to get his car and left. (T. 700)

Ernest McKnight was on his way home riding as a passenger in Williams' jitney at the time of the shooting. (T. 100-1001) He saw a car pull in front of the jitney he was riding, jitney number 6, cutting off the jitney's access so that it could not move. (T. 1002-1003) The defendant exited the car and walked rapidly up to the driver's side of the jitney. (T. 1004) The defendant started arguing with Williams about their confrontation earlier that evening and saying "there is going to be a killing tonight". (T. 1005)

As he approached the jitney the defendant kept his hand and its content behind his back. (T. 1006-1007) After the argument with Williams started, the defendant pulled his hand, in which he held a gun, from behind his back and started shooting. (T. 1007-1008) The first shot went through the door of the jitney. (T. 1008) Williams who was apparently surprised, still had his hands on the steering wheel. (T. 1009) McKnight saw and heard about four or five shots before he took cover on the floor of the jitney. (T. 1010) Williams managed to work his way out of the van and was struggling with the defendant when another shot rang out and Williams fell to the ground. (T. 1010, 1054) The defendant then ran to his car and drove away. (T. 1061)

When Laurie Armstrong arrived home from school on the night of the crime she found the defendant and her mother, Shirley Armstrong, at the house. (T. 755) Shirley had been involved in a relationship with the defendant for several years. (T. 746) Laurie mentioned that she had seen a jitney in a cordoned off area on her way home and she noticed her mother and the defendant look as if they already knew what had happened. (T. 756) Later that evening the defendant told Laurie that he was the one who shot the jitney driver and that he had done so because he disrespected him and his family. (T. 760) The defendant told her that he had fallen asleep on the jitney and arrived downtown without any money for the return fare. Id. Then the driver dragged him off the jitney and said that all Americans

are alike. (T. 761) During their conversation Laurie noticed that the defendant's clothes were splattered with blood in several places. (T. 762-763)

When the police came by the house the next day, Laurie and her mother denied knowing the defendant. (T. 766-768) After the officers left, Laurie discussed the consequences of lying to the police with her mother and both decided to tell the police what they knew. (T. 771) Laurie called the officers from a phone by the school and explained that she knew the defendant and later both she and her mother went down to the station. (T. 771-772,826) Before leaving for the station Laurie spoke to the defendant who repeated his earlier story. (T. 772)

b. The confession.

Sergeant Bobby Meaks was the supervisor of the police team investigating the death of Sam Williams. (T. 1147) Meaks received a phone call on October 13, 1987, informing him that the defendant had turned himself in and to please come to the station. (T. 1148) When he arrived at the station he found the defendant accompanied by the defendant's employer, Mr. Scott. (T. 1151) After Detective Fortune arrived, Meaks informed him that the defendant was waiting and they then asked the defendant to accompany them to an office where they could talk. (T. 1152-1153)

Once in the office the detectives informed the defendant of his constitutional rights by reading from a rights form and having the defendant initial the various paragraphs of the form indicating that he understood. (T. 1155,1157-1158) Each time that a Miranda right was read to the defendant one of the officers explained what had been read and asked the defendant if he understood. (ST. 24-30) Each time the defendant said that he understood and initialled the relevant paragraph. (ST. 25,29,33-34) The defendant waived his rights and agreed to talk to the detectives. (T. 1163,1165)

At first the defendant told the detectives the same story he had previously told Laurie that he had fallen asleep on the jitney and had been subsequently thrown off for lack of fare money. (T. 1165-1166) This time the defendant added that he had left his wallet on the jitney, that he caught up with the jitney in his girlfriend's car and approached the driver in order to recover his wallet. (T. 1167) According to the defendant the driver had left his vehicle, struggled with him and when the defendant pulled out a gun it went off accidentally. (T. 1167-1168) The defendant later changed his story to state that he did not go after the jitney to recover his wallet but instead because the driver had disgraced him. (T. 1171) The defendant's statement was transcribed and sworn to by the defendant. (R. 60-106)

On October 28, 1987, the defendant, Fletcher Embrey Hollinger, was charged by indictment with first degree murder, possession of a firearm during the commission of a felony, shooting into an occupied vehicle and carrying a concealed firearm. (R. 1-2A) On November 9, 1988, the defendant filed a motion to suppress alleging lack of an intelligent and knowing waiver. (R. 49-50) A hearing on the motion was held on February 8, 1989. (ST. 1)

At the hearing the defendant presented expert testimony by Dr. Leonard Haber alleging that the defendant suffered mental deficiencies. (T. 51 et seq.) Defense counsel proceeded to argue that the defendant looked upon his employer, Mr. Scott, as a father figure and Scott had urged him to tell the truth about what happened. Defense counsel also argued that the defendant was not informed of all charges pending against him at the time he was questioned. The State presented testimony that the defendant was alert and indicated he understood his rights on multiple occasions. Furthermore the State noted that the defendant had prior experience with the legal system and showed a good memory of past legal proceedings. At the end of the hearing the judge denied the defendant's motion stating as follows:

> I'll make a finding at this time, for the record, that the statement of Fletcher Hollinger was free, was voluntary, was intelligently made, and that he understood the Miranda warnings, as read to him, and as explained to him, and that he knew what he was doing. And there's no doubt in my mind. I'm very comfortable with that conclusion, based upon what I have seen, and what I have heard today.

(T. 247)

c. The trial.

The case went to trial on February 29, 1989, before the Honorable Arthur Rothenberg, Circuit Court Judge for the Eleventh Judicial Circuit. (T. 249) Sargeant Meaks, Sylvester Archiles, Ernest McKnight and Laurie Armstrong testified to the above stated facts. The State additionally presented the testimony of various witnesses as to the firearm used and the injuries suffered by the victim. The defendant testified on his own behalf. According to the defendant's version of events he boarded the jitney and fell asleep missing his stop. (T. 1526-1527) Williams refused to give him a free ride to his stop and dragged the defendant off the jitney by his legs. (T. 1528) After a brief struggle the defendant approached another jitney driver to ask for a ride but Williams told the driver not to take the defendant. (T. 1528-1529) The defendant then called his girlfriend, Shirley Armstrong, to come pick him up. (T. 1533-1534)

When Shirley arrived to pick him up the defendant got into the driver's seat. (T. 1535) He spotted Williams' jitney and pulled over because he had left his wallet in the jitney. (T. 1535-1536) The defendant allegedly walked over to Williams and asked if he could search the jitney. (T. 1536-1537) Williams then made a motion with his hand and stated, "That son of a

bitch here again. I am going to kill him." (T. 1537) The defendant grabbed Williams' hand as it came up causing the gun to discharge. (T. 1537) Allegedly, the defendant carried a concealed gun, without a permit and with full knowledge that he was breaking the law, for his own safety. (T. 1529-1531) A struggle then ensued in which Williams tried to open the jitney door and additional shots were fired. (T. 1537)

On cross-examination the defendant admitted that in his struggle with Williams, he came out unscathed while Williams ended up with five bullets in him. (T. 1579) The defendant's answer to the large array of testimony against him was to repeatedly deny that any of it was true. When confronted by the statements of the other witnesses and by his own statements to the police the defendant denied their veracity and responded to the prosecutor's questions that the witnesses were lying. At no point during the course of this questioning did defense counsel object to the line of inquiry or to any particular question. Notably, the defendant testified that he was never read his Miranda rights and that the officers had lied although he admitted putting his initials down on the consent form at each relevant paragraph. (T. 1594)

After due deliberation, the jury convicted the defendant on all counts as charged in the indictment. (R. 189-192; T. 1747-1749) The trial court sentenced the defendant to life imprisonment with a twenty-five (25) year minimum mandatory

sentence (R. 193-199) A notice of appeal to the Third District Court followed. (R. 211-212).

On appeal, after filing of briefs and oral argument the Third District issued an opinion affirming the decision below on all grounds except for the dual conviction for first degree murder and use of a firearm in the commission of a felony. (App. A) The District Court certified conflict with the First District's holding in Harper v. State. Id. This petition follows.

POINT ON APPEAL

WHETHER DUAL CONVICTIONS FOR FIRST DEGREE MURDER AND USE OF A FIREARM IN THE COMMISSION OF A FELONY ARISING OUT OF A SINGLE ACT CONSTITUTE A VIOLATION OF THE DOUBLE JEOPARDY PROVISIONS OF THE FLORIDA AND UNITED STATES CONSTITUTIONS?

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal has applied an incorrect reading of the Blockburger and Carawan tests which is inconsistent with prior decisions by this court and by other district courts. First Degree Murder and Use of a Firearm in the Commission of a Felony are two separate offenses which share no common elements. Furthermore, surrounding factors indicate that different ills are addressed by the two laws and therefore multiple punishments were intended. In doing a Blockburger analysis the court must look to the statutory criteria and not to whether the charging document includes the mention of a firearm. So long as the defendant's First Degree Murder sentence has not been aggravated for use of a firearm constitutional considerations do not overcome the presumptions created by statutory rules of construction. Accordingly multiple sentences must be allowed the decision below must be reversed.

ARGUMENT

THE CRIMES OF FIRST DEGREE MURDER AND USE OF A FIREARM IN THE COMMISSION OF A FELONY ARE COMPOSED OF DIFFERENT STATUTORY ELEMENTS AND ADDRESS SEPARATE EVILS AND ARE THEREFORE NOT VIOLATIVE OF THE EITHER STATE OR FEDERAL DOUBLE JEOPARDY CONSIDERATIONS.

"With respect to cumulative sentences in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359,366, 103 S.Ct. 673,678, 74 L.Ed.2d 535 (1983). The legislature retains the substantive power to define crimes and prescribe punishment. Jones v. Thomas, 109 S.Ct. 2522, 105 L.Ed.2d 322, 57 U.S.L.W. 4762 (1989). "[W]here the legislature has expressed its intent that separate punishments be imposed upon convictions of separate offenses arising out of one criminal episode, the Double Jeopardy Clause is no bar to such imposition." Borges v. State, 415 So.2d 1265,1267 (Fla. 1982).

The federal standard for evaluating whether a single act can result in multiple punishments was set forth by the Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision

requires proof of an additional fact which the other does not." Id. at 304, 52 S.Ct. at 182. If either offense includes an element which the other does not, the offenses are separate and discrete. Id. Moreover, if the statutory elements of one offense require proof of facts which the other does not "the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crime." Iannelli v. United States, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284,1293 n.17, 43 L.Ed.2d 616 (1975)(citations omitted).

Florida courts, and in particular this Court, have recognized that the double jeopardy provision of the Florida constitution was intended to mirror the similar Federal provision. Carawan v. State, 515 So.2d 161,164 (Fla. 1987). This Court has therefore accepted the federal interpretation that "'[w]ith respect to cumulative sentences in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'" State v. Smith, 547 So.2d 613 (Fla. 1989) quoting Missouri v. Hunter, 459 U.S. 359,366, 103 S.Ct. 673,678, 74 L.Ed.2d 535 (1983). Although its is possible that the legislature in fact passed a law which punishes the same offense twice in a constitutionally violative manner, it is presumed, that the legislature did not act in ignorance of the constitution and did not intend to punish for the same act twice. As insightfully noted by this Court "the legislature can achieve the same result with greater economy by merely increasing the penalty for the single underlying offense." Carawan at 164.

For the purpose of determining legislative intent, Florida originally adopted a strict reading of the test set forth in Blockburger. Simply stated the Blockburger test compares the elements of the crimes in question. If both have at least one element that the other does not, then a presumption arises that the offenses are separate. If all elements are shared, an opposite presumption arises that the offenses are the same and that the legislature did not intend to punish them separately. This rule was codified by the legislature as follows:

> Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

§ 775.021(4) Florida Statutes (1985).

Applying this test, multiple convictions for first degree murder and use of a firearm in the commission of a felony have specifically been approved by this Court. In State v. Baker, 456 So.2d 419 (Fla. 1984), convictions for two such charges were reviewed.[2] While initially conducting a "lesser included

---

[2] As in the present case the indictment in Baker was titled "Murder in the First Degree" and only mentioned that a firearm was used in commitin the murder in the body of the charge.

offense" analysis,[3] the Court promptly turned to an examination of the propriety of the sentences pursuant to a Blockburger analysis. This court concluded:

> Baker's indictment charged him with **first-degree premeditated murder,** section 782.04, Florida Statutes (1979), and with **use of a firearm during the commission of a felony,** section 790.07, Florida Statutes (1979). The statutory elements of first-degree murder are: (a) the unlawful (b) killing (c) of a human being (d) when perpetrated from a premeditated design to effect the death of the person killed or any human being. § 782.04(1). The statutory elements of use of a firearm during the commission of a felony are: (a) while attempting to commit a felony, (b) displaying, using or threatening or attempting to use any firearm or carrying a concealed firearm. § 790.07(2). **These crimes have no elements in common.**

Baker, 456 So.2d at 422. (emphasis added)

With the announcement of its new rule in Carawan this Court again reviewed the decision in Baker and found it to be

---

> CHARGE: Murder in the First Degree in violation of F.S. 782.04
> SPECIFICATION OF CHARGE: In that Charles L. Baker, did on or about the 31st day of August, 1979, in Volusia County, Florida, then and there unlawfully and from a premeditated design to effect the death of one Josephine Baker, a human being, did kill and murder Josephine Baker by shooting her with a firearm, to-wit: a pistol[.]

Baker v. State, 425 So.2d 36,37 n.1 (Fla. 5th DCA 1983).

[3] Using a similar lesser included offense analysis this Court had already found that use of a firearm offenses are not lesser included offenses of first degree premeditated murder. See Teffeteller v. State, 439 So.2d 840 (Fla. 1983).

sound. In Carawan this Court set out the following analysis: (1) a clear and specific statement of the legislature's intent to punish separately controls; (2) absent such a statement, the court must apply the Blockburger test as codified in § 775.021(4); (3) if the Blockburger test indicates that the offenses are equivalent, then separate punishment is presumed; (4) if the Blockburger test indicates that the offenses are separate, then multiple punishments are presumed unless there is evidence of contrary legislative intent; (5) if Blockburger suggests that the offenses are separate but a reasonable basis exists for concluding that there is a contrary intent, then the rule of lenity codified in 775.021(1) requires that the court find the multiple punishments are impermissible. Carawan, supra; Wheeler v. State, 549 So.2d 687, 689 (Fla. 1st DCA 1989). Applying this test to Baker this Court concluded that in Baker the Blockburger test was met and all surrounding factors indicated the propriety of multiple punishments:

> In [Baker], for instance, the accused had been convicted of first-degree murder and use of a firearm during the commission of a felony. Noting that legislative intent is the overriding issue, but finding none to guide us, we proceeded to analyze the facts of the case under the Blockburger test. Moreover, we found that the two crimes in question shared none of the same elements, tending to show that they addressed separate evils. **The rule of lenity was inapplicable since, if any reasonable inference could be drawn from the face of the statutes, it was that the legislature intended the two offenses to be treated as separate. This conclusion was reinforced by the legislature's manifest concern over the proliferation of violent crimes**

> **involving the use of firearms.** On the basis of the Blockburger test, therefore, we concluded that separate punishments were permissible.

Carawan at 169. (emphasis added)

The Court never had to reach the question of lenity and therefore the analysis survived untouched under both the strict Blockburger reading and the subsequent Carawan interpretation.

In the legislative session which followed the issuance of Carawan the legislature amended section 775.021(4) to include "an act or acts which constitute one or more separate criminal offense". Ch. 88-131, § 7, Laws of Fla. Furthermore, the amendment included a specific statement of legislative intent:

> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
> 1. Offenses which require identical elements of proof.
> 2. Offense which are degrees of the same offense as provided by statute.
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Ch. 88-131, § 7, Laws of Florida.

Based on this amendment this Court in State v. Smith, 547 So.2d 613 (Fla. 1989), concluded that Carawan has been overridden for offenses that occur after the effective date of the amendment. Moreover, Smith determined that the amendment expressed the following intent by the legislature: (1) that multiple

punishments be imposed for separate offenses, where appropriate, without distinction for act or acts; (2) that all criminal offenses containing separate unique statutory elements shall be separately punished (a strict Blockburger rule); (3) that the statute be applied without judicial gloss; (4) that multiple punishment only not be imposed where the three instances set forth in the statute arise. Smith, 547 So.2d at 616.

In the instant case, however, the crime was committed on October 1, 1987, which makes it subject to a Carawan analysis and to a still valid Baker.[4] The State is frankly confused as to the persistence with which the Third District has refused to allow the dual convictions for first degree murder, in which a firearm was used, and use of a firearm in the commission of a felony, in view of this Court's pronouncements in Baker and Carawan. See Reddick v. State, 554 So.2d 564 (Fla. 3d DCA 1989); Jones v. State, 547 So.2d 1278 (Fla. 3d DCA 1989); Perez v. State, 543 So.2d 386 (Fla. 3d DCA 1989); Gonzales v. State, 543 So.2d 386 (Fla. 3d DCA 1989). The entire line of cases seems to be based, without analysis or rationale to support their conclusion, on the initial opinion in Gonzales. Gonzales, however, was based, similarly without analysis, on a cite to Carawan, which is particularly confusing since, as explained

---

[4] Since the Third District appears intent to continue applying finding these two crimes incompatible under the statutory amendment, See Brunson v. State, Case No. 89-2457 (currently set for argument), this Court is urged to broadly address the propriety of dual sentences under both a Carawan and a post-amendment Blockburger context.

above, Carawan reaffirmed the validity of the analysis in Baker. The other cases cited to for support in Gonzales deal with use of a firearm in combination with other crimes for which a Carawan analysis could clearly come out differently than for the present two offenses. Mozqueda v. State, 541 So.2d 777 (Fla. 3d DCA 1989)(attempted first degree murder); Tunidor v. State, 541 So.2d 165 (Fla. 3d DCA 1989)(manslaughter); Smith v. State, 539 So.2d 601 (Fla. 3d DCA 1989)(second degree murder); Henderson v. State, 526 So.2d 743 (Fla. 3d DCA 1988)(second degree murder). Common sense and this Court's prior reasoning in Baker should have guided the lower court to affirm the defendant's conviction and sentence.[5]

"In applying the Blockburger test the courts look only to the statutory elements of each offense and not to the actual evidence to be presented at trial or the facts alleged in a particular information." State v. Carpenter, 417 So.2d 986, 988 (Fla. 1982)(emphasis in original); See also Williams v. State, 15 F.L.W. 1049 (1st DCA, April 27, 1990); Borges v. State 415 So.2d 1265 (Fla. 1982); St.Fabre v. State 548 So.2d 797 (Fla. 1st DCA 1989). The State's mention of the word gun in the charging document to describe the manner of commission of the first degree murder does not constitute a common element between the two crimes. Such a case specific fact does not even enter

---

[5] With passage of the statutory amendment the Third District and this Court may naturally address the issue anew making it important for this Court to address the issue broadly in its opinion. See Smith at 616.

into the Blockburger facet of a Carawan analysis. The analysis is totally limited the statutory elements of the offense and these elements are totally dissimilar:

> The statutory elements of first-degree murder are: (a) the unlawful (b) killing (c) of a human being (d) when perpetrated from a premeditated design to effect the death of the person killed or any human being. § 782.04(1). The statutory elements of use of a firearm during the commission of a felony are: (a) while attempting to commit a felony, (b) displaying, using or threatening or attempting to use any firearm or carrying a concealed firearm. § 790.07(2). **These crimes have no elements in common.**

Baker, 456 So.2d at 422. (emphasis added)

Another relevant factor is that the defendant's sentence for first degree murder was not aggravated as a result of the use of a firearm. See Hall v. State, 517 So.2d 678, 680 (Fla. 1988); Llabona v. State, 557 So.2d 66 (Fla. 3d DCA 1990). In fact it could not have been so aggravated and the State is not suggesting that the defendant's sentence should be aggravated twice for the same offense. Based on the First Degree Murder conviction the defendant receives no additional minimum mandatory sentence time for use of a firearm, no aggravation of the degree of the offense and, since the title of the count does not reflect use of a firearm, no additional stigma. See Florida Statutes § 775.087 (1989). In the absence of any aggravation for use of a firearm the Third District's rationale, therefore, punishes the criminal who used a firearm no more than the one who did not. This outcome is clearly against the legislature's

evident intent to discourage the use of firearms in the commissions of crimes.

Unlike the Third District, the First District applied the appropriate analysis to this issue. In Harper v. State, 537 So.2d 1131 (Fla. 1st DCA 1989), the court affirmed convictions for first degree murder and use of a firearm in the commission of a felony. The court specifically stated "[w]e find clear legislative intent in the statutes that multiple punishments for both crimes are permissible. The first-degree murder statute neither requires use of a firearm as an element, nor can it be enhanced under § 775.087, Florida Statutes (1987)." Harper, at 1132. This holding is consistent with this Court's ruling in Baker as well as with the observation in Carawan that "if any reasonable inference could be drawn from the face of the statutes, it was that the legislature intended the two offenses to be treated as separate. This conclusion was reinforced by the legislature's manifest concern over the proliferation of violent crimes involving the use of firearms." Carawan at 169.

Since the instant crimes, first degree murder and use of a firearm in the commission of a felony, share none of the same statutory elements, address separate evils, and do not cause multiple aggravation of convictions arising out of a single episode, such multiple convictions may be upheld and permissible under the double jeopardy clauses of the state and federal constitution. Such a conclusion results from analysis under

Blockburger, Carawan and the post-amendment statute. Therefore, the Third District's opinion below should be reversed and the matter remanded for further proceedings.

CONCLUSION

Based on the foregoing arguments and citations of authority the decision below should be reversed and an opinion should be issued by the Court finding multiple convictions and sentences for first degree murder and use of a firearm in the commission of a felony consistent with the double jeopardy clauses of the Florida and federal constitutions.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

JORGE ESPINOSA
Florida Bar #0779032
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF PETITIONER ON THE MERITS was furnished by mail to ROSA C. FIGAROLA, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 26th day of September, 1990.

JORGE ESPINOSA