OA 8-29-95 017

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

BRIEF OF RESPONDENT ON THE MERITS

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THE STATE OF FLORIDA,

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vs.

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

BRIEF OF RESPONDENT ON THE MERITS

INTRODUCTION

Respondent, Robert L. Johnson, was the appellee in the district court of appeal and the defendant in the Circuit Court. Petitioner, the State of Florida, was the appellant in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R." will be used to designate the record on appeal, and the symbol "T." will denote the transcript of the proceedings.

STATEMENT OF THE CASE AND FACTS

The respondent adopts the statement of the facts contained in the petitioner's brief on the merits.

SUMMARY OF THE ARGUMENT

In the instant case, the successive prosecution of the respondent for aggravated stalking is barred under section 775.021(4)(b), Florida Statutes (Supp. 1994), which articulates a "same elements" test that is broader than the federal standard.

Florida should reject the "same elements" test set forth by the United States Supreme Court in *United States v. Dixon*, __U.S.__, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), because it fails to adequately safeguard double jeopardy rights against successive prosecutions. Given Florida's strong historical precedent for granting expanded double jeopardy protection under Article I, section 9 of the Florida Constitution, this Court should adopt a "same conduct" test in successive prosecution cases.

ARGUMENT

THE TRIAL COURT CORRECTLY GRANTED THE MOTION TO DISMISS THE CHARGE OF AGGRAVATED STALKING ON DOUBLE JEOPARDY GROUNDS AFTER THE RESPONDENT WAS PREVIOUSLY HELD IN CONTEMPT FOR THE SAME OFFENSE UPON THE VIOLATION OF A BROADLY WORDED INJUNCTION.

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall be "twice put in jeopardy of life or limb" for the same offense. U.S. CONST. amend. V. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (citations omitted).

When an issue of ultimate fact has once been determined by a valid and final judgment, collateral estoppel dictates that the issue cannot be litigated between the same parties in any future lawsuit. *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). As the Supreme Court has explained in *Brown v. Ohio,* 431 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). "It has long been understood that separate statutory crimes need not be identical — either in constituent elements or in actual proof — in order to be the same within the meaning of the constitutional prohibition." *Id.* at 165, 97 S.Ct. at 2225. In a case where a single defendant is subjected to successive prosecutions, the Double Jeopardy Clause represents "a constitutional policy of finality for the defendant's benefit." *Id.* (citing *United States v. Jorn,* 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543, (1971)). That policy protects the accused from prosecutions involving the relitigation of facts from a prior acquittal and from prosecutions allowing additional punishments after a prior conviction and sentence. *Green v. United States,* 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

The debate about the application of the Double Jeopardy Clause in the context of successive prosecutions revolves around two questions. First is the methodological

issue of how to judge whether two offenses are the same. The answer to this question is fairly well settled. The Supreme Court decided in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), that sameness depends on the elements of the two offenses holding that two offenses are distinct if "each [statutory] provision requires proof of a fact which the other does not." *Id.* at 304, 52 S.Ct. at 182.

The second issue, which is at the center of the ongoing polemic, is whether there are factors in addition to the *Blockburger* test that must be considered when determining if a successive prosecution is barred.[1] In *Brown v. Ohio,* the Court indicated that there were additional considerations when it asserted that "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense." *Id.* at 167, n. 6., 97 S.Ct. 2226. A "same conduct" component was thus added to the *Blockburger* analysis in *Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), only to be rejected three years later in *United States v. Dixon*, __U.S.__, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). The *Dixon* Court, however, failed to put the second issue to rest. The Court never reached a consensus about what the analytical framework should be for deciding the scope of the Double Jeopardy Clause in successive prosecution cases. The text of the opinion consists of five discordant interpretations of double jeopardy doctrine.

A recurrent fallacy that plagues much of double jeopardy jurisprudence, and thus adds to the confusion, is the presupposition that the *Blockburger* test is the sole inquiry for purposes of determining if a subsequent prosecution is prohibited on the grounds that it provides the only accepted definition of sameness. Courts often speak

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[1]Justice Rehnquist has observed that "the decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States,* 450 U.S. 333, 343 ,101 S.Ct. 1137, 1144, 67 L.Ed.2d 275 (1981).

in terms of the "same offense" when discussing successive prosecution issues and erroneously assume that to extend double jeopardy protection they must enlarge the definition of sameness. The prohibition against successive prosecutions, however, does not depend on a semantic definition of sameness, but rests on a due process rationale which deems that it is unfair to allow the state to reprosecute an accused after a prior determination of culpability.

The sameness analysis, moreover, is determinative only in multiple punishment cases and is not determinative in successive prosecution cases. This is evinced by the fact that the Court has shown a greater tendency to find double jeopardy violations in successive prosecution cases than in multiple punishment cases. This is because successive prosecutions entail different policy considerations than cumulative punishments and defendants have a greater interest in being protected from reprosecution than they have with respect to multiple punishments.[2] The specific rationale for proscribing reprosecution is:

> [T]hat the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

United States v. DiFrancesco, 449 U.S. 117, 127-28, 101 S.Ct. 426, 432, 66 L.Ed.2d 328 (1980) (*quoting Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957)).

The Double Jeopardy Clause was fashioned as a restraint on government to

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[2] The interests at stake in avoiding successive prosecutions are different from those at stake in the prohibition against multiple punishments, and our cases reflect this reality. The protection against successive prosecutions is the central protection provided by the Clause.

Dixon, 113 S.Ct. at 2882 (Souter, J., concurring in part and dissenting in part).

prevent the state from abusing the power of criminal prosecution. This goal is accomplished by ensuring the finality of judicial determinations regarding the individual's guilt or innocence. Verdict finality, therefore, is at the center of double jeopardy jurisprudence as several commentators have recognized.

> The verdict finality principle rests on the proposition that "finality, and only finality, defines the prohibition against double jeopardy." Its fundamental premise is that, once culpability for a criminal act has been determined, it should never be relitigated.
>
> Culpability in our justice system is determined by the trier of fact, based on the defendant's conduct. As such, the ultimate decision making authority rests with the finder of fact, and the double jeopardy clause, as one part of our justice system, should protect that authority. Because our criminal justice system gives the fact finder the final say, the government has no legitimate interest in relitigating the fact finder's culpability determination.

Bryon L. Land, *Increased Double Jeopardy Protection for the Criminal Defendant: Corbin v. Grady,* 27 WILLAMETTE L. REV. 913, 914 (1991) (footnotes omitted).

In the context of multiple punishments, the purpose of the Double Jeopardy Clause is to protect the defendant from being punished more severely than intended by the legislature. *Blockburger*, which was a cumulative punishment case, embodies a rule of statutory construction designed to preserve the separation of powers whereby the legislature is free, within certain broad limits, to prescribe punishment.[3]

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[3] The Blockburger test is a "rule of statutory construction," and because it serves as a means of discerning congressional purpose *the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent.*

Albernaz v. United States, 450 U.S. at 340, 101 S.Ct. at 1143 (emphasis added). Although *Blockburger* always prohibits successive prosecutions for the same offense, it does not always prohibit cumulative punishments for the same offense. The legislature is presumed not to have intended to punish a person twice for offenses which are the "same" under *Blockburger*. However, if the legislature demonstrably intended that a defendant be punished under two different statutory offenses, then the Clause permits the imposition of cumulative punishments under both statutes, even

With this structure in mind, a thorough understanding of the implications of *Dixon* requires a close reading of the opinion in the context of its historical genesis. The respondent maintains that under the *Blockburger* test, as expanded by section 775.021 Florida Statutes (Supp. 1994), the subsequent prosecution for Aggravated Stalking is barred by double jeopardy. Furthermore, in light of the fact that *Dixon*'s interpretation of the Double Jeopardy Clause does not adequately protect individuals against successive prosecutions, the respondent urges this Court to expand double jeopardy protection under the Florida Constitution by adopting a "same conduct" test.

A. Background

1. The Development of the Law Before *Grady v. Corbin*

The "same conduct" test was first applied in *Ex parte Nielsen,* 9 S.Ct. 672, 131 U.S. 176 (1889), where Nielsen, after being convicted of cohabitation with two women, was subsequently charged with adultery arising from the same living arrangement. The offense of adultery required proof that the defendant had sexual intercourse with one woman while married to another; conviction for cohabitation required proof that the defendant lived with more than one woman at the same time. Nevertheless, the Court in both cases held the separate offenses to be the "same" for purposes of protecting the accused from having to "'run the gauntlet' a second time." *Ashe,* 397 U.S. at 446, 90 S.Ct. at 1195 (*quoting Green,* 355 U.S. at 190, 78 S.Ct. at 225.) "[I]t seems to us very clear" the Court said, "that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *Nielsen,* 131 U.S. at 188, 9 S.Ct. 676.

There has been a long-standing dispute as to whether "incident," as used in *Nielsen*, refers to "element of an offense" or whether it means "act." If "incident" is

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if both statutes punish the "same" offense. *See also Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

synonymous with "element of an offense," *Nielsen* is in effect an early precursor of *Blockburger,* standing for the proposition that successive prosecutions for a greater and a lesser-included offense are prohibited.[4] If "incident" means "act," however, then *Nielsen* bars prosecution for a particular act if that act was a constituent of a greater offense comprised of a series of acts.

In *Ashe*, the Court held that the Double Jeopardy Clause embodies the doctrine of collateral estoppel, which precludes relitigation of an issue of ultimate fact previously determined by a valid and final judgment. *Ashe,* 397 U.S. at 443-444, 90 S.Ct. at 1194. The defendant in *Ashe* was one of four persons who allegedly robbed six men at a poker game. In his first trial, the defendant was acquitted of robbing one of the victims. During the first trial, uncontroverted testimony established that the victim had been a participant in the poker game and had been robbed. Following acquittal on the first charge, the defendant was tried and convicted for having robbed one of the other poker players. The Court concluded that the defendant's identity as one of the robbers had been resolved in the defendant's favor at the earlier trial and could not be relitigated in a second trial. *Id.* at 445, 90 S.Ct. at 1195.

In *Harris v. Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), the Court held that the defendant, who had been prosecuted for felony-murder based on a homicide committed during a robbery, could not be prosecuted for the robbery because the robbery and the felony-murder constituted the same offense. The elements of the robbery, although not specified in the felony-murder statute, were

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[4]Justice Scalia takes the position in *Dixon, contra* Justice Souter, that "incident" means "element of an offense." *Dixon.* 113 S.Ct. at 2861.

> *Nielsen* simply applies the common proposition, entirely in accord with *Blockburger*, that prosecution for a greater offense (cohabitation, defined to require proof of adultery) bars prosecution for a lesser included offense (adultery).

Dixon, 113 S.Ct. at 2860. *Cf. Dixon*, 113 S.Ct. at 2885-86, n. 5 (Souter, J., concurring in part and dissenting in part) ("incident" was intended to mean "act").

incorporated in that statute through its requirement that the prosecution prove a felony. Thus, *Harris'* holding is consistent with the *Blockburger* test which considers two offenses the same for purposes of double jeopardy if one offense wholly encompasses the other. A pure *Blockburger* test, however, evaluates the offenses solely on the basis of their statutory elements. The felony-murder statute under which Harris was prosecuted did not mention robbery, though it required proof of the lesser offense to establish guilt of the greater. The Court thus recognized that even where a comparison of elements did not generate a double jeopardy bar, prosecution of a compound offense would prohibit prosecution of the predicate offense upon which the compound offense was based.

Brown v. Ohio, also applied a somewhat expanded version of *Blockburger* by looking at the proof as well as the elements of the offense. Brown had been prosecuted in one Ohio county for joyriding in a stolen car on December 8, 1973, and was later prosecuted in another Ohio county for the original theft of the car as well as joyriding on November 29, 1973. *Brown,* 432 U.S. at 162, 97 S.Ct. at 2223-2224. A strict application of *Blockburger* would have led to the conclusion that these prosecutions were not for the same offense because each required proof of events on a different date; each thus required proof of an element (i.e., the specific date in question) not required by the other. The Court rejected that interpretation and held that the two offenses were the same. The Court cited *Ashe* and *Nielsen* as authority for the proposition that offenses can be the "same" for some purposes, although they would be separate offenses under *Blockburger*. *Brown,* 432 U.S. at 166, 97 S.Ct. at 2226.

2. *Grady v. Corbin*

Brown revealed a willingness to examine the overlap in evidence and the actual relationship between two charges. The question of whether a "same conduct" test should be part of a double jeopardy analysis was explicitly raised in *Grady.*

The defendant in *Grady*, Thomas Corbin, had crashed his car into another while

he was drunk. *Grady,* 432 U.S. at 162, 110 S.Ct. 2087-2088. The driver of the other car later died of injuries sustained in the accident. *Id.* Corbin appeared in local court and pleaded guilty to two traffic offenses for which he had been ticketed, failure to keep to the right of the median and driving while intoxicated. *Id.* He was sentenced to a fine and a license suspension. *Id.* at 513, 110 S.Ct. at 2088. At no point in this process did the prosecutor or the court realize that the other driver had been killed. Two months later, the district attorney's office obtained a grand jury indictment charging Corbin with reckless manslaughter, vehicular manslaughter, criminally negligent homicide, reckless assault, and driving while intoxicated. *Id.* at 513-514, 100 S.Ct. at 2089. In its bill of particulars, the prosecution stated that it would establish as reckless acts operating a motor vehicle while intoxicated and failing to keep to the right of the median — the two offenses of which Corbin had been convicted — as well as driving at a speed too fast for the weather and road conditions. *Id.* at 514-515, 110 S.Ct. at 2089.

The Court held that the state's intended reliance on the prior offenses to establish an essential element of the charged offense — here, the reckless or negligent acts — made the two offenses the same offense. The prosecution's theory, not the actual evidence it intended to offer, led to this result. *Id.* at 522-523, 110 S.Ct. 2094. The Court made it clear that prosecution of the charged offenses could have proceeded if the State had a theory of reckless or negligent conduct that did not require it to prove the elements of the already prosecuted offenses. The Court noted that "if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence" the prosecution would not be barred. *Id.* at 523, 110 S.Ct. at 2094. The state could not avoid the double jeopardy bar by simply proving the same theory through different evidence. If the state had evidence not offered in the first proceeding that would establish a reckless or negligent act by proving the commission of the already prosecuted offense, the second prosecution would still be barred. For example, the second prosecution would be barred even if the prosecution had eyewitness testimony, not used in the first proceeding, that Corbin drove on the wrong side of the

road.

The majority in *Grady* based its analysis on *Illinois v. Vitale,* 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). In *Vitale*, the defendant caused a fatal automobile accident and was issued a traffic citation at the scene. The citation charged him with failure to reduce speed to avoid an accident in violation of state law. He was convicted and sentenced to pay a fifteen dollar fine. The next day, the State charged him with two counts of involuntary manslaughter arising from the defendant's reckless driving. The defendant moved to dismiss the manslaughter charge on double jeopardy grounds. The *Vitale* Court stated:

> [I]t may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because [the defendant] has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma* . . .

Vitale, 447 U.S., at 420, 100 S.Ct., at 2267 (citations omitted).

Grady held that this application of the Double Jeopardy Clause was correct and controlled the case.[5] *Grady,* 495 U.S. at 515-516, 110 S.Ct. at 2090.

Justice Brennan explained that the *Blockburger* test was a rule of statutory construction designed for the primary purpose of ensuring that defendants were not given a higher sentence than that which was intended by the legislature. *Id.* at 517, 100 S.Ct. 2091. The *Blockburger* test, however, did not address the more central

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[5]*Grady* specifically held that:

> [T]he Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

Grady, 495 U.S. 510, 110 S.Ct. 2087 (J. Brennan).

protections of the Double Jeopardy Clause, viz. to protect citizens from the unfair burden of consecutive prosecutions for the same crime. *Id.*

> The *Blockburger* test is simply a "rule of statutory construction," a guide to determining whether the legislature intended multiple punishments. [*Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983)]
>
> Successive prosecutions, however, whether following acquittals or convictions, raise concerns that extend beyond merely the possibility of an enhanced sentence:
>
> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity...." *Green v. United States,* 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957).
>
> Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged. *See, e.g., Tibbs v. Florida,* 457 U.S. 31, 41, 102 S.Ct. 2211, 2217, 72 L.Ed.2d 652 (1982) (noting that the Double Jeopardy Clause "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction"); *Ashe v. Swenson,* 397 U.S. 436, 447, 90 S.Ct. 1189, 1196, 25 L.Ed.2d 469 (1970) (the State conceded that, after the defendant was acquitted in one trial, the prosecutor did, at a subsequent trial, "what every good attorney would do--he refined his presentation in light of the turn of events at the first trial"); *Hoag v. New Jersey,* 356 U.S. 464, 78 S.Ct. 829, 2 L.Ed.2d 913 (1958) (after an alleged robber was acquitted, the State altered its presentation of proof in a subsequent, related trial — calling only the witness who had testified most favorably in the first trial — and obtained a conviction). Even when a State can bring multiple charges against an individual under *Blockburger*, a tremendous additional burden is placed on that defendant if he must face each of the charges in a separate proceeding.
>
> Because of these independent concerns, we have not relied exclusively on the *Blockburger* test to vindicate the Double Jeopardy Clause's protection against multiple prosecutions.

Grady v. Corbin, 495 U.S. 517-518, 110 S.Ct. 2091-2092 (footnotes omitted).

Grady augmented but did not replace *Blockburger*. Thus, two offenses may be the same under *Blockburger*, yet a successive prosecution for one of them may be prohibited if that offense will be established by conduct constituting all the elements of the already prosecuted offense.[6, 7]

Justice Scalia dissented from the majority's opinion in *Grady*. He criticized the majority's reliance on *Vitale* as support for the "same conduct" test, arguing that *Vitale*'s assertion that the defendant would have a "substantial" double jeopardy claim if the prosecution relied on the defendant's conduct in failing to slow to prove manslaughter was dicta which lacked historical support. *Id.* at 537, 110 S.Ct. at 2101. It could not, therefore, be used to overrule *Blockburger*. The *Blockburger* test, moreover, "best gives effect to the language" of the Double Jeopardy Clause. Justice Scalia maintained that the Clause presupposes that a double jeopardy determination can be made before trial; "[o]therwise, the Clause would have prohibited a second 'conviction' or 'sentence' for the same offense." *Id.* at 529, 110 S.Ct. 2097. The *Grady* test cannot settle double jeopardy claims before trial because it requires consideration of the evidence the prosecution presents at trial. Justice Scalia later wrote the majority opinion in *Dixon*.

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[6] In *Illinois v. Vitale,* [] we suggested that even if two successive prosecutions were not barred by the *Blockburger* test, the second prosecution would be barred if the prosecution sought to establish an essential element of the second crime by proving the conduct for which the defendant was convicted in the first prosecution. Today we adopt the suggestion set forth in *Vitale*.

Grady, 495 U.S. at 510, 110 S.Ct. at 2087 (J. Brennan).

[7] *Grady* also produces a bar if the offense being prosecuted will be established by conduct constituting an element, or the elements, of the already prosecuted offense. If, however, there is merely overlap, double jeopardy will not bar the subsequent prosecution. For example, if the same conduct establishes the mental element of the case already prosecuted and the case being prosecuted, but the two offenses have aspects of the *actus reus* in which they are different, the later prosecution will not be barred.

Responding to Justice Scalia's reproachment that *Blockburger* was the only recognized standard for judging sameness of offenses, Justice Brennan noted that *In re Nielsen* and *Ashe* provided additional double jeopardy protection in successive prosecutions. *Grady,* 495 U.S. at 517, 110 S.Ct. at 2091.

Implicit in Justice Scalia's dissent is the misconception that the notion of sameness was being expanded to include conduct. Although *Ashe* and *Nielsen* grant additional protection, they did not broaden the concept of "same offense," and *Grady* itself no where contains a definition of "same offense." The *Ashe* Court's incorporation of collateral estoppel into a double jeopardy analysis had nothing to do with expanding the definition of sameness, for estoppel applies irrespective of whether the offenses are the same.[8]

Grady did not redefine "same offense." Rather, the Court recognized that successive prosecutions involve double jeopardy interests that are not addressed by the *Blockburger* test. The Court, therefore, added the "same conduct" component to meet the more central protections of the Double Jeopardy Clause.

B. *United States v. Dixon*

Dixon consists of two cases that were consolidated for appeal. Each case arose after an adjudication for contempt and a subsequent prosecution predicated on the same underlying conduct. The Court of Appeals held that under *Grady* all the subsequent criminal charges against the two defendants were barred because the government was relying on the same factual foundation which formed the basis for the contempt findings. *United States v. Dixon,* 598 A.2d 724, 731 (D.C.1991).

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[8]*Ashe* precludes the relitigation of a factual issue that has been resolved in a prior prosecution. For example, if the defendant in *Ashe* were facing a subsequent prosecution for kidnaping one of the participants at the card game, the prosecution would be barred because the issue of the defendant's presence at the scene was already decided in the prior prosecution for robbery. The fact that kidnaping and robbery are different offenses has no bearing on whether collateral estoppel applies.

Furthermore, the Court found that its decision was supported by two state supreme court cases which had been handed down after *Grady*. *Id.* In those cases, the courts ruled that when a criminal prosecution seeks to prove conduct for which a defendant has already been tried in a contempt proceeding, the prosecution is barred by the Double Jeopardy Clause.[9]

1. The Facts of the Case

Dixon

Alvin Dixon was arrested and charged with second degree murder. He was released on a surety bond subject to certain conditions, including the requirement that Dixon refrain from committing "any criminal offense." *Dixon,* 113 S.Ct. at 2853. The United States Attorney filed a Motion To Modify Bond, representing that Dixon had been indicted for possessing cocaine with the intent to distribute it. The Superior Court issued an order, noting that Dixon's indictment reflected an apparent violation of the pretrial release condition, and requiring Dixon to show cause why he should not be held in contempt of court. After a contempt hearing, the court determined that Dixon had violated the conditions of his release and sentenced him to 180 days in prison. *Id.*

Foster

Foster's wife, Ana Foster, filed a petition for a civil protection order (CPO)

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[9]*See State v. Kipi,* 811 P.2d 815, 820 (Haw.1991) *cert. denied,* 502 U.S. 867, 112 S.Ct. 194, 116 L.Ed.2d 154 (1991) (holding that a defendant who pleaded no contest to a criminal contempt charge for violating a protective order could not be subsequently prosecuted for burglary and terroristic threats "based on the same conduct that lead to his contempt conviction"),; *State v. Magazine,* 393 S.E.2d 385 (S.C.1990) (holding that according to *Grady* a defendant who had been held in contempt of court for violating a protective order could not subsequently be tried for criminal assault if the assault charge was based on the same conduct that supported the contempt charge).

directed to her husband. Foster subsequently consented to entry of a CPO directing him not to "molest, assault, or in any manner threaten or physically abuse" his wife. *Id.* at 2854-2855. Ana Foster subsequently filed motions to adjudicate Foster in contempt for sixteen alleged violations of the CPO. The last motion included an allegation that Foster assaulted his wife. *Id.*

The trial court ruled that to prove Foster committed assaults and threats in violation of the CPO, Mrs. Foster's attorney had "to prove as an element, first that there was a Civil Protection Order, and then . . . the assault [or threat] as defined by the criminal code, in fact occurred." *Id.* at 2854. The court found "beyond a reasonable doubt" that Foster assaulted his wife on November 6, 1987 and May 21, 1988, and threatened her on September 17, 1988. Foster was acquitted of all other counts, including alleged threats to his wife. *Id.*

Five months after being found in contempt for violating the CPO, a grand jury indicted Foster on five counts, they were:

(A) simple assault (count I);

(B) three separate counts of threatening to injure another (counts II-IV);

(C) assault with intent to kill (count V). *Id.*

The conduct which formed the basis for counts I and V was relied upon by the prior trial court to hold Foster in contempt.

2. The Opinion of the Court

The *Dixon* Court was divided on whether *Grady* should be overturned, and was even more fragmented regarding the application of the *Blockburger* test. Five of the justices voted to overturn *Grady* and only Justice Kennedy agreed with Justice Scalia's interpretation of the *Blockburger* test as applied to the facts of the case.

Justice Scalia's Opinion

Justice Scalia's application of the *Blockburger* test led to the conclusion that

both the prosecution of Dixon for possession of cocaine with intent to distribute and the prosecution of Foster for simple assault were barred. Since Dixon's release order prohibited him from violating *any* criminal law, the District of Columbia Criminal Code was effectively incorporated into the court order. *Id.* at 2857. Analogizing Dixon's case to *Harris v. Oklahoma,* Justice Scalia theorized that the incorporation of the District of Columbia Criminal Code in the court order rendered the subsequent possession charge a lesser included offense of criminal contempt, thus barring a consecutive prosecution for the drug offense.[10] *Id.*

In Foster's case, Justice Scalia's application of *Blockburger* is less transparent than in the case of Dixon. The opinion states in a perfunctory fashion that the assault charge against Foster *"based on the same event that was the subject of his prior contempt conviction. . ."* is precluded. *Id.* at 2858 (emphasis added). Although the rationale is not explained, it would appear that assault, as prohibited by the CPO, and the substantive offense of assault have identical elements, except perhaps one. I.e., if knowledge of the CPO is an element of contempt, then assault in violation of the CPO subsumes the offense of assault and thus a prosecution for the latter offense is barred by *Blockburger* (since each offense does not have an element that is not common to the other).[11]

The three separate counts of threatening to injure another (counts II-IV) were

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[10]Chief Justice Rehnquist disagreed with Justice Scalia's application of *Blockburger* to the contempt charge and opined that the test should be applied to the "elements of contempt of court in the ordinary sense," and " not . . . the terms of the particular court orders involved."*Dixon,* 113 S.Ct. at 2865. He maintained that "the generic crime of contempt of court has different elements than the substantive criminal charges in this case"; therefore, "they are separate offenses under *Blockburger.*" *Id.* In other words, for Justice Rehnquist, contempt of court has only two elements: (i) knowledge of a court order, and (ii) the wilful violation of that order. *Id.*

[11]Assault has elements *x, y, z,* and contempt for violating an order prohibiting assault has elements *x, y, z,* + (knowledge of the order). Hence, whereas contempt has an element that is not common to assault, the statutory offense of assault does not possess an element that is not common to contempt.

not barred despite the fact Foster was acquitted at the contempt hearing of the charge that he had threatened his wife. *Id.* at 2859. Under section 22-2307 D.C. CODE (1992), it is illegal to threaten someone with kidnaping, physical injury, or property damage. Proof of contempt required a showing of a threat and knowledge of the CPO, whereas a violation of section 22-2307 requires proof of a threat to either kidnap, physically injure or to inflict property damage. Justice Scalia reasoned that each offense has an element not common to the other. *Id.*

What is most perplexing about this logic is that it disregards the principle of collateral estoppel established in *Ashe*. The trial court determined that Foster was not guilty of the alleged threats, yet Justice Scalia would allow the government to indict him for that conduct on the grounds that the threats, as defined by the CPO, are distinct, under *Blockburger,* from the statutory offenses charged. As indicated above, the applicability of collateral estoppel does not depend on a "same elements" analysis. *Supra* at 15. The only explanation that Justice Scalia offers is wholly unsatisfying:

> The collateral-estoppel effect attributed to the Double Jeopardy Clause, *see Ashe v. Swenson*, [] may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts. But this does not establish that the Government "must. . .bring its prosecutions . . .together." It is entirely free to bring them separately, and can win convictions in both. Of course the collateral estoppel issue is not raised in this case.

Dixon, 113 S.Ct. at 2860 (citation omitted).

Next, the majority had to decide whether the subsequent prosecution was based on the same conduct and thus precluded under *Grady.* After determining that *Grady* barred reprosecution, Justice Scalia took the opportunity to overturn *Grady,* echoing many of the same arguments that he had voiced in his dissenting opinion. *Dixon,* 113 S.Ct. 2860.

One argument that Justice Scalia raises in opposition to *Grady* criticizes the notion that successive prosecutions involve different double jeopardy concerns than multiple punishment cases. The problem that Justice Scalia sees with this approach is that it produces a linguistic anomaly where "same offense" means one thing in a

successive prosecution context and means something else with respect to multiple punishments. *Id.* at 2860.

> The centerpiece of Justice Souter's analysis is an appealing theory of a "successive prosecution" strand of the Double Jeopardy Clause that has a different meaning from its supposed "successive punishment" strand. We have often noted that the Clause serves the function of preventing both successive punishment and successive prosecution, see, *e.g., North Carolina v. Pearce,*[] but there is no authority, except *Grady*, for the proposition that it has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term "same offence" (the words of the Fifth Amendment at issue here) has two different meanings — that what is the same offense is yet not the same offense.

Id. (citation omitted). Justice Scalia's linguistic complaint, however, is predicated on the false assumption that double jeopardy protection turns on the lexical definition of "same offense," rather than on the differing interests involved in the successive prosecution context from the multiple punishment context. *See supra* at 6.

The Opinions of Justice White and Justice Souter

Justice White wrote that he was uncomfortable with Justice Scalia's application of the *Blockburger* test, characterizing it as "an overly technical interpretation of the Constitution." *Id.* at 2869. Justice White opined that the Double Jeopardy Clause should bar all of the subsequent prosecutions in both cases because the contempt offenses were the same as or "lesser included offenses of" the subsequent substantive criminal offenses. *Id.*

Justice Souter recognized the that the principal protection extended by the Double Jeopardy Clause is against successive prosecutions. Since the Clause protects against "two distinct types of abuses," (multiple punishments and successive prosecutions), Justice Souter maintained that a double jeopardy analysis must also differ in each context. *Id.* 2881.

Justice Souter read *In re Nielsen* as acknowledging the inadequacy of the "same elements" test. *Id.* at 2884. He argued that the *Nielsen* Court rejected the double

jeopardy test of *Morey v. Commonwealth,* 108 Mass. 433 (1871), a test which became the basis for the "same offense" test. *Dixon,* 113 S.Ct. at 2885. Justice Souter cited several other precedents which were consistent with his interpretation of *Nielsen.* According to Justice Souter, *Brown v. Ohio,* further buttressed his reading of *Nielsen* because the *Brown* Court observed that "'[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense."' *Brown,* 431 U.S. at 165, 97 S.Ct. at 2225. In addition, he read *Harris v. Oklahoma* as focusing on "the conduct actually charged" even though "the *Blockburger* elements test would have produced a different result." *Id.* at 2888. Finally, Justice Souter asserted that the use of the term "'conduct"' in *Illinois v. Vitale* was equivalent to the term "'incident"' as used in *Nielsen* and *Harris*. *Dixon,* 113 S.Ct. at 2888. He concluded that *Nielsen, Brown, Harris,* and *Vitale* supported a "successive-prosecution strand of [the Court's] double jeopardy jurisprudence." as established in *Grady.*[12] *Id.*

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[12]The following table illustrates the distribution of differing views on the Court.

United States v. Dixon

JUSTICES	Dixon's Prosecution Should Be Barred	Foster's Prosecution Should Be Barred	*Grady* Should Be Overruled
SCALIA	Yes	One Count	Yes
KENNEDY	Yes	One Count	Yes
WHITE	Yes	Yes	No
STEVENS	Yes	Yes	No
SOUTER	Yes	Yes	No
REHNQUIST	No	No	Yes
O'CONNOR	No	No	Yes
BLACKMUN	No	No	No
THOMAS	No	No	Yes

C.

The "Same Elements" Test Does Not Adequately Protect Individuals From Being Twice Put in Jeopardy For The Same Offense Thus Requiring Additional Protection Under The Florida Constitution.

The majority's interpretation of the Double Jeopardy Clause in *Dixon* is both conceptually unsound and inconsistent with the dual purposes of the Clause. This Court, therefore, should extend greater double jeopardy protection against successive prosecutions under Article I, section 9 of the Florida Constitution than is currently provided under the federal constitution.

The *Dixon* Court was sharply divided over the question of whether the *Blockburger* test should be determinative in successive prosecution contexts. Although *Dixon* is still a very recent development in federal double jeopardy jurisprudence, one state has already rejected its dubious and irresolute holding.

The Supreme Court of Hawaii has held that *Dixon* does not adequately protect individuals against successive prosecutions and thus has retained the "same conduct" test formulated in *Grady*. *State v. Lessary,* 75 Haw. 446, 865 P.2d 150 (Haw. 1994).

In *Lessary*, the defendant, using a pair of scissors as a weapon, forced his estranged wife to leave her job and go with him to a cane field where they eventually talked for several hours. *Id.* 865 P.2d at 448-449. The next day, Lessary was charged in criminal court with Terroristic Threatening and Unlawful Imprisonment. He was also charged in family court with Abuse. Lessary pled guilty to Abuse in family court and was sentenced to five days in jail. The circuit criminal court subsequently dismissed the Terroristic Threatening and Unlawful Imprisonment charges on double jeopardy grounds. *Id.* 865 P.2d at 450-451.

The Supreme Court of Hawaii concluded that the *Blockburger* test alone did not safeguard individuals from the burden of successive prosecutions.

> Because of its focus on the statutory definitions of offenses, however, the "same elements" test does not prevent the government from initiating multiple prosecutions against an individual based on a single act as long as the subsequent prosecutions are for offenses with "different"

> elements. In *Grady*, the United States Supreme Court recognized the dangers inherent in allowing the government to pursue multiple prosecutions against an individual. . . Although *Dixon* overruled *Grady* and reestablished the "same elements" test as the sole protection against double jeopardy, four justices continued to believe that the Blockburger test alone does not provide adequate protection. . . We do not believe that the State's interest in prosecuting different offenses in different courts outweighs a defendant's "paramount" interest in being free from vexatious multiple prosecutions.

Id. 865 P.2d at 456-457 (citations omitted).

Florida has for some time recognized that the principal protection afforded by the State Constitution's guarantee against double jeopardy is to spare the individual the undue hardship of having to defend against multiple prosecutions:

> The right to be placed in jeopardy only once for the same offense is guaranteed to every citizen. It is not for the purpose of protecting criminals, but is to protect the citizens against the once-existing power of the State, or the sovereign, to continue prosecutions and trials of the same person for the same offense until a conviction is obtained, or the defendant is ruined by the time, expenses and annoyance of such successive prosecutions. This constitutional right stands upon the same basis as those other constitutional rights to be tried by a fair and impartial jury, to demand the nature of and cause of the accusation against him, to meet the witnesses against him face to face, and to be furnished a copy of the indictment against him. Section 11, Declaration of Rights. These rights curtail and restrain the power of the State.

Bizzell v. State, 71 So.2d 735, 738 (Fla. 1954).

This state's historical precedent for a "same conduct" test in successive prosecution cases dates back to at least 1918 where, in *Sanford v. State,* 75 Fla. 393, 78 So. 340 (1918), this Court adopted the following analysis:

> "If the first indictment or information were such that the accused might have been convicted under it *on proof of the facts by which the second is sought to be sustained,* then the jeopardy which attached on the first must constitute a protection against a trial on the second."

Id. 75 Fla. at 396, 78 So. at 341 (*quoting* COOLEY'S CONST. LIM. (7th Ed.)) (*quoted in State v. Mars,* 498 So. 2d 402, 403 (Fla. 1986)) (emphasis added). The *Sanford* test was reiterated by this Court in *State v. Katz,* 402 So. 2d 1184 (Fla.1981), *cert.*

denied by Witherspoon v. Florida, 454 U.S. 1164, 102 S.Ct. 1039, 71 L.Ed.2d 320 (!982), declaring that:

> Florida's test for determining whether successive prosecutions impermissibly involved the same offense is based upon the sufficiency of the allegations in the second information with regard to a conviction of the offense charged in the first. *If the facts alleged in the second information, taken as true, would have supported a conviction of the offense charged in the prior information, the offenses are the same and the second prosecution is barred.*

Id. at 1186 (citing *Bizzell v. State, supra*) (emphasis added); *see also State v. Beamon,* 298 So. 2d 376 (Fla.1974), *cert. denied,* 419 U.S. 1124, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975); *State v. Anders,* 59 So. 2d 776 (Fla.1952); *State v. Bowden,* 154 Fla. 511, 18 So. 2d 478 (1944); *Hagan v. State,* 116 Fla. 553, 156 So. 533 (1934).

Florida, moreover, already extends greater protection against multiple punishments than is afforded under the federal constitution. Justice Kogan, in his concurring opinions in both *Cave v. State,* 613 So. 2d 454, 456 (Fla. 1993), and more recently in *Sirmons v. State,* 634 So. 2d 153, 154-156 (Fla. 1994), explains that section 775.021(4) Florida Statutes (1989), incorporates a broader definition of sameness than *Blockburger.*

The exceptions listed in section 775.021(4) prohibit multiple punishments when the offenses "[arise] from a single act and [are] distinguishable from each other only by degree elements." *Id.* at 155. Despite the fact that two offenses have different elements under a strict *Blockburger* test, a defendant may not be prosecuted for both offenses if one is merely an aggravated version of the other (core) offense. The statute also prohibits cumulative punishments where one offense is a permissive lesser of the other offense, *as charged* in the information. §775.021(4)(b)(3) Fla. Stat. (Supp. 1994). As a result, courts must go beyond *Blockburger* and examine the manner in which the main offense is charged in order to determine whether it subsumes the other as a permissive lesser included offense.

Given that Florida affords greater double jeopardy protection in the multiple punishment context, it should similarly afford additional protections in the more

compelling successive prosecution context.

There is little doubt that the "same conduct" analysis better protects the accused from prosecutorial abuse, which is at the heart of the Double Jeopardy Clause. *Grady's* "same conduct" test specifically attempted to remedy the fact that to allow successive prosecutions invites abuse. Otherwise, the state can force a defendant to endure the expense, anxiety, and embarrassment of multiple trials. Moreover, if the offenses are closely related, the prosecution can gain significant advantages through successive proceedings. The state can, for example, test the evidentiary merits of its case by prosecuting a narrower offense and then cultivate the evidence and the presentation to obtain a conviction on broader, or slightly different charges. Conversely, if thwarted by an unsatisfactory verdict, the state can pursue additional, narrower charges. The prosecution, even when faced with restrictions on successive prosecutions of the same offense, can still draft an information that appears to charge a different offense, while actually pursuing the same criminal conduct.

D.

The Subsequent Charge of Aggravated Stalking Is Barred by Double Jeopardy Under Section 775.021 Florida Statutes.

Under 775.021(4)(b), the subsequent prosecution of the respondent for aggravated stalking is barred. The sameness analysis articulated in section 775.021(4) is broader than the *Dixon* "same elements" test.[13] The *Blockburger* test, therefore, cannot be strictly applied because the Florida legislature has ratified a "same elements"

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[13]In their brief, the state incorrectly asserts that section 775.021(4)(a) implies that the Florida legislature adopted a "strict *Blockburger* analysis." (Brief of Petitioner at 9). The petitioner's construction of the statute ends at section 775.021(4)(a), and fails to account for the significance of the three exceptions listed immediately thereafter under section 775.021(4)(b). *See, Cave,* 613 So. 2d at 456 (Kogan, J., concurring).

test that is more liberal than *Blockburger.*[14, 15] *See, Cave,* 613 So. 2d at 456; *Sirmons,* 634 So. 2d at 154-156 .

In *State v. Weller,* 590 So.2d 923, 925 (Fla. 1991), this Court explained that "[w]hen the commission of one offense always results in the commission of another, then the latter is an inherent component of the former." In order to properly make this determination where the former jeopardy arises as a result of a contempt finding, a court must compare the injunction itself with the subsequent charging document. For the injunction, like a criminal statute, defines the proscribed conduct. Analogously, if a defendant is convicted for offense X and is subsequently charged with offense Y, the proper analysis requires that the statutory elements of X be compared with Y, as charged in the information, to ascertain whether Y, as charged, is subsumed by X.

In the case at bar, the appellate court found that the injunction, which formed the basis for the contempt finding, "prohibited [the respondent] 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." *State v. Johnson,* 644 So.2d 1028 (Fla. 3d DCA 1994). The respondent violated the injunction "by entering Green's place of residence, and pled no contest to the charge of criminal contempt that arose from that violation." *Id.*

The respondent was subsequently prosecuted for aggravated stalking. The felony information charged that:

Robert L. Johnson, on or between April 20, 1993, and April 23, 1993,

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[14]It would be illogical to apply *Blockburger* more narrowly in successive prosecution cases than in the multiple punishment context, thus providing individuals with less protection against successive prosecutions than is afforded with respect to cumulative punishments.

[15]In *State v. Miranda,* 644 So. 2d 342 (Fla. 2d DCA 1994), the appellate court concluded that the injunction and the offense of Aggravated Stalking were separate offenses under *Blockburger.* The court applied a strict *Blockburger* analysis and failed to determine whether Aggravated Stalking as charged in the information was subsumed under the language of the injunction as required by 775.021(4)(b)(3).

> in the county and State aforesaid, did unlawfully and feloniously commit aggravated stalking upon Andrea Green, by knowingly, willfully, maliciously, and repeatedly following or harassing Andrea Green, after the entry against the defendant of an injunction against domestic violence . . .

(R. 1-2)

A comparison of the injunction's language (rather than the specific event used to prove the violation) with the succeeding information shows that the "substantive charge was subsumed under the language of the injunction." *Johnson,* 644 So.2d at 1029.

In the information, the state charged that the defendant stalked the victim by entering her place of residence and thereby *"harassed"* her in violation of an injunction against domestic violence. The injunction specifically prohibited the respondent from entering the victim's residence, or harassing her.

The portion of the stalking statute under which the respondent was charged states:

> (4) Any person who, after an injunction for protection against repeat violence pursuant to Sec. 784.046, or an injunction for protection against domestic violence pursuant to Sec. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows or harasses another person commits the offense of aggravated stalking, a felony of the third degree. . .

§ 784.048(4) Florida Statutes (Supp. 1994). The statute defines "harasses" as:

> (a) "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.

§ 784.048(1)(a) Florida Statutes (Supp. 1994). Currently there are no Florida cases specifying what the terms "knowingly, willfully, [and] maliciously," mean with respect to stalking. There is also no indication that the state would have to establish any material element with respect to stalking in addition to the proof needed to establish a violation of the injunction. The fact that harassment must be wilful and malicious, therefore, does not distinguish the stalking charge from the injunction's prohibitions

for double jeopardy purposes. Nor is there any reason to assume that the meaning of the term "harass" as used in the injunction is different from its statutory definition.

In the instant case, there is no conceivable manner in which one could commit aggravated stalking, as charged in the information, without also violating the terms of the injunction. Consequently, the Third District Court of Appeal was correct when the court concluded that "aggravated stalking is 'a species of lesser-included offense' of the contempt charge. . ." *Johnson,* 644 So.2d at 1029.

CONCLUSION

For the reasons and on the basis of the law set forth herein, the respondent respectfully requests that this Court affirm the Third District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the BRIEF OF RESPONDENT ON THE MERITS has been forwarded to the Office of the Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida, this 19th day of July, 1995.

By: MANUEL ALVAREZ
Assistant Public Defender

APPENDIX

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. SPADONE

Clerk District Court of
Appeal, Third District

By _____
Deputy Clerk

cc: Michael J. Neimand
Manuel Alvarez

/NB

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1994

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.