IN THE SUPREME COURT OF FLORIDA

JOHNNIE E. HILL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 90,049

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner's.:statement of the case and facts is substantially accurate for purposes of review, with the following additions and corrections:

Just as there is no indication in the record that Petitioner was physically present at the bench conference that followed voir dire, there is no indication in the record that he was not. (Supp. R. 115-117.) The. record shows that Petitioner was in the courtroom immediately before voir dire questioning began, and there is no indication in the record that he ever left the courtroom during the jury selection or any other proceedings.

Petitioner was arrested driving the victim's car and wearing the victim's **necklace.** (T. 62-63.) The victim positively identified Petitioner as the man who accompanied the gunman, robbed him of his belongings and took his car. (T. 41.) He recognized Petitioner's face because Petitioner stood close to him during the incident. (T. 41.)

Petitioner orally moved for a new trial on the basis that the verdict was contrary to the weight of the evidence. (R. 154,) Nowhere in the record did Petitioner object to the jury selection procedure or any of the jurors who were selected to serve on his jury.

SUMMARY OF THE ARGUMENT

ISSUE I: Petitioner relies on **Conev v. State, 653 So. 2d 1009 (Fla.), cert. denied, --- U.S. ---, 116 S. Ct. 315, 133 L. Ed. 2d 218** (1995), to support his assertion that his convictions should be reversed; however, **Coney** is not applicable here because that decision did not become final until April 27, 1995, which is over four months after the trial in the instant case. Even if the rule in **Conev** is applicable to his case, this issue was waived since Petitioner did not object or otherwise bring the issue to the trial court's attention. Alternatively, any error caused by Petitioner's absence from the bench conference was harmless.

ISSUE 11: Petitioner's convictions for both armed robbery and carjacking do not violate double **jeopardy** as each offense contains an element that the other does not.

ARGUMENT

ISSUE I

NO ERROR OCCURRED WITH RESPECT TO APPELLANT'S RIGHT TO BE PRESENT WHERE PEREMPTORY CHALLENGES TO PROSPECTIVE JURORS WERE EXERCISED.

Petitioner claims that his convictions must be reversed because the record does not show that he was present at the bench conference in which peremptory challenges were exercised to strike several prospective jurors, as required by **Coney v. State, 653 So. 2d 1009 (Fla.), cert. denied, --- U.S. ---, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995).** Respondent responds that the **record** does not show whether Petitioner was present or absent at the bench conference on jury selection and, in any event, **Conev** is not applicable to Petitioner's case because that opinion became final subsequent to the trial in the instant case.

The discussion of this issue encompasses the first certified question posed by Judge Altenbernd in a concurring opinion, which was joined by the other panel members in the majority opinion:

> I. ON WHAT DATE WAS THE CONEY DECISION ANNOUNCED?

Hill v. State, 22 Fla. L. Weekly D484 (Fla. 2d DCA Feb. 21, 1997). In his concurring opinion, Judge Altenbernd concluded that the rule in **Conev** was "announced" **and** became applicable to all other litigants on January 5, 1995. Respondent disagrees.

This Court released its original opinion in **Coney** on January

5, 1995.[1] In that opinion, the Court stated that its holding was to be applied prospectively only. Petitioner's trial commenced on January 11, 1995, six days after the release of **Coney**. Subsequently, this Court issued a revised opinion in the **Conev** case at the same time that it denied rehearing on **April** 27, 1995.[2] Therefore, over four months after Petitioner's trial was concluded, the original opinion in **Coney** was, in effect, withdrawn, and a revised opinion substituted in its place. Thus, Respondent contends that the original opinion in **Coney** does not control here.

This result is supported by language in another of this Court's cases. In **Allen v. State, 662 So. 2d 323 (Fla. 1995), cert. denied, --- U.S. ---, 116 S. Ct. 1326, 134 L. Ed. 2d 477 (1996)**, the Court considered the defendant's claim that the rule announced in **Koon v. Dugger, 619 So. 2d 246 (Fla. 1993)**, should control his case. However, the Court rejected his contention, stating: "[O]ur ruling in Koon by its own terms is prospective only. The opinion in **Koon** did not become final until rehearing was denied in June 1993, over three months after sentencing occurred in the instant case. Because the **Koon** procedure was not applicable . . . , we find no error. . . ." **Allen, 662 So. 2d at 329.**

There is language to this same effect in **Smith v. State, 598**

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[1]The original opinion can be found at **20 Fla. L. Weekly S16 (Fla. Jan. 5, 1995).**

[2]The revised opinion appeared at **20 Fla. L. Weekly S255 (Fla. Apr. 27, 1995)**, and can now be found at **Conev v. State, 653 So. 2d 1009 (Fla. 1995)**.

So. 2d 1063, 1066 (Fla. 1992), in which the Court attempted to clarify some of the uncertainty about the date from which the district courts should enforce an opinion announcing a prospective rule of law. The **Smith** court directed that its earlier decision in **Ree v. State**, 565 So. 2d 1329 (Fla. 1990)[3], would be applicable to any cases not yet final from the date the mandate issued after rehearing. **Smith**, 598 So. 2d at 1064. **See also State v. Schopp**, 653 So. 2d 1016, 1018 (Fla. 1995) ("there was no 'decision on the merits' until the district court disposed of [defendant's] motion for rehearing," citing to Fla. R. App. P. 9.020(g)(1)). Because there are Florida cases addressing the issue of the effective date of court opinions, it is not necessary to look to decisions from other states for guidance.

Applying the reasoning of the above cases to the instant case, the rule of **Coney** applies only to trials commencing after April 27, 1995. Petitioner's trial was commenced on January 11, 1995. Therefore, **Coney**, does not control his case, and under decisional law which preceded **Coney**, none of Petitioner's rights were violated as he was present in the courtroom and the record does not reflect that there was any limitation imposed on his ability to consult with his attorney. See **Anderson v. State**, 22 Fla. L. Weekly D736 (Fla. 3d DCA Mar. 21, 1997), in which the district court explained:

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[3]This decision was later modified in **State v. Lyles**, 576 So. 2d 706 (Fla. 1991).

> It was generally accepted before *Coney* that the defendant's right to be "present" in the Florida Rule of Criminal Procedure **3.180** sense as it relates to jury selection, meant physical presence in the same courtroom where the jury **was** being selected with an opportunity to discuss which jurors to retain on the jury with his counsel.

Id.

Should this Court find that Coney does control here, Respondent contends that Petitioner waived review of this issue by failing to object below. This rule was recognized by this Court in **Smith v. State, 598 So. 2d 1063, 1066** (Fla. 1992), in which the Court stated: "To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review." The requirement for objection stems from the fact that the issue does not constitute fundamental error, for if it were fundamental error, it would not require a contemporaneous objection to preserve the issue for review.

The original opinion issued in **Coney** on January 5, 1995, contained the following sentence: "Obviously, no contemporaneous objection by the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure." Coney, **20 Fla. L. Weekly at** S17. However, in its revised opinion that was issued April 27, 1995, the Court took out that sentence. The obvious inference to be drawn from that specific and intentional change is

that a contemporaneous objection is required to preserve this issue for review. And since no objection was raised below, the Petitioner in the instant case did not preserve the issue. **See Steinhorst v. State, 412 So. 2d 332 (Fla. 1982)** (for "argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Respondent is cognizant of the first district's decision to the contrary in a line of **cases** beginning with **Meiia v. State, 675 So. 2d 996 (Fla. 1st DCA** 1996), **rev. granted, No. 88,568 (Fla. Jan. 10, 1997).** However, Respondent submits that the first district's conclusion renders meaningless the correction made by the Court in the later **Coney** opinion. We must presume that this Court acted with purpose when it made this change in the language of the opinion. Therefore, Respondent would urge the Court not to follow the first district's interpretation in **Meiia,** but to give this very specific change the only logical meaning possible and find that the fundamental error doctrine is not applicable to this issue.

Finally, even if this Court were to find that no contemporaneous objection is required because a **Conev** error is fundamental, it is subject to harmless error analysis. **Goney 5 so. 2d at 1013.** In **Meiia v. State, 675 So. 2d 996 (Fla. 1st DCA 1996),** the First District stated that even though the **Conev** error was fundamental, harmless error analysis could be applied, and affirmed the defendant's convictions because the court found there

was no reasonable possibility that the error had an adverse impact on the defendant's right to a fair trial. Respondent contends the same is true in Petitioner's case.

As in **Meiia**, Petitioner cites to **Francis v. State, 413 So. 2d 1175 (Fla. 1982), cert. denied, 474 U.S. 1094, 106 S. Ct. 870, 88 L. Ed. 2d 908 (1986)**, in support of his claim that he might have been prejudiced. However, the situation in Petitioner's case is unlike that in **Francis** where jury selection commenced after the defendant left the courtroom to go to the bathroom and continued at a conference in the judge's chambers while the defendant sat in the courtroom, The Petitioner in the instant case was present in the courtroom and no conferences were conducted in his absence or outside the courtroom. Although the record here does not show that Petitioner **was** consulted about peremptory strikes, the record **also** does not show that he was denied the opportunity to consult with his attorney.[4] Thus, Respondent maintains that any technical error under **Conev** was harmless.

This result is supported by **Gibson v. State, 661 So. 2d 288 (Fla. 1995).** In **Gibson** defense counsel asked the court for a recess so that he could consult with his client. The trial court implicitly denied the request by asking the attorneys to go on with

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[4]It is also notable that in **Francis**, the defendant raised the issue of his absence from the jury selection proceedings to the trial court in a motion for a new trial, **Francis, 413 So. 2d at 1177,** which this Petitioner did not.

their challenges for cause. The attorney did so, without renewing his request or objecting on the record. **Gibson, 661 So. 2d at 290.**

On appeal, the defendant **argued** that the trial court violated his right to be present **at the challenging** of jurors by conducting the challenges **at a** bench conference. In addition, he complained that the trial court's refusal to allow him to consult with his attorney before the attorney exercised peremptory challenges violated his right to assistance of counsel. **Id.**

This Court rejected both of these contentions. Stating that the defendant's attorney had not raised to the trial court the issue of consulting with his client about jury challenges, the Court then observed that the record did not show that the defendant was prevented or limited in any way from consulting with his counsel concerning jury challenges. **Gibson, 661 So. 2d at 291.** Thus, since no record objection was made to the trial court's procedure, this Court concluded: "In short, [the defendant] has demonstrated neither error nor prejudice on the record before this Court." **Id.** Respondent notes that the Court cited to **Coney**, therefore, was clearly **aware** of that case and its holding when **Gibson** was decided some nine months later.

Similarly, this Petitioner made no objection to the trial court's procedure below, nor has he shown how he **was** prejudiced by the procedure that **was** used. The record does not show that he was prevented from conferring with counsel about jury selection or that

he was precluded from participating.[5] Any error that occurred was harmless.

The Third District has held similarly. In **Anderson v. State,** 22 Fla. **L. Weekly D736 (Fla. 3d DCA Mar. 21,** 1997), the district court stated that the strict dictates of **Coney** had been violated because the defendant was not brought to the bench for exercise of peremptory strikes, nor did the judge ascertain, on the record, that the defendant knowingly waived his right to be there. Noting that this Court has acknowledged that the "new" rule announced in **Coney** has since been superseded by an amendment to rule 3.180. **Amendments to the Florida Rules of Criminal Procedure, 21 Fla. L. Weekly S518 (Fla. Nov. 27,** 1996), the district court pointed out that this amendment merely returned the **law** to the practice in effect before **Coney**.

Even though it acknowledged that the **Coney** definition applied to the case under consideration, the Third District still declined to reverse and order a new trial, stating that the defendant could not possibly be prejudiced because he was in the courtroom throughout the questioning of the venire, heard all of the

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'Further evidence that the procedure used here was not unconstitutional or did not vitiate Petitioner's right to **a** fair trial is the fact rule 3.180(b) has recently been amended to provide that "[a] defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed." **Amendments to the Florida Rules of Criminal Procedure,** 21 Fla. **L. Weekly S518 (Fla. Nov. 27,** 1996).

responses, and did not object when his attorney accepted the jury. This was true even though there was nothing in the record to show that the attorney had actually discussed the challenges with the defendant. Thus, the court stated that the defendant is now estopped from arguing that he was not given an opportunity to be heard on the issue of jury selection because he had an opportunity to voice any objection to the jury before it was sworn,

The outcome should be the same in the instant case. Here, Petitioner was present in the courtroom during selection of the jury. Although a recess was not taken before the defense attorney accepted the jury at the bench conference, immediately thereafter, the judge called out the names of the panel members chosen, asked the others to return to the main jury room, and then swore in the jury. As in **Anderson**, Petitioner could have advised the trial judge if he was not happy with the panel or wished to have any other input in the selection process. There was ample opportunity before the panel was sworn when the names of those chosen were announced and the other venire members left the courtroom. Because he said nothing, he should be estopped from raising the issue now.

Because the error was not preserved below in the instant **case**, this brings us to the second certified question:

> II. IF A CONEY ISSUE IS NOT PRESERVED AT TRIAL, MUST A PRISONER FILE A POSTCONVICTION MOTION ALLEGING UNDER OATH THAT HE OR SHE WOULD NOT HAVE EXERCISED PEREMPTORY CHALLENGES IN THE SAME MANNER AS HIS OR HER ATTORNEY?

Hill v. State, 22 Fla. L. Weekly D484 (Fla. 2d DCA Feb. 21, 1997) (Altenbernd, J., concurring). Respondent asserts that this is the proper method for obtaining relief for an unpreserved **Conev** issue, and urges this Court to answer this question in the affirmative.

The purpose of a postconviction motion under **Florida Rule of Criminal Procedure 3.850** is to inquire into alleged constitutional infirmities of **a** judgment or sentence, not to review ordinary trial errors which are cognizable on direct appeal. **McCrae v. State, 437 so. 2d 1388 (Fla. 1983).** Matters which could have or should have been raised on direct appeal are not cognizable in **a rule 3.850 motion,** Id. It has been held that an attorney's failure to object to reversible error may constitute ineffective assistance of counsel, which must be raised in a motion for postconviction relief under rule 3.850, not on direct appeal. See, e.g., **Davis v. State, 648 So. 2d 1249 (Fla. 4th DCA 1995).**

Respondent contends that postconviction review is necessary in a **case** such as this one, because the record does not show whether Petitioner was,, in fact, at the bench conference, or whether he ever conferred with his attorney about the jury strikes. Postconviction review of factual evidence- not in the record is permitted because there can be no practical determination on the basis of the record provided for direct appeal. **Brown v. State, 633 So. 2d 112, 116 (Fla. 2d DCA 1994)** (Altenbernd, J., concurring). See **State v. Callawav, 658 So. 2d 983 (Fla. 1995)** (issue should be

dealt with under **rule** 3.850 which provides for an evidentiary hearing when issue is not pure question of law, but depends upon resolution of factual evidence); **see also Mitchell v. State, 309 SO. 2d 558 (Fla. 2d DCA 1975)** (where record is insufficient to permit a review of alleged noncompliance with statutory notice required when a minor is charged with a crime, relief is properly sought under **Fla. R. Crim. P.** 3.850; therefore, orders appealed were affirmed without prejudice to appellant to raise the issue in a postconviction motion). These types of questions are best handled by means of a postconviction proceeding, with its built-in provision for an evidentiary hearing.

In his concurring opinion in **Ganyard v. State, 22 Fla. L. Weekly D92 (Fla. 1st DCA Dec. 30, 19961,** Judge Lawrence noted that ethical rules require a defense attorney to consult with and inform his client about his right to have input during the selection of the jury, and if the attorney fails to do this, the defendant may bring it to the trial court's attention. Moreover, if he is not **aware** of his rights, he may bring his claim in postconviction proceedings under **Florida Rule of Criminal Procedure** 3.850. Id.

Similarly, in his concurring opinion in the case at bar, Judge Altenbernd stated that a defendant who has not preserved a claim under **Coney** must bring his claim in **a** motion for postconviction relief under **rule** 3.850 in which he must swear that he would have done something differently during the selection of his jurors.

Hill v. State, 22 Fla. L. Weekly D484 (Fla. 2d DCA Feb. 21, 1997) (Altenbernd, J., concurring). The oath requirement arose from a concern about the use of false allegations in postconviction motions. Gorham v. State, 494 So. 2d 211 (Fla. 1986). See also Brown v. State, 633 So. 2d 112, 116 (Fla. 2d DCA 1994) (Altenbernd, J., concurring) ("To avoid abuse, the rule 13.8501 requires sworn allegations of the critical facts that are outside the record.")

The need for this requirement is exemplified by the decision in Dorsev v. State, 22 Fla. L. Weekly D603 (Fla. 4th DCA Dec. 18, 1996), in which the Fourth District refused to find harmless error with respect to a Coney violation on the basis that the defendant's participation in jury selection might have resulted in different jurors deciding the case. The holding in Dorsev is at odds with the decision in Ganvard v. State, 22 Fla. L. Weekly D92 (Fla. 1st DCA Dec. 30, 1996), in which the First District found harmless error where a defendant did not participate in a bench conference because no peremptories were exercised at all, Under the reasoning of Dorsev, who could say what might have happened if the defendant had been involved in the bench conference? After all, he might have stricken one of the panel members who ultimately served.

Respondent submits that the thrust of the issue should not be something so speculative. Rather, the issue is whether the defendant's right to a fair trial was violated because he would have selected or not selected specific jurors for specific reasons

if he had participated. In other words, he cannot **make** the bare conclusory allegation without providing specific facts to back it up.

Requiring a factually detailed and sworn postconviction motion comports with the requirements for relief with respect to other types of errors. For example, in **Sorgman v. State, 549 So. 2d 686 (Fla. 1st DCA 1989)**, the First District held that a motion for postconviction relief alleging ineffective assistance of counsel for failure to interview **and call** witnesses must apprise the trial court of the names of the witnesses, substance of their testimony, and how the omission prejudiced the outcome of the defendant's trial. Likewise, in **State v. Beach, 592 so. 2d 237 (Fla. 1992)**, this Court stated that **a** defendant who challenges the validity of using his prior convictions on a guidelines scoresheet on the basis that they were obtained without benefit of counsel has to swear that (1) the offense involved was punishable by more than six months of imprisonment or that he was actually imprisoned on that charge; (2) he was entitled to court-appointed counsel because he was indigent; (3) no counsel was appointed for him; and (4) he did not waive his right to counsel. **Cf. Hill v. Lockhart, 474 U.S. 52,** 106 **S. Ct.** 366, 88 **L. Ed. 2d 203 (1985)** (when a defendant challenges his conviction following entry of a guilty plea, that defendant must show that there was reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have

insisted on going to trial).[6]

For all of the above reasons, Respondent requests that this Court find that Coney does not control the outcome of this case, and answer the second certified question in the affirmative. Petitioner has failed to show error as to Issue I, and the decision of the Second District should be affirmed,

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[6]Respondent notes that the First District has chosen a different approach. In **Golden v. State 22 Fla. L.** Weekly **D493 (Fla. 1st DCA Feb. 20, 1997)** (on rehearing'), the district court relinquished jurisdiction to the trial court so that the record could be supplemented with a reconstruction of the bench conference proceedings since the trial transcript did not show whether the defendant was physically present at the bench conferences or whether he conferred with his attorney about the peremptory challenges. After the record was supplemented with affidavits by the attorney'; and an order from the trial court, the First District resumed its review. Even though the affidavits showed that the defendant had not been present at the bench conference where the peremptories were exercised, the district court found the error was harmless since the record showed that the defendant had consulted with counsel before the challenges, 'thus, had the opportunity to participate in a meaningful way in the selection of the jury." Id. Respondent suggests that this is an unnecessary and burdensome procedure.

ISSUE II

APPELLANT'S DUAL CONVICTIONS FOR ARMED ROBBERY AND CARJACKING DO NOT VIOLATE DOUBLE JEOPARDY PROTECTIONS.

Petitioner contends that his convictions for both armed robbery and **carjacking** violate double jeopardy. Respondent disagrees, relying on the Third District Court of Appeal's decision in **Smart v. State, 652 So. 2d 448 (Fla. 3d DCA), rev. denied, 660 So. 2d 714 (Fla. 1995).**

In **Smart**, the defendant held the victim at gunpoint and robbed him of his jewelry and wallet. An accomplice then struck the victim, and the defendant drove off with his **car.** The district court rejected the defendant's argument that he could not be convicted of both offenses, stating that the defendant

> was properly convicted and sentenced for both armed robbery of the personal effects under section 812.13(2)(a), (b), Florida Statutes (1993), and the armed carjacking of a different item, the vehicle, which is forbidden by a different statute, section 812.133(2)(a), Florida Statutes (1993).

Smart, 652 So. 2d at 448.

The Fifth District has **also** upheld convictions for both armed robbery and carjacking. In **Mason v. State, 665 So. 2d 328, 329 (Fla. 5th DCA 1995)**, the defendant was convicted of aggravated battery, carjacking, kidnapping, armed robbery and aggravated assault. The district court affirmed all of these convictions, and rejected the defendant's argument that the robbery of money and the taking of the car "should be combined into one robbery because

carjacking is a form of robbery and both robberies merged together under the facts of [that] case." The court explained that two separate crimes were committed:

> First the taking of the money and then the carjacking--the taking of the car. They are separate crimes and the commission of them occurred separately. If appellant had carjacked and there was money in the car then he could have been charged with only one robbery, or the carjacking. But here the two occurred independent of each other and at different times, although in a course of conduct which included the kidnapping and other crimes.

Mason, 665 So. 2d at 329. Cf. Joseph v. State, 316 So. 2d 585 (Fla. 4th DCA 1975) (defendant properly convicted of both robbery and larceny of a motor vehicle after he robbed victims in their dwelling and stole their car as he left).

Similarly, in the instant case, Petitioner was charged by way of supersedeas information with armed robbery of the victim's personal effects (jewelry, a wallet containing money and various personal items), under section 812.13(1) and (2)(a), as well as the carjacking of a different item, the victim's car, which is conduct forbidden under section 812.133(2)(b). The jewelry, money and wallet stolen from the victim were not inside the victim's car, which Petitioner drove away. Thus, under the above authorities, Petitioner's convictions for both offenses were proper and should be affirmed by this Court.

This reasoning is supported by the decision in State v. Getz, 435 so. 2d 789 (Fla. 1983), in which this Court found that a

defendant could be separately convicted and sentenced for both grand theft of a firearm and petit theft of a calculator and coins from the same property at the same time. The court explained that the legislature had written the statute to treat the theft of different types of property as separate criminal offenses with distinct punishments since theft of a firearm **was** separately listed in the grand theft statute. Getz, **435 so. 2d at 791.** The court concluded that this indicated a legislative intent to allow multiple punishments for multiple offenses arising out of a single criminal episode. **Id.** The United State Supreme Court explained in **Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983):**

> Where, as here, a legislature specifically authorizes cumulative punishment 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 and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

In **M.P. v. State, 662 So. 2d 1359 (Fla. 3d DCA 1995)**, the Third District said, the "question is whether the legislature intended to authorize separate punishments for the two crimes." **M.P., 662 So. 2d at 1359.** Thus, we must look to the intent of the legislature when conducting a double jeopardy analysis because the double jeopardy clause "'presents no substantive limitation on the legislature's power to prescribe multiple punishments,"' but rather, "'seeks only to prevent courts either from allowing

multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense."' Borges v. State, 415 So. 2d 1265, 1267 (Fla. 1982) [citations omitted].

Even if this Court determines that the legislature did not intend to allow multiple punishments by enacting the separate carjacking statute, under traditional double jeopardy analysis, the dual convictions here do not violate double jeopardy principles. The purpose of **section 775.021, Florida Statutes** (1993), is to set out the legislative intention that separate convictions and separate sentences are to be imposed for separate offenses committed during one criminal episode. It has been said that **section 775.021(4)(a),** is nothing more than a codification of the rule announced by the United States Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932): Under this rule, separate offenses exist where each requires proof of an element that the other does not. See Sirmons v. State, 634 so. 2d 153 (Fla. 1994)(Kogan, J., concurring). Other sections of the statute prohibit dual punishment for necessarily lesser included offenses, see **section 775.021(4)(b)1.**, and permissive lesser included offenses, see **section 775.021(4)(b)3.**, as well as those offenses "which are degrees of the same offense as provided by statute," see **section 775.021(4)(b)2.** Id.

Applying this statute to the two offenses here shows that they are separate offenses. Petitioner was charged with a violation of

section 812.13(1) and (2)(a), robbing the victim with a firearm, and taking his wallet, jewelry and other personal items, which is a first degree felony punishable by life. He was also charged with a violation of section 812.133(2)(b), taking the victim's motor vehicle or carjacking while carrying no firearm or deadly weapon, a felony of the first degree. Here, the charge of armed robbery with a firearm required proof that a firearm was used, and that the enumerated personal property was taken, which the carjacking charge did not, In contrast, the carjacking charge required that the state prove Petitioner took the victim's vehicle, which the armed robbery charge did not. Therefore, the elements are different under section 775.021(4)(a).

When determining whether one offense is a lesser included offense of the other, we look at both the statutory elements and the charging document. As noted by the supreme court in **Borses v. State, 415 so. 2d 1265 (Fla. 1982),** "a less serious offense is included in a more serious one if all of the elements required to be proven to establish the former are also required to be proven, along with more, to establish the latter." However, "if each requires proof of an element that the other does not, the offenses are separate and discrete and one is not included in the other." Id. As explained above, each of the offenses in question here requires proof of an element that the other does not. Therefore, neither section 775.021(4)(b)1., nor section 775.021(4)(b)3, would

exclude punishment for both charges. Finally, the two offenses in question are not degrees of the same offense as provided by statute; therefore, section 775.021(4)(b)2. does not mandate that Petitioner cannot be punished for both crimes.

Although Petitioner relies on Sirmons v. State, 634 So. 2d 153 (Fla. 1994), in support of his contention that his convictions violate double jeopardy, that case is factually distinguishable because it involved the propriety of dual convictions for armed robbery and grand theft based on the defendant's taking of a single automobile. That is not the case here because Petitioner was charged with carjacking of the vehicle and armed robbery of some different items.

Respondent suggests that the double jeopardy argument made here is analogous to the claim that a defendant cannot be convicted of two crimes based on her possession of two different types of contraband at the time she is arrested. That argument was rejected by this Court in Jenkins v. Wainwright, 322 So. 2d 477 (Fla. 1975), where the Court approved multiple convictions and sentences for a defendant convicted of possession of cannabis sativa and possession of a hallucinogenic drug, and said: "The facts in the instant case show that the petitioner had possession of two separate drug substances, each of which constitutes in and of itself a separate violation of law." Id. at 479.

Petitioner's reliance on cases such as State v. Thompson, 607

SO. 2d 422 (Fla. 1992), which found that double jeopardy protections prohibited dual convictions for two offenses which are "degree variants of the core offense of theft," is misplaced in light of the fact that Petitioner was charged with armed robbery of different items than the car which formed the basis for the carjacking charge. In addition, Respondent suggests that the continued viability of **Thompson** in double jeopardy analysis is in question in light of recent decisions from this Court because **Thompson** and its progeny represent nothing more than the old "same evil" test from **Carawan v. State, 515 So. 2d 161 (Fla. 1987)**, i.e., if the statutes are directed at the same evil, theft, then the state cannot obtain convictions for both without violating the guarantee against double jeopardy.

In **Carawan,** the defendant was convicted of attempted manslaughter, aggravated battery and shooting into an occupied dwelling. In addressing his argument that these multiple convictions violated the prohibition against double jeopardy, this Court stated that if two offenses have separate elements under **Blockburger** "then a presumption arises that the offenses are separate;" however, this "presumption . . . can be defeated by evidence of a contrary legislative intent." **Carawan, 515 So. 2d at** 165. The Court then concluded that the legislature does not intend to punish the same offense under two different statutes, and that the rule of lenity may defeat the **Blockburger** presumption which

"favors multiple punishments wherever each crime has an element not shared by the other." **Id. at 168.** Thus, the Court stated that

> where there is a reasonable basis for concluding that the legislature did not intend multiple punishments, the rule of lenity contained in section 775.021(1) and our common law requires that the court find that multiple punishments are impermissible. For example, where the accused is charged under two statutory provisions that manifestly address the same evil and no clear evidence of legislative intent exists, the most reasonable conclusion usually is that the legislature did not intend to impose multiple punishments. [emphasis added]

Carawan, 515 So. 2d at 168.

However, in **State v. Smith, 547 so. 2d 613 (Fla. 1989)**, the supreme court recognized that **Carawan** was legislatively overruled by way of amendment to **section 775.021(4)**. The court noted that "the statutory element test shall be used for determining whether offenses are the same or separate," and if they are separate, there is no doubt of the legislature's intent to punish these offenses separately, and there is then no occasion to apply the rule of lenity. **Smith, 547 So. 2d at 616.** Clearly, by this amendment, the legislature rejected the "same evils" analysis.

Recent cases support this conclusion. For example, in **State v. Johnson, 676 So. 2d 408 (Fla. 1996)**, this Court held that a defendant could be convicted of both aggravated stalking and contempt of court for violating an injunction. The Court explained:

> Johnson committed one criminal offense when, in contravention of a court injunction, he contacted Green and entered her place of residence. The only elements

> necessary to prove the contempt offense were knowledge of the injunction and a willful violation of that injunction. He was also charged with a second offense--aggravated stalking. The statutory elements of aggravated stalking under section 784.048(4) are knowledge of an injunction and knowingly, willfully, maliciously, and repeatedly following or harassing the beneficiary of the injunction. Each of the two offenses contains an element not contained in the other. Criminal contempt requires proof of entering the residential premises, which the aggravated stalking offense does not; aggravated stalking requires proof of maliciousness which the contempt offense does not.

Johnson, 676 So. 2d at 411. Thus, the court approved these dual convictions even though it could be said that the two offenses are species of the same core offense (or directed at the same evil): harassment of the victim.

Petitioner's argument that he cannot be convicted of both armed robbery and carjacking because "[b]oth charges arose from the same act of taking Mr. Goitia's property" must also fail. In **M.P.**, the Third District held that a child could be adjudicated delinquent both for carrying a concealed weapon and possession of a firearm by a minor, even though both charges related to the same weapon and arose from the same incident. **M.P. v. State, 662 So. 2d 1359 (Fla. 3d DCA 1995).** In approving the decision of the district court, this Court, explained that the same conduct test was no longer the law:

> it makes no difference that the offenses at issue stemmed from the same conduct by M.P. The Supreme Court specifically overruled the *Grady v. Corbin*, *495* U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), "same-conduct" test as being "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law

understanding of double jeopardy." United *States v. Dixon*, **509** U.S. **688, 704, 113** S. Ct. 2849, 2860, 125 L. Ed. 2d 556 (1993)

M.P. v. State, 682 So. 2d 79 (Fla. 1996). Petitioner's "same act" test is nothing more than an attempt to resuscitate the now defunct "same conduct" test of **Grady.**

Another decision by this Court mandates affirmance of the Petitioner's convictions. In **State v. McCloud, 577 So. 2d 939 (Fla. 1991)**, the defendant was charged with one count each of possession of cocaine and sale of cocaine in two separate informations. Although he pleaded guilty to both counts of sale, the trial judge granted his motion to dismiss the possession charges based on double jeopardy. The state appealed, and this Court affirmed the trial court's action, but certified the question of whether a defendant could be convicted of both sale and possession of the same quantum of cocaine. **McCloud, 577 So. 2d at** 940.

This Court determined that one of the possession charges was properly dismissed for reasons not pertinent here. Id. However, the Court found that the remaining charge should not have **been** dismissed, and remanded the case for further proceedings. **McCloud, 577 so. 2d at 941..**

In reaching that conclusion, the Court first looked **at section 775.021(4)(b), Florida Statutes (Supp. 1988)**, which permits dual convictions and sentences for offenses based on one act, with

certain enumerated exceptions. Id. The defendant argued that he fit into one of the exceptions because possession of cocaine was a lesser included offense of the charge of **sale** of cocaine. However, this Court agreed with the state's contention that under the **Blockburaer** test, codified at **section 775.021(4)(a)**, possession was not **a** lesser included of sale since each contains an element that the other does not. This was true even though the defendant in McCloud actually possessed and sold the same quantum of cocaine, because **section 775.021(4)(a)** specifically directs that we look only at the statutory elements "without regard to the accusatory pleading or the proof **adduced at trial." McCloud, 577 So. 2d at 941.** The Court explained:

> [t]hus section 775.021(4)(a) precludes the court from examining the evidence to determine whether the defendant possessed and sold the same quantum of cocaine such that possession is a lesser-included offense of sale in **any** one **case.**

Id. It is clear in the instant case, if one looks only **at the** statutory elements and does not look at the evidence adduced at trial, that two different offenses occurred.

Respondent asks this Court to find that no double jeopardy violation occurred, and uphold the decision of the Second District which affirmed Petitoner's convictions for armed robbery and carjacking.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests this Honorable Court to hold that Coney is only applicable to cases tried after April 27, 1995. In addition, Respondent asks the Court to uphold the decision of the district court affirming Petitioner's convictions, and answer the second certified question in the affirmative, requiring such unpreserved issues to be brought by postconviction motion.

Respectfully submitted,

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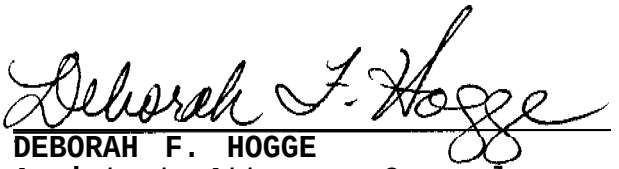

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John C. Fisher, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33831, this 24th day of April, 1997.

Deborah J. Hogge

COUNSEL FOR RESPONDENT