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 REPLY BRIEF ON THE MERITS

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ARGUMENT

I. THE PROHIBITION AGAINST DOUBLE JEOPARDY REQUIRES THE REVERSAL OF THE GRAND THEFT CONVICTION AS ONLY ONE TAKING OCCURRED.

A. Armed Robbery and Grand Theft of an Automobile Are Degree Variants of the Core Offense of Theft; Thus the Protection Against Dual Convictions Provided by § 775.021(4)(b)(2), Fla. Stat. (1993), Is Applicable Here.

The state argues that the only protection against double jeopardy that is applicable here is that found in the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). Specifically, the state argues that this case is controlled by § 775.021(4)(a), Fla. Stat. (1997), which codified the *Blockburger* test, and not by § 775.021(4)(b)(2), in which the Legislature stated its intent that dual convictions **not** be allowed for "[o]ffenses which are degrees of the same offense as provided by statute." Resp. Br. at 6-7. According to the state, § 775.021(4)(b)(2) is inapplicable because "nowhere in the Florida statutes is grand theft made a degree of robbery, or vice versa." Resp. Br. at 8. In support of its argument, though, the state cites to just two cases[1], which predate the 1991 amendments to § 775.021. Conspicuously absent from the state's argument on this point is any discussion of this Court's subsequent decisions interpreting the statute. As those decisions

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[1] *State v. Rodriguez*, 500 So. 2d 120 (Fla. 1986); *Salazar v. State*, 560 So. 2d 1207 (Fla. 3d DCA 1990).

show, the state's view of the double jeopardy protections applicable here is much too narrow.

"Double jeopardy is not implicated as long as the criminal offenses . . . contain statutory elements which the others do not, **and the charged offenses are not degree variants of each other**." *Donaldson v. State*, 722 So. 2d 177, 183 (Fla. 1998) (citations omitted, emphasis added). When "two crimes are degree variants of the same underlying crime," then "dual convictions cannot stand" under the Double Jeopardy Clause of the state and federal constitutions. *State v. Anderson*, 695 So. 2d 309, 311 (Fla. 1997); *see* Art. I, § 9, Fla. Const.; U.S. Const. amend. V. Grand theft of an automobile and robbery with a weapon "are merely degree variants of the core offense of theft." *Sirmons v. State*, 634 So. 2d 153, 154 (Fla. 1994). "[D]ual convictions based on the same core offense cannot stand." *Id*.

The state's argument that, as a matter of law, the protection that § 775.021(4)(b)(2) provides against dual convictions does not apply here is thus refuted by *Sirmons*, which involved the very same offenses found here and held that § 775.021(4)(b)(2) does apply. Other cases from this Court and the district courts also show that the state's argument here – that the degree variants must be found in the language of the statutes themselves – is faulty. *See, e.g.*, *State v.*

Thompson, 607 So. 2d 422 (Fla. 1992), *approving and adopting Thompson v. State*, 585 So. 2d 492 (5th DCA 1991) (protection against double jeopardy prohibits dual convictions for fraudulent sale of a counterfeit controlled substance [§ 817.563] and felony petit theft [§ 812.014(2)(d)] where both charges arose from same fraudulent sale); *Darby v. State*, 1999 WL 1243366 at *2 (Fla. 5th DCA 1999) ("imposition of a sentence on the jury's verdict of guilt on the charge of both grand theft and robbery would constitute double jeopardy"); *Vasquez v. State*, 711 So. 2d 1305, 1306 (Fla. 2d DCA 1998) (concurrent convictions for grand theft auto [§ 812.014] and obtaining a vehicle with intent to defraud [§ 817.52] barred based on the same transaction); *State v. McDonald*, 690 So. 2d 1317 (Fla. 2d DCA 1997) (§ 775.021(4)(b)(2) prohibits dual convictions for grand theft [§ 812.014] and credit card fraud [§ 817.62] as both "are degrees of the same offense").

B. The Facts of This Case Show That Just One Taking Occurred; Reversal of the Grand Theft Conviction is Thus Required

Relying on the opinion below, the state tries to distinguish this case from *Sirmons* factually by arguing that two separate takings occurred here "with two separate intents, to-wit: the intent to steal the property inside the victims' residence, and the intent to steal the van outside the residence." Resp. Br. at 11. This

argument, however, ignores the uncontroverted facts of this case.

As explained in Petitioner's initial brief, **and agreed with by the state** (Resp. Br. 2), the plan **before** the robbery began was to steal **both** electronic equipment **and** the van, and to use the van to transport the other stolen items. Initial Br. at 2-3, 11-12 (citing to T. 200-01, 355, 362-64). "[W]here property is stolen from the same owner from the same place by a series of acts, if each taking is a result of a separate independent impulse, it is a separate crime." *Brown v. State*, 430 So. 2d 446, 447 (Fla. 1983). The converse, then, must also be true – where there is just one "impulse" then there is just one crime. "What is dispositive is whether there have been successive and distinct forceful takings with a separate and independent intent for each transaction." *Id*. The facts here show an intent to commit just one theft of property from the same victim at the same residence. There was no "separate independent impulse" to take the van. To the contrary, there was but one forceful taking here, and that same force was used to steal both the electronic equipment and the van.

The state's attempted distinction here – that there were "two separate intents" because the equipment was *inside* the house while the van was *outside* (Resp. Br. at 8-9, 11) (emphasis in original) – is contrary to the facts, which show that prior to beginning the robbery the robbers intended to take both the equipment and the van

together. Further, the state's attempted distinction is not logical. The state does not argue "two separate intents" based upon the theft of the keys to the van *downstairs* and the theft of computer equipment *upstairs*. The intent behind the theft is not determined by the need to walk outside the house to take an item any more than it is determined by the need to walk upstairs to take an item. The facts here show just one single "intent" to rob the victim of several items from the residential premises.

Case law also shows that the state's attempted factual distinction is without merit. *J.M. v. State*, 709 So. 2d 157 (Fla. 5th DCA 1998) and *Castleberry v. State*, 402 So. 2d 1231 (Fla. 5th DCA 1981) are, of course, identical factually to the present case yet in both of those cases the Fifth District found that just one taking had occurred.[2] In *Hamilton v. State*, 487 So. 2d 407 (Fla. 3d DCA 1986), the defendant was convicted of grand theft and robbery. "The record affirmatively demonstrates that the defendant held up the victim at gunpoint and stole the victim's

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[2] The state makes no attempt whatsoever to distinguish either *J.M.* or *Castleberry* from this case. Nor does the state make any argument as to why *J.M.* or *Castleberry* should be disapproved. In contrast, Hayes explained in his initial brief why the Third District's decisions in *Wilson v. State*, 608 So. 2d 842 (Fla. 3d DCA 1992) and *Lattimore v. State*, 571 So. 2d 99 (Fla. 3d DCA 1990), are factually distinguishable, are not well reasoned and, in any event, are no longer good law in light of this Court's subsequent decisions. Initial Br. at 14-17. The state has no response to this comprehensive analysis.

cash and automobile – all in a single transaction. One robbery was therefore committed – not a grand larceny of the automobile and a robbery of the cash as adjudicated below." *Id*. at 408.

In *Wallace v. State*, 724 So. 2d 1176 (Fla. 1998), the defendant was charged with and convicted of two counts of resisting an officer with violence. Wallace tried to punch one officer, then, when a second officer attempted to handcuff him, Wallace pulled away and punched the second officer in the face. *Id*. at 1177. This Court reversed one of the convictions, holding that "continuous resistance to the ongoing attempt to effect his arrest constitutes a single instance of obstruction." *Id*. at 1181.

In *Sessler v. State*, 740 So. 2d 587 (Fla. 5th DCA 1999), the defendant took money from a cash register and a pistol from the clerk. He was convicted of robbery based on the stolen money and of grand theft based on the stolen pistol. *Id*. at 588. On appeal, the grand theft conviction was vacated. "Although the State contends that 'the robbery of the money and the theft of the clerk's gun were two separate and distinct acts,' it is clear that there was only one robbery under the facts of this case. Hence, Sessler could not have been separately convicted of robbery of the cash and robbery of the gun." *Id*.

In *Cobb v. State*, 586 So. 2d 1298 (Fla. 2d DCA 1991), the defendant

pointed a gun at a person trying to unlock a car door and told him to give him the keys. The person complied, and the defendant and his accomplices drove off in the car. The defendant was convicted of one count of robbery based on the taking of the car keys and another count of robbery based on the taking of the car. *Id*. at 1299. On appeal, the Second District reversed one of the robbery convictions. "Immediately upon taking the keys from [the victim], the appellant and his companions jumped in the car and fled. Thus, the taking of [the] car was not successive and distinct from the taking of the keys. . . Rather, the taking of the car and the taking of the keys were products of the same intent." *Id*. at 1300.

In *Ward v. State*, 730 So. 2d 728 (Fla. 1st DCA 1999), the defendant was convicted of armed robbery and armed carjacking. The robbery charge was based on the taking of keys from the victim and the taking of her purse from the front seat of her car. The state argued that the robbery and carjacking convictions arose out of separate transactions or episodes. *Id*. at 729. The First District disagreed. "All of the victim's property was taken as a part of the same criminal transaction or episode, without any temporal or geographic break. . . Accordingly, double jeopardy precludes convictions for both offenses." *Id*. at 729-30.[3]

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[3] The Third District recently issued an opinion in which it certified conflict with *Ward* after upholding separate convictions for robbery and carjacking in similar circumstances. *Cruller v. State*, 1999 WL 1062243 (Fla. 3d DCA

In *Nordelo v. State*, 603 So. 2d 36 (Fla. 3d DCA 1992), the defendant "took money from the cash register, and then shortly thereafter, from the victim. Though technical logic dictates that there were two separate acts of taking, practical logic dictates that the takings were part of one comprehensive transaction to confiscate the sole victim's property." *Id*. at 38. One count of armed robbery was vacated.

In *Campbell-Eley v. State*, 718 So. 2d 327 (Fla. 4th DCA 1998), the victim was stabbed three times with a knife, the third stabbing being fatal. The defendant was convicted of second degree murder and aggravated battery, with the state arguing that the case did not involve a single criminal homicide because the first two stab wounds did not cause the victim's death. *Id*. at 329-30. The court did not agree. "As the blows in the instant case occurred in rapid succession in a matter of seconds and were part of the violent acts which undisputedly led to the victim's murder, we conclude that they were all part of a single homicidal assault." *Id*. at 330. As the Fifth District noted, "the legislature did not intend to create a separate offense for every murderous blow that a defendant inflicted upon a deceased in a single incident." *Id*. at 329. So too here, the legislature did not intend to create a separate offense for every item stolen during the course of one robbery.

November 24, 1999). Cruller filed a notice of intent to invoke this Court's discretionary jurisdiction, and a briefing schedule has been set by this Court.

The cases relied upon by the state (Resp. Br. at 9-10) are distinguishable. Hayes explained in his Initial Brief (at 14-16) that *Wilson v. State*, 608 So. 2d 842 (Fla. 3d DCA 1992), rests upon questionable precedent and, in any event, can no longer be considered good law in light of this Court's subsequent decisions in *Sirmons* and *Anderson*. *Waters v. State*, 542 So. 2d 1371 (Fla. 3d DCA 1989), involved "two separate acts of the defendant," robbing the victim of money and a watch, and then, "**after the victim abandoned the car and escaped from the defendant's presence**," taking a car. *Id*. (emphasis added).

None of the other cases cited by the state involve a charge of grand theft. Instead, the state relies upon a series of cases involving charges of armed robbery and armed carjacking. In some of those cases, the crimes occurred in different locations. *See Howard v. State*, 723 So. 2d 863, 864 (Fla. 1st DCA 1999) ("two discrete offenses: taking the victim's car at gunpoint, and shortly thereafter, **while in a different location**, taking his personal effects") (emphasis added); *Smart v. State*, 652 So. 2d 448 (Fla. 3d DCA), *review denied*, 660 So. 2d 714 (Fla. 1995) (victim robbed "at an A.T.M." and then the defendant drove off in his car; court specifically distinguished cases where the "acts of taking were part of one comprehensive transaction to confiscate the sole victim's property."). Here, of course, the entire robbery occurred at the same residence.

Other cases cited by the state involved separate, distinct acts. *See Mason v. State*, 665 So. 2d 328, 329 (Fla. 5th DCA 1995) ("two separate crimes committed. First the taking of the money and then the carjacking . . . the commission of them occurred separately . . . **independent of each other**.") (emphasis added); *Simboli v. State*, 728 So. 2d 792, 793 (Fla. 5th DCA) (Defendant, a passenger in a taxicab, demanded the driver's money. "After the driver turned over his cash, appellant **then** had the driver empty his pockets . . . **and then** forced the driver out of the cab and drove away with it.") (emphasis added), *review denied*, 741 So. 2d 1137 (Fla. 1999). Here, in contrast, there was just one planned robbery and one consummated robbery, and the theft of the van was an integral part of the overall robbery plan – without the van the other items could not have been transported. Indeed, the first thing asked for, according to the victim's testimony, was the keys to the van.

Finally, the case of *Consiglio v. State*, 743 So. 2d 1221 (Fla. 4th DCA 1999), involved "two separate acts: (1) an intent and act to steal money from the victim; and (2) an intent and act to steal the victim's car." *Id*. In contrast, here the facts show but one "intent": to commit a robbery in which both electronic equipment and a van were taken, and the van used to transport the electronic

equipment. That is precisely what happened.[4]

The undisputed facts here show one plan to commit one robbery of one victim at one residence. The "intent" at all times was to take both the electronic equipment and the van. The taking of the van was not separate and distinct from the taking of the electronic equipment; to the contrary the taking of both were inextricably intertwined as the van was to be used to transport the electronic equipment. The taking of the van was accomplished by the exact same force as was used to effect the taking of the electronic equipment. Therefore, as discussed above, "case law and logic dictate that these takings were, in reality and by their propinquity, a continuous transaction of an armed robbery of one victim." *Nordelo*, 603 So. 2d at 39. There was just one taking here, with one intent, and so the grand theft conviction should be reversed.

II. HAYES' FEDERAL CONVICTION FOR POSSESSION OF A FIREARM IN RELATION TO A DRUG TRAFFICKING CRIME IS ANALOGOUS TO § 790.053, FLORIDA STATUTES (1993), AND SO SHOULD BE SCORED AS A MISDEMEANOR.

The state acknowledges that "open carrying" of a firearm is a "critical

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[4] *Consiglio* further appears to be in direct conflict with the First District's decision in *Ward v. State*, 730 So. 2d 728 (Fla. 1st DCA 1999). As noted *supra*, at 7 n.3, the issue of whether dual convictions for robbery and carjacking arising out of the same episode may be sustained will shortly be presented to this Court for decision.

element[]" which must be encompassed by a Florida Statute in order to find that statute analogous to the federal statute, 18 U.S.C. § 924(c)(1), which punishes anyone who "uses or carries" a firearm in relation to a drug trafficking crime. Resp. Br. 13. The crux of the state's argument, unaccompanied by citation to any supporting authority, is that § 790.07(2), Fla. Stat. (1993), prohibits the **open** carrying of a firearm through its prohibition against the "display" of a firearm because the two are one and the same. Resp. Br. at 13-14 ("open carrying, i.e., 'display'"; "'display,' i.e., the open carrying"). Thus, the state argues, there is no ambiguity as to whether § 790.07(2) or § 790.053, Fla. Stat. (1993) is "the analogous or parallel Florida statute"[5] to 18 U.S.C. § 924(c)(1) because § 790.07(2) "encompasses both of the two critical elements necessary for the federal offense of possession of a firearm in relation to a drug trafficking crime." Resp. Br. 13. The premise of the state's argument, though, is wrong. Open carrying of a firearm is **not** the same as the "display" of a firearm.

To show "use" of a firearm under 18 U.S.C. § 924(c)(1), the government must show "active employment" of the firearm, such as by "displaying" it. *Bailey v. United States*, 516 U.S. 137, 148 (1995); *United States v. Quinn*, 123 F. 3d 1415, 1426 (11th Cir. 1997). The "use" must "make[] the firearm an operative

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[5] Fla. R. Crim. P. 3.701(d)(5)(B).

factor in relation to the predicate offense." *Bailey*, 516 U.S. at 142. To sustain a conviction under the alternative "carry" prong of 18 U.S.C. § 924(c)(1), the government must show an actual transporting of the firearm, either on the person or in a vehicle, in relation to a drug trafficking offense. *Muscarello v. United States*, 118 S. Ct. 1911, 1913-16 (1998); *Quinn*, 123 F. 3d at 1426-27. Thus, "a firearm can be used without being carried . . . and a firearm can be carried without being used." *Bailey*, 516 U.S. at 146. Significantly, "carrying a gun . . . does not necessarily involve the gun's 'active employment.'" *Muscarello*, 118 S. Ct. at 1918.

The United States Supreme Court has thus recognized that "displaying" a firearm involves the "active employment" of the firearm, but that "carrying" a firearm does not necessarily involve the active employment of the firearm. The state's argument that all open "carrying" of firearms necessarily involves the "display" of the firearm thus falls apart.

Two examples show the fallacy of the state's argument. First, consider a person caught on videotape walking by himself in an otherwise-deserted warehouse to place drugs in a corner for later pick-up by someone else. He is carrying a firearm in front of him in his right hand in case the guard dog gets loose and comes after him. This person is openly "carrying" a firearm during and in relation to a drug trafficking crime, but he is neither "displaying" the weapon (there is no one

there to display it to) nor "using" the weapon (it is not, as *Bailey* requires, "an operative factor in relation to the predicate offense"). Such conduct would **not** be covered by § 790.07(2).

As a second example, consider a person who drives a hatchback automobile to the scene of a drug sale. In the hatchback area, clearly visible through the hatchback but not readily accessible from the driver's seat, is a firearm. The driver consummates the sale while sitting in the driver's seat and the other person never sees the firearm. Again, this person has "carried" (openly) a firearm during and in relation to a drug trafficking crime, but has neither "displayed" nor "used" the firearm. This conduct would likewise not be reached by § 790.07(2).[6]

Thus, as Hayes argued in his Initial Brief (at 19-20), the conduct proscribed by 18 U.S.C. § 924(c)(1) might be analogous to § 790.07(2) or § 790.053, depending on the facts of the federal offense. But the facts underlying the federal crime cannot be considered when determining the analogous Florida statute.

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[6] A further problem with the state's argument that open carrying of a firearm always equates to display of the firearm is that it would render the words "a concealed" meaningless within the disjunctive phrase "or carries a concealed firearm" found in § 790.07(2). There would be no need to distinguish between carrying a concealed firearm or carrying a firearm openly under the government's reading of the statute as all carrying would be prohibited. "Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Bailey*, 516 U.S. at 506-07 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994)).

Dautel v. State, 658 So. 2d 88, 91 (Fla. 1995). Pursuant to Fla. R. Crim. P. 3.701(d)(5)(C) and the accompanying Commission Notes, then, the federal conviction should be scored as a misdemeanor analogous to § 790.053.

Finally, the state tries to defend the Third District's determination of "the most analogous Florida Statute," App. 6-7, arguing that "it is only reasonable to seek to find the Florida statute that is the closest or most analogous to the federal statute involved." Resp. Br. at 13. This argument too is devoid of any supporting citation and, once again, is just wrong. Rule 3.701(d)(5)(B) requires a determination of "the analogous or parallel Florida statute," not the "most analogous" statute. Rule 3.701(d)(5)(C) requires any uncertainty about the appropriate analogous statute be resolved in the defendant's favor. This is fully in keeping with the axiomatic principle that criminal statutes are construed strictly and any uncertainty is resolved in favor of the defendant. When Hayes is resentenced by the trial court, then, the federal conviction under 18 U.S.C. § 924(c)(1) should be scored as a misdemeanor.

CONCLUSION

"[I]f the legislature continues to grant the exceptions listed in Chapter 775, Florida Statutes, which restrict the application of a strict *Blockburger* test, then we must enforce these exceptions when they apply." *McDonald*, 690 So. 2d at 1319.

The exception found in § 775.021(4)(b)(2) prohibiting dual convictions for differing degrees of the same offense is fully applicable here, so the conviction for grand theft should be reversed. Further, the federal conviction under 18 U.S.C. § 924(c)(1) should be scored as a misdemeanor upon resentencing.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply 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 10th day of January, 2000.

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