ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 87,757

SONNY D. ANDERSON,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR
SEMINOLE COUNTY, FLORIDA

PETITIONER'S RRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF THE CASE AND FACTS

Sonny D. Anderson was charged by information with committing perjury in an official proceeding and providing false information in an application for bail. §§ 837.02, 903.035, Fla. Stats. (1991). The factual allegation supporting both charges was "...his lateness to court on October 8, 1990 which resulted in his being remanded to custody and a bond increase was due to his taking his girlfriend's daughter, Desera Hollie, to the emergency room of the Central Florida Regional Hospital in Sanford..." (R 4-5)

At Anderson's jury trial, the State introduced the transcript of the proceeding held on January 25, 1991, during which Anderson testified that the reason he was late for court on October 8, 1990, was because he took his girlfriend's daughter to the hospital. The State **also** presented testimony from the Anderson's girlfriend that Anderson had not taken the child to the hospital before he arrived at the courthouse on October 8. Anderson was convicted of perjury in an official proceeding and providing false information in an application for bail, both third degree felonies. Anderson was sentenced as an habitual offender to two concurrent ten year terms of incarceration.

An order granting a belated appeal on September 1, 1993. An initial brief was filed on Anderson's behalf on March 9, 1994,

alleging that the trial court erred in adjudicating Anderson guilty and imposing separate sentences for both charges due to the prohibition against double jeopardy. The state filed its answer brief; there was no oral argument requested by either side.

On June 16, 1995, the District Court of Appeal, Fifth District, entered an opinion finding that double jeopardy was violated because these two crimes were the same "core offense". Moreover, the court found that the legislature could not have intended that by telling a single lie at a single hearing Anderson committed two third degree felonies. "Even absent the rule of lenity, it does not appear to have been the legislature's intent in enacting these statutes to transform this event of making one false statement into two discrete crimes." Anderson v. State, 669 So. 2d 262, 265 (Fla. 5th DCA 1996).

Judge Goshorn dissented, agreeing that the controlling statute was section 775.021, Florida Statutes (1991). These two offenses pass the traditional Blockburger test as each requires an element that the other does not, a finding also made by the majority.

Nor did conviction of these two offenses run afoul of the exceptions delineated in the statute, found Judge Goshorn. There is no "core offense" of lying, and so subparagraph 775.021(4)(b)(2) is inapplicable. Neither is one crime "subsumed" in the other in

his view, because the false information necessary for a violation of subsection 903.035(3) is not required to be provided in an "official proceeding" as defined by section 837.02. It was not the factual allegations of this case, but rather, the statutory elements which must be examined. Further support for this conclusion was found by Judge Goshorn in the observation that both crimes were third degree felonies, and so one cannot be a lesser of the other.

Upon the State's timely motion for rehearing, the district court certified te following question to this Court for resolution:

> WHETHER THE DOUBLE JEOPARDY CLAUSE PERMITS A DEFENDANT TO BE CONVICTED AND SENTENCED UNDER BOTH SECTION 837.02, FLORIDA STATUTES (1991), PERJURY IN AN OFFICIAL PROCEEDING, AND SECTION 903.035, FLORIDA STATUTES (1991), PROVIDING FALSE INFORMATION IN AN APPLICATION FOR BAIL, FOR CHARGES THAT ARISE OUT OF A SINGLE ACT?

Notice to invoke this Court's jurisdiction was timely filed and this brief follows in accordance with this Court's order of April 18, 1996.

SUMMARY OF ARGUMENT

It is the sole prerogative of the legislature to define crimes and affix punishment. In the context of multiple punishment for one act, the Florida Legislature has expressed its intent in section 775.021(4), Florida Statutes (1993). All parties agree that the two crimes at issue survive the threshhold test because each contains an element that the other does not.

The next relevant question is whether cumulative punishment is nonetheless precluded because the two crimes are the same, necessarily lesser offenses or 'offenses which are degrees of the same offense as provided by statute." Id. As this Court recently observed, the Blockburger test is designed to identify crimes that are the same or necessarily lesser included offenses.

The remaining statutory exception limits cumulative punishment for degrees of crimes which have different elements and are not necessarily lesser included offenses. Examples include the various forms of sexual battery and first, second and third degree murder. Even though these crimes are not the same or lesser offenses of each other, the legislature does not intend multiple punishment for one act because they are 'degrees of the same offense as provided by statute."

The dissent below was correct that the common element of the

"core offense" must itself be a crime to be the 'same offense as provided by statute." Lying is not a crime. Therefore, the legislature intends cumulative punishment for perjury in an official proceeding and providing false information in an application for bail. The State respectfully requests this Honorable Court to answer the certified question in the affirmative.

ARGUMENT

DOUBLE JEOPARDY DOES NOT PROHIBIT CONVICTIONS FOR PERJURY IN AN OFFICIAL PROCEEDING AND PROVIDING FALSE INFORMATION IN AN APPLICATION FOR BAIL BECAUSE EACH CONTAINS AN ELEMENT THAT THE OTHER DOES NOT AND NONE OF THE STATUTORY EXCEPTIONS APPLY.

This case involves the species of double jeopardy which answers khe question of what crimes can be charged in a single prosecution for one act. Although this question is relatively basic, resolving it is the subject of much judicial effort.[1] "The hard part is figuring out what this statute means and how it applies to a given set of charged offenses." Anderson v. State, 669 So. 2d 262, 263 (Fla. 5th DCA 1995). In this case, the State contends that the district court reached a legally incorrect conclusion that convictions and sentences for both of these two offenses are barred by double jeopardy.

When cumulative punishments are imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment that the legislature

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[1]As of this writing, the Court has pending before it several cumulative punishment double jeopardy cases. See, Boler and Oats v. State, Case No. 85,623; M.P. v. State, Case No. 86,968; Salazar v. State, Case No. 87,010; Gaber v. State, Case No. 86,990.

intended. Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983); Jones v. Thomas, 491 U.S. 374, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989). Where a legislature specifically authorized cumulative punishments under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockburger, a court's task of statutory construction is at an end. Missouri v. Hunter, 103 S. Ct. at 679. This is so because the power to define crimes and prescribe punishments for those found guilty of them resides solely with the legislature. Albernaz v. United States, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981). As this Court recognized in State v. Hegstrom, 410 So. 2d 1343, 1345 (Fla. 1981), "(t)o hold that the double jeopardy clause might violate the Constitution by authorizing too many punishments for a single act 'demands more of the double jeopardy clause than it is capable of supplying.'" (footnote omitted).

In the recent case of State v. Johnson, 21 Fla. L. Weekly S 154 (Fla. April 4, 1996), this Court held that the appropriate test to determine whether double jeopardy bars multiple punishments is the Blockburger[2] test, which has been codified as section 775.021, Florida Statutes (1995). The question is not the particular

[2]Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

factual allegations of the case, but rather, whether each crime requires proof of an element that the other does not.

In this case, all parties agree that the two crimes at issue are not the **same** under this test. The crime of providing false information in an application for bail requires proof that the false information **was** provided in connection with an application for or attempt to secure bail. A perjury charge requires proof that the false statement occurred in an official proceeding, and that it was made under oath.

In Florida, the expression of legislative intent does not end with the Blockburger test. Section 775.021(4)(b)(1) lists three exceptions to the rule that the legislature intends multiple punishments: 1) offenses which require identical elements of proof; 2) offenses which are degrees of the same offense as provided by statute; and 3) offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense. This Court has held that this legislative intent is not merely an aid in determing whether the legislature intended multiple punishments, but rather a precise polestar. State v. Smith, 547 So. 2d 613, 615 (Fla. 1989).

In State v. Smith, 547 so. 2d at 616 n. 6, this Court described the three exceptions which prohibit imposition of

multiple punishments as offense which are: 1) the **same; 2) necessarily** included; or 3) **a degree offense.** The statutory **language at** issue here is: 'offenses which are degrees of the same offense as provided by statute." The State respectfully suggests that the legislature intended this category to preclude multiple punishment for offenses which are degrees of the same crime, but which are not necessarily lesser included offenses. For **instance,** sexual battery as proscribed in section 794.011 has several different degrees of crimes depending upon the existence of different elements, but the various kinds of sexual battery are not necessarily lesser included offenses of each other. So, one **act** of sexual intercourse against a physically incapacitated person accomplished by violence could constitute two crimes under Blockburger. §§794.011(4)(a); 794.011(4)(b), Fla. Stats. (1995) They are not the 'same" nor is one "subsumed" in ther other. Yet double jeopardy would bar two convictions because the two crimes are 'degrees of the **same** offense as provided by statute."

In **a** similar vein, third degree murder is not a necessarily lesser included offense of second or first degree murder. The State submits that the legislature sought to except these types crimes from cumulative punishment, even though they survive a Blockburger test, are not "identical" and are not "lesser

offenses... subsumed by the greater offense."

In Sirmons v. State, 634 So. 2d 153, 154 (Fla. 1994), this Court held that this statutory language proscribed separate punishments for "...offenses (that) are merely degree variants of the core offense of theft." Dissenting, Justice Grimes noted that grand theft and robbery have always been entirely separate crimes, citing State v. Rodriguez, 500 So. 2d 120 (Fla. 1986). In his view, the 'core offense" analysis was just a resurrection of the rejected Carawan "separate evils" test. The State respectfully suggests that Justice Grimes was correct. The effect of the 'core offense" analysis is emphasize the facts of the particular case, and not the statutory elements of the crime. "The hard part is figuring out what this statute means and how it applies to a given set of charged offenses." Anderson v. State, 669 So. 2d 262, 263 (Fla. 5th DCA 1995). The State respectfully invites this Honorable Court to clarify Sirmons and hold that "core offense" means degrees of the same statutory offense as described above.

Should this Court determine that 'degrees of the same offense" is equivalent to 'core offense", then at the very least, the common element should be a complete criminal offense. In a concurring decision in Sirmons, Justice Kogan noted that, "Florida's criminal code is full of offenses that are merely aggravated forms of

certain core underlying offenses such as theft, battery, possession of contraband and homicide." Id. at 155. These offenses are all complete crimes. Here, lying or providing a false statement is not a criminal offense, and so there is no core offense. "It is only when the defendant makes the intentionally false statement 'in an official proceeding' or 'in connection with an application for bail' that the behavior becomes criminal." Anderson v. State, 669 so. 2d at 267.

To define core offense as a common element which is not itself a crime would expand the statutory language beyond its obvious meaning. "Offenses which are degrees of the same offense as provided by statute" must be interpreted to mean that the common element is a crime defined by statute.

Nor can one of these offenses be a lesser of the other as described by subsection (3), because they are both third degree felonies. See, Jones v. State, 588 so. 2d 644 (Fla. 2d DCA 1991), approved, 608 So. 2d 797 (Fla. 1992). Moreover, as this court recently observed in State v. Johnson, supra, the Blockburger test by its very nature is designed to distinguish between crimes that are lesser included offenses and crimes that are not; if two crimes are separate under this test, then one cannot be a lesser of the other. See also, State v. Weller, 590 So. 2d 923, 926 (Fla. 1991).

The parties agree that the crimes at issue do not run afoul of the Blockburger test. The next relevant question becomes whether the legislature nevertheless intends to preclude cumulative punishment because the two offenses fall into one of the three categories excepted by statute. The core offense analysis is unworkable because it focuses on the conduct. The legislature intended "offenses which are degrees of the same offense as provided by statute" to prevent punishment for two crimes that are degrees of the same offense but not lesser included offenses like sexual battery and homicide. Even if 'core offense" analysis is correct, the district court incorrectly held these two crimes share a 'core offense" because lying is not a crime. To hold otherwise effectively rewrites the statute because no longer would the two crimes have to be the "same offense as provided by statute".

CONCLUSION

Based upon the foregoing argument and authority, Petitioner respectfully requests this Honorable Court to answer the certified question in the affirmative.

Respectfully submitted,

Robert A. Butterworth
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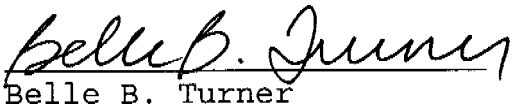

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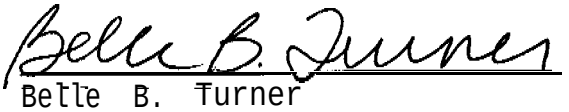
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief has been furnished by delivery to the Nancy Ryan, Office of the Public Defender, 112A Orange Avenue, Daytona Beach, FL 32114, counsel for appellant, this 13th day of May, 1996.



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STATE OF FLORIDA,

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SONNY D. ANDERSON,

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ON DISCRETIONARY REVIEW FROM THE
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SEMINOLE COUNTY, FLORIDA

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

Anderson v. State, 669 So. 2d 262 (Fla. 5th DCA 1995)

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Sonny Daniel ANDERSON a/k/a Ernest Anderson, Appellant,

v.

STATE of Florida, Appellee.

No. 93-2146.

District Court of Appeal of Florida, Fifth District.

June 16, 1995.

Order Denying Rehearing and Granting Certification March 15, 1996.

Defendant was convicted in the Circuit Court, Seminole County, Newman D. Brock, J., of perjury in an official proceeding and providing false information in an application for bail, and he appealed. The District Court of Appeal, Griffin, J., held that defendant who made single false statements to court in course of bail modification hearing could not be convicted of both perjury in an official proceeding and providing false information in connection with application for modification of bail.

Affirmed in part and reversed in part.

Goshorn, J., filed dissenting opinion.

Criminal Law ⇐29(5.5)

Defendant who made single false statements to court in course of bail modification hearing could not be convicted of both perjury in official proceeding and providing false information in connection with application for modification of bail. West's F.S.A. §§ 775.021(4), 837.02, 903.035.

Appeal from the Circuit Court for Seminole County, Newman D. Brock, Judge.

James B. Gibson, Public Defender and Daniel J. Schafer, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Belle B. Turner, Asst. Atty. Gen., Daytona Beach, for appellee.

GRIFFIN, Judge.

Sonny Daniel Anderson appeals from the final judgment and sentence imposed stemming from his convictions for perjury in an official proceeding[1] and providing false information in an application for bail.[2] Anderson asserts several errors on appeal, only one of which merits discussion.

The State charged Anderson by information as follows:

COUNT I

SONNY DANIEL ANDERSON on the 25th day of January, 1991, did then and there at an official proceeding, to-wit: Motion for Reduction of Bond and Motion for Pre-Trial Detention before the Honorable Alan A. Dickey, Circuit Judge and relating to Seminole County Case Number A90-2191-CFA, while under oath make a false statement which he did not believe to be true in regard to a material matter, to-wit: that his lateness to court on October 8, 1990 which resulted in his being remanded to custody and a bond increase was due to his taking his girlfriend's daughter, Desera Hollie, to the emergency room of the Central Florida Regional Hospital in Sanford, contrary to Sections 837.02 and 837.011, Florida Statutes,

COUNT II

AND SONNY DANIEL ANDERSON, on or about the 30th day of October, 1990,[3] did then and there in connection with an application for bail or modification of bail for the charge of Robbery, a second degree felony (Seminole' County Case Number A90-2191-CFA), intentionally provide false information at a hearing before the Honorable Alan A. Dickey, Circuit Judge, on his Motion for Reduction of Bond, to-wit: that his lateness to court on

1. § 837.02, Fla.Stat. (1991).

2. § 903.035, Fla.Stat. (1991).

3. Although Count II of the information alleges a different date, the parties are agreed, that the offense occurred on January 25, 1991 and that both charges arose out of thi same conduct.

October 8, 1990 which resulted in his being remanded to custody and a bond increase was due to his taking his girlfriend's daughter, Desera Hollie to the emergency room of the Central Florida Regional Hospital in Sanford, and further that SONNY DANIEL ANDERSON knew or should have known that said information was to be used in connection with an application for or modification of bail and knew that said information was false, contrary to Section 903.035(1)(a) and 903.035(3), Florida Statutes.

At Anderson's jury trial, the State introduced the transcript of the proceeding held on January 25, 1991, during which Anderson testified that the reason he was late for court on October 8, 1990, was because he took his girlfriend's daughter to the hospital. The State also called Anderson's girlfriend who testified that, although her daughter had been ill, Anderson had not taken her to the hospital before he arrived at the courthouse on October 8th. Anderson was convicted of perjury in an official proceeding and of providing false information in an application for bail, both third degree felonies. Anderson argues that he may not be convicted of both offenses. We agree and reverse.

This case is governed by the 1988 amendment to subsection 775.021(4), Florida Statutes (1991):

> (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 of an element 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.

The hard part is figuring out what this statute means and how it applies to a given set of charged offenses.

The problem with this statute was well illustrated several years ago by Judge Altenbernd in *Kurtz v. State*, 564 So.2d 519, 522 (Fla. 2d DCA 1990). There the Second District Court was presented with the question whether, in light of the 1988 amendments to section 775.021(4), one death could support a conviction for both the crime of DUI manslaughter and culpable negligence manslaughter. Employing the above-quoted three-part test, as the *Kurtz* court understood it, yielded an affirmative answer—a result that seemed b&h illogical and contrary to the legislature's intent. In *Kurtz*, the court had an advantage this' 'court does' not; it knew the correct' answer-that one death would not support two homicide convictions—in spite of the formula.[4] The *Kurtz* court correctly rejected the results of an analysis which it knew 'had to be faulty, although it could not explain why the formula did not work.

In the present &se, as in *Kurtz*, application of the statutory framework for determining the, propriety . of two separate criminal convictions for one' false statement does not yield an answer ' that comports with logic. Unfortunately, here there is no wealth of precedent comparable to that available to the *Kurtz* court on which we can confidently rely for the correct answer. We have found no instance where a person making one false statement to the court in the course of a bail modification hearing has been charged 'and convicted of both the felony of perjury in an official proceeding and the felony of y&d- ing false information in' connection with an

4. In *Kurtz*, the court knew the right answer based on "many precedents over many years" .. that did comport with logic: one death equates to one homicide crime. 564 So.2d at 522.

application for a modification of bail. It may be that the problem lies in the phrase "offenses which are degrees of the same offense as provided by statute." As is discussed in the dissent, the question this provision raises is what are degrees of the same offense and can two or more crimes be the same offense if the common core is not a crime.

That the common core shared by two offenses does not itself have to be a crime in order for the offenses to be degrees of the same offense is shown by the supreme court's decisions in *Goodwin v. State*, 634 So.2d 157 (Fla.1994) and *Thompson v. State*, 20 Fla.L.Weekly S95 (Fla. Oct. 27, 1994). Because of the cryptic language used in section 775.021(4), the phrase "degrees of the same offense as provided by statute" has required construction. "Degrees of the same offense" is not limited to "third degree," "second degree" or "first degree;" it appears to mean the scope or extent of crimes identified anywhere in the Florida Statutes that are essentially varieties of the same core offense. These are "degree factors" and they are different from "degrees of crime." *See also Sirmons v. State*, 634 So.2d 153 (Fla.1994), *State v. Chapman*, 625 So.2d 838 (Fla.1993).

In *Goodwin*, the court held that vehicular homicide and unlawful blood alcohol level manslaughter (UBAL manslaughter) were "aggravated forms of a single underlying *offense* distinguished only by degree factors." 634 So.2d at 157 (emphasis added). Yet, the only "core offense" shared by these two statutory crimes is killing someone while operating a motor vehicle. Causing a death while operating a motor vehicle is not a crime in and of itself. Only the addition of the various aggravating factors listed in these statutes elevates such deaths to the status of a crime.[5]

Similarly, in the recent *Thompson* decision, the supreme court found that, based on a single sexual act, a defendant could not be convicted of sexual battery on a physically incapacitated victim in violation of section 794.011(4)(f), Florida Statutes (1991), and sexual activity while in custodial authority of a child in violation of section 794.041(2)(b), Florida Statutes (1991). The court held that the two offenses were "distinguished only by degree elements" within the meaning of *Sirmons* and *Goodwin*.[6]

In this case, as well, there was no shared core crime. The two offenses shared only certain core conduct which, with the addition of certain additional factors, became these two crimes. The core offense involved in this case is the making of a false statement within the context of judicial proceedings. Florida has a number of these false statement offenses tailored to fit the circumstances of the making of the statement. It is made a crime to lie under oath in official[7] or unofficial[8] proceedings, to lie in seeking bail,[9] and to make false written declarations in certain documents which must be verified.[10] These

5. Vehicular homicide requires proof that the defendant killed someone while operating a motor vehicle in a reckless manner and that there be a causal relationship between that recklessness and the victim's death. *Higdon v. State*, 490 So.2d 1252 (Fla.1986). It does not require proof that the defendant was intoxicated. By contrast, UBAL manslaughter (or DUI manslaughter) requires proof that the defendant killed someone through simple negligence while operating an automobile under the influence of alcohol. *Magaw v. State*, 537 So.2d 564 (Fla.1989). It does not require proof of recklessness.

6. The crime of sexual battery on a physically incapacitated victim requires the commission of a "sexual battery" (which is defined as oral, anal or vaginal penetration by, or union with, the sexual organ of another by any other object, but excluding an act done for a bona fide medical purpose) with a physically incapacitated victim twelve years of age or older without the victim's consent. The offense of sexual activity while in custodial authority of a child exists regardless of consent and requires the commission of "sexual activity" (which is defined the same as "sexual battery" except that the definition does not exclude an act done for a bona fide medical purpose) with a child twelve years of age or older but less than eighteen to whom one stands in a position of familial or custodial authority. The above-mentioned definition of "sexual battery" describes conduct that is neither a crime nor an offense.

7. § 837.012, Fla.Stat. (1993).

8. § 837.02, Fla.Stat. (1993).

9. § 903.035, Fla.Stat. (1993).

10. § 92.525, Fla.Stat. (1993).

circumstances may or may not go to the *seriousness* of the offense, which is usually reflected in the degree ascribed to the crime. For example, perjury in official proceedings and lying in bail applications or modifications are deemed more serious than perjury in an unofficial proceeding, but, using this court's description, in *Thompson v. State*, 585 So.2d 492; 494 (Fla. 5th DCA 1991), *adopted and* approved *in full*, 607 So.2d 422 (Fla.1992), they are still "degrees (or more specific descriptions)" of the same offense within the meaning of section 775.021(4)(b)2.[11]

Even if the foregoing effort to find a path through the statute and case law is wrong, we conclude, as have many other appellate judges of this state, that the legislature "could not have intended" that by telling a single lie at a single hearing—that he was late for an earlier court appearance because he had to take his girlfriend's child to the hospital—Anderson committed two third degree felonies. See *Goodwin*, 634 So.2d at 157–158 (Grimes, J., concurring); *State v. Chapman*, 625 So.2d 838, 839 (Fla.1993); *Thompson*, 585 So.2d at 494; *Kurtz*, 564 So.2d at 522–523. The legislature plainly intended to punish the making of a false statement on an official proceeding. It is only due to the overlap of these two statutes at the point where the false statement designed to gain release is made during sworn testimony in a bail hearing that both statutes apply. Even absent the rule of lenity, it does not appear to have been the legislature's intent in enacting these statutes to transform this event of making one false statement into two discrete crimes. We accordingly vacate the conviction for violation of section 903.035(1)(a), Florida Statutes.

AFFIRMED in part; REVERSED in part.

PETERSON, J., concurs.

GOSHORN, J., dissents, with opinion.

GOSHORN, Judge, dissenting.

As the majority acknowledges, this case is controlled by subsection 775.021(4), Florida Statutes (1991) which provides:

(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 of an element 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.

Courts have recognized that the last sentence of subsection (4)(a) is essentially the traditional *Blockburger*[1] test—"whether each

11. The bail offense involved here would appear to be a permissive lesser included offense of perjury in an official proceeding but for the happenstance that the underlying felony for which bail was sought was robbery, a second degree felony. It is an idiosyncrasy of this statute that it derives its degree from the degree of crime for which bail was sought. Thus, in this case the bail offense is a third degree felony, like the perjury offense. *See* § 903.035(3), Fla.Stat. (1989). Because of this oddity, even if our supreme court were to adopt Justice Kogan's view that subsection (3) of section 775.021(4)(b) encompasses permissive lesser included offenses, which seems in keeping with the majority's evolving degree-of-factor analysis, the crimes charged in this case would not fall within the subsection, although "lesser" in the sense that one is subsumed within the other. See *generally Sirmons*, 634 So.2d at 154 (Fla.1994) (Kogan, J., concurring); *Cave v. State*, 613 So.2d 454, 456–57 (Fla.1993) (Kogan, J., concurring).

1. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

provision requires proof of in additional fact which the other does not." *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182. However, in Florida, the inquiry into double jeopardy does not end there. Our legislature went on to state three rules of statutory construction which it classified as exceptions to its declared intent "to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction." § 775.021(4)(b), Fla.Stat. (1993). Under paragraph (4)(b), multiple sentences and convictions are impermissible if: (1) the two offenses "require identical elements of proof"; (2) the offenses are "degrees of the same offense as provided by statute"; or (3) the statutory elements of the lesser offense are "subsumed by the greater offense." *See* § 775.021(4)(b)1.,2.,3., Fla.Stat. (1993); *see also State v. Smith*, 547 So.2d 613, 615 (Fla. 1989) (stating that the legislative amendment to subsection 775.021(4) added a three-pronged statement of legislative intent which is not merely "an 'aid' in determining whether the legislature intended multiple punishment ... [but rather] is the specific, clear, and precise ... polestar"); *Williams v. State*, 560 So.2d 311, 313 (Fla. 1st DCA 1990).

Applying section 775.021 to the instant facts, Anderson's convictions for violating both section 837.02 [2] and section 903.035 [3] pass the initial inquiry required by paragraph 775.021(4)(a) because each crime requires proof of an element that the other does not. Unlike the crime of providing false information in an application for bail, the perjury charge under section 837.02 requires proof that the statement occurred in an official proceeding and also that it was made under oath. Unlike the perjury charge, to convict under section 903.035, the State must prove that the information the defendant provided was done "in connection with an application for or attempt to secure bail."

Anderson acknowledges that his dual convictions pass this analysis, but contends that subparagraph (4)(b)2. prohibits convictions under both statutes because section 903.035, providing false information in connection with an application for bail, is merely a lesser degree of the offense enumerated in section 837.02, which requires the false information to be communicated in an official proceeding. He asserts that both crimes are forms of the same underlying core offense of lying or giving false information. For the reasons discussed below, I find Anderson's reasoning flawed.

First, I believe Anderson's reliance on *Sirmons v. State*, 634 So.2d 153 (Fla.1994) is misplaced. In *Sirmons*, the defendant appealed on double jeopardy grounds after he was convicted of grand theft auto and robbery with a weapon. The supreme court reversed, noting that both offenses were "merely degree variants of the core offense of theft." *Id.* at 154. The *Sirmons* court explained:

> The degree factors of force and use of a weapon aggravate the underlying theft offense to a first-degree felony robbery. Likewise, the fact that an automobile was taken enhances the core offense to grand theft. In sum, both offenses are aggravated forms of the same underlying offense distinguished only by degree factors.

Id. In reaching its decision, the *Sirmons* court relied on *Johnson v. State*, 597 So.2d

2. Subsections 837.02(1) and (2), relating to perjury in official proceedings, provide:

> (1) Whoever makes a false statement, which he does not believe to be true, under oath in an official proceeding' in regard to any material matter shall be guilty of a felony of the third degree.
>
> (2) Knowledge of the materiality of the statement is not an element of this crime, and the defendant's mistaken belief that his statement was not material is not a defense.

3. Section 903.035, relating to information provided on applications for bail, provides in pertinent part:

> (1)(a) All information provided by a defendant, in connection with any application for or attempt to secure bail, to any court ... shall be accurate, truthful, and complete without omissions to the best knowledge of the defendant.
>
> * * * * * * *
>
> (3) Any person who intentionally provides false or misleading material information ... in connection with an application for bail or for modification of bail is guilty of a misdemeanor or felony which is one degree less than that of the crime charged for which bail is sought, but which in no event is greater than a felony of the third degree.

798 (Fla.1992) and *State v. Thompson*, 607 So.2d 422 (Fla.1992), *approving Thompson v. State*, 585 So.2d 492 (Fla. 5th DCA 1991). It elaborated as follows:

> In *Johnson*, the defendant had been convicted of grand theft of cash and grand theft of a firearm for the snatching of a purse that contained both money and a firearm. We determined that the dual convictions and sentences were improper because "the value of the goods or the taking of a firearm merely defines the degree" of the theft and does not result in two separate crimes. In other words, the dual convictions could not stand because each offense was simply an aggravated form of the underlying offense of theft, distinguished only by degree factors.
>
> In a similar vein, we recently held in *Thompson* that a defendant cannot be convicted of both fraudulent sale of a counterfeit controlled substance and felony petit theft where both charges arose from the same fraudulent sale. We agreed with the Fifth District Court of Appeal that section 775.021(4)(b)2., Florida Statutes (1989), bars the dual convictions because both fraudulent sale and felony petit theft are simply aggravated forms of the same underlying offense distinguished only by degree factors.

Id. at 153–54 (citations omitted).

Sirmons, *Johnson*, and *Thompson* are distinguishable from the present case. In those cases, the court recognized that both statutes under which each defendant was convicted were merely aggravated forms of the same underlying offense—theft. Here, sections 903.035 and 837.02 have different "core offenses." Neither of these statute's core offenses is "lying" or "providing a false statement" because such action is not illegal. To lie or to provide false information is not an offense.[4] It is only when the defendant makes the intentionally false statement, "in an official proceeding" or "in connection with an application for bail", that the behavior becomes criminal.[5] Accordingly, because in my view the underlying crimes in each statute under which Anderson was convicted do not arise from the same core offense, I would find subparagraph 775.021(4)(b)2. inapplicable to the present case. *Cf. Thompson v. State*, 585 So.2d 492,493 (Fla. 5th DCA 1991) (stating that subparagraph 775.021(4)(b)2. "excepts 'degree' crimes such as the various forms of homicide").

Likewise, I do not believe Anderson's dual convictions fall within the "lesser offense

4. Black's Law Dictionary defines "offense" as follows:

> A felony or misdemeanor; a breach of the criminal laws; violation of law for which penalty is prescribed.' The word "offense," while sometimes used in various senses, generally implies a felony or a misdemeanor infringing public as distinguished from mere private rights, and punishable under the criminal laws, though it may also include the violation of a criminal statute for which the remedy is merely a civil suit to recover the penalty. An act clearly prohibited by the lawful authority of the state, providing notice through published laws.
>
> Criminal offenses may be classified into general categories as felonies and misdemeanors and as offenses against the person (*e.g.* murder, manslaughter), against habitation and occupancy (*e.g.* burglary, arson), against property (e.g. larceny), against morality and decency (*e.g.* adultery); against public peace, against government (e.g. treason).

"Black's Law Dictionary 1081 (6th ed. 1996) (citations omitted). See also *Sirmons*, *634* So.2d at 155 (listing crimes such as theft, battery, possession of contraband, and homicide as examples of core underlying offenses) (Kogan, J., concurring).

5. I believe the majority's interpretation of *Goodwin v. State*, 634 So.2d 157 (Fla.1994) and *Thompson* v. *State*, 20 Fla.L. Weekly S95 (Fla. Feb. 23, 1995) expands them beyond their scope. *Goodwin* involves aggravating factors in automobile deaths while *Thompson* deals with sexual activity with a physically incapacitated child while in a position of familial or custodial authority. *See Goodwin*, *634* So.2d at 157; *Thompson*, 20 Fla.L.Weekly at S96. The present case, on the other hand, involves two separate statutes addressing different legislative policies. Otherwise, it would have been unnecessary for the legislature to have included section 903.035 in the bail statute because the conduct could have been prosecuted under the perjury statute, which had been in existence for years... *See* §§ 837.012, 02, Fla.Stat. (1991); *cf. Kurtz v. State*, *564* So.2d 519, 522 (Fla. 1st DCA 1990) (stating that DUI manslaughter and manslaughter with culpable negligence are "two separately codified crimes, which are not mutually exclusive and involve different legislative policies, [and therefore] 'do not appear to be 'degrees of the same offense as provided by statute' ") (citations omitted).

subsumed by the greater offense" exception enumerated in subparagraph 775.021(4)(b)3. Because the false information necessary for a violation of subsection 903.035(3), "in connection with an application for bail," is not required to be provided in an "official proceeding" as defined by section 837.02,[6] the elements of subsection 903.035(3) are not "subsumed" by the perjury charge, and therefore, the exception does not apply.[7] I reject the argument that subparagraph 775.021(4)(b)3. should apply because Anderson's false information was provided during his application for bail (which was an official proceeding). Both the statute's clear language and established case law provide that the court must examine the *statutory elements* of each crime rather than the individual factual situation presented in each case. § 775.021(4)(b)3., Fla.Stat. (1993); *Cherry v. State*, 592 So.2d 292, 294 (Fla. 2d DCA 1991) (stating that "courts look only to the statutory elements of each offense and not to the actual evidence to be presented at trial or [to] the facts alleged in a particular information."). (quoting *State v. Carpenter*, 417 So.2d 986, 988 (Fla.1992)); *Donovan v. State*, 572 So.2d 522, 526 (Fla. 5th DCA 1990) (same).

Further support for my conclusion is found in *Jones v. State*, 588 So.2d 644, 646 (Fla. 2d DCA 1991), *approved*, 608 So.2d 797 (Fla. 1992). There, the court found subparagraph 775.021(4)(b)3. inapplicable where, as in this case, both crimes were classified as third degree felonies.[8] The court reasoned that one offense is not subsumed by the other because there was no "lesser" or "greater" offense. *See also Kurtz*, 564 So.2d at 522 (declaring that neither DUI manslaughter nor manslaughter with culpable negligence "is a 'lesser offense' [of the other] because the two carry the same penalty") (citing *State v. Carpenter*, 417 So.2d 986 (Fla.1982)).

The majority fails to acknowledge that, in response to the supreme court's decision in *Carawan v. State*, 515 So.2d 161 (Fla.1987), the legislature, in its 1988 amendment to section 775.021, clearly stated: "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 to determine legislative intent." § 775.021(4)(b), Fla.Stat. (1991).[9] Our supreme court recognized that amendment in *State v. Smith*, 547 So.2d 613 (Fla.1989):

> It is readily apparent that the legislature does not agree with our interpretation of legislative intent and the rules of construction set forth in *Carawan*. More specifically:
>
> (1) The legislature rejects the distinction we drew between act or acts. *Multiple punishment shall be imposed for separate offenses even if only one act is involved.*
>
> (2) The legislature does not intend that (renumbered) subsection 775.021(4)(a) be treated merely as an "aid" in determining whether the legislature intended multiple punishment. Subsection 775.021(4)(b) is the specific, clear, and precise statement of

6. "Official proceeding" is defined in Chapter 837 as follows:

> [A] 'proceeding heard, or which may be or is required to be heard, before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, master in chancery, hearing examiner, commissioner, notary, or other person taking testimony or, a deposition in connection with any such proceeding.

§ 837.011(1), Fla.Stat. (1993).

7. Paragraph 903.035(1)(a) only requires that the defendant provide the information "to any court, court personnel, or (individual soliciting or recording such information for the purpose of evaluating eligibility for, 'or securing, bail. . . ." § 903.035(1)(a), Fla.Stat. (1993).

8. While recognizing that a violation of section 903.02 is not always punishable as a third degree felony, the fact that the legislature permitted the punishment to rise to this level supports the conclusion that it could not have intended section 903.035 to be subsumed within Section 837.02, which is a third degree felony.

9. The majority bases part of its analysis on legislative intent. However, such a conclusion would seem to violate the supreme court's clear directive in *Smith* that "subsection 775.021(4) removes the need to *assume* the legislature does not intend multiple punishments for the same offense, it clearly does not." *Smith*, 547 So.2d at 616.

legislative intent referred to in *Carawan* as the controlling polestar; Absent a. statutory degree crime or a contrary clear and specific, statement of legislative intent in the particular criminal offense statutes,[5] *all* criminal offenses containing unique statutory elements *shall* be separately punished.

(3) Section 775.021(4)(a) should be strictly applied without judicial gloss.

(4) By its terms and by listing the only three instances where multiplepunishment shall not be imposed, subsection 775.021(4) removes the need to *assume* that the legislature does, not intend multiple punishment for the same offense, it clearly does not. However, the statutory element test *shall* be used for determining whether offenses are the same or separate: Similarly, there will be no occasion to apply the rule of lenity to subsection 775.021(4) because offenses will either contain unique statutory elements or they will not, i.e., there will be no doubt of legislative intent and no occasion to apply the rule of lenity.

[5] As we pointed out in *Carawan,* criminal offense stat&t&rarely contain a specific statement of whether the legislature does or does not intend separate punishment for the offense(s). Theoretically there is nothing to preclude the legislature from inserting a specific statement in a criminal offense statute that it does nor does not intend separate punishment for the offense created therein.

Id. at 615–16 (first emphasis added) (footnote omitted).

In summary, I would hold that Anderson's convictions for, both perjury in an official proceeding and providing false information in connection with an application for bail do not violate Anderson's double jeopardy protections. Both crimes contain an element that the other does not, and I find none of the exceptions presented in paragraph 775.021(4)(b) applicable. Therefore, I respectfully dissent.

ON MOTIONS FOR REHEARING AND TO CERTIFY QUESTION

PERCURIAM.

We deny the appellee's motion for rehearing but grant its motion to certify the following question to the Florida Supreme, Court as one of great public importance:

WHETHER THE DOUBLE JEOPARDY CLAUSE PERMITS A DEFENDANT TO BE CONVICTED AND SENTENCED UNDER BOTH SECTION 837.02, FLORIDA STATUTES (1991), PERJURY IN AN OFFICIAL PROCEEDING, AND SECTION 903.035, FLORIDA STATUTES (1991), PROVIDING FALSE INFORMATION IN AN APPLICATION FOR BAIL, FOR CHARGES THAT ARISE OUT OF A SINGLE ACT.

REHEARING DENIED; QUESTION CERTIFIED.

PETERSON, C.J., and GOSHORN and GRIFFIN, JJ., concur.

WEST KEY NUMBER SYSTEM

Henry and Donna MOGLER, Individually, and as Personal Representatives of the Estate of Michael Mogler, Deceased, Appellants,

v.

Dirk FRANZEN, M.D., and Dirk Franzen, M.D., Pd., Appellees.

No. 95–0308.

District Court of Appeal of Florida, Fourth District.

Nov. 8, 1995.

Opinion on Denial of Rehearing and Rehearing En Banc March 13, 1996.

After parties agreed to determine medical malpractice damages in voluntary binding arbitration, dispute arose during arbitration discovery as to what damages were recoverable. Defendants sought declaratory relief as to whether certain damages were recoverable. The Circuit Court for Martin County,