IN THE SUPREME COURT OF FLORIDA

CASE NO. **96,813**

JOSEPH HAYES,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

The petitioner, Joseph Hayes, was the defendant in the trial court and the respondent, State of Florida, was the prosecution. In this brief, the designation "R." refers to the Record on Appeal in the court of appeal; the designation "T." refers to the separately bound transcripts of proceedings; and the designation "S.R." refers to the Supplemental Record on Appeal in the court of appeal.

STATEMENT OF THE CASE

Hayes was charged in the circuit court of the Eleventh Judicial Circuit of Florida in and for Miami-Dade County with armed robbery, armed burglary of a structure, and grand theft of a motor vehicle. R. 1-3. He was found guilty on all three counts and sentenced by the trial court (Honorable Leonard J. Glick, presiding) on March 2, 1998, to 27 years in the state prison. R. 55-58.

The initial appellate brief was filed with the Third District Court of Appeal on January 5, 1999 (Case No. 98-929). Shortly thereafter, Hayes filed a motion in the trial court, pursuant to Rule 3.800(a) of the Florida Rules of Criminal Procedure, to correct errors in his Guideline Scoresheet. The trial court held a hearing on the motion and, on February 8, 1999, summarily denied relief. A notice of appeal was timely filed and that case (Case No. 99-566) was subsequently consolidated with the earlier appeal (Case No. 98-929).

On September 22, 1999, the Court of Appeal issued its decision, affirming the convictions but finding error in the calculations of the Sentencing Guidelines and the permissible departure therefrom and remanding for resentencing. (A. 1-). This appeal timely followed.

STATEMENT OF FACTS

All of the charges against Hayes stemmed from one theft of items from an occupied residence in Hialeah on September 30, 1993. The robbery was done by Hayes and a person named Tony Hayman. A woman who was present at the home testified that the robbers took computers, cellular phones, a beeper, a camera, and a van. T. 205.

Hayes, in a statement he gave to police that was read into evidence at trial, explained that a man named Mike had approached him and Hayman to do the robbery. T. 341-42, 344-45. The plan was for Hayes and Hayman to meet Mike outside the house where the robbery would take place. T. 347, 350-51. When they met Mike outside the house, **before** the robbery had commenced, he pointed out a van that belonged to the occupants of the house and it was decided to also steal the van in order to transport the computers that were to be taken. T. 355, 362-63.

The keys to the van were taken as part of the same robbery, as the victim corroborated:

Q. After they handcuffed you and put tape over your mouth and over your head, what happened next?

A. He asked me to take him upstairs because he wanted the keys to the van.

T. 200; *see also* T. 201 (she told robber keys to van "were downstairs on top of the stereo" and she was taken back downstairs). Hayes and Hayman then loaded the van with the stolen items and drove away. T. 362-64.

Hayes was sentenced pursuant to the guidelines as they existed in 1993, in accordance with the date of the offense. R. 53. The primary offense at conviction was the category 3 armed robbery, which was scored at 82 points. *See* Fla. R. Crim. P. 3.988(c). The additional offenses at conviction, armed burglary and grand theft automobile, were scored at a total of 34 points. Hayes was also given an additional 14 points for "moderate or penetration" victim injury. The total points scored was 130. R. 53. Trial counsel did not object to these figures.

The recommended sentencing range for 130 points is 5½–7 years, with a permitted range of 4½–9 years. The trial court, however, departed upward based upon Hayes' prior conviction in federal court on charges of (1) conspiracy to possess with intent to distribute cocaine; (2) possession of a firearm in relation to a drug trafficking crime; and (3) possession of an unregistered short barreled

shotgun. S. R. 37, 71-74 (Excerpt from PSI).[1] Those crimes were committed in January, 1994, and so were not scoreable as a "prior record." Pursuant to *Harris v. State*, 685 So. 2d 1282 (Fla. 1996), then, the prosecutor said she calculated the federal crimes as if they were scoreable as a prior record, and she told the trial court that she arrived at a total score of 300 points, which provided for a recommended sentencing range of 17–22 years and a permitted range of 12–27 years. S. R. 38. There was no explanation from the prosecutor as to how she arrived at the total of 300 points.

Defense counsel did not object to the prosecutor's calculations. Based upon those calculations, the trial court imposed the maximum permissible sentence – 27 years in State Prison. S. R. 54–55.

While Hayes' direct appeal was pending, he filed a Rule 3.800(a) motion in the trial court, alleging that the Guidelines Scoresheet contained several errors that were apparent from the face of the record. Even though the state conceded one error and the trial court acknowledged another error, T. 2/8/99 at 4-10, the trial court summarily denied all relief. An appeal from the denial of that motion was

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[1] The federal crimes were all shown in the PSI, S. R. 74, of which both sides and the court had copies. There were no objections from either side as to the description of the federal crimes. S. R. 34–37. The scoresheet prepared by Probation, S.R. 9, 38, was incorrect.

consolidated with the appeal from the conviction and sentence.

The Third District Court of Appeal affirmed the convictions for both armed robbery and grand theft of a motor vehicle, citing to its past decisions in *Lattimore v. State*, 571 So. 2d 99 (Fla. 3d DCA 1990) and *Wilson v. State*, 608 So. 2d 842 (Fla. 3d DCA 1992), and holding that "[t]he auto theft occurs not upon the taking of the keys but on the subsequent taking of the car." A. 3. The court certified direct conflict with the Fifth District Court of Appeal and its decisions in *J.M. v. State*, 709 So. 2d 157 (Fla. 5th DCA 1998) and *Castleberry v. State*, 402 So. 2d 1231 (Fla. 5th DCA 1981).

On the sentencing issues, the court of appeal agreed with most of Hayes' arguments and accordingly remanded for resentencing consistent with its opinion. On one crucial issue, however, the court of appeal disagreed with Hayes. That issue was how to score his federal conviction for possession of a firearm in relation to a drug trafficking crime. At oral argument, Hayes urged that the analogous Florida statute was section 790.053, Florida Statutes (1993), but the court of appeal rejected that argument, finding that the analogous statute was section 790.07(2), Florida Statutes (1993). The ruling against Hayes on this point, if allowed to stand, means that upon resentencing he is subject to a maximum sentence of twelve years imprisonment. If there is a ruling in Hayes' favor on this point, he will be facing no

more than nine years imprisonment upon resentencing.

SUMMARY OF ARGUMENT

1. This Court should accept jurisdiction. The Third and Fifth District Courts of Appeal have each reviewed cases where there were convictions for armed robbery, which included the taking of car keys, inside a residence, and grand theft of a vehicle taken from outside the residence using the keys taken inside. The Fifth District has concluded that the charged crimes were part of one comprehensive transaction as the car keys taken from inside the house were then immediately used to steal the car outside the residence, and so the grand theft conviction had to be vacated based on double jeopardy principles. The Third District, however, has concluded on the same fact pattern that the protection against double jeopardy was not implicated because the taking of the car outside the house was separate from the robbery inside the house. This Court should accept jurisdiction to resolve this direct conflict.

2. Armed robbery and grand theft are degree variants of the core offense of theft. As the armed robbery and grand theft here were part of one comprehensive transaction to take the victim's property, the protection against double jeopardy prohibits the dual convictions.

3. This Court should also address the scoring of the federal crime of

possession of a firearm in relation to a drug trafficking crime. There are two possible analogous Florida statutes and the Third District held that the harsher of the two statutes was the most analogous. This holding contradicts Rule 3.701(d)(5)(C) of the Florida Rules of Criminal Procedure (1993), which provides that "[w]hen unable to determine whether an offense at conviction is a felony or a misdemeanor, the offense should be scored as a misdemeanor." The holding also appears to contradict every other reported decision involving a case where two Florida statutes are possibly analogous to a foreign conviction. It appears that in every other reported case, the decision has been to find the least serious Florida statute as the analogous statute.

ARGUMENT

I. JURISDICTION IS APPROPRIATE IN THIS CASE BECAUSE THE DECISION, WHICH FOLLOWS PRECEDENT FROM THE THIRD DISTRICT COURT OF APPEAL, IS IN DIRECT CONFLICT WITH PRIOR DECISIONS BY THE FIFTH DISTRICT COURT OF APPEAL

The Third and Fifth District Courts of Appeal have each issued multiple decisions addressing the question of whether double jeopardy is implicated when a defendant is convicted of robbery and grand theft auto where the robbery, including the taking of car keys, occurred inside a dwelling, and the auto theft

followed immediately outside the dwelling. The Fifth District has concluded that the dual convictions violate the protection against double jeopardy and so has quashed the grand theft convictions, while the Third District has upheld both convictions. A chronology of the cases is as follows:

In *Castleberry v. State*, 402 So. 2d 1231 (Fla. 5th DCA 1981), *rev. denied*, 412 So. 2d 470 (Fla. 1982), the defendants/appellants were charged with and convicted of armed robbery and grand theft auto. *Id*. at 1231. They entered a residence and bound both occupants, then took various items of property, including keys to a car owned by one of the victims. *Id*. They obtained the keys by asking the victim for them, whereupon the victim told the intruders that the keys were on top of a dresser. *Id*. at 1201–02 & n.2. "Having taken everything they wanted from inside the house, and while the victims remained restrained and in fear, the appellants took the car." *Id*. at 1202.

The Fifth District determined that the automobile "was personal property taken during the course of the robbery" as the taking of the car, like the other property, "was effectuated by force and by placing the two victims in fear." 402 So. 2d at 1201. Thus, "because possession of the car, like all the rest of the personalty taken from the residence . . . was the product of the same force and fear, the taking of the car . . . is a lesser included offense of the robbery." *Id*. at

1202. The grand theft conviction was thus reversed. *Id*.

Nine years later, in *Lattimore v. State*, 571 So. 2d 99 (Fla. 3d DCA 1990), the defendant/appellant was convicted of strong-arm robbery and grand theft auto. *Id*. at 100. The strong-arm robbery occurred in the victim's house, "during which the defendant secured, among other things, the keys to the subject automobile, and thereafter walked outside the house and stole said automobile." *Id*.

The Third District held that the theft of the auto was "a separate, independent criminal act apart from the strong-arm robbery," and thus allowed both convictions to stand. *Id*. In doing so, the court noted the "*contra*" decision in *Castleberry*, but did not attempt to reconcile the two cases and did not certify conflict.

Two years later, the Third District was again confronted with a case involving convictions for robbery and grand theft auto. *Wilson v. State*, 608 So. 2d 842 (Fla. 3d DCA 1992). "The defendant took the victims' keys during the robbery" which took place inside a hotel room. *Id*. at 843. "After the robbery, he walked outside the hotel and stole their automobile." *Id*.

Citing to its decision in *Lattimore*, the Third District upheld both convictions because, it said, "the theft of the automobile was a separate, independent criminal act apart from the strong-arm robbery which occurred inside the hotel room." *Id*. The Fifth District's decision in *Castleberry* was not mentioned.

Last year, the Fifth District revisited the same issue. *J.M. v. State*, 709 So. 2d 157 (Fla. 5th DCA 1998). There, the defendant went into an apartment, "demanded money and the car keys, . . . then grabbed the car keys, . . . ran out the door, and drove off" in the car. *Id*. at 157. He was convicted of both armed robbery and grand theft. *Id*.

The Fifth District held that "[w]hen robbery is accomplished by a defendant entering a residence and taking car keys along with other property and then proceeding immediately to the stolen vehicle, only one taking has occurred." *Id*. Then, citing to its decision in *Castleberry* as well as this Court's decision in *Sirmons v. State*, 634 So. 2d 153 (Fla. 1994), the Fifth District quashed the grand theft conviction. *Id*. at 158. The Third District's decisions in *Lattimore* and *Wilson* were not discussed or even mentioned in *J.M.*

In the present case, while inside the house, "the robbers took computers, cellular phones, a beeper, a camera, and keys to the homeowners' van. They then went outside and used the keys to steal the van." App. 3. Citing to its decisions in *Lattimore* and *Wilson*, the Third District upheld both the armed robbery and grand theft convictions. *Id*. In doing so, the court certified direct conflict with the Fifth District's decisions in *J.M.* and *Castleberry*. App. 3-4.

A direct conflict clearly exists here between the Third and Fifth District

Courts of Appeal. In multiple cases all involving armed robbery inside an occupied dwelling where car keys were taken, followed immediately by the theft of the vehicle from outside the dwelling, the Fifth District has held that there is just one comprehensive taking and so has quashed the grand theft convictions, while the Third District has held that there are two separate takings and so has allowed both the armed robbery and grand theft convictions to stand. This Court should therefore accept jurisdiction and resolve this conflict.

II. THE PROHIBITION AGAINST DOUBLE JEOPARDY REQUIRES THE REVERSAL OF THE GRAND THEFT CONVICTION AS ONLY ONE TAKING OCCURRED. THE DECISION BELOW SHOULD THUS BE QUASHED AND *J.M.* AND *CASTLEBERRY* APPROVED.

Hayes was convicted on separate counts of armed robbery (Count 1 – R. 1, 50) and grand theft of a motor vehicle (Count 3 – R. 3, 48). Both charges arose out of the same criminal episode – a robbery of a residence during which a gun was used; the occupant of the home was tied up; various items, including keys to a van, were stolen from the home; those items were immediately placed in the van; and the van was then driven away. T. 200–01, 362–64. The theft of the van was planned before the robbers entered the home. T. 362-63. The victim testified that when the robbers entered the house, "the man grabbed the towel and threw it on top of my [face]. He covered my mouth with tape and put handcuffs on my hands

behind my back." T. 198.[2] The prosecutor asked "what happened next?" and the answer was "He asked me to take him upstairs because he wanted the keys to the van." T. 200. The robbery, then, was from its inception intended to include the vehicle as well as computers, cell phones, and other items. Indeed, without the van, into which "everything" was put, T. 364, the robbers would have been hard pressed to transport the other stolen items.

The federal and state constitutions protect a person from being "twice put in jeopardy" for the same offense. Art. I, § 9, Fla. Const.; U. S. Const. amend. V. This protection includes a prohibition against "the evil of multiple punishments for single offenses." *Carawan v. State*, 515 So. 2d 161, 164 (Fla. 1987).

"Legislative intent is the polestar" for analyzing a double jeopardy claim based upon multiple punishments for the same offense. *State v. Anderson*, 695 So. 2d 309, 311 (Fla. 1997). "Whether multiple convictions and sentences may be imposed for offenses resulting from a single criminal episode is purely a question of legislative intent." *Hardy v. State*, 705 So. 2d 979, 979 (Fla. 4th DCA 1998).

The Florida Legislature has stated that its general intent is "to convict and

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[2] It is not clear from the victim's testimony is she was referring to Hayes or Hayman, but for the purposes of this appeal it does not matter which person bound and gagged her.

sentence for each criminal offense committed in the course of one criminal episode." § 775.021(4)(b), Fla. Stat. (1997). Crucially, however, the Legislature has also provided exceptions to this general rule, one of which is controlling here: "Offenses which are degrees of the same offense as provided by statute" are not to be punished separately. § 775.021(4)(b)(2), Fla. Stat. (1997). Under this legislative exception, "[m]ultiple punishments are barred for those 'crimes' that are degrees of the same underlying 'crime.'" *Anderson*, 695 So. 2d at 311; *see also id*. at 312 (Anstead, J., specially concurring) ("courts should be careful not to allow dual prosecutions for both a principal offense and a 'species of lesser included' offenses of the principal offense").

The crimes of "robbery with a weapon and grand theft of an automobile . . . are merely degree variants of the core offense of theft. The degree factors of force and use of a weapon aggravate the underlying theft offense to a first-degree felony robbery. Likewise, the fact that an automobile was taken enhances the core offense to grand theft." *Sirmons v. State*, 634 So. 2d 153, 154 (Fla. 1994). This Court should thus quash the decision below and approve the Fifth District's holding that "[w]hen robbery is accomplished by a defendant entering a residence and taking car keys along with other property and then proceeding immediately to the stolen

vehicle, only one taking has occurred." *J. M.*, 709 So. 2d at 157.[3] The contrary decisions in *Lattimore* and *Wilson* predate this Court's seminal holdings in *Sirmons* and *Anderson* and are consequently not in accordance with current double jeopardy analysis. A review of this analysis shows that Hayes' conviction for grand theft must be reversed.

The holding in *Sirmons* was clear and unequivocal that armed robbery and grand theft are "merely degree variants of the core offense of theft." 634 So. 2d at 154.[4] "Florida's criminal code is full of offenses that are merely aggravated forms of certain core underlying offenses such as theft, battery, possession of contraband, or homicide. It seems entirely illogical . . . to impose multiple punishments when all of the offenses in question both arose from a single act and were distinguished from each other only by degree elements." *Id*. at 155 (Kogan, J., concurring). So too here. There was just one act – a theft of several items from

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[3] Even the Third District has recognized that multiple acts of taking that are "part of one comprehensive transaction to confiscate the sole victim's property" can support just one robbery conviction. *Fraley v. State*, 641 So. 2d 128, 129 (Fla. 3d DCA 1994) (quoting *Nordelo v. State*, 603 So. 2d 36, 38 (Fla. 3d DCA 1992)).

[4] *See also Gibbs v. State*, 698 So. 2d 1206, 1207-08 (Fla. 1997) (discussing holding in *Sirmons* and stating "Our conclusion was based upon the offenses being 'aggravated forms of the underlying offense, distinguished only by degree factors.'").

a person at a residence. The use of a gun makes that theft armed robbery. The fact that a motor vehicle was one of the items taken makes the theft grand theft. It is still just one theft, however.

Moreover, the three concurring justices in *Anderson* stated that the decision "restores some measure of good sense and common understanding of the double jeopardy clause to our jurisprudence." 695 So. 2d at 312 (Anstead, J., concurring specially, with Kogan, C. J., and Overton, J., concurring). It was noted that, in the past, Florida courts had sometimes "invok[ed] a hyper–technical analysis" to find separate crimes "based on the same underlying conduct." *Id*. Thus, even if the Third District's holdings in *Wilson* and *Lattimore* might have been correct when decided, they are no longer good law. With the decision in *Anderson*, the Florida Supreme Court put itself back in line with United States Supreme Court jurisprudence holding that the constitutional provisions against double jeopardy prohibit dual prosecutions for both a principal offense and a lesser included offense arising out of the same conduct. *Id*. Here, as in *Anderson*, "the two crimes are degree variants of the same underlying crime," and so the "dual convictions cannot stand." 695 So. 2d at 311.[5]

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[5] *Cf. Ward v. State*, 730 So. 2d 728, 729-30 (Fla. 1st DCA 1999) (double jeopardy precludes convictions for both armed robbery and armed carjacking

Further, the cases cited in *Lattimore* do not really support its holding, and *Wilson* provides no citation other than to *Lattimore* in support of its holding. The decision in *Lattimore* cites to two cases for support, *Waters v. State*, 542 So. 2d 1371 (Fla. 3d DCA (1989), and *Joseph v. State*, 316 So. 2d 585 (Fla. 4th DCA 1975). 571 So. 2d at 100. In *Waters*, the defendant robbed the victim of a "watch and money by fear," then drove off with the victim's car "**after the victim abandoned the car and escaped from the defendant's presence**." 542 So. 2d at 1371 (emphasis added). Thus, unlike here, there is no indication that the defendant obtained the keys to the motor vehicle (or the vehicle itself) by placing the victim in fear. To the contrary, for aught that appears in the decision, the defendant may have been interested in just the victim's personal effects, then decided to take the car only after it was abandoned by the victim.

Likewise, in *Joseph*, there is no indication in the decision that the keys to the vehicle were obtained as part of the robbery. There, appellant "robbed the occupants of the dwelling. Upon leaving the house appellant stole the owners'

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where robbery charge predicated, in part, upon taking of victim's keys while outside the car. "[H]ere there was only one 'forceful taking.' All of the victim's property was taken as a part of the same criminal transaction or episode, without any temporal or geographic break."); *Cobb v. State*, 586 So. 2d 1298 (Fla. 2d DCA 1991) (same)

motor vehicle." 316 So. 2d at 586. From what is reported, then, the theft of the vehicle may not have been in any way related to the earlier robbery inside the dwelling. Here, in contrast, the theft of the van flowed directly from the theft of the keys moments earlier from the presence of the victim, while she was in fear.

Finally, it does not matter that the double jeopardy issue was not raised in the trial court as it was addressed on the merits by the Court of Appeal. Further, "any actual double jeopardy violation based on dual convictions is fundamental error within the meaning of section 924.051(3) [Fla. Stat. (1997)], and may therefore be raised for the first time on appeal." *Laboo v. State*, 715 So. 2d 1034, 1035 (Fla. 1st DCA 1998); *accord Henry v. State*, 707 So. 2d 370, 371 (Fla. 1st DCA 1998); *Austin v. State*, 699 So. 2d 314 (Fla. 1st DCA 1997) (en banc); *Grene v. State*, 702 So. 2d 510, 511 (Fla. 3d DCA 1996).

III. IF MORE THAN ONE FLORIDA STATUTE IS POSSIBLY ANALOGOUS TO A FOREIGN CONVICTION, THAT CONVICTION MUST BE SCORED BASED UPON THE LEAST SERIOUS FLORIDA STATUTE

The jurisdiction of this Court encompasses the entire decision and record below. *Reed v. State*, 470 So. 2d 1382, 1383 (Fla. 1985); *Rupp v. Jackson*, 238 So. 2d 86, 89 (Fla. 1970). This is especially true where the lower court has addressed the issue in question on the merits. *See Reed*, 470 So. 2d at 1383.

Here, the court of appeal addressed the scoring of Hayes' federal convictions, which formed the basis for the trial court's departure sentence. App. 5-8. One of those federal convictions was for possession of a firearm in relation to a drug trafficking crime, pursuant to 18 U.S.C. § 924(c)(1). This Court should address the merits of the lower court's decision on this point because the proper scoring of foreign convictions is a matter of great public importance, and because the outcome affects Hayes' sentence.

After the instant offense, Hayes committed federal crimes, one of which was possession of a firearm in relation to a drug trafficking crime, for which he was tried and convicted prior to his trial here. App. 5. Because the federal offenses occurred after the date of the instant offense (September, 1993), they were not scoreable as a "prior record" under the Sentencing Guidelines. Pursuant to this Court's decision in *Harris v. State*, 685 So. 2d 1282 (Fla. 1996), then, the federal offenses could be considered only for the purpose of imposing a limited departure sentence.

Where, as here, "a subsequent offense has actually been tried before the instant offense, departure is only appropriate within the recommended or permitted guidelines range had the offense been scored under prior record." *Harris*, 685 So. 2d at 1284. The "proper procedure is to treat the [prior] conviction as if it were

scoreable," and then departure is permitted "but only within the recommended or permitted guidelines range allowable under prior record." *Id*. at 1285.

"When scoring federal . . . convictions, assign the score for the analogous or parallel Florida statute." Fla. R. Crim. P. 3.701(d)(5)(B). "[O]nly the elements of the out–of–state crime, and not the underlying facts, should be considered in determining whether the conviction is analogous to a Florida statute for the purpose of calculating points for a sentencing guidelines scoresheet." *Dautel v. State*, 658 So. 2d 88, 91 (Fla. 1995). "When unable to determine whether the conviction to be scored as prior record is a felony or a misdemeanor, the conviction should be scored as a misdemeanor." Fla. R. Crim. P. 3.701(d)(5)(C). "Any uncertainty in the scoring of the defendant's prior record shall be resolved in favor of the defendant." Fla. R. Crim. P. 3.701(d)(5) Sentencing Guidelines Comm'n Notes.

The federal statute punishes anyone who "uses or carries a firearm" "during and in relation to any . . . drug trafficking crime." 18 U.S.C. § 924(c)(1). Looking at the underlying facts of the federal conviction is prohibited by *Dautel*, so there is no way to tell whether Hayes was convicted for "using" or "carrying" a firearm. There are thus two possible analogous Florida statutes.

The court of appeal found that section 790.07(2), Florida Statutes (1993) was "the most analogous" Florida statute. App. 6-7. That statute makes it a

second degree felony for anyone who, "while committing or attempting to commit any felony, displays, uses, threatens, or attempts to use any firearm **or carries a concealed firearm**." *Id*. (emphasis added). The court rejected Hayes' contention that the appropriate analogous statute was section 790.053, Florida Statutes (1993), which makes it a misdemeanor for a person to "openly carry on or about his person any firearm."

The court of appeal committed legal error by seeking to determine the "most analogous" Florida statute. Rule 3.701(d)(5)(B) requires that the score for a federal conviction be based on "the analogous or parallel Florida statute," not "the most analogous" statute. Further, Rule 3.701(d)(5)(C) mandates that any uncertainty as to whether the "offense at conviction is a felony or a misdemeanor" is to be resolved in the defendant's favor and scored as a misdemeanor.

The federal statute at issue here can be satisfied by openly "carrying" a firearm, but that conduct is **not** prohibited by section 790.07(2). *See State v. Gibson*, 452 So. 2d 553, 554 n.1 (Fla. 1984), *overruled on other grounds*, *Hall v. State*, 517 So. 2d 678 (Fla. 1988); *Parker v. State*, 482 So. 2d 576, 578 (Fla. 5th DCA 1986). Rather, it is section 790.053 that makes it unlawful to "openly carry" a firearm. It cannot be determined, then, whether the federal "offense at conviction" was analogous to section 790.07(2) or 790.053 as, depending on the facts of the

federal offense, the same conduct could be prohibited by either Florida statute (but not both). Rule 3.701(d)(5)(C) should thus have been applied here and the federal offense should have been scored as a misdemeanor, not a second degree felony.

Decisions from this Court and from other courts of appeal support this conclusion. In *Dautel*, this Court determined the analogous Florida statute for the Ohio crime of gross sexual imposition. The state's arguments that the analogous statute was either the one prohibiting lewd and lascivious assault or the one prohibiting attempted sexual battery were rejected as each Florida statute required proof of an element that was not required to be proven for the Ohio conviction. 658 So. 2d at 91. Instead, this Court found that the misdemeanor statute prohibiting battery was the analogous Florida statute. *Id*. This was so even though the Ohio conviction required that the touching involve "sexual contact" and required that the contact be done "for the purpose of sexually arousing or gratifying another person," neither of which are required elements of battery under Florida law. *Id*.[6]

In *Rager v. State*, 720 So. 2d 1134 (Fla. 5th DCA 1998), the issue was the

[6] The court of appeal here was thus unwarranted in its concern that section 790.053 "merely" prohibits the open carrying or a firearm and does not require that the carrying be done while committing another criminal offense. App. 7.

proper scoring of two Ohio sexual battery convictions. The Florida sexual battery statute, section 794.011, assigns varying levels of severity to the offense depending on the underlying facts. Because the underlying facts of a foreign conviction cannot be looked at in determining the analogous Florida statute, the court in *Rager* held that the Ohio convictions had to be analogized to the least severe offense proscribed by the Florida statute. *Id*. at 1136-37 & n.4.

In *Lee v. State*, 675 So. 2d 682 (Fla. 1st DCA 1996), a Georgia burglary conviction was scored as a second-degree felony on the theory that a dwelling was burglarized. *Id*. at 683. The Georgia statute, however, does not require that the burglarized structure be a dwelling. Consequently, the First District held that the Georgia conviction had to be scored as a third-degree felony. *Id*.

The instant case appears to be the only reported case in which more than one Florida statute is possibly analogous to a foreign conviction, and the more severe of the possible statutes is held to be analogous. This result is in direct contradiction with Rule 3.701(d)(5)(C) and also at odds with the more general principle that ambiguity is to be construed in a criminal defendant's favor. The proper score for the federal conviction of possession of a firearm in relation to a drug trafficking crime, then, is two points based upon section 790.053, not the thirty points assigned to it by the court of appeal. Correcting the score for this

conviction will result in a lower cell on the guidelines grid, and consequently a lower maximum possible sentence, for Hayes. It will also clarify for future cases the correct way to score a foreign conviction when more than one Florida statute is possibly analogous.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction over the case, quash the grand theft conviction, and find that the federal offense of possession of a firearm in relation to a drug trafficking crime is analogous to section 790.053 and thus should be scored as a misdemeanor upon resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Initial Brief on the Merits was delivered by mail to Douglas J. Glaid, Assistant Attorney General, Office of the Attorney General, 110 S.E. 6th Street, 10th Floor, Fort Lauderdale, FL 33301, this 19th day of November, 1999.

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