IN THE SUPREME COURT OF FLORIDA

JESSIE SIRMONS,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 80,545

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 249238
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114

(904)252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

JESSIE SIRMONS, Petitioner,	)	
vs.	)	CASE NO. 80,545
STATE OF FLORIDA, Respondent.	)	

PETITIONER'S BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

The petitioner was convicted, inter alia, of both grand theft auto and robbery with a weapon for the single taking by force (at knifepoint) of the victim's automobile. Sirmons v. State, 17 FLW D1826 (Fla. 5th DCA July 31, 1992). (Appendix A) On appeal to the District Court of Appeal, Fifth District, the petitioner maintained that the dual convictions for robbery and grand theft auto were violative of double jeopardy since there was a single taking. Id.

While the district court agreed that there was but one taking, the court approved of the multiple convictions. Citing Rodriquez v. State, 500 So.2d 120 (Fla. 1986), **receded from** in Carawan v. State, 515 So.2d 161 (Fla. 1987), and State v. Smith,

547 So.2d 613 (Fla. 1989), the district court applied the Blockburger[1] test to hold that the dual convictions were proper since second degree **grand** theft requires an additional element (value or, as here, the automobile element) not contained in the crime of robbery. Sirmons v. State, supra. The district court refused to grant relief from the dual convictions for this sole reason despite recognizing that this Court, in the unanimous decision of Johnson v. State, 597 So.2d 798 (Fla. 1992), indicated that the core or nuclear elements of theft is what controls in a double jeopardy claim and the crime is actually defined by subsection (1) of the theft statute[2] alone and not by reference to subsection (2) which merely defines the degrees of the crime. Sirmons v. State, 17 FLW at D1827.

The petitioner timely filed a Motion for Rehearing or Suggestion that Question be Certified to this Court. (Appendix B) On August 28, 1992, the district court denied the motion. (Appendix C) A notice to invoke this Court's discretionary jurisdiction was filed on September 28, 1992. This proceeding follows.

---

[1]Blockburger v. United States, 284 U.S. 299 (1932).

[2]§ 812.04, Fla. Stat. (1989).

SUMMARY OF ARGUMENT

The decision of the district court directly and expressly conflicts with decisions of this Court on the same issue of law. The court's opinion follows a conflicting line of cases which misinterprets and fails to follow the correct state and federal constitutional analysis which would preclude dual convictions for a single criminal act wherein the same core elements are present (and the only differing elements are those defining the degree of the crime).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN SIRMONS V. STATE, 17 FLW D1826 (Fla. 5th DCA July 31, 1992), EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF FLORIDA.

The opinion of the Fifth District in the instant case, as recognized in that opinion, follows one line of cases which directly conflicts with another line of cases, causing further confusion among the precedents on the issue of double jeopardy and identity of offenses. This holding, if allowed to stand, would allow courts (and the legislature, in defining offenses) to ignore the clear prohibition of the Florida and federal constitutions against double jeopardy.

In the instant case, the petitioner was charged and convicted of both armed robbery and grand theft auto for one act of taking the victim's car at knifepoint. The district court even recognized that there were not two separate factual instances giving rise to the dual offenses; rather, the court said that the offenses were predicated on the single act of taking the automobile. Sirmons v. State, 17 FLW D1826 (Fla. 5th DCA July 31, 1992). The court, however, in deciding that the single act constituted two separate crimes looked no further than the test announced in Blockburger v. United States, 284 U.S. 299 (1932), that if there are unique elements in the two statutory crimes, then multiple convictions are allowed. This holding conflicts with numerous cases form this Court which hold that a strict

Blockburger test is not the end of the double jeopardy analysis.

In this Court's recent case of Johnson v. State, 597 So.2d 798 (Fla. 1992), this Court did not apply the strict Blockburger test for all of the elements of grand theft in concluding that multiple convictions were prohibited for grand theft of a firearm and grand theft of cash where there was only one act of taking the victim's purse. Rather, the Court found that the core or nuclear elements of theft, i.e. the taking of another's property without their consent, contained in Section 812.014, Florida Statutes, **subsection (1)**, are the elements defining the nature of the crime for double jeopardy analysis. The elements contained in subsection (2) of that statute merely set forth the degree of the crime.

> The theft occurred when Johnson wrongfully took the property of another. He did this in one swift motion. The degree of the crime of theft depends on what was taken. Because of the value of the property, his crime was a third-degree felony. Because part of the goods he took was a firearm, his crime additionally is defined as a third-degree felony. Subsection 812.014(1), Florida Statutes (1989), defines the crime of theft, and subsection 812.014 (2) sets the degree of the crime committed under subsection (1). We conclude that the value of the goods or the taking of a firearm merely defines the degree of the felony and does not constitute separate crimes. A separate crime occurs only when there are separate distinct acts of seizing the property of another.

See also Foster v. State, 596 So.2d 1099, 1103-1113 (Fla. 5th DCA 1992) (Cowart, J., dissenting), **disc. rev. granted**, Fla. Sup. Ct.

Case No. 79,950. Just as in Johnson, the value or nature of the goods was not considered in determining whether multiple offenses were committed; so here, too, value or nature of the stolen items may not constitute the additional, unique element to differentiate the taking for the armed robbery and the taking for the **grand** theft. Rather, the crime of **theft** (whether it be grand or petit) is subsumed into, and is a lesser offense of, the crime of robbery (a theft with force). Robbery is simply an enhanced form of theft.

The Court also indicated in Johnson that the single taking in one swift action cannot form the basis for two convictions. Similarly, this Court indicated in Cleveland v. State, 587 So.2d 1145 (Fla. 1991), that the single act of the use of a firearm in committing a robbery cannot form the basis of a separate conviction for the use of a firearm while committing a felony. In the instant case, the district court specifically found that there was only one action, one taking of the automobile. The Blockburger test [and the "legislative intent" espoused in Section 775.021(4), Florida Statutes (1989)] cannot be used to circumvent the constitutional protections against double jeopardy where only one crime in fact, one unlawful taking of the property of another, has occurred. See also Grady v. Corbin, 495 U.S. 508 (1990); Foster v. State, supra at 1111-1112 (Cowart, J., dissenting).

Also, Houser v. State, 474 So.2d 1193 (Fla. 1985) (a single death equals only one crime of either DUI Manslaughter or

Vehicular Homicide), and Gaskin v. State, 591 So.2d 917 (Fla. 1991) (one death equals only one first degree murder, either premeditated or felony murder), conflict with the instant case in which the district court held that one taking equals two crimes. The core elements of theft and robbery, not the degree elements, must be used to determine the "identity of offense" double jeopardy issue.

These decisions, which conflict with the court's opinion in the instant case, all uphold the constitutional ban on double jeopardy. The opinion of the district court in Sirmons, supra, and the cases it relies on have failed to recognize and preserve this important state and federal constitutional right.

In conclusion, the opinion of the district court of appeal in the instant case is in direct and express conflict with decisions of this Court. This Court should exercise its discretionary jurisdiction to clarify the confusion caused by the conflict and return significance to the constitutions' double jeopardy provisions.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court accept jurisdiction of this cause, vacate the decision of the District Court of Appeal, Fifth District, and remand with instructions to vacate the duplicative conviction for grand theft.

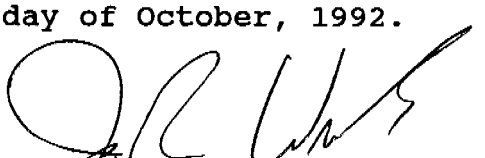
Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 249238
112 Orange Avenue - Suite A
Daytona Beach, Florida 32114
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal, and mailed to Jessie S. Sirmons, Inmate # 300194, Tomoka Correctional Institution, 3950 Tiger Bay Rd. Daytona Beach, FL 32114, this 8th day of October, 1992.



JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JESSIE SIRMONS, Petitioner,	)	
vs.	)	CASE NO. 80,545
STATE OF FLORIDA, Respondent.	)	

A P P E N D I C E S

APPENDIX A -- Sirmons v. State
17 FLW D1827 (Fla. 5th DCA July 31, 1992)

APPENDIX B -- Motion for Rehearing

APPENDIX C -- Order denying Motion for Rehearing

v. State, 487 So.2d 408 (Fla. 3d DCA 1986). In this case Potenzo's testimony at trial was that he and Cammarano decided to rob the bar and kill anyone present. To insure that the car ([illegible]marano's car) would not be seen at the bar, Cammarano p[illegible]d his car some blocks from the bar and they walked back to the bar to do the robbery. Their pretence to gain entry to the bar was to do plumbing work.[1] Cammarano carried a blue bag (his) containing a screw driver and crow bar to the bar. The screwdriver and crow bar were to be used to open the bottom drawer of the safe.[2] The blue bag was to be used to carry the money away from the premises. Cammarano and Potenzo were planning to leave for Ft. Lauderdale immediately after the robbery. Potenzo shot both victims, and he and Cammarano loaded the money into the blue bag and fled the scene.

Cammarano's testimony was that they actually went to the bar to do plumbing work and that without warning Potenzo shot the owners of the bar.[3] He (Cammarano) ran out of the bar, in shock, about ten seconds before Potenzo. Potenzo was presumably packing the cash into the blue bag during this period. At some point on the way back to the car, which was parked some distance from the bar because either it had run out of gas or was having engine trouble, Potenzo threw the blue bag to Cammarano who caught it by instinct.

Potenzo, by affidavit, now claims that he alone planned and committed the robbery and murder without the knowledge or assistance of Cammarano. The trial court must compare his present position, his previous testimony and the independent evidence previously presented to determine if his recantation is credible.

The independent evidence includes one witness who observed them leaving the bar "at the same time . . . as close together as you could be and not run into each other." They were stopped before they got to the car with Potenzo carrying the gun (Cam[illegible]no's) and Cammarano carrying the blue bag with the mon[illegible]he car contained about eight gallons of gas and a test drive revealed no evidence of engine trouble. Cammarano's packed suitcase was found in the trunk of the car with his clothes and with the gun cleaning kit and extra ammunition for the gun. Cammarano was unable to explain, if they were at the bar to do plumbing, what happened to his plumbing tools and the plumbing material to do the job.

If the court believes the recanted testimony, before a new trial is granted the court must also believe that the changed testimony would probably result in a different verdict in the new trial. *Mitchell v. State*, 493 So.2d 1058 (Fla. 1st DCA 1986). This can only be determined from a complete review of the previous trial. I have not attempted to summarize the entire testimony presented at trial. The State presented some twenty six witnesses and the defense presented seven. The summary given is merely to show that the record is extensive and may be sufficient for the court to make its decision without an evidentiary hearing.

[1]This was a morning robbery and the bar was closed so that the owners could count the previous evening's receipts.

[2]Cammarano worked as a plumber for the bar and was familiar with the safe.

[3]Cammarano admitted that Potenzo did say something about robbing the bar the previous evening but he paid no attention to it.

(COBB, J., dissenting.) I would affirm based on the *Tipsy Coachman Rule. See, e.g., Carraway v. Armour*, 156 So.2d 494 (Fla. 1963); *Taylor v. Orlando Clinic*, 555 So.2d 876 (Fla. 5th DCA 1989), *rev. denied*, 567 So.2d 435 (Fla. 1990). As shown by the facts outlined in Judge Harris's opinion, the instant 3.850 [illegible]on is patently frivolous and this case should be put out of its misery.

* * *

Criminal law—Separate convictions for grand theft auto and robbery with weapon involving single taking of same automobile proper

JESSIE SIRMONS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-1178. Opinion filed July 31, 1992. Appeal from the Circuit Court for Osceola County, Belvin Perry, Jr., Judge. James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Judy Taylor Rush, Assistant Attorney General, Daytona Beach, for Appellee.

(PETERSON, J.) The only issue that merits discussion in this appeal is whether convictions for both grand theft auto and robbery with a weapon are proper when the convictions are predicated on a single taking of the same automobile. We hold that both convictions are proper and affirm.

Sirmons gained entrance to the victim's automobile by threatening her with a knife and then directed her to drive to different locations. Later, Sirmons drove. After terrifying her with repeated acts of sexual battery and threats of death, he finally returned the keys to the victim, abandoning both the victim and the automobile.

In *Rodriquez v. State*, 443 So. 2d 236 (Fla. 5th DCA 1983) (*Rodriquez I*), this court considered whether a defendant could be convicted and punished for both robbery and grand theft when there was a single taking of property. This court held that dual convictions for these offenses were improper, reaffirming our earlier decisions that the theft of property which supports a conviction of robbery, even though that theft be grand theft, is a necessarily lesser included offense of robbery. *Rodriquez I*, at 239, citing *Perkins v. Williams*, 424 So. 2d 990 (Fla. 5th DCA 1983); *Castleberry v. State*, 402 So. 2d 1231 (Fla. 5th DCA 1981), *review denied*, 412 So. 2d 470 (Fla. 1982). *See also McClendon v. State*, 372 So. 2d 1161 (Fla. 1st DCA 1979).

Rodriquez I was quashed in *Rodriquez v. State*, 500 So. 2d 120 (Fla. 1986) (*Rodriquez II*). In reversing, the supreme court recognized the principle of constitutional law found in *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983): "Where a single act violates two criminal statutes, separate punishments for the two offenses are permissible if the legislature intends such a result." *Rodriquez II*, at 121. The court disapproved this court's emphasis on the facts of the case rather than on the statutory elements of the crimes charged. *Rodriquez I* also used erroneous reasoning, said the court, because it ignored the "clear legislative intent" expressed in section 775.021(4), that there be convictions and sentences for each criminal offense committed during a criminal episode. The supreme court stated:

> It is now well settled in Florida that the determination of whether one offense is a lesser included offense of another, at least for purposes of deciding whether there may be cumulative convictions based on a single factual event, is made by analysis of the statutory elements, without regard to the allegations in a particular charging document or the evidence presented at a particular trial. *State v. Baker*, 456 So. 2d 419 (Fla. 1984); *State v. Baker*, 452 So. 2d 927 (Fla. 1984); *Borges v. State*, 415 So. 2d 1265 (Fla. 1982).

Rodriquez II, at 121-22. The court then went on to analyze the robbery and grand theft statutes concluding that each contains at least one element that the other does not, to-wit: robbery—force; grand theft—the value of the property taken.

Thereafter, in *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), the supreme court expressly receded from *Rodriquez II*. The court concluded that dual punishments were improper since robbery and grand theft, when predicated on a single underlying act, address the same evil. *Carawan*, at 170. *Carawan* was short-lived, however, and the supreme court conceded in *State v. Smith*, 547 So. 2d 613 (Fla. 1989), that the rules of construction announced in *Carawan* were overridden by the legislative amendment of section 775.021(4), Florida Statutes. *Smith* leads us to believe that *Rodriquez II* is again the rule in Florida criminal jurisprudence and that dual convictions and sentences can result when robbery and grand theft are committed during a single act.

We are led to this conclusion by the following:

1. Although without citation to *Blockburger*,[1] the *Smith* court used the *Blockburger* test to determine whether the crimes charged were separate offenses subject to separate punishments. The legislative intent expressed in section 775.021(4), Florida Statutes (Supp. 1988), was cited as authority, but the statute appears to adopt the *Blockburger* test. *See Smith*, 547 So. 2d at 618 n.3 (Shaw, J., concurring in part, dissenting in part).

2. The court stated in *Smith* that, "[a]bsent a statutory degree crime or a contrary clear and specific statement of legislative intent in the particular criminal offense statutes, *all* criminal offenses containing unique statutory elements *shall* be separately punished." *Smith*, at 616. The court specifically held in *Rodriquez II* that second-degree grand theft is not a lesser included offense of robbery. *Rodriquez II*, at 121.

Having reviewed the recent unanimous decision of *Johnson v. State*, 17 F.L.W. S259 (Fla. May 1, 1992), however, we admit we entertain some doubt whether the supreme court would conclude that *Rodriquez II* controls. In *Johnson*, the supreme court analyzed the theft statute, section 812.014, Florida Statutes (1989). The supreme court held that the crime of theft is defined by subsection (1) of the statute[2] and that subsection (2) merely defines the degree of the crime committed under subsection (1). Thus, there is only one crime, that of theft. The value or the nature of the item as set forth in subsection (2) merely classifies the degree of the crime for the purpose of imposing a more severe sentence for the higher degree of the crime. Part of the rationale in *Rodriquez II* was that second degree grand theft was a separate crime containing an element not contained in the crime of robbery, to-wit: value of the property taken must be $100 or more, but less than $20,000. The *Rodriquez II* court added that second degree theft was a separate crime even though petit theft as defined in section 812.014 is a necessarily included lesser offense of robbery. *Rodriquez II*, at 122. *Johnson* seems to cloud that distinction. Further, *Johnson* seems to hold that, where there is one taking, there is one crime.

Notwithstanding some doubt raised by *Johnson*, we conclude that *Rodriquez II* controls the question whether there can be dual convictions of robbery and grand theft auto for a forceful taking of an automobile from another. We note that we are in good company. *Collins v. State*, 577 So. 2d 986 (Fla. 4th DCA 1991); *see also Huston v. State*, 557 So. 2d 887, 887 (Fla. 4th DCA 1990) (Anstead, J., concurring specially).[3]

The judgment and sentences are affirmed.

AFFIRMED. (HARRIS and GRIFFIN, JJ., concur.)

---

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

[2]Subsection 812.014(1) provides:

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.

[3]*Compare* Jackson v. State, 587 So. 2d 1168 (Fla. 4th DCA 1991), *citing* Rodriquez II, holding that convictions for both armed robbery and the underlying larceny were barred by double jeopardy considerations. Since the Fourth District cited Rodriquez II, we assume that the reference to larceny in Jackson meant petit theft.

* * *

Contempt—Civil—Error to find husband in civil contempt for failure to pay certain marital debts as ordered in final judgment of dissolution of marriage—Contempt does not lie to enforce payment of marital debt to third party pursuant to court order—Error to fail to make requisite finding as to husband's present ability to pay

EDDIE R. FINNEY, Former Husband, Appellant, v. CAROLYN D. FINNEY, Former Wife, Appellee. 5th District. Case No. 92-111. Opinion filed July 31, 1992. Appeal from the Circuit Court for Flagler County, Kim C. Hammond, Judge. Armistead W. Ellis, Jr., Daytona Beach, for Appellant. No Appearance for Appellee.

(DIAMANTIS, J.) This is an appeal from two orders finding the appellant/ex-husband in willful civil contempt for not paying certain marital debts of the parties as ordered in the final judgment of dissolution. We reverse.

Contempt does not lie to enforce payment of a marital debt to a third party pursuant to a final judgment of dissolution of marriage because the final judgment is in the nature of a property settlement. *Broyles v. Broyles*, 573 So.2d 357, 360 (Fla. 5th DCA 1990); *Hobbs v. Hobbs*, 518 So.2d 439 (Fla. 1st DCA 1988); *Meadows v. Bacon*, 489 So.2d 850 (Fla. 5th DCA 1986); *Marks v. Marks*, 457 So.2d 1137 (Fla. 1st DCA 1984).

Further, neither order contains the requisite finding of appellant's present ability to pay the debts nor does the record contain any such finding by the lower court. The absence of a finding of appellant's present ability to pay is a fatal defect requiring reversal. *Bowen v.* Bowen, 471 So.2d 1274, 1279 (Fla. 1985); *Fredericks v. Sturgis*, 598 So.2d 94 (Fla. 5th DCA 1992); *Mauldin v. Roman*, 588 So.2d 667 (Fla. 5th DCA 1991); *Broyles v. Broyles, supra.*

Accordingly, we vacate the contempt orders because failure to pay marital debts pursuant to a court order is not subject to the contempt power of a court. Moreover, the trial court failed to make the requisite finding of a present ability to pay.

REVERSED. (GOSHORN, C.J., and SHARP, W., J., concur.)

* * *

Criminal law—Post conviction relief—Sentencing—Defendant entitled to full credit for time served on incarcerative portion of original probationary split sentence—Award of credit is judicial task to be accomplished at sentencing rather than administrative function to be accomplished by Department of Corrections post-sentencing

STEVEN DOUGLAS WILSON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 92-1429. Opinion filed July 31, 1992. 3.850 Appeal from the Circuit Court for Citrus County, John P. Thurman, Judge. Steven Douglas Wilson, Raiford, Pro Se. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, Daytona Beach, for Appellee.

(PETERSON, J.) Steven Douglas Wilson appeals the summary denial of his motion for post-conviction relief pursuant to rule 3.850, Florida Rules of Criminal Procedure. We reverse only on the trial court's refusal to give full credit for time served on the incarcerative portion of the original probationary split sentence and affirm on all other issues.

Wilson originally was sentenced on ten counts of burglary of a structure to concurrent split sentences of three and one-half years' incarceration followed by two years' community control. The sentence exceeded the statutory penalty of five years for third-degree felonies. After serving the initial period of incarceration, he twice violated the terms of community control before the expiration of five years from the time of original sentencing and was finally sentenced to five years' incarceration following revocation of community control. Wilson received credit for county jail time served following his arrest for violation of the terms of community control, but none for the original period of incarceration.

The Department of Corrections found the error and communicated assurances that Wilson would receive the appropriate credits. Nevertheless, Wilson is entitled to a judicial award of proper jail time credit. § 921.161(1), Fla. Stat. (1991). The Department of Corrections most likely will be enlisted by the court to calculate the credit, but the award of the credit is a judicial task—to be accomplished at sentencing rather than an administrative function to be accomplished post-sentencing. The Department of Corrections cannot correct an illegal sentence or render the illegality harmless; the trial court is required to accomplish the task. *Jones v. State*, 570 So. 2d 345 (Fla. 5th DCA 1990).

We affirm the denial of all issues raised in the 3.850 motion

IN THE DISTRICT COURT OF
APPEAL, FIFTH DISTRICT
OF THE STATE OF FLORIDA

CASE NO. 91-1178

JESSIE SIRMONS,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING
OR
SUGGESTION THAT QUESTION BE CERTIFIED

APPELLANT, by and through his undersigned counsel, respectfully requests that this Honorable Court grant rehearing of this cause; and in support hereof Appellant would show that:

1. On July 31, 1992, this Honorable Court affirmed Appellant's convictions for, inter alia, both robbery with a weapon and grand theft of a motor vehicle;

2. In concluding that "[State v.] Rodriguez[, 500 So.2d 120 (Fla. 1986)] II is again the rule in Florida criminal jurisprudence and that dual convictions and sentences can result when robbery and grand theft are committed during a single act[,]" this Honorable Court has apparently overlooked the fact that proof of robbery requires proof of "taking of money or other property which may be the subject of larceny," s. 812.13(1), Fla. Stat. (1991), and that it is not the value of the property taken in this case which provides an essential element of grand theft but the nature of the property, i. e., a motor vehicle, and that

the property taken was necessarily alleged in the information and proven at trial to be "property," to-wit: a motor vehicle;

3. The conclusion that "Rodriguez II" requires affirmance in this case also apparently overlooks the fact that in Rodriguez, the element which constituted the charge of grand theft in that case which was not part of the charge of robbery was the value of the property, i. e., a cash register valued at $250.00 containing less than $50.00 cash, whereas in this case the nature of the property was such that its taking constituted the subject of both the robbery and the grand theft; See Rodriguez v. State, 443 So.2d 236 (Fla. 5th DCA 1983), and s. 812.014, Fla. Stat. (1981);

4. This Honorable Court's decision correctly acknowledges that, under Johnson v. State, 17 F.L.W. S259 (Fla. May 1, 1992), the Supreme Court would hold that where there is one taking, there is but one crime of robbery or theft;

5. This Honorable Court's decision conflicts with its own holding in Castleberry v. State, 402 So.2d 1231 (Fla. 5th DCA 1981), review denied, 412 So.2d 470 (Fla. 1982), which Appellant contends remains viable and directly applicable to the facts of this case wherein the taking of an automobile was the result of the same force and fear that constituted the robbery and thus could not support a separate conviction; Castleberry was relied on recently by the Third District Court of Appeal to reverse a second conviction of robbery because even though the takings were separate, they were "in reality and by their propinquity, a continuous transaction;" Nordelo v. State, 17 F.L.W. D1746 (Fla.

3d DCA July 21, 1992);

6. This Honorable Court's decision is in conflict with Johnson v. State, 17 F.L.W. S259 (Fla. May 1, 1992), because it does not distinguish the nature of the property from its value in determining whether the offense of grand theft was committed as part of the crime of robbery, and reaches a conclusion contrary to that which Johnson would dictate.

WHEREFORE Appellant respectfully requests that this Honorable Court grant rehearing of this cause and reverse Appellant's conviction for grand theft of a motor vehicle.

IN THE ALTERNATIVE, Appellant respectfully suggests that this Honorable Court certify as one of great public importance the question of whether there may be dual convictions for robbery and grand theft where the property which is the subject of the robbery is a motor vehicle.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Jessie Sirmons, P. O. Box 500, A-79, Olustee, Florida 32072-0500, this 17th day of August, 1992.

Bryan Newton
ATTORNEY

91-580 BJ

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JESSIE SIRMONS,
Appellant,

v.

Case No. 91-1178

STATE OF FLORIDA,
Appellee.
_____/

DATE: August 28, 1992

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING OR SUGGESTION THAT QUESTION BE CERTIFIED, filed August 17, 1992, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

Frank J. Habershaw

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Office of the Public Defender, 7th JC
Office of the Attorney General, Daytona Beach
Jessie Sirmons