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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CAMERON ELLIS,

Respondent.

CASE NO. 91,154

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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AUTHORITIES CITED

FLORIDA RULES OF JUDICIAL ADMINISTRATION

STATEMENT OF THE CASE

Respondent agrees with the statement in petitioner's initial brief on the merits, except to add the following:

A. At the end of voir dire examination of the venire, the court conducted a bench conference at which Amy Everard, respondent's counsel, exercised peremptory challenges on juror Walukiewicz, SR 104-105, and apparently at least two others (the discussion was confused). SR 105-108. The record does not show if respondent was present at the bench conference, and there was no colloquy with the court concerning his absence. During the appeal, jurisdiction was relinquished to the trial court for determination whether respondent was at the bench conference, but neither trial counsel nor the court could remember.

The state's evidence was that Fort Pierce police officers C.C. Ross, David Jones, Rodney Nieves, Bill Hall, and Sandra Larkins went to an area where respondent

and other men were standing around a car.[1] When respondent entered the car to get the registration, Ross and Nieves saw a gun clip in the car. T 30-33 (testimony of Ross). After respondent got out of the car, Officer Jones saw a bulge in respondent's shorts pocket.[2] As Jones felt for the bulge, a physical altercation arose which formed the basis of the prosecution for the twin charges of battery on a law enforcement officer (Jones) and resisting an officer (Jones) with violence. R 37-30 (testimony of Ross), 50-52 (Jones), 61-62 (Hall). The details of this altercation were in dispute below: Respondent and his brother gave testimony differing sharply from that of the officers. R 77-78; 85-86.

In final argument, the state argued to the jury

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[1] The defense repeatedly objected to comments and evidence that the officers confronted the men in response to a report of criminal activity. T 9-13 (motion heard between jury selection and opening statements), 24 (objection to state's opening statement), T 30 (objection during testimony of Officer Ross), 43-44 (objection during testimony of Officer Jones).

[2] The bulge was caused by "a good size bundle of keys". T 56 (testimony of Jones).

> ... But he knowingly and willfully opposed and obstructed, resisted David Jones efforts to continue his investigation.
>
> And if you get right down to it, it also meets the same criteria for intentionally touch or struck David Jones against his will. The battery. The actual touching was the battery. But the battery gets worse because it is not just that touching. The battery continues when this man decides to jump on top of Officer Jones seconds later.
>
> The resisting of an officer with violence, happened when this man offered to do him violence. "Keep your fucking hands off me" and made that motion to strike away his hand and, yes, he did strike the hand.

T 111.

At the close of the state's case, T 66-72, at the close of the evidence, T 97-98, and at sentencing, T 147-48, the defense argued that the two offenses charged were identical for double jeopardy purposes, so that the court should dismiss one of the charges. The court rejected the defense argument apparently on the basis of Nelson v. S t a t 665 So. 2d 382 (Fla. 4th DCA 1996).

B. On appeal, respondent made three arguments: First, that the court should reverse because the record did not show compliance with Coney v. State, 653 So. 2d 1009 (Fla. 1995). In this regard, respondent noted that the state had a constitutional duty to furnish a record adequate to permit full appellate review. Initial brief in district court, p. 7, n. 4. Second, it was error to permit comments and testimony as to why the officers had confronted respondent and his companions. Third, battery on a police officer and obstructing an officer with violence are identical offenses, so that respondent could not be legally convicted of both.

The district court reversed on the Coney issue, and did not address the other two issues. Ellis v. State, 696 So. 2d 904, 90.5 (Fla. 4th DCA 1997) ("Only one of the three issues raised merits discussion. Because the trial court did not comply with the dictates of Coney v. State, [cit.], we reverse.").

SUMMARY OF THE ARGUMENT

1. Since the record was insufficient to permit appellate review, the lower court was correct in ordering a new trial.

2. Reversal was required under Coney.

3. Reversal was required in any event because the dual convictions were illegal and petitioner relied on improper evidence and argument.

ARGUMENT

POINT I

THE GOVERNMENT FAILED TO PROVIDE A RECORD ADEQUATE FOR APPELLATE REVIEW.

The state must furnish the defendant with a record adequate to permit full appellate review. See Mayer v. Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971), Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). Thus, in DeLap v. State, 350 So. 2d 462 (Fla. 1977), this Court ordered a retrial where the record was insufficient to afford full appellate review. See also M.R.G. v. State, 576 So. 2d 1378 (Fla. 2d DCA 1991) (reversing on authority of DeLap where record of adjudicatory hearing was unavailable). cf. Fla. R. Jud. Admin. 2.070 (b) (requiring that all criminal proceedings be reported at public expense).

In criminal cases, where reversible error is claimed, the appellate court will reverse where the record does not affirmatively show compliance with due process. In Brown v. State, 471 So. 2d 6 (Fla. 1985), this Court held

that it was fundamental error to use a deposition as substantive evidence of guilt where the defendant was not present at the deposition, writing: "The state now argues that Brown waived his right to be present at the deposition because he failed to object to using the deposition at trial on the basis of his absence at its taking. We find, however, that the state's failure to follow rule 3.190(j)(3) created fundamental error by depriving Brown of his constitutional right to confront and cross-examine the witnesses against him. There is no way to correct this error, and we must grant Brown a new trial." Accord Walls v. State, 615 So. 2d 822 (Fla. 4th DCA 1993). Likewise, State v. Upton, 658 So. 2d 86, 87 (Fla. 1995) held that a valid waiver of the right to jury trial must be made by the defendant personally either in writing or in a colloquy in which the defendant "receives full explanation of the consequences of the waiver by the trial judge." Accord Hibbert v. State, 675 So. 2d 1016 (Fla. 4th DCA 1996).

Hence, the lower court was correct in writing:

Thus, we are left with a record that is silent as to Appellant's presence at the immediate site where jurors were peremptorily challenged. A defendant has a due process right to be present at the site where peremptory challenges are exercised. See Coney, 653 So. 2d at 1012-13; Matthews v. State, 687 So. 2d 908, 909 (Fla. 4th DCA 1997). Since the burden is upon the trial court or the State to make the record show that all requirements of due process have been met, we hold that the burden is on the trial court or the State to make the record show that the dictates of Coney have been complied with. See id. at 910 n. 2; Alexander v. State, 575 So. 2d 1370, 1371 (Fla. 4th DCA 1991). Here, neither the trial court nor the State has met this burden as they have failed to demonstrate that Appellant was present at the site where jurors were peremptorily challenged.

In so holding, we recognize conflict with the First District which has found that since it is the appellant's burden to show reversible error, it is the appellant's burden to demonstrate that he was not present at the site where juror challenges were exercised. See Faison v. State, 697 So. 2d 585 (Fla. 1st DCA 1997); Daniels v. State, 691 so. 2d 1139 (Fla. 1st DCA 1997); Moore v. State, 685 So. 2d 87 (Fla. 1st DCA 1996). Where the record is silent, we do not see how the appellant would ever be able to meet this burden. We find that the more prudent approach would be

> to keep the burden on the trial court and the State to show that the Coney requirements have been met. See Matthews, 687 So. 2d at 910 n. 2; Alexander, 575 So. 2d at 1371.

Ellis, 696 So. 2d at 905.

Notwithstanding the foregoing, petitioner's initial brief relies almost entirely on civil cases as a defense against its failure to provide an adequate record at bar. Under those cases,[3] the appellant in a civil case must present to the appellate court a record sufficient to support the appeal. For instance, in Applegate, the bank challenged on appeal an order of the trial court but did not file a record showing the proceedings on which the order was based. This Court wrote that the district court should have affirmed the order because the bank had not furnished a sufficient appellate record.

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[3] Applegate v. Barnett Rank of Tallahassee, 377 So. 2d 1150 (Fla. 1980), fmann v. Baker, 392 So. 2d 13 (Fla. 4th DCA 1980), White v. White, 306 So. 2d 608 (Fla. 1st DCA 1975), City of Hialeah v. Cascardo, 443 so. 2d 448 (Fla. 1st DCA 1984), Mills v, Heenan, 382 So. 2d 1317 (Fla. 5th DCA 1980).

A very different rule applies in criminal cases. There, the government, which is engaged in depriving the citizen of liberty, must affirmatively show that it has complied with due process. The state must provide a record sufficient for appellate review. E.g. Mayer 404 U.S. at 194 ('the State must afford the indigent a 'record of sufficient completeness' to permit proper consideration of (his) claims"), Griffin. This rule generally does not apply to civil cases. See Justice Black's extensive discussion of the distinction between the constitutional rules governing criminal and civil cases in his dissent in Boddie v. Connecticut, 401 U.S. 371, 390-91, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), noting that Griffin "studiously and carefully refrained from saying one word or one sentence suggesting that the rule there announced to control rights of criminal defendants would control in the quite different field of civil cases. And there are strong reasons for distinguishing between the two types of cases." See generally M.L.B. v. S.L.J., 117 S.Ct. 555 (1996), in which the Court held

that the state had to provide an adequate appellate record to afford appellate review of an order terminating parental rights because of the significant liberty issue involved, while noting that in ordinary civil proceedings the state has no such duty.

Petitioner's brief next relies on O'Steen v. State, 111 so. 725 (Fla. 1927), in which, according to petitioner, "this Court presumed that the defendant had been formally arraigned where the record did not expressly show whether there had been a formal arraignment. Recognizing that a defendant has the right to be present at arraignment, this Court said that if this right is being violated, then defense counsel has the obligation of objecting and making the record affirmatively show the absence of the defendant. Id. at 728. This Court stressed that a judgment is presumed correct and will not be reversed absent an affirmative showing of error." Petitioner's initial brief on the merits, pages 3-4.

petitioner's brief misreads O'Steen. There, for the first time on rehearing in this Court, O'Steen maintained that the record did not show that there had been an arraignment. In rejecting this claim, this Court noted that "this court has had certified to it by the clerk of the court below a record of the minute entries in this case, which show that on July 2, 1923, the defendant, being present in court, was duly arraigned and pleaded not guilty". Id. 728.

O'Steen also argued for the first time on rehearing that he had been absent from the trial. This Court noted that 'if so fundamental a right of the defendant be violated, his counsel should make due objection and exception, and see to it that the record affirmatively shows that the defendant was not present." Id. But this Court then wrote in the next two sentences: "But, under the law laid down in the Lovett Case,[4] and which is in

[4] O'Steen, characterized the holding in Lovett v. State, 11 So. 172 (1892), as follows: 'It was held in that case that it was indispensable to a legal conviction of a defendant on trial for murder that he should be

line with the weight of authority up to that time, if the record be silent upon that point, not expressly showing whether he was present or absent, and the other entries in the record proper did not afford a reasonable presumption of his presence at the trial, ~~the verdict and~~ judgment would be set aside. Yet the rule had been qualified to the extent, as recognized in the Lovett Case, that it will be held sufficient if the presence of the defendant appears from the entire record by necessary and reasonable implication." Id (e.s.).

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personally present in court during the trial, and it is likewise indispensable that the record proper of the trial, as distinguished from the bill of exceptions, should show such personal presence, that presence by an attorney is not sufficient, and that presence at the time of the trial cannot be inferred from the express statement in the record proper of such presence at the time of the sentence, where the expression of the record as to the trial is 'Came the said plaintiff and the said defendant by their respective attorneys,' etc. The judgment in that case was reversed; but it will be observed that during the same term it was shown to the court that the transcript was erroneous and that as a matter of fact the real record of the court below did show that the defendant personally participated in the trial; whereupon this court vacated its entry of the judgment of reversal, and restored the case to the docket for further proceedings."

This Court went on to note that the clerk's minute entries showed "that the defendant was present in court in his own proper person, as well as accompanied by counsel, at the time the jury was impaneled and sworn to try the issue joined, and the taking of testimony begun, on May 15, 1925, that he was present in person in court and accompanied by his counsel when the taking of testimony was resumed and completed, and during the argument of counsel and the charging of the jury by the court, and the retiring of the jury for the purpose of considering their verdict, and that on the same date the jury returned into court and rendered their verdict." Id. 730.

O'Steen, noted that, as a general rule the appellant must affirmatively show error on the record, but added "there are exceptions, such as that pointed out in the Lovett Case". Id. 729 (e.s.).

In sum, O'Steen is contrary to petitioner's position at bar. Under O'Steen, the record must affirmatively show the defendant's presence. O'Steen lost his appeal

because the record affirmatively made showed a showing.[5] The present record does not show respondent's presence at the bench conference, so that reversal is required under O'Steen.

Petitioner next relies on Gibson v. State, 661 So. 2d 288 (Fla. 1995). Gibson involved a pre-Coney trial at which counsel requested 'an afternoon recess so I may have ten minutes or so to speak with Mr. Gibson to advise him of some things and see how he would like for me to proceed." Without recessing, the court heard cause challenges. Gibson argued on appeal that this showed that "the trial court violated his right to be present with counsel during the challenging of jurors by conducting the challenges in a bench conference." Id. 290. This court rejected the argument, noting that Gibson had "demonstrated neither error nor prejudice on the record before this Court. cf. Conev v. State, [cit.]

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[5] It is noteworthy that in O'Steen the clerk failed to file transcripts of trial proceedings. This Court would now have reversed for that reason alone under Griffin and DeLap.

(holding trial court's error in conducting pretrial conference where juror challenges were exercised in absence of defendant was harmless beyond reasonable doubt)." Id. 291.

Gibson has no bearing on the case at bar. Since Gibson was tried before Coney, he had no right to be at the bench conference, if any there was. In any event, there could be no prejudice because cause challenges involve only legal argument. **At** bar, the record shows that there was a bench conference at which peremptory challenges were made at a post-Coney trial. The record does not show compliance with Coney or any waiver of respondent's presence.

For the rest, petitioner relies on lower court rulings which are contrary to the decision at bar. It does not suggest why these cases present a better rule than that used at bar. As shown above, the result reached at bar is in line with precedents of the Supreme Court and of this Court that the state must furnish a record adequate for appellate review and that compliance

with due process must affirmatively appear on the record. This Court should affirm.

POINT II

WHETHER THE COURT ERRED IN COMPLYING WITH THIS COURT'S RULING IN CONEY.

In its brief, petitioner argues that Boyett v. State, 688 so. 2d 308 (Fla. 1996) set out a "new rule" of law which should apply retrospectively to respondent, so that the lower court's compliance with Coney was error. According to petitioner, this "new rule" was that "Boyett at the very least held that immediate site does not mean 'at the bench."' Petitioner's initial brief on the merits, page 8.

Boyett does not support petitioner's argument. Boyett states at pages 309-10:

> We find that Boyett's guilt phase issue is without merit. The record reflects that Boyett was present in the courtroom, but not at the bench, when peremptory challenges were exercised. Boyett argues that our decision in Coney v. State, 653 So. 2d 1009 (Fla.1995), cert. denied, --- U.S. ---, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), should apply to him insofar as it requires that a defendant be present at the actual site where jury challenges are exercised. Although in that case we explicitly stated that our ruling was to

be prospective only, Boyett argues that he should be entitled to the same relief because his case was not final when the opinion issued, or, in the alternative, that the rule announced in Coney was actually not new, and thus should dictate the same result in his case. We reject both of these arguments.

In Coney, we interpreted the definition of "presence" as used in Florida Rule of Criminal Procedure 3.180. We expanded our analysis from Francis v. State, 413 so. 2d 1175 (Fla.1982), which concerned both a defendant whose right to be present had been unlawfully waived by defense counsel, and a jury selection process which took place in a different room than the one where the defendant was located. In Coney, we held for the first time that a defendant has a right under rule 3.180 to be physically present at the immediate site where challenges are exercised. See Coney, 653 So. 2d at 1013. Thus, we find Boyett's argument on this issue to be without merit. [FN1]

> FN1. Although it does not change our analysis in this case, we note that we have recently approved an amendment to rule 3.180(b) which will provide a clearer standard by which to resolve such issues in the future. The rule will now read: "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, No. 87,769, slip op. at 2 (Fla. Nov. 27, 1996).

Boyett's second Coney argument--that the rule of that case should apply because Boyett's case was non-final when the decision issued--is also without merit. In Coney, we expressly held that "our ruling today clarifying this issue is prospective only." Coney, 653 So. 2d at 1013. Unless we explicitly state otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced. See Armstrong v. State, 642 So. 2d 730, at 737-38 (Fla.1994), cert. denied, --- U.S. ----, 115 S.Ct. 1799, 131 L.Ed.2d 726 (1995). Because Boyett had already been tried when Coney issued, Coney does not apply.

We recognize that in Coney we applied the new definition of "presence" to the defendant in that case: the state conceded that the defendant's absence from the immediate site where challenges were held was error, and we found that the error was nonetheless harmless. Coney, 653 So. 2d at 1013. It was incorrect for us to accept the state's concession of error. Because the definition of "presence" had not yet been clarified, there was no error in failing to ensure Coney was at the

> immediate site. Although the result in Coney would have been the same whether we found no error or harmless error, we recede from Coney to the extent that we held the new definition of "presence" applicable to Coney himself.

Thus, the only thing 'new" about Boyett was its ruling that, since the Coney rule (defendant must actually be at bench conference) applies only to cases tried after the date that Coney became final, it was error to apply the Coney rule retroactively to Coney himself. Boyett does not support the state's position. Respondent was tried after Coney became final, so that it applies at bar. The lower court was correct in reversing the convictions.

POINT III

THERE ARE OTHER VALID GROUNDS FOR REVERSAL OF THE CONVICTIONS?

A. The trial court erred in permitting convictions for both battery on a police officer and for obstructing an officer with violence, and placing respondent on probation for both offenses. It should have entered a judgment of acquittal as to one of the offenses.

Apparently relying on Nelson v. State, 665 So. 2d 382 (Fla. 4th DCA 1996), the trial court concluded that there was no bar to convictions and sentences for both offenses. T 147-48. Nelson states at page 383:

> As to appellant's conviction for resisting arrest with violence, appellant raises the issue of whether the trial court erred in adjudicating appellant guilty of both battery on a law enforcement officer **and** resisting arrest with violence based on double jeopardy grounds. Battery on a law enforcement officer and resisting arrest with violence are separate offenses. , ate v. Henriquez, 485 So. 2d 414 (Fla.

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[6] As petitioner noted at page 7, footnote 1 of its initial brief on the merits, this Court has jurisdiction to consider all issues in this cause.

1986). While these offenses are similar in nature and usually happen in conjunction with one another, based on their statutory elements they are separate and distinct. See State v. carpenter, 417 so. 2d 986 (Fla. 1982). Hence, the intent of the legislature is to provide for separate convictions and punishments. State v. Baker, 452 So. 2d 927 (Fla. 1984).

In State v. Henriquez, this Court, relying on State v. Carpenter, 417 So. 2d 986 (Fla. 1982), wrote:

> The elements of resisting an officer with violence are 1) knowingly 2) resisting, obstructing or opposing a law enforcement officer 3) in the lawful execution of any legal duty 4) by offering or doing violence to his person. @ 843.01, Fla. Stat. (1983). The elements of battery on a law enforcement officer are 1) knowingly 2) actually 3) intentionally 4) touching or striking 5) against the will 6) of a law enforcement officer 7) engaged in the lawful performance of his duties. §§ 784.03 and 784.07, Fla. Stat. (1983). In Carpenter after comparing the statutory elements of each offense, we concluded that
>
> > while resisting arrest with violence and battery on a law enforcement officer are similar offenses, and while they usually happen in conjunction with one another, one does not necessarily

> involve the other. Under section 843.01, Florida Statutes (1979), one could obstruct or oppose a law enforcement officer by threatening violence and still at the same time not be committing a battery on the law enforcement officer as proscribed in section 784.07, Florida Statutes (1979).
>
> 417 so. 2d at 988. Likewise, as the First District Court of Appeal recently observed, "the placement of an unwanted hand on an officer's arm qualifies as a battery, although no resistance or obstruction occurs." Larkins v. State, 476 So. 2d 1383, 1384 (Fla. 1st DCA 1985). Therefore, we again conclude that these are separate offenses. Where, based on their statutory elements, offenses are separate and distinct, the intent of the legislature clearly is to provide for separate convictions and punishments. State v. Baker, 452 So. 2d 927, 929 (Fla. 1984); § 775.021(4), Fla. Stat. (1983).

485 So. 2d at 415-16 (footnote omitted).

Respondent does not dispute that Nelson and State v. Henriquez are on point. He argues, however, that they were wrongly decided in light of more recent decisions of this Court and of the United States Supreme Court.

In State v. Anderson, 695 So. 2d 309 (Fla. 1997), this Court revisited the vexing question of when concurrent convictions are illegal. Gibbs v. State, 698 So. 2d 1206, 1209 (Fla. 1997), summarizes State v. Anderson as follows:

> In Anderson, we answered the following certified question:
>
> > 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.
>
> Anderson, 695 So. 2d 309. We held:
>
> > Both statutes punish the same basic crime (i.e., the violation of a legal obligation to tell the truth) and differ only in terms of the degree of violation....
> >
> > Because the two crimes are degree variants of the same underlying crime, Anderson's dual convictions cannot stand. See generally Art. I, S 9, Fla. Const.
>
> Anderson, 695 So. 2d 309.

In United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), the Court reached a similar result. While bonded out of jail with a condition that he would be subject to contempt proceedings if he committed any crime while at liberty, Alvin Dixon was arrested and charged with possession of narcotics. The court which had released him on bond convicted him of contempt by committing the offense of possession of narcotics. Dixon maintained, and the Supreme Court eventually agreed, that the contempt prosecution was a double jeopardy bar to the drug possession charge.[7] On this point, Justice Scalia's opinion for the Court **was** joined by Justice Kennedy, with three other justices (White, Stevens, and Souter) joining in the judgment.

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[7] Although United States v. Dixon, unlike the case at bar, involve "multiple" (that is, successive) prosecutions, the distinction is irrelevant. The same principles apply to both cases: "In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies." 509 U.S. at 696.

Looking not to the elements of the contempt and narcotics offenses in the abstract, the Court considered that the factual basis for the two charges was identical, and concluded: "Because Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution violates the Double Jeopardy Clause." 509 U.S. at 699. In reaching this conclusion, the Court necessarily rejected the view espoused by the Chief Justice in dissent that "Because the generic crime of contempt of court has different elements than the substantive criminal charges in this case, I believe that they are separate offenses under Blockburger."[8] Id. 715.[9] Thus, under United States v.

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

[9] The Chief Justice continued in his dissent: "There [in Blockburser], we stated that two offenses are different for purposes of double jeopardy if 'each provision requires proof of a fact which the other does not.' 284 U.S., at 304 (emphasis added). Applying this test to the offenses at bar, it is clear that the elements of the governing contempt provision are entirely different from the elements of the substantive crimes. Contempt of court comprises two elements: (i) a court order made known to the defendant, followed by (ii)

Dixon, the court is not to look strictly to the statutory elements of the offenses charged: it must look to what the state must actually prove in order to sustain its theory of the case.

Accordingly, State v. Henriquez and Nelson were wrongly decided. This Court based its analysis in State v. Henriquez on the notion that it is theoretically possible to resist an officer with violence without committing a battery, and that it is theoretically possible to commit a battery on an officer without resisting or obstructing the officer. This abstract approach is incorrect. The question under State v. Anderson and United States v, Dixon is whether each offense requires proof of an element that the other does not:

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willful violation of that order. [Cit.] Neither of those elements is necessarily satisfied by proof that a defendant has committed the substantive offenses of assault or drug distribution. Likewise, no element of either of those substantive offenses is necessarily satisfied by proof that a defendant has been found guilty of contempt of court." 509 U.S. **at 715-16.**

> The same-elements test, sometimes referred to as the "Blockburger" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution. In a case such as Yancy,[10] for example, in which the contempt prosecution was for disruption of judicial business, the same-elements test would not bar subsequent prosecution for the criminal assault that was part of the disruption, because the contempt offense did not require the element of criminal conduct, and the criminal offense did not require the element of disrupting judicial business.

United States v. Dixon, 509 U.S. at 696-97 (e.s.).

At bar, the elements of the two crimes were identical: the battery constituted the obstruction or resistance of the officer, and the obstruction or resistance consisted of the battery. Accordingly, the court erred in permitting convictions of both offenses.[11]

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[10] State v. Yancy, 4 N.C. 133 (1814).

[11] A guilty verdict constitutes a "conviction" regardless whether the court withholds adjudication. State v. Gazda, 257 So. 2d 242, 243-44 (Fla. 1971); United States v. Orellanes, 809 F.2d 1526, 1528 (11th Cir.1987) (discussing Florida law).

The court should have entered a judgment of acquittal as to one of the offenses, and erred in placing respondent on probation for both offenses. See Rutledge v. United States, 116 S.Ct. 1241 (1996) (Double Jeopardy Clause forbade sentences and convictions for both continuing criminal enterprise and lesser included offense of conspiracy to distribute controlled substances). This Court should reverse and remand with instructions to enter a judgment of not guilty as to one of the two charges, and vacate the probation term as to that offense. Alternatively, it should direct the lower court to consider this issue in light of State v. Anderson and United States v. Dixon.

B. Over defense objection, the jury heard that the officers had confronted respondent and his companions in response to information regarding potential criminal activity. It was error to overrule the defense objections, and, given the closeness of the case, the state cannot show that the error did not affect the verdict.

In opening statement to the jury the following occurred as the state told the jury how Officers Ross and Larkins came to encounter respondent and his companions:

> At that time while they were on duty at the substation, near Avenue I and 13th Street, Ft. Pierce, an anonymous individual came to them and gave them informationregardingpotential criminal activity off of 13th and Avenue 1.
>
> [DEFENSE COUNSEL] : Objection, Your Honor.
>
> May we approach?
>
> THE COURT: Well, if you are just going to repeat the objection that was made previously,[12] I will deny the objection.
>
> Go ahead.
>
> [PROSECUTOR]: Based on the information that they obtained, they then went to

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[12] Before opening statements, the defense moved to exclude, among other things, any mention that the officers encountered appellant pursuant to a tip of possible criminal activity. T 9-15. The court ruled that "I don't see why we need to go any further from other than just to testify that, based upon information received, I went and did this." T 13. After further objection from the defense, it stated: "Well, I think that I have already indicated how I want the anonymous tip handled; that the details of what was said, they will not come out." T 15.

> the area of 13th Street and Avenue I and, en-route radioed other units, basically broadcast on the radio that this is where they were going, they were looking at this criminal activity.
>
> At the time that they had arrived, Officer Larkins and Officer Ross were also met by Officer David Jones, Officer Rodney Nieves and Officer Bill Hall. All of them arrived at almost the same time. And when they arrived, what they saw was four black males standing around a Dade County car, blue green in color and, based on the information they obtained, they went up and talked to these individuals. . . . .

T 24-25.

The following occurred during direct examination of Officer Ross:

> Q Okay, I would like for you to describe the incident that happened and I would like you to start at the point where an individual approached you with information.
>
> A An individual approached myself --
>
> [DEFENSE COUNSEL]: Objection.
>
> Same grounds as my first motion and also hearsay.

THE COURT: Okay, I will overrule the objection but don't tell us anything that the individual said to you.

THE WITNESS: An individual approached myself and another officer while I was at the substation located on 23rd Street and Avenue I, gave us a location.

We went to investigate what we were told by this individual.

When we got to this location we saw five black males standing around a car, a blue car with a Dade County tag. We went to talk to the individuals standing around the car to investigate what we were told.

T 30-31. Likewise, the following occurred during the direct examination of Officer Jones (T 43-44):

Q ... If you would, for the jurors, describe what your job functions are as a road patrol officer.

A To answer calls for service, respond to domestic -- respond to domestics and crime scenes in progress, crimes past.

Q Okay.

And, again, you have indicated that you were working on July 5th, 1995, in that capacity. At that -- on that date and at that 11:40 P.M. Hour, did you hear a call on the radio regarding an incident that happened at I and 13th?

[DEFENSE COUNSEL] : Objection, Your Honor.

Hearsay. As to what he heard over the radio.

THE COURT: He is only asking that and it only calls for a Yes or No answer.

But don't tell us anything you have heard over the radio, however.

A Yes, sir.

Q You did hear that information.

A Yes, sir.

The court erred in overruling the defense objections under Davis v. State, 493 So. 2d 11 (Fla. 3rd DCA 1986) (police officer's testimony that he talked to witnesses before putting together photo array hearsay; officer's reasons for putting together photo array irrelevant). See also Conley v. State, 620 So. 2d 180 (Fla. 1993) (error to admit contents of police dispatch), approving of Harris v, State, 544 So. 2d 322 (Fla. 4th DCA 1989) (en banc) (although officers may testify that they responded to dispatch, they may not testify to its

contents, especially if it contains accusatory information).

At bar, the jury heard that "an anonymous individual came to [the police] and gave them information regarding potential criminal activity off of 13th and Avenue I", and that a flock of officers, whose duty is to "answer calls for service, respond to domestic -- respond to domestics and crime scenes in progress, crimes past", in response to information "regarding an incident", descended on respondent and his companions and began questioning them.

The improper comments and evidence were reasonably likely to lead the jury to conclude that respondent and his brother were engaged in criminal activity, so as to make their testimony less credible and to make that of the officers more credible. Hence, the state cannot show that the error in overruling the defense objections did not affect the jury.

CONCLUSION

The lower court did not err in ordering a new trial. This Court should affirm. Further, this Court should order that at retrial respondent may at most be convicted of only of the offenses, and the state may not present evidence and argument concerning reports of criminal activity and other irrelevant matters as set out in Point III.B above. If this Court should reverse the decision as to Point I or II above, it should nevertheless grant respondent appropriate relief under Point III above.

Respectfully submitted,

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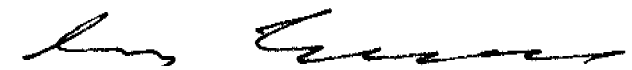

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Melynda Melear, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401, by courier this 24 day of November, 1997.

Of Counsel