IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,854

THE STATE OF FLORIDA,

Petitioner,

-vs-

ROBERT L. JOHNSON,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
CONFLICT JURISDICTION

PETITIONER'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar No. 0239437
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite N921
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441
Fax No. (305) 377-5655

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INTRODUCTION

The Petitioner, the **STATE OF FLORIDA,** was the Appellant below. The Respondent, **ROBERT L. JOHNSON,** was the Appellee below. The parties will be referred to as they stand before this Court. The symbol "A" will designate the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The facts are succinctly stated by the Third District as follows:

> In March 1993, a permanent injunction against domestic violence was served upon Johnson. The injunction prohibited him from engaging in any criminal offense resulting in physical injury to Andrea Green, entering onto her place of residence or place of employment, or abusing, threatening, or harassing her. Johnson violated the terms of the injunction by entering Green's place of residence, and pled no contest to the charge of criminal contempt that arose from that violation.
>
> At the same time, and based upon the same conduct - Johnson's entry onto Green's residence - the State filed an information charging Johnson with aggravated stalking by violating a prior injunction. Johnson moved to dismiss the information on the ground of double jeopardy; the trial court granted the motion.

(A. 2).

The Third District affirmed the order dismissing on double jeopardy grounds, the charge of aggravated stalking. (A. 1). This affirmance was based on the reasoning that aggravated stalking in violation of an injunction is a species of a lesser included offense of the contempt charge. This finding was based

on the premise that there was no conceivable way in which Respondent could have committed aggravated stalking against the victim without also violating the terms of the injunction, a crime for which Respondent had previously been convicted. (A. 2). The Court reached this conclusion by looking at the contents of the injunction and not the contents of the actual charging documents. (A. 3).

Petitioner then timely filed its Notice to Invoke the Discretionary Conflict Jurisdiction of this Court. Petitioner also filed a Motion to Stay Mandate with the Third District and in awaiting a ruling thereon.

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SECOND DISTRICT'S DECISIONS OF STATE v. MIRANDA, 19 FLA. L. WEEKLY D2322 (FLA. 2nd DCA 1994); RICHARDSON v. LEWIS, 639 So. 2d 1098 (FLA. 2nd DCA 1994) AND THE FIFTH DISTRICT'S DECISION IN MCCRAY v. STATE, 640 So.2d 1215 (FLA. 5th DCA 1994).

SUMMARY OF THE ARGUMENT

The Third District, in the instant case held, that the rule against double jeopardy barred the prosecution for aggravated stalking in violation of an injunction where the Respondent had been previously convicted of criminal contempt for violating the injunction, because the aggravated stalking was based on the same conduct as the criminal contempt. This holding expressly and directly conflicts with decisions of the Second District and Fifth District which held that double jeopardy only applies where the elements of proof are the same. Since this conflict is evident from the face of the opinion, this Court should exercise its discretionary jurisdiction.

ARGUMENT

THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SECOND DISTRICT'S DECISIONS OF STATE v. MIRANDA, 19 FLA. L. WEEKLY D2322 (FLA. 2nd DCA 1994); RICHARDSON v. LEWIS, 639 So. 2d 1098 (FLA. 2nd DCA 1994) AND THE FIFTH DISTRICT'S DECISION IN MCCAY v. STATE, 640 So. 2d 1215 (FLA. 5th DCA 1994).

In the instant case, the Third District held that the rule against double jeopardy barred the prosecution for aggravated stalking in violation of an injunction where the Respondent had been previously convicted of criminal contempt for violating the injunction because aggravated stalking was based on the same conduct as the criminal contempt. This holding is in direct and express conflict with State v. Miranda, 19 Fla. L. Weekly D2322 (Fla. 2nd DCA 1994) which when faced with the exact same situation, found no double jeopardy problem since the Second District looked at what was charged to determine the elements of the offense.

In Miranda, the Second District held that a defendant can be prosecuted for both criminal contempt for violating an injunction and aggravated stalking in violation of the injunction since the two prosecutions survives the same elements test of Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). In Miranda, a domestic violence injunction was entered against Defendant which enjoined him physically abusing, threatening, or harassing the victim, either directly or indirectly, at any time or place and enjoined him from entering

on or about the victim's place of employment. The defendant pled guilty to criminal contempt for violating above provisions of the injunction. The State also filed an information against defendant charging him with aggravated stalking in violation of the same domestic violence injunction and the same conduct that the criminal contempt conviction was based on. The trial court granted the motion to dismiss based on double jeopardy, but the Second District reversed.

In reversing the granting of the motion to dismiss, the Court relied on the Blockburger test, examining the elements of both the criminal contempt charge and the aggravated stalking charge to see if each requires proof of an element that the other does not. It found that both the aggravated stalking charge and the contempt charge required proof that an injunction for protection had been issued. However, the Court did not compare the entire injunction to the aggravated stalking charge, but only compared the elements of the violated conditions of the injunction to the remaining elements of aggravated stalking. The Court found that aggravated stalking requires proof that a person "knowingly, willfully, maliciously and repeatedly follows or harasses another person"; that "harasses" means "to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose": that "course of conduct" includes the requirement that there be a "series of acts over a period of

time". The Court found that no such requirements were contained in the elements of the violated conditions of the injunction. (Emphasis added). The condition that the defendant not "harass the Petitioner either directly or indirectly, at any time or place whatsoever", may be violated by a single act of harassment as defined by its plain meaning since no statutory definition was provided. The Court then held:

> . . . Thus, the aggravated stalking charge includes elements not included in the contempt charge. The fact that evidence of repeated phone calls may constitute the proof to be adduced at both the contempt trial and the aggravated stalking trial does not render these charges the same offense. The focus in doing a Blockburger analysis is on the statutory elements of the offenses and not on the accusatory pleadings or proof to be adduced at trial in a particular case.

Id. at 2323. The Court then found that the contempt charge also required proof of violation of the element of the condition that defendant "not enter or about Petitioner's place of employment" and that this was not necessary to prove the aggravated stalking charge. Therefore, the contempt charge also included element not included in the aggravated stalking charge.

The Second District's holding in Miranda expressly and directly conflicts with the Third District's decision herein. The Third District, although saying it applied the same elements test to find double jeopardy, in reality applied the discredited same conduct test of Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 69 L. Ed. 2d 548 (1990). Instead of looking at the

elements of the charge of criminal contempt, the Third District looked to the accusatory pleading, the injunction, to do the Blockburger analysis. As such, not only is the instant decision in conflict with the Miranda decision, but it is also erroneous.

The instant decision is also in conflict with the Fifth District's decision in McCray v. State, 640 So. 2d 1215 (Fla. 5th DCA 1994). In McCray, the defendant claimed that it was error to deny his motion to dismiss charges based on double jeopardy grounds. He claimed that he was prosecuted for the same offense twice; first in a contempt proceeding; and second, for the underlying offense for which he had been previously held in contempt. The Fifth District had to remand the case because it did not have a sufficient record to determine the issue:

> . . . We do not have before us the order below which found McCray guilty of criminal contempt, or findings as to which acts he committed violated the court's earlier protection order. Thus it is impossible for us to make a proper Blockburger comparison of the criminal contempt offense with the May 22 offenses . . . (Footnote omitted).

Id. at 1218. This holding also conflict's with the instant one since it acknowledges that the same elements test applies to the acts the defendant was charged with in violation of the injunction and not the conduct underlying the offense.

In Richardson v. Lewis, 639 So. 2d 1098 (Fla. 2nd DCA 1994), an injunction for protection prohibiting the defendant

from, among other things, committing battery on or entering the residential premises of former girlfriend was entered. He was charged with criminal contempt for violating the injunction by entering the home and attacking the former girlfriend. As a result of this conduct, defendant was charged with armed burglary and aggravated battery. After being convicted of criminal trespass and aggravate battery he moved to dismiss the contempt charge a double jeopardy grounds, which was denied by the trial court. The Second District affirmed because it found conduct charged in the criminal contempt contained different elements than the substantive offenses.

CONCLUSION

Based on the foregoing, Petitioner submits that the instant decision expressly and directly conflicts with those cited herein and respectfully requests this Court be exercise its discretion herein and accept jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar No. 0239437
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite N921
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441
Fax No. (305) 377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON JURISDICTION** was furnished by mail to **MANUEL ALVAREZ,** Attorney for Respondent, 1320 N.W. 14th Street, Miami, Florida 33125 on this 8 day of December, 1994.

MICHAEL J. NEIMAND
Assistant Attorney General

mls/

IN THE SUPREME COURT OF FLORIDA

CASE NO.

THE STATE OF FLORIDA,

Petitioner,

vs.

ROBERT L. JOHNSON,

Respondent.

_____/

APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar No. **0239437**
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, N-921
Post Office Box 013241
Miami, Florida 33101
305-377-5441
Fax No. (305) 377-5655

93-132262-E

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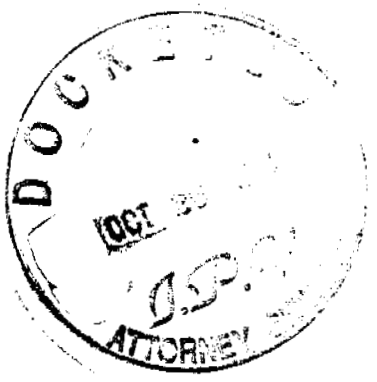
AND, IF FILED, DISPOSED OF.



IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1994

93-13114

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NO. 93-2734

ROBERT L. JOHNSON, **

Appellee. **

Opinion filed October 26, 1994.

An Appeal from the Circuit Court for Dade County, Scott J. Silverman, Judge.

Robert A. Butterworth, Attorney General, and Michael J. Neimand, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Manuel Alvarez, Assistant Public Defender, for appellee.

Before BASKIN, JORGENSON, and GERSTEN, JJ.

PER CURIAM.

The State appeals from an order dismissing, on double jeopardy grounds, a charge of aggravated stalking. We affirm.

In March, 1993, a permanent injunction against domestic violence was served upon Johnson. The injunction prohibited him from engaging in any criminal offense resulting in physical injury to Andrea Green, entering onto her place of residence or place of employment, or abusing, threatening, or harassing her. Johnson violated the terms of the injunction by entering Green's place of residence, and pled no contest to the charge of criminal contempt that arose from that violation.

At the same time, and based upon the same conduct - Johnson's entry onto Green's residence - the State filed an information charging Johnson with aggravated stalking by violating a prior injunction. Johnson moved to dismiss the information on the ground of double jeopardy; the trial court granted the motion.

The trial court properly dismissed the charge of aggravated stalking. To determine whether the double jeopardy provision bars a subsequent prosecution, the Supreme Court has applied the "same-elements test"[1] which "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." United States v. Dixon, 509 U.S. ___, 113 S. Ct. 2849, 2856 , 125 L. Ed. 2d 556, ____ (1993) (citations omitted). In Dixon, the Court applied the same-elements test to bar a prosecution for possession of cocaine with intent to

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[1] See Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932).

distribute after Dixon had already been found guilty of contempt of court for violating a condition of his release by engaging in a criminal act, namely the precise substantive offense with which he had been charged: possession of cocaine with intent to distribute. The crime of violating a condition of his release could not be "abstracted from the 'element' of the violated condition." Dixon, 509 U.S. at ___, 113 S. Ct. at 2857, 125 L. Ed. 2d at ___.

In this case, as in Dixon, the substantive charge was subsumed under the language of the injunction. There is no conceivable way in which Dixon could have committed aggravated stalking against the victim without also violating the terms of the injunction, a crime for which he had already been convicted. In the language of Dixon, aggravated stalking is "a species of lesser-included offense" of the contempt charge, id. (citations omitted); the rule against double jeopardy thus barred the subsequent prosecution for aggravated stalking. See also Illinois v. Vitale, 447 U.S. 410, 421, 100 S. Ct. 2260, 2267, 65 L. Ed. 2d 228, 238 (1980) (person convicted of crime having several elements included in it may not subsequently be tried for lesser-included offense consisting solely of one or more elements of crime for which he already was convicted).

AFFIRMED.

93-132262-E

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1994

WEDNESDAY, NOVEMBER 30, 1994

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 93-2734
ROBERT L. JOHNSON,	**	
Appellee.	**	

Upon consideration, appellant's motion for rehearing is hereby denied. Baskin, Jorgenson and Gersten, JJ., concur.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of Appeal, Third District

By _____
Deputy Clerk

cc: Michael J. Neimand
Manuel Alvarez

/NB