ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

SONNY D. ANDERSON,

Respondent.

CASE NO. 87,757

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

RESPONDENT'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

The District Court correctly vacated one of Respondent's convictions because the two crimes he was convicted of are merely variants of the same core offense. This court need not exercise its jurisdiction in this matter, since the District Court's decision was correct and its subject matter is not of great public importance. If this court does accept jurisdiction, it should affirm either on the basis announced by the District Court or on the basis of the protection against double jeopardy guaranteed by the state constitution.

ARGUMENT

SECTION 775.021, FLORIDA STATUTES, AND DOUBLE JEOPARDY PRINCIPLES PROHIBIT DUAL CONVICTIONS FOR PERJURY AND FOR MAKING A FALSE STATEMENT IN CONNECTION WITH A BAIL APPLICATION.

The State argues that the Florida Legislature clearly intended for defendants to be punished by two felony convictions when they lie under oath at bond hearings. Respondent submits first, that this case does not involve a matter of great public importance, and that this court should therefore decline to accept jurisdiction; second, that the legislative intent the State perceives is by no means clear from the Florida Statutes; and third, that even if that legislative intent were clear, this court should hold as a matter of state constitutional law that the dual convictions cannot stand.

Respondent was convicted in this case of violating both Section 837.02, Florida Statutes, and Section 903.035, Florida Statutes . Section 837.02 provides as follows:

> Perjury in official proceedings.
>
> (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.

The substance of Section 837.02 has not been altered since it was created in the Legislature's last comprehensive rewriting of the entire criminal code, in section 55, Chapter 74-383, Laws of Florida. That comprehensive rewriting of the criminal code also included creation of Section 837.01, Florida Statutes, which makes it a first-degree misdemeanor to lie under oath other than in an

official proceeding, and Section 837.06, which makes it a second-degree misdemeanor to make a false statement not under oath which is intended to mislead a public servant in performance of his duties. Sections 54, 58, Chapter 74-383, Laws of Florida.

Section 903.035 provides:

> **Applications for bail; information provided; hearing on application for modification: penalty for providing false or misleading information or omitting material information.**
> (l)(a) All information provided by a defendant, in connection with any application for or attempt to secure bail, to any court, court personnel, or individual soliciting or recording such information for the purpose of evaluating eligibility for, or securing, bail for the defendant, under circumstances such that the defendant knew or should have known that the information was to be used in connection with an application for bail, shall be accurate, truthful, and complete without omissions to the best knowledge of the defendant.
>
> (b) The failure to comply with the provisions of paragraph (a) may result in the revocation or modification of bail.
>
> ******** ********
>
> (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.

Subsection (3), the penalty provision, was added to Section 903.035

in 1984, pursuant to seotion 41 of Chapter 84-103, Laws of Florida. Chapter 84-103 was "[a]n act relating to bail," which created a regulatory board for bondsmen and created numerous statutes affecting bondsmen's rights and duties. See Laws of Florida (1984) at 315.

The "degree factors" test.

The respondent agrees with the State that the two offenses set out above each require proof of a fact the other does not, and that therefore they are not "the same offense" under the Blockburger[1] test codified in Section 775.021(4)(a), Florida Statutes. However, the District Court correctly held that although the two offenses are not "the same offense" for double jeopardy purposes, they are fundamentally the same core offense distinguished only by degree factors. Accordingly this court's precedents in Sirmons v. State, 634 So, 2d 153 (Fla. 1994), (Dennis) Thompson v. State, 607 So. 2d 422 (Fla. 1992), and (Joseph) Thompson v. State, 650 SO. 2d 969 (Fla. 1994), apply to this case.

The State argues that this court should overrule its recent decisions in Sirmons and both Thompson cases, on the theory that this court wrongly construed language in Section 775.021(4)(b), Florida Statutes, in all three cases. The disputed language is subsection 2 below:

> (4)(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or

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[1] Blockburger v United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed, 2d 306 (1'932).

> transaction and not to allow the principle of lenity...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 State argues that "offenses which are degrees of the same offense" should be read to mean only the various kinds of murder and sexual battery. This court, of course, in Sirmons, read that language to mean "core offenses distinguished by various degree factors." The respondent submits that the statutory construction announced in Sirmons is correct, and that the District Court's application of the rule of Sirmons in this case is likewise correct. The "core offense" here is obstruction of justice by making a false or misleading statement; the two overlapping statutes involved in this case each make it a crime to obstruct justice by lying, one solely in the context of bail applications (whether made under oath or not) and the other more generally in the context of any judicial proceeding where the defendant has been sworn to tell the truth (whether the statement affects a bail application or not), The two statutory crimes involved in this case are two of several variants of the same core offense, and one of the respondent's two felony convictions for making one false statement was correctly vacated by the district court.

This court should decline to exercise its jurisdiction in this matter, since the District Court's decision was correct and since its subject matter is not of great public importance, As Judge Griffin noted in the District Court's opinion, no other reported case involves dual convictions for perjury and for making a false statement in a bail application. Anderson v. State, 669 So. 2d 262, 263-64 (Fla. 5th DCA 1995). If this court does accept jurisdiction of this case, it should affirm the District Court's decision for the reason argued above,

State constitutional law.

If this court disagrees with the argument made above, it should still affirm the District Court's decision on the basis of Article I, Section 9 of the Florida Constitution. That section of the Declaration of Rights guarantees that "[n]o person shall be . . .twice put in jeopardy for the same offense."

The State argues that the various Legislatures have the sole and final power to decide how many criminal prosecutions, and how many felony convictions, can follow from one act. The State cites in support of that principle several relatively recent cases from the United States Supreme Court. That Court has only in the last few decades held that the federal double jeopardy clause limits only courts, not legislatures, and that accordingly the legislatures can in all situations create unlimited numbers of statutory offenses that all apply to and all can be used, in a single proceeding, to punish a single act. See Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673, 75 L. Ed. 2d 535 (1983); Albernaz v.

United States, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. ad 275 (1981). Earlier, in Gore v. United State, 357 U.S. 386, 389 and n.2, 392 (1958), the court assumed that Congress is free to establish independent offenses to combat the same problem, *provided it does establish independent offenses* rather *than giving "different* labels to *the* same *thing" or "different descriptions of the same offense."* Nothing in the law of any jurisdiction precludes this court from interpreting Article I, section 9 in a manner consistent with the assumption behind Gore rather than in a manner consistent with Albernaz.

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). 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); Qsborne 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. Hood, 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). This court should follow the lead of those states, and if it accepts jurisdiction in this case should affirm on the basis that the Florida Constitution prevents the Legislature from making it two felonies to lie under oath in a bond hearing.

CONCLUSION

The respondent requests this court to decline to exercise its jurisdiction in this matter. If this court takes jurisdiction of this case, the respondent requests it to affirm the decision of the District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on counsel for the State, Assistant Attorney General Belle B. Turner, of 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by **way** of the Attorney General's in-basket at the Fifth District Court of Appeal, and mailed to: Mr. Sonny D. Anderson, No. 847830-B-37, Baker C. I., P. 0. Box 500, Sanderson, FL 32087 this 3rd day of June, 1996.

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