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 REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

In the context of multiple punishment for one act, the Florida Legislature has expressed its intent in section 775.021(4), Florida Statutes (1993). At issue in this case is the meaning of the exception for 'offenses which are degrees of the same offense as provided by statute." Id. The State contends that this 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." A '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.

This Court has long held that the legislature has the exclusive power to define crimes and that for double jeopardy analysis, the intent of the legislature is the sole issue. The doctrine of separation of powers demands no less.

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.

Respondent agrees that the two crimes at issue in this case, perjury in an official proceeding and making a false statement in connection with a bail application, are not the same for purposes of the Blockburger test as each crime contains an element that the other does not. (RB 4) Further, Respondent agrees that the crimes are not the same, nor is one a lesser offense of the other. §775.021(4) Fla. Stat. (1993). However, Respondent contends that these two offenses are 'fundamentally the same core offense distinguished only by degree factors." (RB 4)

The State requests this Court to clarify (not overrule) the decision in Sirmons v. State, 634 SO. 2d 153 (Fla. 1994), and hold that "core offense" means degrees of the same statutory offense. The State offered two examples (not intended to be an exclusive list as suggested by Respondent) to illustrate the suggested interpretation of this language. Some crimes are defined by different degrees, yet are not lesser included offenses of each

other and are not the same. For instance, third degree murder is not a necessarily lesser offense of either second or first degree murder, but it is nevertheless well established that double jeopardy precludes more than one conviction for one homicide victim. Houser v. State, 474 So. 2d 1193 (Fla. 1986). Likewise, one act of sexual battery upon a person physically incapable of communicating lack of consent that is also 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."

The State maintains that the 'core offense" must itself be a crime. It is only this construction which gives meaning to the statutory language requiring that two offenses be "the same as provided by statute". Respondent has not addressed this argument which constitutes the most logical construction of this statute.

Rather, Respondent suggests that despite this obvious interpretation, this Court should hold that courts, and not the Legislature, have the power to determine how many felony convictions can follow from one act under the state constitution, citing Traylor v. State, 596 So. 2d 957 (Fla. 1992). The State

responds that there are several impediments to this argument. First of all, to do so would violate the doctrine of the separation of powers. It is well established that the legislature has the exclusive power to define crimes. See, e.g. Borges v. State 415 so. 2d 1265 (Fla. 1982). Moreover, this Court has held that the double jeopardy protection contained in the state constitution is the same as the federal constitutional standard, and to hold as Respondent suggests would require this Court to reverse this long standing precedent. State v. Cantrell, 417 So. 2d 260 (Fla. 1982). Courts should avoid reaching constitutional grounds if it can reach the same result without resorting to a constitutional basis. See, e.g., Spradley v. State, 537 So. 2d 1058 (Fla. 1st DCA 1989). This Court should exercise judicial restraint as there is no need to decide this issue on the state constitutional grounds advanced by Respondent.

Most significantly, to hold that legislative intent is irrelevant in double jeopardy law would require this court to overrule countless prior decisions. Even Carawan v. State, 515 So. 2d 161 (Fla. 1987) recognized that the intent of the legislature was the overriding issue in double jeopardy analysis. Indeed, this Court has held that the sole issue is legislative intent. v . Smith, 547 So. 2d 613 (Fla. 1989). Virtually every decision from

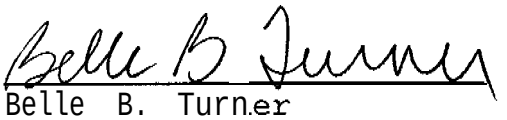
this Court on this issue has expressly recognized the principle that Respondent now suggests should be abandoned. See, e.g., State v. Chapman, 625 So. 2d 838 (Fla. 1993); Jones v. State, 608 So. 2d 794 (Fla. 1992); Jones v. State, 569 So. 2d 1234 (Fla. 1990); State v. Hollinger, 581 So. 2d 153 (Fla. 1991); State v. Oliver, 581 So. 2d 1304 (Fla. 1991); Love v. State, 559 So. 2d 198 (Fla. 1990); State v. Glenn, 558 So. 2d 4 (Fla. 1990). For these reasons, this position is unpersuasive.

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
Attorney General



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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 Respondent, this 20th day of June, 1996.

Belle B. Turner
Assistant Attorney General