IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 82,002

KEVIN BERNARD BROWN,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS AND INITIAL BRIEF ON THE MERITS OF THE CROSS-APPEAL

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TABLE OF CONTENTS

TABLE OF CITATIONS

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STATE OF FLORIDA,	:	
Petitioner,	:	
VS.	:	CASE NO. 82,002
KEVIN BERNARD BROWN,	:	
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RESPONDENT'S ANSWER BRIEF ON THE MERITS AND
INITIAL BRIEF ON THE MERITS OF THE CROSS-APPEAL

I PRELIMINARY STATEMENT

This is a state appeal from the decision of the First District Court of Appeal below, Brown v. State, 617 So.2d 744 (Fla. 1st DCA 1993). Respondent was the defendant in the circuit court and the appellant in the district court. All proceedings were held in Duval County before Circuit Judge Hudson Olliff.

Volume I of the 10-volume record on appeal will be referred to as "R"; Volumes II through VIII will be referred to as "T." The supplemental record containing the hearing of November 13, 1990, will be referred to as "SR." The supplemental volume of the hearing held December 3, 1990, will be referred to as "ST."

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as reasonably accurate, but makes the following additions:

On December 30, 1989, Osborn "Shakey" Hall, manager of the Avenue B General Store, was robbed by two men and shot. Hall testified that one of the robbers was Ronald Burch, whom he had known for three years (T-179). At trial in December, 1990, Hall identified respondent, Kevin Brown, as Burch's companion (T-181-82). Hall testified that Burch was armed with a .38 revolver and the other man had an automatic pistol (T-183). Hall believed four to five shots were fired at him (T-184). Hall indicated that he had identified a photograph of Burch from a photospread detectives showed him at the hospital (T-211). He further indicated he identified Brown's photo from a separate photospread (T-213). He acknowledged that he was more positive of his identification of Burch than of Brown (T-216-17). Hall acknowledged having 5 or 6 felony convictions. He said he was on both probation and parole for three 1983 convictions of operating an illegal lottery (T-172-73).

Respondent requested the trial to reconsider its ruling on the state's motion in limine based upon the state's inquiries of Hall on direct examination:

> Q: Now, has anybody made you any promises to you to get you to testify here today, sir?
>
> Q: Has anybody made any dealings with you to get you to testify at all?

Q: Have I or anybody else told you that your probation would not be violated no matter what you said or anything like that?

(T-174,220-28). Defense counsel argued that these questions opened the door to defense inquiries about the nolle-pross of Hall's gambling charges, and the fact his parole was not violated, despite the new gambling charges. The judge denied the request (T-228). Defense counsel also requested that the state's motion in limine #1 be denied, particularly since the state had, on direct examination, questioned Hall about his "illegal occupations" (T-172,228-38). The court granted the state's motion (T-235).

Kevin Walker testified that, on December 30, 1989, he saw Kevin Brown and Calvin Broughton at George DeCosta's house. Brown said "he had to go make a lick," which in street talk, means to rob someone (R-318-20). Brown and Broughton left and Walker saw them later in the day with a "wad of money" (R-320). Walker said Brown was armed at that time with a .25 automatic (T-324).

Ronald Burch pleaded guilty to attempted second-degree murder and armed robbery in exchange for a 10-year sentence, conditioned on his testimony against Brown (T-345-47). Burch testified that he, Broughton and Brown robbed Shakey Hall at the Avenue B General Store. Burch was armed with a .38 revolver and Brown had a .25 automatic (T-350). Burch denied firing his weapon and indicated that Brown, after removing money from Hall's pockets, started shooting towards him (T-353). Burch testified that, before the robbery, Brown had said, "We'll have

to kill him if we go in the store and rob him, because he know your face" (T-356).

Detective Watson testified concerning Brown's written statement following his arrest January 4, 1990 (T-383-84). In that statement, Brown indicated that Burch and Kevin Walker robbed Shakey Hall and he (Brown) drove them there (T-394-96).

Detective Hill testified that he prepared two photo-spreads, one containing a photograph of Burch and the other containing a photo of Brown, which he showed to Hall (T-415-18). Hill indicated Hall positively identified the photo of Burch and signed the back (T-418). With respect to the second photospread, Hall did not, in Hill's opinion, make a positive identification, but rather, selected two photos, one being Brown's (T-419). Hill indicated that, when he read the written statement Detective Watson had received, he told Brown he was not being truthful (T-424-26). Hill left the interrogation room but did return, at which time, Brown admitted that he and Burch had gone inside the business (T-428-29). Hill then requested that Brown put that statement in writing. He left the statement form with Brown and, when he returned shortly thereafter, discovered pieces of torn paper. He gathered the small pieces of paper together and took them to the Florida Department Lab [sic] (T-429).

Detective Robinson, Hill's partner, testified that Brown admitted to him that he had participated in the robbery and had been one of the persons who shot the victim (T-45). Brown

indicated he was armed with a .25 and Burch had a .38 weapon (T-452).

David Warniment, an expert in firearm identification, testified that the three shell casings seized inside the store were .25 auto cartridge cases (T-500,299-300). The spent cartridge which had been seized from under Hall's shirt in the shoulder area was a .25 auto full metal jacketed bullet (T-500, 282-83,285,300).

At the close of the state's case, respondent moved for a judgment of acquittal, which was denied (T-526-27).

Tommy Reeves, a private detective, testified that, on March 12, 1990, Shakey Hall told him that he knew one of the persons who had robbed his store, but did not know the second one. He indicated that he could not identify the second person since he kept his head down most of the time he was there, and Burch had done most of the talking (T-567-68).

III SUMMARY OF ARGUMENT

In his cross-appeal, respondent argues that he was denied a fair trial because he was denied the right to cross-examine Shakey Hall, the victim of the robbery and shooting, concerning Hall's previous arrests on gambling charges. Respondent was entitled to inform the jury of these charges and the fact they were nolle-prossed after the robbery here.

The certified question is whether a defendant can be convicted of attempted first-degree murder, armed robbery with a firearm, and use of a firearm in commission of a felony. The state confusingly argues both that Blockburger controls the double jeopardy issue here and that it does not not. Respondent argues that the First District Court below correctly conducted a Blockburger analysis, on the basis of which, it concluded that the use of a firearm conviction violated double jeopardy and must be vacated.

IV ARGUMENT

ISSUE I

THE TRIAL COURT ERRED REVERSIBLY IN GRANTING THE STATE'S MOTION IN LIMINE, THEREBY DEPRIVING RESPONDENT OF HIS RIGHT, GUARANTEED BY BOTH THE FLORIDA AND FEDERAL CONSTITUTIONS TO CONFRONT HIS ACCUSERS.

While respondent raised three guilt issues, the First District Court of Appeal addressed only two sentencing issues in its opinion, certifying the question which respondent addresses in Issue II of this brief. Under Trushin, once this court accepts jurisdiction of a case, it can reach any and all issues raised in the case. Trushin v. State, 425 So.2d 1125 (Fla. 1982). Respondent therefor asks this court to consider whether the trial court erred in granting the state's motion in limine, which prevented him from questioning the robbery victim about the circumstances surrounding gambling charges against him, which charges were dropped after the robbery and before respondent's trial.

Before trial, the state filed a motion in limine seeking to preclude the defense from eliciting facts concerning Osborn "Shakey" Hall's October 24, 1989, arrest for bookmaking and the subsequent nolle-pross of that charge (R-64-65). At a hearing on the motion, the fact of Hall's arrest was established. A violation of probation affidavit was also filed, and the arrest also caused a violation of parole hearing (ST-43,56). The charges were nolle prossed January 18, 1990, in order for Hall to render substantial assistance to the state attorney's office and the Jacksonville Sheriff's Office (R-66, ST-26-27). The

prosecutor indicated that, within one month to six weeks after the nolle pross, Hall had rendered the substantial assistance thereby precluding refiling of the charges (ST-27,31). The trial court granted the state's motion, precluding Brown from questioning Hall about these matters during cross-examination (R-80, T-133).

It is well-settled that bias or prejudice of a witness has an important bearing upon his credibility and evidence showing such bias is always relevant. Wells v. State, 336 So.2d 416 (Fla. 2d DCA 1976). Cross-examination is the proper method by which to adduce evidence of bias or prejudice. Davis v. Ivey, 93 Fla. 387, 112 So. 264 (1926), cert. denied 275 U.S. 526, 48 S.Ct. 19, 72 L.Ed. 407 (1927). As noted in Lavette v. State, 442 So.2d 265, 268 (Fla. 1st DCA 1983), review denied, 449 So.2d 265 (Fla. 1984), the defense should be allowed wide latitude to demonstrate bias or possible motive for a witness' testimony, and "any evidence tending to establish that a witness is appearing for the state for any reason other than to tell the truth should not be kept from the jury."

In Morrell v. State, 297 So.2d 579, 580 (Fla. 1st DCA 1974), the First District Court said:

> It is clear that if a witness for the state were presently or recently under actual or threatened criminal charges or investigation leading to such criminal charges, a person against whom such witness testifies in a criminal case has an absolute right to being those circumstances out on cross-examination or otherwise so that the jury will be fully apprised as to the witness' possible motive or self-interest with respect to the testimony he gives.

> Testimony given in a criminal case by a witness who himself is under actual or threatened criminal investigation or charges may well be biased in favor of the state without the knowledge of such bias by the police or prosecutor because the witness may seek to curry their favor with respect to his own legal difficulties by furnishing biased testimony favorable to the state. (emphasis added)

Thus, the actual existence of any agreement concerning testimony is not a prerequisite to the admissibility of this type of testimony. Rather, the "mere chance that a witness, in [his] own mind, may be attempting to curry favor is sufficient to allow for broad cross-examination in order to show bias." Thornes v. State, 485 So.2d 1357, 1359 (Fla. 1st DCA), review denied 492 So.2d 1335 (Fla. 1986).

In its brief in the district court, the state argued that evidence concerning the disposition of the charges against Hall was not admissible because it was remote in time from the trial. It is true that Morrell held that charges from another state, which related to a 2-year-old incident and had been dropped six months to a year earlier, were too remote to be relevant. The state explained that the charges against Hall here were dropped in January, 1990, and the trial was held in December, 1990, 11 months later. This comparison with Morrell is specious, however, because the robbery and shooting here occurred in December, 1989.

Thus, while it may have taken this case a year to go to trial, the charges against the victim/state witness Hall were nolle-prossed after the robbery and shooting and while charges

resulting from those crimes were pending. That is, there is a temporal nexus between the charges which were dropped and the charges which were tried which was not present in Morrell, where the charges on which the defense wanted to impeach the witness were unrelated in time or subject matter to the crimes being tried. Here, the crucial timing of the nolle-pross made that incident relevant to Hall's testimony.

As this court well knows, a nolle-pross is not an absolute barrier to the reinitiation of a prosecution. There is no guarantee that, had the state been displeased with Hall's testimony, it would not have reinstated the gambling charges. More to the point, Hall may have believed the charges could be reinstated, see Thornes, and this alone would have given him a motive to improve his testimony. This court should bear in mind that, while Hall was positive of his identification of Burch, whom he knew previously, he was not positive when he identified Brown as Burch's companion.

Brown contends he should have been allowed to cross-examine Hall concerning his October arrest and the subsequent nolle-pross of the charge. The fact that both the prosecutor and Hall's attorney denied that any consideration was given for Hall's testimony in Brown's trial (ST-42,29-30), was not dispositive, and was probably irrelevant. Rather, it was for the jury to determine with full knowledge of the facts whether Hall had a possible motive based on self-interest to give the testimony he gave. For that reason, respondent contends the trial court's ruling was error.

ISSUE II/CERTIFIED QUESTION

WHETHER A PERSON WHO HAS BEEN CONVICTED OF ARMED ROBBERY WITH A FIREARM AND ATTEMPTED FIRST-DEGREE MURDER WHICH ARISES OUT OF THE SAME CRIMINAL EPISODE OR TRANSACTION MAY ALSO BE CONVICTED OF POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, TO WIT: ATTEMPTED FIRST-DEGREE MURDER, WHERE THERE HAS BEEN NO ENHANCEMENT OF THE ATTEMPTED MURDER CHARGE AS A RESULT OF USE OF THE FIREARM.

Respondent Brown was found guilty of armed robbery with a firearm, attempted first-degree murder, and use of a firearm during commission of a felony, to wit: attempted first-degree murder. The First District Court of Appeal held that, under a Blockburger/Cleveland double jeopardy analysis, Brown could not be convicted of the use of a firearm charge, as its elements were shared with the other charges, and vacated it. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Cleveland v. State, 587 So.2d 1145 (Fla. 1991). The court certified the question, and the state appealed.

A Blockburger analysis focuses on whether each offense requires proof of an element which the other does not, to decide whether a defendant can be convicted of one offense or two. In Cleveland, this court held that, for the single act of using a firearm in committing a robbery, a defendant could be convicted only of armed robbery but not also convicted of use of a firearm in commission of a felony.

There is no question but that there is a vast potential for confusion in double jeopardy issues, and the state appears confused on what its position is. In quoting Missouri v.

Hunter, the state argues that a Blockburger analysis does not determine whether dual punishments may be imposed, but then argues that the legislature codified Blockburger in the 1989 amendment to section 775.021(4), Florida Statutes, as the test of double jeopardy in Florida. Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). The state quoted the following, inter alia, from Hunter:

> Our analysis and reasoning in Whalen and Albernaz leads inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. [Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)] (emphasis added in state's brief)

Missouri v. Hunter, 459 U.S. at 368, (quoted in State's Merit Brief (SMB), p. 6). The state then argues:

> The 1988 Florida Legislature simplified the task of Florida courts vis-a-vis double jeopardy by amending Section 775.021(4), Florida Statutes (1989), 1 to include the following statement of legislative intent: [quotes section 775.021(4) in its entirety]
>
> 1 This section as amended is a codification of the following statutory element test used to determine whether two offenses are the "same," which was established in Blockburger...

(SMB-7).

The state seems to be arguing incongruously both that Blockburger is the test of double jeopardy in Florida (section 775.021(4)) and that it is not (Missouri v. Hunter).

Respondent contends that Blockburger is the test for double jeopardy in Florida, except in cases where the court has found a clear legislative intent to the contrary. The exceptions, such as the one-homicide-conviction-per-death rule of Houser, do not apply here. Houser v. State, 474 So.2d 1193 (Fla. 1985). It may be worth noting that Justice Barkett predicted that double jeopardy questions would continue to plague the court, notwithstanding the supposedly once-and-for-all statement of intent set out in section 775.021(4). Justice Barkett said:

> It is not true, as the majority implies, that the pre-Carawan "standard" governing the propriety of multiple punishments was in any sense coherent....
>
> As we noted in our own review of Carawan, there were some occasions when this Court arbitrarily applied a strict Blockburger analysis and others when it arbitrarily did not. This is the chaotic "standard" to which the majority returns today. (cites omitted)

State v. Smith, 547 So.2d 613, 619 (Fla. 1989) (Barkett, J., dissenting). The dissent continued:

> Yet the meaningless of this "standard" is not my chief objection to the majority's approach. Certainly, the fact that the lower courts now are thrown helter-skelter back into the pre-Carawan muddle is reason enough to object, since it necessarily implies that the lower courts now will be entitled to apply whichever of competing and inconsistent pre-Carawan cases they deem fit. More importantly, the majority abdicates this Court's obligation to avoid statutory constructions that lead to absurdity and to apply statutes rationally, acording to the principles of our Constitution. For these reasons, the majority interprets subsection 775.021(4), Florida Statutes (Supp. 1988), in a manner that

> violates both due process and the prohibition against double jeopardy....

Id. This case amply illustrates the problems Justice Barkett warned of.

The state misstated the pertinent element of armed robbery. The state argued that armed robbery requires that the person charged carry only a "deadly weapon" and not specifically a firearm (SMB-10). The statute defines the highest degree of robbery (a first-degree felony punishable by life) as occurring when "the offender carried a firearm or other deadly weapon." § 812.13, Fla.Stat. Separate portions of the standard jury instructions cover a firearm, on the one hand, or a deadly weapon, on the other. Fla.Std.Jury Insts. (Crim.). So, carrying either a firearm or a different deadly weapon would be treated the same under the statute, but carrying a firearm is an element, albeit an element with an alternative, of armed robbery. Brown was convicted specifically of robbery with a firearm (R-81).

According to the state, use of a firearm in commission of a felony is not a true lesser-included offense of armed robbery because, in terms of statutory elements, the firearm could be used in any felony, not just armed robbery. There are two errors in this argument. First, it is an argument which is modelled on the way this court interpreted the felony murder statute. This court has interpreted legislative intent to be that a defendant can be convicted both of felony murder and of the underlying felony. State v. Enmund, 476 So.2d 165 (Fla.

1985). Enmund is more reasonably read as a construction of the felony-murder statute than as a statement of general principle. It stands for the uniqueness of the felony-murder statute, not for the applicability of a similar principle in different contexts. There is no precedent for applying an Enmund analysis in any other context, but that is what the state is asking for here. The second error is that Cleveland presented the same or a similar issue, and this court has previously rejected this very argument in Cleveland.

According to the First District's analysis in the Brown opinion below, this court's opinion in Cleveland focused on the "single act" of possessing a firearm, that is, Cleveland was act-specific. Brown, 617 So.2d at 747. According to the district court, under a Cleveland analysis, since Brown committed discrete acts of attempted murder and robbery, he could be also be convicted of use of a firearm, since he committed more than a single act. The district court believed, however, that the proper analysis was the statutory elements test of Blockburger and section 775.021(4). Under a statutory elements test,

> ...the charge of possession of a firearm during the commission of a felony does not contain any elements that are distinct from the armed robbery with a firearm and, since both crimes occurred during the same criminal transaction, the appellant could not be convicted and sentenced as to both.

Brown, 617 So.2d at 747. The district court's seeming criticism of Cleveland was ultimately unnecessary, because Cleveland would reach the same result under either a "same act" or a statutory elements analysis.

The state argued that legislative intent controls over a Blockburger analysis. Counsel for respondent agrees. The only problem is how to put that principle into practice, and the state is not persuasive on this crucial point. The legislature has made no express statement of intent concerning the question of multiple convictions in this context. In Hall v. State, 517 So.2d 678 (Fla. 1988), this court held that dual convictions for armed robbery and use of a firearm in commission of a felony were not permissible. In Cleveland, a post-Smith case, this court reaffirmed the holding of Hall. The state now argues, in effect, that this court misconstrued legislative intent in Hall and Cleveland.

So, in this context, did the legislature intend to permit dual convictions? Did the legislature intend that each one of multiple convictions had to have a firearm element, or a separate conviction of use of a firearm was permissible? Or, did the legislature intend the enhancement to apply only once, that is, once a defendant was convicted of one armed offense, the use of a firearm charge was subsumed as to all offenses in the same episode? The statutes do not say expressly. Since 1988 and again in 1991, this court has said that dual convictions are not permitted. Cleveland; Hall. The legislature has not overruled this court on this point. The legislature's inaction on this matter contrasts markedly with its hurried passage of the anti-Carawan amendment. Ch. 88-131, Laws of Fla.; Carawan v. State, 515 So.2d 161 (Fla. 1987).

Without an express statement of contrary legislative intent, the state must argue that dual convictions here are permissible under Blockburger, but this court has previously held that they are not, in Cleveland and Hall, and the legislature has not acted to the contrary. Under a Blockburger analysis, Brown may not be convicted of both armed robbery and use of a firearm in commission of a felony. Without a clear statement of legislative intent to the contrary, his dual convictions cannot stand.

Respondent asks that this court notice the effect of the habitual offender statute on the fact that this appeal by the state is even before this court. While the state strenuously seeks reinstatement of the use of a firearm conviction (a second-degree felony), which is related to the attempted murder conviction (a first-degree felony), respondent has been sentenced to concurrent life sentences as an habitual offender, both on the attempted murder and the armed robbery. This court's disposition of this sentencing issue is not likely to make any real difference here.

The state is in a position to make this argument only because Brown's attempted murder conviction were not reclassified due to the firearm, as it could have been, under section 775.087, Florida Statutes. It is abundantly clear that the conviction was not reclassified because, due to a quirk in the habitual offender statute, Brown could and did get a worse sentence on a first-degree felony (on which an habitual offender sentence of life can be imposed) than on a life felony, on

which only a nonhabitual life sentence could be imposed. See (Cecil) Johnson v. State, 616 So.2d 1 (Fla. 1993); Burdick v. State, 594 So.2d 267 (Fla. 1992).

If this court is going to decide this case, it ought to reach the guilt issue and decide whether Brown should get a new trial. If, on the other hand, the court is interested only in the sentencing issue, it is hardly worth the effort of a decision, because it will not substantially affect his sentence. Respondent urges this court to uphold its previous decision in Cleveland.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court reverse his conviction and remand for new trial, or in the alternative, affirm the district court decision on the certified question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Wendy Morris, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Kevin Bernard Brown, inmate no. 114417, Sumter Correctional Institution, P.O. Box 667, Bushnell, Florida 33513, this 1st day of ~~August~~ September, 1993.

KATHLEEN STOVER