IN THE SUPREME COURT OF FLORIDA

83013

CASE NO. ~~81,183~~

FREDERICK E. MELVIN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

CASES **PAGE**

CASES **PAGE**

OTHER AUTHORITIES

INTRODUCTION

Respondent, the STATE OF FLORIDA, was the prosecution at trial. Petitioner, FREDERICK E. MELVIN, was the Defendant. All parties will be referred to as they stood at trial. The symbols "Exh." followed by the appropriate letter and page number will be used to refer to the record on appeal in this Court, including the transcript of the plea colloquy conducted June 14, 1990, and "B" will refer to the Defendant's brief on the merits, respectively. The symbol "App." followed by the appropriate letter designates the State's appendix attached hereto.

STATEMENT OF THE CASE AND FACTS

The Defendant, Frederick E. Melvin, was charged by Information with attempted first degree murder and unlawful possession of a firearm while engaged in a criminal offense, in the courts of the Eleventh Judicial Circuit Court of Dade County, Florida, Case No. 89-46022. He was additionally charged with second degree murder and unlawful possession of a firearm while engaged in a criminal offense, Case No. 90-3133. (App. A, B).

On June 14, 1990, the Defendant negotiated a plea with the State of Florida wherein he pled no contest to both Informations. The Defendant's trial counsel, Mr. Robert Singer, stipulated that each Information, if proved, would constitute *prima facie* cases of guilt. (Exh. C:29; App. A, B). The trial court conducted the following colloquy:

> **THE COURT:** Is that your understanding?
>
> **MR. SINGER:** (Defense Counsel) That's correct, Judge. The bottom line is that it's 30 years with a minimum mandatory of three included, and all sentences to run concurrent.
>
> **THE COURT:** This is what you communicated to your client?
>
> **MR. SINGER:** Pardon me?
>
> **THE COURT:** Is this what you communicated to your client?
>
> **MR. SINGER:** That's correct, judge.
>
> **THE COURT:** That's your understanding, Mr. Frederick Melvin?

THE DEFENDANT: Pardon me? Yes, Sir.

THE COURT: Mr. Frederick Melvin, I find that you are alert and intelligent, that you have understood the terms of the plea as explained to you by your lawyer, you have had ample opportunity to discuss this case with your lawyer, your lawyer is able and competent, your plea is free and voluntary, you understand the nature and consequences of your plea, you have no right to a presentence investigation, and there is ample evidence to support the plea based upon the stipulation of counsel.

(Exh. C:30-31).

Pursuant to the plea, the trial court sentenced the Defendant in Case No. 89-46022 to thirty years on Count I, with a three-year minimum mandatory term, plus fifteen years on Count II to be served concurrent with Count I. As to Case No. 90-3133, the Defendant was sentenced to thirty years state prison on Count I, with a three-year minimum mandatory term, plus fifteen years on Count II to be served concurrent with Count I. Terms on all counts in both cases were to be served concurrently including the two three-year minimum mandatory terms which were to be served concurrently to each other. (Exh. C:30).

No direct appeal of the convictions was taken. However, the Defendant petitioned this Court for a state Writ of Habeas Corpus. The substance of said petition rested on the Information sworn to by the Assistant State Attorneys, alleging that Assistant State Attorneys have no authority to attest to such

charging documents. The petition for review was denied by this Court on November 19, 1990. (Reference Florida Supreme Court Case No. 76,834).

On January 14, 1991, the Defendant petitioned the United States Supreme Court for a Writ of Certiorari to review this Court's denial of state Habeas Corpus relief. Similar claims were raised. The petition was ultimately denied on February 19, 1991. (Reference United States Supreme Court Case No. 90-6591).

On August 29, 1991, the Defendant filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the Southern District of Florida. He filed a Memorandum of Law in Support of his Petition. By Order of the Honorable Magistrate Judge Sorrentino, the Defendant was permitted to proceed in *Forma Pauperis* in the District Court. The grounds raised in the Petition were that the court lacked jurisdiction to enter judgment or impose sentence because the Informations were signed by an assistant state attorney in violation of §27.181(s), Fla. Stat. and Rule 3.140(g), Fla.R.Crim.P.

On November 7, 1991, the State of Florida, Richard L. Dugger as Respondent, replied that the Defendant's claims were unexhausted as they were not brought before the state courts by the correct procedural vehicle, nor did the claim rise to the level of a federal constitutional violation. On November 26,

1991, Magistrate Judge Sorrentino recommended the Petition for Writ of Habeas Corpus be denied, and Judge James W. Kehoe entered a final judgment denying the petition for Writ of Habeas Corpus on January 8, 1992. (Reference United States District Court of Appeal - Southern District of Florida Case No. 91-1857-Civ-KEHOE).

On September 20, 1993, the Defendant filed an appeal in the United States Court of Appeals for the Eleventh Circuit, alleging that the Southern District abused its discretion in affirming the trial court's judgment and sentence based upon the purported defective Informations. Following receipt of the Briefs on Appeal, the appeal was denied December 23, 1993. (Reference United States Court of Appeals For the Eleventh Circuit Case No. 93-4357).

This appeal follows in which the Defendant raises for the first time, the issue of trial court error on the basis of double jeopardy violations in judgment and sentencing.

QUESTION PRESENTED

WHETHER DEFENDANT IS PREVENTED FROM SEEKING TO OVERTURN HIS CONVICTION AND SENTENCE FOR POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE ON DOUBLE JEOPARDY GROUNDS WHERE HE WAS ALSO CONVICTED OF FELONIES ENHANCED BY THE USE OF THE SAME FIREARM, BUT WHERE, IN A NEGOTIATED PLEA AGREEMENT HE HAS PLED TO BOTH THE JUDGMENT AND TO THE SPECIFIC SENTENCE IN QUESTION? [RESTATED]

SUMMARY OF THE ARGUMENT

(A) The Defendant first argues that his plea was involuntarily and unknowingly entered because he was not told of the consequences of his plea and his counsel was ineffective for failing to so inform him. This contention is belied by the plea colloquy and the record.

(B) The Defendant argues he should not have been convicted and sentenced for both use of a firearm in the commission of a felony and for other felonies which were enhanced because of the use of a firearm. He bases this argument is based upon double jeopardy principles. As a general rule, under federal law, double jeopardy claims are waived by the entry of a guilty plea to the charges. An exception lies where the constitutional infirmity is the State's lack of power to bring the charges at all.

Defendant's case falls under the general rule. No double jeopardy claim was implicated until he was convicted of both charges. Up until that time under a variety of scenarios he could have been convicted of the felonies and of possession of a firearm. As such it can not be said that the state was without power at all to bring the charges.

This Court has previously approved the federal rule. The decision below was based on both the federal principles and upon this court's dictum. On the contrary, the cases which purportedly conflict with the decision below are not so grounded. One case did not even involve the question of waiver. The second, relying on the first, essentially found there could be no waiver because of the adverse consequences which would flow from a waiver. The State submits that subsequent consequences are not a valid consideration in determining whether a waiver occurred. Rather the analysis should examine the acts of the defendant prior to the waiver.

One such factor which must be considered is that Defendant's plea was negotiated both as to conviction and sentence. By so pleading he avoided the possibility of two consecutive life sentences without possibility of parole. (Exh. A:21; Exh. B:23). It would now be unjust to allow him to renege on his bargain.

The decision of the Third District Court of Appeal should be affirmed, and Defendant's convictions and sentences should be upheld. (Exh. 41).

(C) The State also respectfully submits that the Court's decision in Cleveland should be reexamined. The only test is identity of elements. As this Court has held in the past, the

homicide statute and the other felonies do not contain identical statutory elements. As such the State may properly convict and sentence Defendant for each offense. Thus regardless of whether Defendant waived the claim or not, his double jeopardy argument is without merit and his convictions and sentences should be affirmed.

(D) Even if Defendant's claims are meritorious, he is not entitled to simply have the allegedly jeopardy-violative convictions and sentences vacated. The sentences and convictions were part of a comprehensive *quid pro quo*. The State is therefore entitled either to the benefit of its bargain or to have the entire agreement set aside, although the State at its discretion, may seek to enforce the agreement without the objectionable elements. If the Court finds for Defendant, upon remand the valid charges should be reinstated and the parties placed in the positions they occupied immediately prior to the entry of the plea.

ARGUMENT

THE DEFENDANT WAIVED HIS DOUBLE JEOPARDY CLAIM AS TO BOTH CONVICTION AND SENTENCE BY KNOWINGLY AND VOLUNTARILY ENTERING INTO A COMPREHENSIVE NEGOTIATED PLEA AGREEMENT.

A. Defendant's plea was knowingly and voluntary upon the advice of effective counsel.

Initially, the Defendant contends that his plea was involuntary because he was not apprised of the consequences of the plea, there was no factual basis for the plea, and he did not know that he could be sentenced on each of the counts to which he pled. Separately he contends that this lack of knowledge was due to incompetent counsel. A review of the plea colloquy in this case refutes each of those claims, and the Defendant should not be afforded relief on this basis.

In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the United States Supreme Court held that the two part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel claims. This two part test requires that a defendant 1) show that his counsel's representation fell below an objective standard of reasonableness, and 2) demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland

v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In analyzing such a claim, the fact that the defendant entered a plea is an important fact. Indeed, less than the exhaustive and plenary investigation that would accompany a trial is required to enter a plea. Lee v. Hopper, 499 F.2d 456 (5th Cir.), *cert. denied*, 419 U.S. 1053, 42 L.Ed.2d 650, 95 S.Ct. 633 (1974). In addition, it has been held that "counsel owes a lesser duty to a client who pleads guilty than to one who decides to go to trial, and in the former case counsel need only provide his client with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial." Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984), *citing* Walker v. Caldwell, 476 F.2d 213, 218 (5th Cir. 1973). In addition, in order to obtain relief counsel must show that there is a reasonable probability that he would not have pled guilty but for counsel's error. Hill v. Lockhart, *supra*. Applying these standards to the case *sub judice*, it is apparent that relief must be denied.

On the basis of the Information alone, Defendant was apprised of the fact that he was being charged with two life felonies and two second degree felonies. (App. A, B). Defense Counsel, Mr. Singer, attested before the court that he had consulted with his client and communicated the plea to him, and the Defendant responded affirmatively when asked if, indeed the

terms of the plea had been so communicated to him by counsel. (Exh. C:30). The factual basis for the plea was stipulated to by counsel as stated in the Informations. Moreover, the Defendant has not demonstrated that he would have gone to trial, but for the alleged errors of his attorney. The plea colloguy clearly supports the trial court's finding that the Defendant's plea was voluntary and knowingly entered, and absent an abuse of discretion should not be disturbed on appeal.

B. Defendant has waived his double jeopardy claim.

Defendant asserts that under Cleveland v. State, 587 So. 2d 1145 (Fla. 1991), it was improper to convict and sentence him on the charge of unlawful possession of a firearm while engaged in a criminal offense where he was also convicted of other offenses which were enhanced because of the use of a firearm.[1] He further asserts that that claim was not waived when he pled guilty, without objection, to the charges he now complains of and agreed to the sentences which were imposed in order to avoid potential consecutive life sentences without possibility of parole. The Third District Court of Appeal rejected his contentions. (Exh. p. 41) That court was correct and its judgment should be affirmed.

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[1] But see the State's argument "C.", below.

The question of whether the double jeopardy protection afforded under the U.S. Constitution[2] is waivable where the Defendant pleads guilty is controlled by United States v. Broce, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). Broce sets forth the general rule that a voluntary and counseled guilty plea waives all constitutional claims, including double jeopardy. Broce, 488 U.S., at 569. Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), sets forth the narrow exception to the rule. The exception applies only where the constitutional infirmity lies in the State's power to bring any charge at all. Broce, 488 U.S., at 575.

In Johnson v. State, 483 So. 2d 420 (Fla. 1986), this Court ruled that there are circumstances where a jeopardy claim may be waived, *citing* United States v. Pratt, 657 F.2d 218 (8th Cir. 1981), and United States v. Herzog, 644 F.2d 713 (8th Cir. 1981), *cert. den.*, 451 U.S. 1018, 101 S. Ct. 3008, 69 L.Ed.2d 390 (1981).[3]

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[2] Florida's double jeopardy clause in Article I, Section 9 of the state constitution was intended to mirror the protection provided by the U.S. Constitution. Carawan v. State, 515 So. 2d 161, 164 (Fla. 1987), overruled on other grounds, State v. Smith, 547 So. 2d 613 (Fla. 1989).

[3] Johnson pled guilty to a lesser offense and was convicted and sentenced accordingly. The trial court subsequently improperly vacated the judgment and reinstated the original charges, for which Johnson was tried and convicted.

The Court found that the double jeopardy claim had not been waived by the defendant's failure to raise the issue before his trial. Although Johnson did not involve the question of whether a guilty plea waives a double jeopardy claim, the Court did observe:

Both Pratt and Herzog involved guilty pleas to charges which were allegedly multiplicitous. Presaging Broce, the Eighth Circuit distinguished Menna in both cases and held that the claim was waived.

Significantly, the Menna exception does not appear to have been applied by the Supreme Court in any case where, as here, the allegedly jeopardy-violative charges were brought in the same proceeding. Although this factor is not *per se* dispositive of the issue, it highlights the reasons for the exception. In both Menna and Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L.Ed.2d 628 (1974), the defendants had previously been convicted. Subsequent to their convictions, new charges, based upon the same offense were brought. In both cases the exception was applied because:

> the defendant's right was "the right not to be haled into court at all upon the felony charge. The very initiation of proceedings against him . . . thus

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> We agree with the Court of Appeals of New York that the failure to raise the defense before the second trial is more equivocal than agreeing to plead guilty to the second charge, and conclude, as it did, that the failure to timely raise a double jeopardy claim does not, in and of itself, serve as a waiver of the claim. See, People v. Michael, 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371.

Johnson, at 422-423 (emphasis supplied).

> operated to deny him due process of law."

Broce, 488 U.S., at 574-575 (quoting Blackledge, 417 U.S., at 30-31).

Defendant cannot claim that he could not lawfully be **charged** as he was. Mahaun v. State, 377 So. 2d 1158 (Fla. 1979). Obviously, double jeopardy is not implicated until a defendant is convicted of at least one of the charges. Defendant's contention can only be that he ought not to have been convicted of both possession of a firearm in the course of committing a felony and of the same felony "enhanced" by the use of a firearm. Cleveland v. State, 587 So. 2d 1145 (Fla. 1991).

Had Defendant not pled guilty and stood trial, the jury could properly have found him guilty of the lesser offense of attempted second degree murder without a firearm **and** of possession of a firearm while committing that attempted homicide in Case No. 89-46022. (App. A). Or the jury could have found that he was guilty of manslaughter without a firearm in Case No. 90-3133 and properly convicted him also of possession of the firearm during that homicide. (App. B). In neither case would the "double enhancement" which Cleveland proscribes have arisen.

The Third District's opinion in the case at bar was a logical extension of its previous holding in Guardado v. State,

562 So. 2d 696 (Fla. 3d DCA 1990), *rev. den.*, 576 So. 2d 287 (Fla. 1990). Guardado, in turn was based soundly upon Johnson.

The cases which Defendant asserts conflict with Novaton v. State, 610 So. 2d 726 (Fla. 3d DCA 1992), Kurtz v. State, 564 So. 2d 519 (Fla. 2d DCA 1990), and Arnold v. State, 578 So. 2d 515 (Fla. 4th DCA 1991), do not have similar pedigrees. In Kurtz, waiver was not even in issue. Kurtz pled *nolo contendere*, **reserving** the right to appeal the trial court's denial of his double jeopardy claim. On appeal the court declined to even address whether Kurtz' convictions violated the double jeopardy clause as a matter of constitutional law. Kurtz, at 520. It held that under Carawan and § 775.021(4), Fla. Stat. (Supp. 1988), the convictions were improper as a matter of statutory law.

The court in Arnold, in a rather murky opinion first observed -- apparently approving of the holding in Guardado -- that double jeopardy protections are waivable in some "circumstances". Arnold, at 516. It then concluded that the distinction between Menna and Pratt and Herzog was that "multiplicitousness" as a defense is waived by a plea. Id., at 517. The court rejected the distinction, finding a "complicating factor" and citing Kurtz. Id. It quoted that portion of the Kurtz opinion which found that §775.021(4), Fla. Stat. (Supp. 1988) does not authorize additional convictions in cases where

additional punishments would be improper. The court pointed out that, as "an even stronger argument", a conviction without a sentence could be used on a future scoresheet as an additional or prior offense. Hence, the court concluded that Arnold did not waive the right to challenge his convictions or the sentences by entering a plea of *nolo contendere* without reserving the right to appeal. Id.

The rule set forth in the Fourth District's opinion seems to be that a waiver of double jeopardy rights is effective only when there are no adverse consequences which flow from the waiver. This amounts to holding that the rights may never be waived.

The State submits that the Fourth District's reasoning is faulty. Even setting aside the fact that it appears to be based upon a precedent in which the waiver was not an issue, it apparently ignores the essence of what a waiver is. Undoubtedly, finding a waiver in this, or any other case, will have adverse consequences. Waiver has been defined as:

> The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege, or of the opportunity to take advantage of some defect irregularity, or wrong.

Black's Law Dictionary 1580 (abr. 6th ed. 1990). Certainly the defendants in Broce could have suffered the same consequences as

those envisioned in Arnold. This consideration simply should not be a factor when determining whether a waiver has occurred.

It must be remembered that the waiver doctrine derives from the admissions necessarily made upon entry of a voluntary plea of guilty. Broce, 488 U.S., at 573-574. As such the relevant inquiry is not the consequences arising from the waiver but the acts from which the waiver arises.

Thus, the fact that this was a negotiated plea should be taken into account. Herzog took this factor into account:

> Appellant had ample time prior to entering his pleas in which to scrutinize closely the charges in the indictment and determine if they were subject to objection. He chose not to challenge the indictment, but rather to negotiate for the dismissal of numerous counts in return for his pleas. Appellants reasons for pleading guilty and nolo contendere to four counts of the indictment are as valid now as they were at the time the pleas were entered. The indictment to which appellant pleaded has not changed with the passage of time.
>
> To permit appellant to now raise his double jeopardy complaint would thwart the orderly and efficient administration of our criminal justice system . . .

Herzog, at 716. Also, see Pratt, at 221:

> Menna's case was not complicated by the presence of additional charges which the state agreed to dismiss. And Menna did

> not explicitly and voluntarily expose himself to the very event (here, consecutive terms of imprisonment) that he later claimed was a violation of the Double Jeopardy Clause. Pratt by contrast . . . had no right to be surprised at the sentence that was imposed. He received the benefit of his bargain, dismissal of the other four counts.
>
> Waiver of constitutional rights is not lightly to be presumed, . . . however, we believe that it would be unjust in the circumstances of this case for the defendant to be heard to say that his sentence was illegally imposed.

See, also, Quarterman v. State, 527 So. 2d 1380 (Fla. 1988)(plea bargain constitutes a valid reason for departure from guideline sentence; thus no grounds existed for withdrawal of plea); Johnson v. State, 458 So. 2d 850, 851 (Fla. 2d DCA 1984)("Because Johnson was bound by her contract, we affirm the sentence."); Jacobs v. State, 522 So. 2d 540 (Fla. 3d DCA 1988)(denial of motion to correct allegedly illegal sentences affirmed where they were part of negotiated plea).[4]

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[4] Although its finding of waiver obviated the necessity of considering the issue, the court in Broce pointedly observed:

> We therefore need not consider the degree to which the decision to enter into a plea bargain which incorporates concessions by the Government, such as the one agreed to here, heightens the already substantial interest the Government has in the finality of the plea.

Broce, 488 U.S., at 576 (emphasis in original)

Defendant contends that his plea was involuntary. A review of the plea colloquy (Exh. C:25-35) indicates that Defendant and his counsel had time in which to contemplate the State's offer. At no point was any objection to the counts in question or the sentences raised by Defendant or his counsel.

By agreeing to the thirty-year sentences with the three-year minimum mandatory terms, all to run concurrently, the Defendant avoided the possibility of consecutive life sentences without possibility of parole, which would have been within the judge's discretion to impose as within the statutory maximum penalty. The Defendant should be held to his bargain.

The decision below comports with the law as established by this court and the Supreme Court of the United States. The decision in Arnold does not. Novaton should be approved, Arnold should be disapproved,[5] and the Defendant's convictions and sentences should be affirmed.

C. Defendant's convictions and sentences do not violate the double jeopardy clause.

Although the issue appears to have been raised in Cleveland, the state submits that under the present version of §775.021(4), Fla. Stat., and State v. Smith, 547 So. 2d 613 (Fla.

[5] As discussed above, Kurtz did not involve a waiver issue. Its correctness therefore need not be addressed.

1989), the convictions and sentences herein are proper. The State therefore respectfully requests that the Court reconsider its holding in Cleveland.

In Hall v. State, 517 So. 2d 678 (Fla. 1988), based upon the Court's interpretation of § 775.021(4) in Carawan, it was held that dual convictions of the type involved here are not permissible. In response to Carawan, the legislature amended §775.021(4).

In Smith, the Court held that following the amendment it was the intent of the legislature that:

> all criminal offenses containing unique statutory elements shall be separately punished.
>
> * * *
>
> However the statutory element test shall be used for determining whether offenses are the same or separate.

Smith, at 616.

In State v. Gibson 452 So. 2d 553 (Fla. 1984), which Hall overruled based upon Carawan,[6] the Court applied the Blockburger[7]

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[6] Hall, at 678:

> We find, in accordance with our recent decision in Carawan v. State, 515 So. 2d 161 (Fla. 1987), that the question must be answered in the negative, and our

test to the armed robbery and firearm possession statutes. It found that the elements of armed robbery were:

> (1) a taking of money or other property that may be the subject of larceny; (2) from the person or custody of another; (3) by force, violence, assault, or putting in fear; and (4) that the offender carried a firearm or other deadly weapon in the course of committing the robbery. § 812.12(1), (2)(a), Fla. Stat. (1977). The elements of the other offense in question [were] (1) the display, use, or threat or attempt to use; (2) a firearm; (3) while committing or attempting to commit a felony. § 790.07(2), Fla. Stat. (1977)

Gibson, at 556. The Court held:

> Applying this test to the statutory elements of the two offenses in question in the present case, we conclude that, because each offense has at least one statutory element that the other does not, the offenses are separate crimes even when based on the same act or factual event. Therefore under the Blockburger test, the two offenses were intended by the legislature to be separately prosecuted and punished.

Id. (emphasis added).

> decision in State v. Gibson, 452 So. 2d 553 (Fla. 1984), is overruled.

[7] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The statutory element test referred to in Smith under § 775.021(4) is a codification of Blockburger. See, Gibson, at 557, n. 6.

The statutory definitions of the crimes have not changed since Gibson was decided in 1984. The test applied in Gibson was that prescribed by Smith and §775.021(4). The State therefore respectfully submits that Cleveland's reaffirmation of Carawan-based Hall is anomaly which must be corrected. See, also, Hall, at 680-681 (Shaw, J., dissenting). The State respectfully asks this court to overrule Cleveland and Hall and return to Gibson.

D. Defendant's only remedy is to set aside the entire plea agreement and reinstate the charges against him.

Defendant requests that this court remand his case with directions to vacate the two counts of possession of a firearm during the commission of a felony, and further requests that he be allowed to withdraw his plea. (B. 40). Even if Defendant is correct on the merits of his claim, he is not entitled to the relief he seeks. The proper remedy in a case involving an improper guilty plea is to vacate the entire plea and return the parties to the *status quo ante*.[8] To allow the plea to stand would allow Defendant to get more than he bargained for and deny the State what it bargained for. Forshee v. State, 579 So. 2d 388 (Fla. 2d DCA 1991); Jolly v. State, 392 So. 2d 54 (Fla. 5th DCA 1981); Prestridge v. State, 519 So. 2d 1147 (Fla. 3d DCA 1988). Thus if the Court finds for Defendant, it should remand with

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[8] However, the State has the option of enforcing the plea with the objectionable convictions and sentences, if it so desires. This option is to prevent the injustice which would occur if, due to the passage of time, key witnesses or evidence were no longer available. Jolly v. State, 392 So. 2d 54 (Fla. 5th DCA 1981).

instructions to vacate the pleas and reinstate the charges against Defendant, unless the State desires to stand by the plea.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **FREDERICK E. MELVIN,** *Pro Se* DC#095246, Glades Correctional Institution, 500 Orange Avenue Circle, Belle Glade, Florida 33430 on this 3 day of March 1994.

CONSUELO MAINGOT
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

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APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

Information and Arrest Form
Case No. 89-46022
Filed March 20, 1990 App. A

Information and Arrest Form
Case No. 90-3133
Filed February 12, 1990 App. B

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