IN THE SUPREME COURT OF FLORIDA

BRIEN ALLEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 87,941

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Brien Allen, defendant in the trial court and appellant below, will be referred to herein as "petitioner." Respondent, the State of Florida, appellee below, will be referred to herein as "the State." References to the three-volume record on appeal will be by the use of the symbol "R" followed by the appropriate volume and page number(s), e.g., (R I 22). Additionally, references to the indictment in Circuit Court Case no. 93-2765, which was attached to the State's motion to supplement the record on appeal in the district court, will be by the symbol "ASM" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts as being generally supported by the record.

SUMMARY OF ARGUMENT

Petitioner claims that he was improperly convicted of armed burglary, armed robbery, and armed kidnapping, where he committed all three offenses during a single criminal episode. Specifically, petitioner claims that because all three offenses share the "armed" component, and because he committed all three with the same firearm, his convictions for the three "armed" offenses violate double jeopardy principles. However, all three substantive felonies of which petitioner was convicted have different elements, and none of the crimes completely subsumes all of the elements of either of the other two. Thus, the legislature's intent, as clearly set forth in Section 775.021(4), Florida Statutes, is to punish petitioner for all three offenses. The mere fact that all three offenses share the single element of use of a firearm does not render petitioner's convictions for all three offenses improper or "unconstitutional." Moreover, petitioner's interpretation of the pertinent statutes leads to absurd results not intended by the legislature. This Court therefore should answer the certified question in the affirmative and approve the First District's decision affirming petitioner's convictions for armed burglary, armed robbery, and armed kidnapping.

ARGUMENT

ISSUE/CERTIFIED QUESTION

WHETHER APPELLANTS MAY BE SEPARATELY CONVICTED AND SENTENCED FOR ARMED BURGLARY, ARMED ROBBERY, AND ARMED KIDNAPPING WHERE EACH OFFENSE IS PART OF THE SAME CRIMINAL EPISODE? (Restated from petitioner's brief)

Petitioner claims that his convictions for armed kidnapping, armed robbery, and armed burglary are "unconstitutional" because they violate double jeopardy principles. Specifically, petitioner alleges that because each offense includes "the core fact of use of the firearm," see Petitioner's initial brief a 10, he is being improperly punished multiple times for his use of a single firearm during one criminal episode. To support this argument petitioner relies primarily on a portion of this Court's opinion in State v. Stearns, 645 So. 2d 417 (Fla. 1994), where the Court characterized its earlier decision in State v. Brown, 633 So. 2d 1059 (Fla. 1994), as holding "that a defendant could not be convicted and sentenced for two crimes involving a firearm that arose out of the same criminal episode." Stearns, 645 So. 2d at 418. Petitioner claims that the First District's decision below affirming all three of his convictions is contrary to the aforementioned "directive" in Stearns. Petitioner's initial

brief at 10. However, a close examination of Stearns and Brown demonstrates that petitioner's expansive interpretation of Stearns is incorrect, and that the First District correctly determined that Stearns is inapplicable to this case.

The defendant in State v. Brown, supra, was convicted of one "armed" felony (armed robbery with a firearm) and one felony (attempted first degree murder) in which use of a weapon was not charged. Additionally, Brown was convicted of possession of a firearm during the commission of a felony, in violation of Section 790.07(2), Florida Statutes, based on his use of a firearm to commit the attempted murder. Brown argued on direct appeal before the First District that he could not be convicted of both armed robbery with a firearm and possession of a firearm during the commission of a felony where both offenses arose from the same criminal episode. The First District noted that

> [w]ith respect to cumulative sentences in a single trial, the dispositive question is whether the Legislature intended separate convictions and sentences for the two crimes. State v. Smith, 547 So. 2d 613, 614 (Fla. 1989).

Brown v. State, 617 So. 2d 744, 746 (Fla. 1st DCA 1993). Applying the statutory analysis mandated by Section 775.021(4), Fla. Stat. (1991), and disregarding the fact that the accusatory

pleading had charged Brown with violating Section 790.07(2) based on his possession of a firearm while committing the attempted murder rather than the armed robbery, the First District held that

> **the charge of possession of a firearm during the commission of a felony does not contain any elements that are distinct from the armed robbery with a firearm** and, since both crimes occurred during the same criminal transaction, the appellant could not be convicted and sentenced as to both.

Brown, 617 So. 2d at 747 (emphasis added). Hence, the First District in Brown determined that because **all** of the elements of the offense of possession of a firearm during the commission of a felony were subsumed by the elements of armed robbery, the legislature did not intend to punish a defendant separately for both offenses when both were committed during one criminal transaction. This Court subsequently approved the aforementioned decision in State v. Brown, 633 So. 2d at 1061.

The situation in Stearns was almost identical to that in Brown. Like Brown, Stearns was convicted of one "armed" felony (burglary of a structure while armed) and one felony (grand theft) in which the use of a firearm was not charged. In addition, Stearns was convicted of possession of a concealed firearm during the commission of a felony, in violation of

Section 790.07(2), Fla. Stat. (1991), based on his possession of a concealed firearm while committing the grand theft. See Stearns v. State, 626 So. 2d 254, 255 (Fla. 5th DCA 1993). The convictions at issue in Stearns thus were indistinguishable from those in Brown. Consequently, this Court's determination that Stearns could not be convicted of both armed burglary and possession of a concealed firearm under Section 790.07(2), State v. Stearns, 645 So. 2d at 418, was in complete accord with the decision in Brown. Indeed, the only difference between the two cases was that Stearns was charged with possession of a **concealed** firearm during the commission of a felony, while Brown was not. However, given the fact that both the plain "carrying" offense and the "concealed weapon" offense fall under Section 790.07(2), that difference is not significant.

It is evident from the foregoing that Stearns, like Brown, was a "subsumption" or "identical elements" case under Section 775.021(4), Florida Statutes. Thus, although this Court in Stearns characterized Brown as holding that "a defendant could not be convicted and sentenced for two crimes involving a firearm that arose out of the same criminal episode," Stearns, 645 So. 2d at 418, such an expansive portrayal of the holding in Brown was not necessary to the decision in Stearns. See Delancy v. State,

21 Fla. L. Weekly D1093 (Fla. 3d DCA May 8, 1996) ("Stearns must be read in the context of its particular facts, and in tandem with the decision on which it relies, State v. Brown, [infra]." The aforementioned language from Stearns therefore was dicta which this Court should not apply to a case like the one at bar, where no two crimes have identical elements, and where no offense completely subsumes all of the statutory elements of any of the remaining offenses.

As was the case in Brown and Stearns, the issue squarely before this Court in the case at bar is whether the legislature intended to punish petitioner separately for each of the offenses of which he was convicted. The proper method for analyzing this issue is set forth in Section 775.021(4), Fla. Stat. (1991), which provides as follows:

> (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 (a) 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.

(Emphasis added). Thus, unless multiple offenses fall within one of the exceptions outlined above, the legislature's intent is to punish the commission of each offense.

Petitioner in this case was convicted of one count of armed burglary of a dwelling, with a firearm, in violation of Section 810.02(2)(b), Fla. Stat. (1991) (ASM 1 [46]); one count of armed kidnapping with a firearm, in violation of Sections 775.087 and 787.01(2), Fla. Stat. (1991) (ASM 2 [47]); and one count of armed robbery with a firearm, in violation of Section 812.13(2)(a), Fla. Stat. (1991) (ASM 2 [47]). By enacting statutes establishing the substantive offenses of armed burglary and robbery with a firearm, and by expressly permitting the reclassification of **any** felony (including kidnapping) "except a

felony in which the use of a weapon or firearm is an essential element"[1] if the defendant uses a firearm to commit it, the legislature evinced its clear intent to punish separately the distinct substantive offenses of armed burglary, armed kidnapping, and armed robbery.[2] Obviously, none of these offenses is a "degree" of one of the other two offenses.[3] Moreover, each of these offenses has numerous distinct elements that the other two do not, and petitioner does not argue otherwise; rather, as set forth above, petitioner alleges only that all three offenses share the "core fact" of the use of a firearm. Finally, none of the crimes for which petitioner was convicted completely subsumes **all** of the elements of any other.

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[1]See Section 775.087(1), Fla. Stat. (1991).

[2]This directly refutes petitioner's assertion that "[n]othing in the Florida Statutes clearly expresses the Legislature's intent to apply multiple reclassifications in one brief episode when each reclassification involves a single core fact." Petitioner's initial brief at 11.

[3]In his brief, petitioner cites Sirmons v. State, 634 So. 2d 153 (Fla. 1994), as supporting his argument. See Petitioner's initial brief at 10. However, because this Court analyzed Sirmons as a "degree crimes" case under Section 775.021(4)(b)2, Fla. Stat. (1989), that decision is wholly inapplicable to this case and petitioner's reliance on it is misplaced. See Sirmons at 153-154 ("In sum, both offenses are aggravated forms of the same underlying offense distinguished only by degree factors. Thus, Sirmons' dual convictions based on the same core offense cannot stand.").

Thus, petitioner's convictions for all three substantive offenses were proper under the analysis of legislative intent set forth in Section 775.021(4)(a) and (b).

The foregoing analysis demonstrates that petitioner's reliance on Stearns and Brown is completely misplaced. Simply put, this is not a case like Brown or Stearns, where the defendant received an enhanced sentence for committing a specific felony with a firearm, and where he was also convicted for his mere **possession** of a firearm while committing a felony. Rather, petitioner was convicted and punished for three separate and distinct substantive felonies that he committed with a firearm. Petitioner therefore was **not** punished multiple times for his mere use or possession of a firearm, as he suggests. Further, by claiming that he was improperly convicted of three offenses with an "armed" component, petitioner advocates the radical position that if separate and distinct offenses share **a single element**, i.e., if only one element of a given crime is subsumed by another entirely different crime, convictions for those separate offenses are improper.[4] Clearly, however, if the offenses for which

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[4]That this is the true nature of petitioner's argument is evident from the fact that he asks this Court to remedy the alleged error by "reducing the convictions." Petitioner's initial brief at 6-7. Although petitioner does not specify which

petitioner was convicted share only one element, then he is **not** being punished multiple times for the same offense. Moreover, pursuant to the unambiguous language of Section 775.021(4)(b), offenses which share only one "identical" element are to be punished separately, regardless of the fact that they are committed during the same criminal episode or transaction.

The propriety of the legislature's decision to punish defendants separately for all "armed" substantive offenses committed in a single criminal episode is clearly illustrated by the fact that petitioner's use of a firearm facilitated his commission of each offense of which he was convicted. For example, petitioner could have burglarized the victim's home and left before she returned. However, his discovery and use of the firearm no doubt emboldened him to lie in wait for her return. Moreover, as he grabbed the victim and dragged her back toward the bedroom, petitioner constantly threatened the victim with the

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of his "unconstitutional" convictions this Court should vacate or "reduce" if it adopts his argument, it appears that petitioner would have this Court affirm one of his "armed" convictions, and then "reduce" the remaining two by striking the "armed" element from them. Thus, although he attempts to characterize this case as one involving "multiple enhancements" for one "core fact," in reality his argument is that separate convictions for distinct substantive crimes are improper if those crimes share a single element.

gun (R III 139-140). In fact, the victim testified that after the incident she had cuts and a bruise on her face where petitioner "pressed the gun into [her] cheek and told [her] he was going to blow [her] head off" (R III 141). Petitioner's claim that he is being improperly punished "three times for the use of one firearm on one victim[5] at one time in one place in one brief incident," Petitioner's initial brief at 10, is therefore completely without merit; and because petitioner's argument is directly contrary to the analysis of legislative intent set forth in Section 775.021(4), this Court must reject it.

Finally, the State notes that an interpretation of the statutes at issue here which adopts petitioner's position would lead to absurd results. Take, for instance, a case where a defendant enters a building full of people and robs each individual at gunpoint during a single episode or transaction. In that situation, the defendant's use of the same gun clearly would facilitate the robberies of all the victims; moreover, each victim would suffer the exact same fear resulting from the threat

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[5]Taken to its logical conclusion, petitioner's "core fact" argument that a defendant may not be convicted of multiple offenses involving the use of the same firearm, could be applied to bar convictions for multiple offenses committed against the same victim.

of being shot and possibly killed. Nevertheless, under petitioner's argument the defendant would face only **one count** of armed robbery. In the remainder of the armed robberies, the "armed" component would have to be stricken because the defendant could not be convicted of more than one "armed" charge based on his or her use of the same gun during the single episode. Again, petitioner's argument here is that under Stearns and Brown, a defendant may be convicted of only one crime involving a firearm committed during a single criminal episode. Hence, regardless of the length of the "episode" or the number of victims involved, a defendant "could not be convicted and sentenced for two crimes involving a firearm that arose out of the same criminal episode." State v. Stearns, 645 So. 2d at 418. This result, which clearly was not intended by the legislature, is an absurd one that this Court must avoid. Dorsey v. State, 402 So. 2d 1178, 1183 (Fla. 1981) (citation omitted) ("In Florida it is a well-settled principle that statutes must be construed so as to avoid absurd results."); State v. Webb, 398 So. 2d 820, 824 (Fla. 1981).

Further, such an interpretation of the pertinent statutes goes far beyond any previous decision on the matter by this Court. Although this Court held in Palmer v. State, 438 So. 2d 1 (Fla. 1983), that the legislature did not intend to permit the

imposition of consecutive mandatory minimum terms for separate armed felonies committed during a single criminal transaction, the Court **upheld** the defendant's convictions for thirteen separate counts of **armed robbery** committed with a single firearm during the same criminal episode. In fact, the Court in Palmer expressly stated that its decision there "[did] not prohibit the imposition of multiple concurrent three-year minimum mandatory sentences upon conviction of separate offenses included under subsection 775.087(2)[.]" Id. at 4. The Court in Palmer thus indicated that a defendant **can** be convicted of multiple "armed" offenses committed during a single criminal episode, contrary to petitioner's argument here.

To summarize, petitioner was convicted of three distinct substantive felonies that he committed with a firearm. All three felonies have different elements, and none of the crimes completely subsumes all of the elements of either of the other two. Consequently, the legislature's intent, as clearly set forth in Section 775.021(4), is to punish petitioner separately for all three offenses. The fact that all three offenses share the single element of use of a firearm does not render petitioner's convictions for all three crimes improper or "unconstitutional." Moreover, petitioner's interpretation of the

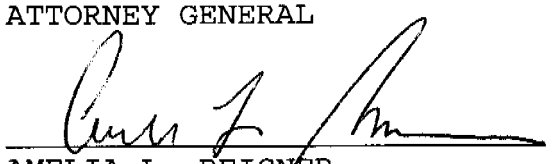
pertinent statutes leads to absurd results not intended by the legislature. This Court therefore should answer the certified question in the affirmative, and approve the First District's decision affirming petitioner's convictions for armed burglary, armed robbery, and armed kidnapping.

CONCLUSION

For the reasons set forth herein, the State respectfully requests that this Court answer the certified question in the affirmative and approve the First District's decision below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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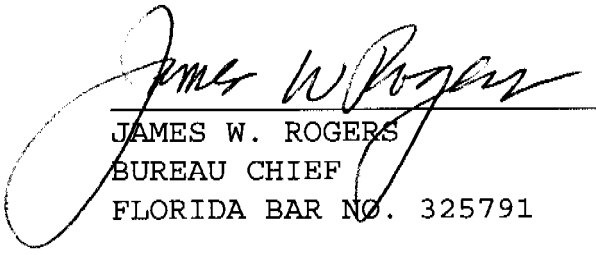

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to Chet Kaufman, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 17th day of September, 1996.

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Assistant Attorney General

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APPENDIX

(Copy of First District's opinion in
Allen v. State, No. 94-1905
(Fla. 1st DCA April 9, 1996)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

BRIEN ALLEN,

Appellant,

v.

CASE NO. 94-1905

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed April 9, 1996.

An appeal from the Circuit Court for Leon County.
J. Lewis Hall, Judge.

Nancy A. Daniels, Public Defender; Chet Kaufman, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Amelia L. Beisner, Assistant Attorney General, Tallahassee, for appellee.

WOLF, J.

We are faced with one issue in this case: Whether appellant's convictions and sentences for the offenses of armed robbery, armed kidnapping, and armed burglary, committed with the same firearm during the same criminal episode, constitute impermissible, multiple punishments for the same offense. The issue might be restated as whether the case of State v. Stearns, 645 So. 2d 417

(Fla. 1994), and its progeny, require us to reverse two of the convictions in the instant case.

In Stearns, supra, the supreme court stated, "In Brown we held [referring to State v. Brown, 633 So. 2d 1059 (Fla. 1994)] that a defendant could not be convicted and sentenced for two crimes involving a firearm that arose out of the same criminal episode." Id. at 418.

In Everett Brown v. State, 21 Fla. L. Weekly D10 (Fla. 1st DCA Dec. 18, 1995), we questioned whether this broad statement was applicable where each of the firearm offenses contained separate and distinct elements. We, nevertheless, felt bound to apply Stearns as interpreted by this court in A.J.H. v. State, 652 So. 2d 1279 (Fla. 1st DCA 1995). See also Maxwell v. State, 666 So. 2d 951 (Fla. 1st DCA 1996).[1] We do not, however, feel that we are required to follow Stearns in the instant situation, where each of the crimes contain elements that are separate and distinct, and none of the offenses are criminal only as a result of the defendant possessing or concealing a firearm. Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995).

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[1]A very good argument may be made that the language in Stearns, supra, only constituted dicta, and that the crimes involved in that case did not each involve separate elements, and therefore, the supreme court did nothing to extend the original holding in State v. Brown, 633 So. 2d 1059 (Fla. 1994). In light of this court's decision in A.J.H., supra, however, this court is not free to interpret Stearns so narrowly.

In Stearns, the court held that the defendant could not be found guilty of carrying a firearm during commission of grand theft when he received an enhanced sentence for burglary of a structure while armed. In the instant case, each offense for which the defendant was convicted was criminal, notwithstanding the possession of the firearm. Under these circumstances, we find Stearns is inapplicable.[2]

It is somewhat unclear, however, whether each offense may be enhanced as a result of the use of the same firearm during one criminal episode. We, therefore, affirm, but certify the following question as being one of great public importance:

> WHETHER APPELLANTS MAY BE SEPARATELY CONVICTED AND SENTENCED FOR ARMED BURGLARY, ARMED ROBBERY, AND ARMED KIDNAPPING WHERE EACH OFFENSE IS PART OF THE SAME CRIMINAL EPISODE?

MINER and VAN NORTWICK, JJ., concur.

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[2]We would note that the case of Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA 1995), is also inapplicable in that the firearm which was stolen in the instant case was taken prior to the victim returning home, the robbery necessarily involved the separate act of taking different items, and therefore, appellant was not convicted of a theft involving the same gun which provided the basis for the armed burglary charge.