IN THE SUPREME COURT OF FLORIDA

AFGHARI BOLER, et al.,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 85,623

ON APPEAL FROM THE CIRCUIT COURTS
FOR THE EIGHTEENTH AND FIFTH JUDICIAL CIRCUITS

CERTIFIED BY THE FIFTH DISTRICT COURT OF APPEAL

APPELLANTS' INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS cont'd

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Mr. Boler's case.

On July 21, 1992, the State Attorney for the Eighteenth Judicial Circuit (Brevard County) issued an indictment in case no. 92-11435-CFA charging Afghari Boler with first-degree felony-murder and with robbery. (R 1374-75) The offenses were alleged to have taken place on June 2, 1992; the alleged victim of both offenses was Harry Brink. (R 1375) Count I of the indictment charged that the appellant

> did...unlawfully kill a human being, Harry Brink, by shooting Harry Brink with a firearm, and said killing was committed by Afghari Urundi Boler, while engaged in the perpetration, or in the attempt to perpetrate robbery...and in the course of committing said robbery, Afghari Urundi Boler carried a firearm, to wit: handgun.

(R 1375) Count II of the indictment charged the appellant with robbing Mr. Brink and with using a firearm in the course of that robbery. (R 1375)

Mr. Boler testified in the jury trial of his case that on the night of June 1-2, he and some friends consumed cocaine for quite a while, and that later that night, he entered a Mapco convenience store with the intention of robbing the store to get money for more cocaine. (T 386-89) He testified that one of the other men in the car handed him the gun, which he had not known was there; that the man who gave him the gun told him it was loaded; that he then went in the store and asked the clerk for money; and that he had no intention at that time of shooting the clerk. (T 390-91) Mr. Boler

went on to testify that he asked the clerk for the money in the register; that the clerk gave it to him, then told him there was more money in back; that the two of them went to the back of the store, where the clerk grabbed the appellant by the arm; and that the gun went off, without the appellant's intending it to go off, in the struggle between the two. (T 392-95)

The jury returned verdicts of guilty as charged on both counts, and Mr. Boler was adjudicated guilty of both counts. (R 495-6, 499, 1582-83) The trial judge imposed a sentence of life imprisonment on Count I, to include a twenty-five year minimum mandatory term, and a consecutive life sentence on Count II, to include a three-year minimum mandatory term for use of a firearm. (R 1585-91)

Timely notice of appeal from the judgment and sentencing orders was filed July 2, 1993. (R 1620) The appellant argued in his initial brief filed in the Fifth District Court of Appeal that his dual convictions violate the federal double jeopardy clause, and argued in the alternative that his mandatory minimum sentences should have been imposed to run concurrently. A three-judge panel of the Fifth District Court of Appeal, in its case no. 93-1622, reversed Mr. Boler's conviction for robbery. (Slip op. at 8) The District Court combined Mr. Boler's appeal with its case no. 93-2092, Oats v. State, and "passed through" both cases for resolution by this court pursuant to Article 5, section (3)(b)(4), Florida Constitution, and Rules 9.030(a)(2)(B) and 9.125, Florida Rules of Appellate Procedure.

Mr. Oats's case.

On April 13, 1992, the State Attorney for the Fifth Judicial Circuit (Marion County) filed an information charging Sonny Boy Oats in case no. 92-909-CFA-Z with one count of third-degree felony murder and one count of grand theft. (R 47) The offenses were alleged to have taken place March 9, 1992. (R 47)

The third-degree murder count charged that Mr. Oats

> did unlawfully, and without any premeditated design to effect death, while feloniously engaged in the perpetration of, or attempt to perpetrate grand theft, a felony, kill and murder Salvatore Cocchi, a human being, by unlawfully taking and carrying away the purse (and its contents) belonging to Irene Contillo, a [sic] elderly disabled person, in a public place at a time when frequented by many senior citizens and in view of Salvatore Cocchi, who as a "Good Samaritan" gave chase to Sonny Boy Oats, III, in an attempt to make a selfhelp [sic] recovery of Mrs. Contillo's property and/or to make a citizen's arrest, and the physical and emotional stress viewing the theft and the subsequent chase incident led to a cardiac arrythmia in Salvatore Cocchi which resulted in his death.

(R 47) The theft count charged Mr. Oats with obtaining, using, or endeavoring to take or use Irene Contillo's purse and its contents, and charged that the purse and its contents were worth more than $300 but less than $20,000. (R 47)

Mr. Oats filed a motion to dismiss the third-degree murder charge pursuant to Rule 3.190(c)(4), Florida Rules of Criminal Procedure. (R 183-85) In the motion the appellant alleged the

following facts:

> 1. That the Defendant, Sonny Boy Oats, III, is charged in Count I of the information with Third Degree Murder of Salvatore Cocchi.
>
> 2. That the Defendant, Sonny Boy Oats, III, is alleged to have committed a grand theft by stealing a purse which belonged to Irene Contillo and purportedly contained property of a value in excess of $300 and the theft was committed with no violence nor threat of violence, nor with any physical touching of Irene Contillo or any other person.
>
> 3. That the victim of the alleged homicide, Salvatore Cocchi, was a bystander who gave chase to the defendant, Sonny Boy Oats, and was not the victim of the theft, nor was he acquainted with nor in the company of Irene Contillo, the victim of the theft.
>
> 4. That the defendant, Sonny Boy Oats, neither confronted, touched, threatened, nor ran toward Salvatore Cocchi.
>
> 5. That the alleged victim, Salvatore Cocchi, had a lengthy history of heart disease.
>
> 6. That Salvatore Cocchi chased Sonny Boy Oats on foot.
>
> 7. That Salvatore Cocchi suffered a heart attack from the exertion and passed away.

(R 183-84) The State traversed the motion as follows:

> 2. In paragraph 2 of the Defendant's "Motion" [it] <u>does</u> correctly state that Sonny Boy Oats, III "is alleged" (I assume as indicated by Count II of the Information 92-909-CFA-Z) to have committed Grand Theft

by taking a purse which belonged to Irene Contillo, which contained property of value in excess of $300 but the State's allegation does not indicate affirmatively that the theft was committed "with no violence nor threat of violence, nor with any physical touching of Irene Contillo or any other person." This is, as charged in Count II. Grand Theft, not Robbery, thus giving rise to a predicate crime to Count I being Third Degree (Felony) Murder not First Degree (Felony) Murder as robbery would dictate.

3. In paragraph #3 of the Defendant's "Motion" the Defendant correctly asserts that the victim of the alleged homicide, Salvatore Cocchi, was a bystander, who gave chase to "the perpetrator" (again we are to assume Mr. Oats?) and was not the victim of the theft, nor was he acquainted with, nor in the company of Irene Contillo, the victim of the theft. I know not what the phase [sic] "in the company of" means, the facts as sworn to the undersigned that Mr. Cocchi was in the close proximity of Mrs. Contillo, and was able to see that she was an elderly, disabled female, and would have been able to see Mr. Oats take her purse and would have been close enough to over hear [sic] her excited screams, "He stole my purse, he stole my purse!"

4. In paragraph #4 of the Defendant's "Motion" it is stated that "the perpetrator" of the theft neither confronted, touched, threatened nor ran toward Salvatore Cocchi, the state has no knowledge of these facts as only Mr. Cocchi would know this and he is dead, and it is not clear as to who "the perpetrator" is.

5. ....The State agrees that Mr. Cocchi had a significant history of

> heart problems...."[B]ut for" the physical and emotional stress experienced by Mr. Cocchi during and as a result of his chasing the person who took Mrs. Contillo's purse he would not have had a fatal seizure at that time.
>
> **********
>
> 7. In paragraph #7 of the Defendant's "Motion" it states Salvatore Cocchi suffered a heart attack from the exertion (of the chase) and passed away. The State agrees with this fact but adds that Mr. Cocchi was also close enough to the theft incident itself that he witnessed the physical condition and age of Mrs. Contillo and the emotional distress of Mrs. Contillo as a result of her purse being stolen.

(R 127-29) The State further noted in its traverse that

> Mrs. Contillo was an elderly, disabled person, who utilized a "walker" and/or wheel chair to get about.

(R 130) An affidavit sworn to by the district medical examiner was attached to the traverse; in that affidavit she stated

> I can state with a high degree of medical certainty that the physical and emotional stress of the "chase incident" led to a cardiac arrythmia and death of Mr. Cocchi.
>
> In conclusion, but for the "chase incident" following the "purse snatch" it is unlikely that there would have been a fatal seizure at that time.

(R 136)

The trial court denied the motion to dismiss the murder charge. (R 186) Mr. Oats pleaded no contest to Counts I and II as charged, specifically reserving the right to appeal the order

denying dismissal. (R 12-27) The trial court sentenced Mr. Oats to four years' incarceration to be followed by four years' probation for the third degree murder, and to four concurrent years' incarceration and one concurrent year's probation for the theft. (R 31-32, 205-211)

Timely notice of appeal from the judgment and sentencing orders was filed August 17, 1993. (R 212) In his initial brief filed in the Fifth District Court of Appeal, Mr. Oats argued that his motion to dismiss should have been granted, and argued in the alternative that his dual convictions violate the federal double jeopardy clause. The District Court affirmed his convictions, and combined his case with Mr. Boler's case for immediate review by this court.

SUMMARY OF ARGUMENT

Point one: Recent decisional law from the United States Supreme Court, and a 1988 amendment to the rules of statutory construction contained in the Florida Statutes, both indicate that dual convictions and punishments are no longer possible in Florida for felony murder and the predicate felony. The appellants' convictions and sentences for armed robbery and grand theft, respectively, should be vacated for those reasons. The appellants further request this court to apply the protection against double jeopardy that appears in the Florida Constitution in their cases; that protection must, of course, be at least as great as that provided by the federal constitution.

Point two: In Mr. Boler's case, consecutive minimum mandatory sentences for the capital offense charged in Count I, and for use of a firearm in the predicate felony, were improperly imposed. If this court denies the relief sought on Point I, the minimum mandatory term for use of a firearm should be struck from the sentencing order.

Point three: In Mr. Oats's case, the district court departed from this court's precedent in holding that the defendant should be held legally responsible for the death of Mr. Cocchi.

ARGUMENT

POINT ONE

DUAL CONVICTIONS FOR FELONY MURDER AND ITS UNDERLYING FELONY VIOLATE THE FEDERAL DOUBLE JEOPARDY CLAUSE.

In State v. Enmund, 476 So. 2d 165 (Fla. 1985), this court held that entering convictions for both felony murder and the predicate felony does not violate the double jeopardy clause of either the Florida or the federal constitution. However, the United States Supreme Court's decision in United States v. Dixon, 509 U.S. ___, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), appears to overrule Enmund as to the federal double jeopardy clause. A 1988 amendment to the rules of construction set out in the Florida Statutes also appears to call for this court to recede from Enmund. The appellants request this court to reverse their convictions for the predicate offenses in these cases, robbery and theft respectively, based on Dixon and on the 1988 amendment to Section 775.021(4), Florida Statutes.

Felony murder and double jeopardy.

The Florida constitution and the federal constitution both protect those charged with crimes from being twice put in jeopardy for the same offense. Article I, section 9, Florida Constitution; U.S. Constitution, Amendment 5. The question whether felony murder and its predicate felony are "the same offense" for double jeopardy purposes has been the subject of considerable appellate litigation in both jurisdictions.

In Harris v. Oklahoma, 433 U.S. 682, 97 S. Ct. 2912, 153 L.

Ed. 2d 1054 (1977), the defendant was convicted of felony murder in an Oklahoma state court. 433 U.S. at 682. He was later, in the same jurisdiction, convicted of committing the underlying felony, robbery with firearms. Id. The United States Supreme Court accepted review of the second conviction and reversed it because the robbery was included in the felony murder. Id. The Court noted that the Oklahoma courts hold that "in a felony murder case, the proof of the underlying felony...is needed to prove the intent necessary for a felony murder conviction." Id.

Two years later, in State v. Pinder, 375 So. 2d 836 (Fla. 1979), this court relied on Harris v. Oklahoma to affirm an appellate decision that vacated Pinder's conviction for burglary. Pinder had been simultaneously convicted of the burglary and of first-degree murder on a felony-murder theory. 375 So. 2d at 837-39. This court held that there was no significant distinction between Harris's case and Pinder's, although Harris was convicted in successive prosecutions and Pinder's dual convictions were imposed in a single proceeding. Id. at 838. In support of the latter conclusion, this court quoted the Supreme Court's opinion in Ex Parte Lange, 18 Wall. 163, 173, 21 L. Ed. 872, 878 (1874), as follows:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly, it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the

> second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had and on a second conviction, a second punishment inflicted?
>
> The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.

Pinder at 838.

In another two years, however, this court receded from Pinder, holding that Harris v. Oklahoma was manifestly meant to apply only to cases involving successive prosecutions. State v. Hegstrom, 401 So. 2d 1343 (Fla. 1981). The Hegstrom decision was based on opinions issued in two intervening United States Supreme Court cases, Whalen v. United States, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980), and Albernaz v. United States, 450 U.S. 333, 101 S. Ct. 11377, 67 L. Ed. 2d 275 (1981). See Hegstrom, 401 So. 2d at 1345. The Court's opinion in Albernaz stated that at least in single prosecutions involving multiple punishments--as distinct from cases involving successive prosecutions--the federal double jeopardy clause was intended *solely* to protect defendants from more punishment than the relevant legislature intended. 450 U.S. at 344.

Similarly, in Whalen, the Court looked to legislative intent before deciding that Congress intended that felony murder and the underlying felony, in the District of Columbia, should be punished in a single prosecution as one offense rather than two. 445 U.S. at 693-94.

In Hegstrom, the defendant was convicted and sentenced, in one proceeding, for felony murder and the underlying robbery. This court concluded that the Florida Legislature did not intend multiple punishment in that situation, since the felony is a necessarily lesser included offense of felony murder. 401 So. 2d at 1346. This court disapproved Hegstrom's multiple sentences *but approved his multiple convictions,* since according to Albernaz double jeopardy has to do only with sentencing. Hegstrom at 1346.

Four years later, in State v. Enmund, 476 So. 2d 165 (Fla. 1985), this court overruled Hegstrom. The Enmund court concluded that the underlying felony is not, after all, a necessarily lesser included offense of felony murder and that the Florida Legislature did, after all, intend both separate convictions and separate punishments for felony murder and the underlying felony. 476 So. 2d at 167. Justice Overton dissented, "[b]ecause the elements of the felony are the elements utilized as a substitute for premeditation in establishing first-degree [felony] murder." Enmund at 170. The reason for the dissent in Enmund was the reason for the decisions in Whalen v. United States, supra, and Harris v. Oklahoma, supra. See Whalen, 445 U.S. at 693-94; Harris, 433 U.S. at 682.

United States v. Dixon.

In United States v. Dixon, 509 U.S. ___, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), the United States Supreme Court returned double jeopardy law, as it affects lesser included offenses that are incorporated in greater offenses, to the state it was in at the time of Harris v. Oklahoma, supra, and State v. Pinder, supra. This court should accordingly recede from State v. Enmund and should reinstate its decision and opinion in State v. Pinder in their entirety.

The Court in Dixon held that the federal double jeopardy clause was always intended to provide *identical* protection in the contexts of successive prosecutions and simultaneous prosecutions, and that accordingly one of its previous decisions--Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), which relied on the opposite assumption--had to be overruled. That holding was announced by Justice Scalia, in Part IV of an opinion concurred in by Justice Kennedy. Dixon, 113 S. Ct. at 2859-64, 125 L. Ed. 2d at 573-78. Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, expressly concurred in Part IV of the Court's opinion. Id., 113 S. Ct. at 2865, 125 L. Ed. 2d at 579. The agreement by five members of the Court that double jeopardy protection is the same in simultaneous prosecution cases and in successive prosecution cases created binding precedential opinion. See Santos v. State, 629 So. 2d 838, 840 (Fla. 1994); see also United States v. Underwood, 717 F. 2d 482, 486 (9th Cir. 1986) (principle directly and explicitly stated as a ground of decision

is not dictum). Accordingly this court's conclusion, announced in 1981 in State v. Hegstrom, that Harris v. Oklahoma applies only in successive prosecutions has been proved incorrect.

Five Justices also reaffirmed in Dixon that the rule of Harris v. Oklahoma precludes dual convictions where a lesser statutory offense is "incorporated" as an essential element of a greater statutory offense. 113 S. Ct. at 2857, 125 L. Ed. 2d at 569 (Scalia, J.); 113 S. Ct. at 2867-68, 125 L. Ed. 2d at 581-82 (Rehnquist, C.J., concurring and dissenting). In Dixon, Justices Scalia and Kennedy would have applied the rule of Harris in the case before them; no other Justice agreed that Harris should be so extended. Dixon and his co-petitioner were each punished for contempt of court for committing crimes a judge had ordered them not to commit, either in an injunction or a release order. The issue before the Court was whether the contempt adjudications and sanctions precluded later trials for the substantive crimes. Since no five Justices agreed on the question whether an injunction or release order "incorporates" criminal offenses for double jeopardy purposes, Dixon creates no binding precedent on that specific issue. However, as noted above, five justices in Dixon agreed that Harris is still good law.

The Court in Dixon did not make it clear how the rule of Harris v. Oklahoma is to be harmonized with the Court's decisions in Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983), Albernaz v. United States, supra, and Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

Blockburger is the case usually cited for the long-standing principle of statutory construction that a legislature probably intends two statutory offenses to be punished separately if each has an element the other does not. Albernaz stands for a rule that where the Blockburger test is "passed," and two statutory offenses each contain an element the other does not, and if legislative history is barren of any other indication of the legislature's intent, then the offenses are in all cases to be considered separate for double jeopardy purposes. 450 U.S. 333, 344. This court reached the same conclusion in State v. Smith, 547 So. 2d 613 (Fla. 1989). In Missouri v. Hunter, the Court held that even where the Blockburger test is *not* passed, that is where two offenses have the same elements, provided the Legislature made it affirmatively clear that it intends multiple punishments for both statutory offenses, the federal double jeopardy clause does not preclude two convictions and punishments. Hunter, 459 U.S. 359, 368-69. Accord State v. Smith.

The appellants have assumed that Dixon was not meant to override Missouri v. Hunter or Albernaz. The appellants have further assumed that the rule of Harris v. Oklahoma--which is an exception to the rule of Blockburger, see Grady v. Corbin, 495 U.S. 508, 528, 110 S. Ct. 2084, 109 L. Ed. 2d 548, 569 (1990) (Scalia, J., dissenting)--operates in much the same way that the Blockburger rule does. Both are best understood as creating rebuttable presumptions: if an offense "passes" the Blockburger test, presumptively the offenses are the same for double jeopardy

purposes. If an offense falls into the Harris exception, and accordingly does not "pass" the Blockburger test, then presumptively the offenses are separate for double jeopardy purposes *unless* the Legislature affirmatively makes it clear that it intends separate convictions and punishments for them.

Felony murder and the predicate felony fall into the Harris exception, and the Florida Legislature, since a change it made in its rules of construction in 1988, has not expressed an intent for the two to be punished separately.

State v. Enmund and Section 775.021(4), Florida Statutes.

This court should recede from its 1985 decision in State v. Enmund and reinstate its 1979 decision in State v. Pinder, because two basic principles underlying Enmund have been superseded by United States v. Dixon and by a 1988 amendment to Section 775.021(4), Florida Statutes. In Enmund a majority of this court agreed, over Justice Overton's dissent, that the underlying felony is not a *necessarily* included lesser offense of felony murder, and that accordingly the two are not the same offense for double jeopardy purposes. Harris v. Oklahoma and Whalen v. United States--which, in light of Dixon, apply to all felony murder cases--establish that *for double jeopardy purposes* a lesser offense is "the same" as a greater offense if it is "incorporated" in exactly the manner that Florida's felony murder statute "incorporates" twelve enumerated underlying felonies. Whalen, 445 U.S. at 686, 693-94; Harris, 433 U.S. at 682. This court has recognized that lesser included offenses are not always the same for double

jeopardy purposes and for jury-alternative purposes. State v. Weller, 590 So. 2d 923, 925-6 (Fla. 1991). It appears from Dixon, Whalen and Harris that Justice Overton has been correct on this point all along, and that for double jeopardy purposes, at least those permissive lesser included offenses that are "incorporated" in greater offenses are "the same" as the greater offenses. State v. Rodriquez, 500 So. 2d 120, 124 (Fla. 1986) (Overton, J., dissenting), receded from in Carawan v. State, 515 So. 2d 161, 170 (Fla. 1987); State v. Enmund, 476 So. 2d 165, 170 (Fla. 1985) (Overton, J., dissenting); State v. Baker, 456 So. 2d 419, 423-24 (Fla. 1984) (Overton, J., dissenting).

This court also held in Enmund that the Legislature appeared to intend multiple punishments for both felony murder and the predicate felony. This holding was based on the version of Section 775.021(4) then in effect. The 1988 version of Section 775.021(4), which applies to the 1992 offenses charged in these cases, is significantly different from the 1983 version in effect at the time of Enmund.

In 1983, Section 775.021(4) read as follows:

> **775.021 Rules of construction**
>
> (4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof that the other does not, without

> regard to the accusatory pleading or the proof adduced at trial.

In 1988, the Legislature added the language underlined below:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Ch. 88-131, s.7, Laws of Florida. The 1983 version incorporated the rule of Blockburger v. United States, supra. The 1988 version of Section 775.021 retained the Blockburger formulation and added a number of exceptions to its general rule that separate statutory offenses are to be punished separately.

This court has construed the 1988 exceptions in a number of

cases, concluding that subsection (4)(b)(1) appears to do nothing more than restate the Blockburger formulation that already appears in subsection (4)(a). Thompson v. State, 585 So. 2d 492, 493 (Fla. 5th DCA 1991), decision approved and opinion adopted 607 So. 2d 422 (Fla. 1992); see Sirmons v. State, 634 So. 2d 153, 155 (Fla. 1994) (Kogan, J., concurring). Subsection (4)(b)(2) has engendered some controversy, with a narrow majority of this court giving a broad construction to "degree offenses." See Sirmons. Neither (4)(b)(1) nor (4)(b)(2) is at issue in this case.

Subsection (4)(b)(3), which provides for a single punishment for "lesser offenses the statutory elements of which are subsumed by the greater offense," has also caused some disagreement. Justice Kogan has concluded that (4)(b)(3) refers to all permissive lesser included offenses. Cave v. State, 613 So. 2d 454, 456-7 (Fla. 1993) (Kogan, J, concurring specially). Majorities of this court appear to have concluded that (4)(b)(3) refers only to necessarily lesser included offenses. Thompson, supra; State v. McCloud, 577 So. 2d 939 (Fla. 1991). The appellants submit that Justice Kogan is correct on this point, and that the wording of subsection (4)(b)(3) appears to encompass at least those permissive lesser included offenses that are "incorporated" in a greater offense in the manner described in Dixon, Harris and Whalen, supra. The appellants further submit that as a matter of federal constitutional law Justice Overton's dissents in Rodriquez, Enmund and Baker, supra, are correct, and that at least those permissive lessers that are "incorporated" in a greater offense must be considered separate

offenses *unless* the Legislature affirmatively makes it clear that it intends separate punishment for both.

Nothing in any of the Florida Statutes other than Section 775.021 indicates whether the Legislature intends separate convictions and punishments for felony murder and the predicate felony. Cf. Missouri v. Hunter, supra, 459 U.S. at 539 (setting out express legislative intent to authorize dual punishment recited in Missouri statutes). Section 782.04, the murder statute, is silent on the subject, and has been silent throughout the eventful history of felony murder vis-a-vis double jeopardy in Florida. The Legislature had no response to State v. Pinder, supra, which established for two years that only one punishment could be had for those two offenses; nor has the Legislature responded to State v. Hegstrom or State v. Enmund, which had the opposite effect. It appears that whether felony murder and the predicate felony are punished once or twice is a matter of no great moment to the Florida Legislature. This is unsurprising: third degree felony murder occurs in odd, one-in-a-million situations, viz. Mr. Oats's case, and first degree felony murder, at the time of the offenses involved in this case, was punishable only by life in prison with a mandatory minimum term of twenty-five years and is now punishable only by life in prison with no possibility of parole. Sections 775.082(1), 782.04(1)(a), Fla.Stat. (1993); 775.082(1)(a), Fla.Stat. (1994 supp.).

In short, it appears that after United States v. Dixon, Harris v. Oklahoma applies to both successive-prosecution and simulta-

neous-prosecution cases, and that Harris presumptively precludes convictions for both felony murder and the underlying felony. The Florida Legislature has announced that it does not intend dual punishments when a lesser offense is "subsumed" in a greater offense; that "subsumed" language appears to apply at least to those permissive lesser included offenses that are "incorporated" in a greater offense. The appellants request this court to vacate their robbery and theft convictions, respectively, for those reasons.

Florida constitutional law.

As an alternative to the arguments set out above, the appellants submit that their convictions for robbery and theft should be set aside as a matter of Florida constitutional law. Until 1991, the Florida courts generally construed and applied the double jeopardy clause in Article I, section 9 in the same manner that the United States Supreme Court construed and applied the federal double jeopardy clause. State v. Cantrell, 417 So. 2d 260 (Fla. 1982); see, e.g., Hegstrom, supra. However, in Wright v. State, 586 So. 2d 1024 (Fla. 1991), this court stated (in a context unique to death penalty cases) that

> [a]lthough federal law provides some guidance for interpreting the meaning of Florida's double jeopardy clause, we rely here on article I, section 9 of the Florida Constitution, which has historically focused upon the protection of the rights of the individual, and thus provides at the very least the same protection of individual rights as the federal constitution.

586 So. 2d at 1032 (citations and internal punctuation omitted). A few months later, this court issued its landmark opinion in Traylor v. State, 596 So. 2d 957 (Fla. 1992), holding that in all cases

> [w]hen called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein. We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.

596 So. 2d at 962-63.

The appellate courts of at least ten states grant their citizens greater double jeopardy protection than the federal constitution provides. People v. Paulsen, 601 P. 2d 634 (Colo. 1979); State v. Lessary, 865 P. 2d 150 (Hawaii 1994); Derado v. State, 622 N.E. 2d 181 (Ind. 1993); Osborne v. Commonwealth, 867 S.W. 2d 484, 493 n.5 (Ky. Ct. App. 1993); State v. Steele, 387 So. 2d 1175 (La. 1980); State v. Lancaster, 631 A. 2d 453 (Md. 1993); People v. Harding, 506 N.W. 2d 482 (Mich. 1993); State v. Hogg, 385 A. 2d 844 (N.H. 1978); State v. Yoskowitz, 563 A. 2d 1 (N.J. 1989); Swafford v. State, 810 P. 2d 1223 (N. M. 1991). As the United States Supreme Court has acknowledged, its double jeopardy opinions over the years have been less than a model of clarity and predictability. See Albernaz v. United States, supra, 450 U.S. 333, 343 (caselaw a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator); see generally United States v. Dixon. The Supreme Court has acquired two new members since

Dixon was issued; that Court's next double jeopardy decision may successfully harmonize the various opinions in Dixon with the Court's earlier precedents in Albernaz and Missouri v. Hunter, or it may not. The appellants accordingly submit that this court should adopt its own principles of double jeopardy law which guarantee at least those protections currently guaranteed by federal constitutional law. Specifically, the appellants request this court to vacate the dual convictions and sentences in these cases on the basis of Florida constitutional law if this court does not agree with the arguments set out above.

POINT TWO

IN MR. BOLER'S CASE, CONSECUTIVE MANDATORY MINIMUM SENTENCES WERE IMPROPERLY IMPOSED.

Mr. Boler was sentenced to life in prison on the first-degree murder conviction below; that sentence includes a twenty-five-year minimum mandatory term. See Section 775.082(1), Florida Statutes (1991). He was also sentenced to a consecutive term of life in prison on the armed robbery count, to include a three-year minimum mandatory term for use of a firearm. See Section 775.087 (2)(a)(1), Florida Statutes (1991). Mr. Boler accordingly will serve 28 years in prison before becoming eligible for a control release date. See Section 947.146(3)(a),(b), Florida Statutes (1993).

In Downs v. State, 616 So. 2d 444 (Fla. 1993), this court approved consecutive minimum mandatory sentences, one a twenty-five-year term for a capital offense and one a three-year term for using a firearm in an aggravated assault. Downs involved two victims; the aggravated assault was committed on a witness to the murder in that case. 616 So. 2d at 445. In its opinion this court stated

> [i]n the instant case we have a capital felony, first-degree murder, and a noncapital felony, aggravated assault. The applicable minimum mandatory sentences, twenty-five years for the former crime and three years for using a firearm during the commission of the latter, address two separate and distinct evils--killing someone and using a firearm. We see no reason why a trial court cannot, in its discretion, stack those minimum mandatory sentences. It would be improper to add a three-

> year minimum for using a firearm to kill the murder victim to the capital minimum mandatory, but Downs committed two distinct and separate crimes, and the trial court imposed distinct and separate penalties.

616 So. 2d at 446. This court went on to announce in Downs that it was disapproving the decision in Blair v. State, 559 So. 2d 349 (Fla. 1st DCA 1990), quashed in part on other grounds, 598 So. 2d 1068 (Fla. 1992), "wherein the court disallowed stacking a 25-year minimum mandatory sentence for first-degree murder and a three-year minimum for using a firearm during a robbery." Downs at n.4. The opinion in Blair does not indicate whether that case involved more than one victim, and does not indicate whether felony-murder was involved.

This case, unlike Downs, did not involve "two distinct and separate crimes." The indictment in this case charged felony-murder and not premeditated murder; the offense charged on Count I would not have been a capital offense had it not taken place during the course of the robbery charged in Count II. The mandatory terms, according to Downs, may not be imposed consecutively; the three-year mandatory term imposed as part of the sentence on Count II should accordingly be struck.

POINT THREE

IN MR. OATS'S CASE, THE MOTION TO DISMISS THE THIRD-DEGREE MURDER CHARGE SHOULD HAVE BEEN GRANTED.

The district court's decision to affirm the order denying dismissal in Mr. Oats's case was inconsistent with this court's decision in Tipton v. State, 97 So. 2d 277 (Fla. 1957); with the First District Court's decision in Penton v. State, 548 So. 2d 273 (Fla. 1st DCA), rev. den. 554 So. 2d 1169 (Fla. 1989); and with the Fifth District Court's own correct decision in Todd v. State, 594 So. 2d 802 (Fla. 5th DCA 1992). The decision in Mr. Oats's case should be reversed.

In Todd, the defendant swiped $110 from a church's collection plate in full view of the congregation. 594 So. 2d at 803. A parishioner gave chase, and died of a heart attack during the chase. Id. The trial judge denied a motion to dismiss a charge of misdemeanor-manslaughter against Todd. Id. The Fifth District Court, in a scholarly opinion based in part on this court's decision in Tipton and on the First District's decision in Penton, reversed and held that the theft was not the *legal* cause of the parishioner's death.

> Although the petty theft did trigger a series of events that concluded in the death of [the parishioner] and was, in that sense, a "cause" of the death, the petty theft did not encompass the kind of direct, foreseeable risk of physical harm that would support a conviction of manslaughter. The relationship between the unlawful act committed (petty theft) and the result effected (death by heart attack during pur-

> suit in an automobile) does not meet the test of causation historically or currently required in Florida for conviction of manslaughter.

Todd, 594 So. 2d at 806.

In Tipton, this court reached a similar result, holding that the defendants' mildly regrettable conduct in rudely pushing a store attendant should not be considered the legal cause of the attendant's dying of a heart attack even if it was the actual cause of the heart attack. 97 So. 2d at 281. Penton v. State, supra, is similar to both Todd and Tipton; the First District Court reversed Penton's conviction for manslaughter where the alleged victim died after chasing the person who stole his son's bicycle. The court in Penton held both that the medical testimony did not establish actual causation, and that in any event the conduct involved in the theft was not sufficiently culpable to be punished by a manslaughter conviction. 548 So. 2d at 274-75 and n.2.

In this case, Mr. Oats stole a purse and was chased by a bystander who died of heart trouble shortly afterward. The State's traverse admitted that the pursuit--not the shock of witnessing the theft--was the immediate cause of death. The Fifth District held that Mr. Oats, in his motion to dismiss, did not effectively dispute the possibility that he might have robbed Mrs. Contillo, the purse's owner, by taking her purse with force or violence. Slip op. at 9. The district court accordingly assumed that the taking of the purse was done violently, since the State is entitled to all reasonable inferences that can be drawn from the charging document, and held that it was foreseeable that someone would give chase, and

that it is not unreasonable to punish the defendant for murdering Mr. Cocchi. Id. at 9, 14-15. The appellant submits that this line of reasoning is untenable: the defendant was not charged with a robbery, and it is not reasonable to assume from the fact he was charged with a theft that he probably committed a robbery. This case is indistinguishable from Todd; in Todd, the district court reached a conclusion that was consistent with Tipton, but in this case it did not.

Mr. Oats requests this court to reverse the district court's decision on this point, and to remand his case to the trial court with directions to vacate his conviction and sentence for felony murder.

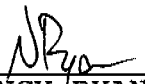
CONCLUSION

Mr. Boler requests this court to affirm the District Court's decision in his case. If that relief is not granted, he requests this court to strike the mandatory minimum sentence he received for use of a firearm.

Mr. Oats requests this court to reverse the District Court's decision in his case, and to vacate his conviction and sentence for third-degree murder on the grounds argued in Point III. If that relief is not granted, he requests this court to vacate his conviction and sentence for theft on the grounds argued in Point I.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER



NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Robert A. Butterworth, Attorney General, of 210 N. Palmetto Ave., Suite 447, Daytona Beach, Fla. 32114, by way of his basket at the Fifth District Court of Appeal; and mailed to Afghari U. Boler, No. 780961, Apalachee C. I., P. O. Box 699, Sneads, FL 32460-0699 and Sonny Boy Oats, III, Rt 4, Box 293 Holly Lane, Humboldt, TN 38343 on this 5th day of June, 1995.

NANCY RYAN