IN THE SUPREME COURT OF FLORIDA

BRYON GORDON,

Petitioner,

vs. CASE NO. 96,834

STATE OF FLORIDA,

Respondent.
_____)

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

# PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR PETITIONER

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## STATEMENT OF THE CASE AND FACTS

The State Attorney for the Ninth Judicial Circuit filed an information in case no. CR98-3684 charging the petitioner with one count of attempted first-degree murder with a firearm (Count I), one count of causing bodily injury during a felony, with a firearm (Count II), one count of aggravated battery causing great bodily harm, with a firearm (Count III), and one count of robbery with a firearm (Count IV). (R 6-9) The offenses were all alleged to have taken place on March 16, 1998, and the alleged victim in each case was Michael Friedman. (R 6-9) Attempted first degree murder with a firearm and causing bodily injury during a felony are each life felonies. Sections 782.04(1)(a), 777.04(4) (b), 775.087(1)(a), 782.051(1), Florida Statutes (1997). Aggravated battery causing great bodily harm committed with a firearm is a first-degree felony. Sections 784.045(1)(a)(1), 775.087(1)(a), Florida Statutes (1997). Robbery with a firearm is a first-degree felony punishable by life in prison. Section 812.13(2)(a), Florida Statutes (1997).

A jury trial was held before the Honorable Frank N. Kaney, Circuit Judge, on all four counts. (T 1-343) At trial Michael Friedman testified that on the night of March 15, 1998, after drinking four or five bourbon and cokes, he left the Full Moon Saloon on Orange Blossom Trail in Orlando and was shortly afterward surrounded by a large group of young black men. (T 84-88) One of the young black men, whom Mr. Friedman positively identified as the defendant, confronted Friedman with a gun, punched him in the face

and demanded his money; Mr. Friedman initially refused to give up his wallet, and the young man with the gun put the gun to Friedman's side and fired one shot. (T 90-96) Friedman testified that the defendant was pulling the wallet out of his (Friedman's) pocket at the time he fired the gun.(T 96-97, 102, 105-06) An emergency room doctor testified that Mr. Friedman was shot in the back near his shoulder blade. (T 148)

At the close of the State's case and again at the close of all the evidence, the defense moved for a judgment of acquittal. (T 209-12, 245-46) As part of those motions defense counsel argued that the aggravated battery charge (Count III) was subsumed in the attempted first-degree murder charge (Count I). (T 209-10) At the close of all the evidence the defense renewed its motion, arguing "there was one gunshot, and we have three crimes basically charged for the same offense." (T 245-46) Judge Kaney responded "Well, I think they can do that." (T 246)

The jury returned verdicts of guilty as charged on all four counts. (T 326-27, R 78-84) As the jury left the courtroom, the judge announced "[The defendant wi]ll be adjudicated guilty as to those four charges," and asked for argument to be made at sentencing regarding "whether or not I can sentence as to two, or whether ...2 and 3 are subsumed into 1." (T 330) At sentencing the judge announced:

> THE COURT: I'm going to–well, I'll give you a chance to unconvince me. My inclination is to rule that...Counts 2 and 3 are subsumed into

> Count 1, the attempted first degree murder, given the facts of this case, which was that there was a single gunshot that caused all the damage. Now, if you want to unconvince me, you're certainly welcome to try, but that's the ruling I think is the safest ruling to make at this point.
>
> THE STATE: ...I would be inclined to agree that count 2 [causing bodily injury during a felony] would likely be subsumed. However, in Count 3, because the State charged it not as an aggravated battery with a firearm but because we charged it as an aggravated battery causing great bodily harm...that is an element that is not subsumed by count 1, which is an attempted first degree murder. That doesn't require a showing of injury at all. Therefore, that would be a separate element that would not have been proven for Count 1 that would be there for Count 3; and that would be why the State doesn't feel that it would be subsumed.

Defense counsel disagreed with the State, noting "I'm not really arguing with you, [Judge.]" (T 332-33) Judge Kaney responded

> THE COURT: Well, I'm going to adjudge him guilty of all four, but I'm not going to sentence him on 2 and 3.

(T 333)

The sentencing guidelines scoresheet in the record includes 116 points for the primary level 10 offense of attempted first degree murder (Count I), 58 points for the additional level 10 offense of causing bodily injury during a felony (Count II), 37 points for the additional level 8 offense of aggravated battery with a firearm (Count III), and 46 points for the additional level 9 offense of robbery with a firearm (Count IV). (R 92) Those 257 points were added to 40 points for severe victim injury and 5.4

points for prior record to make a total of 302.4, which translates to a permitted guidelines sentence of 305.8 to 343 months in prison. (R 92-93) On September 17, 1998 Judge Kaney adjudicated the petitioner guilty on all four charges and sentenced him, on Count I (attempted murder) to 276 months with a minimum mandatory term of three years, and on Count IV (robbery) to 60 consecutive months (for a total of 336 months) with a consecutive mandatory term of three years. (T 340-41, R 108-10, 98-100)

Notice of appeal was timely filed from the September 17 judgment and sentencing orders. (R 111) The petitioner argued to the Fifth District Court of Appeal, in its case no. 98-2906, that the convictions entered on Counts II and III (causing bodily harm in the course of a felony, and aggravated battery) should be vacated because those counts were subsumed in Count I (attempted murder).[1] The petitioner further argued in his appeal that the sentence imposed on Count I should be reduced because points were added on his guidelines scoresheet to reflect the convictions on Counts II and III, even though the judge did not impose separate sentencing orders on those counts.

The State, in its brief filed in the petitioner's direct appeal, accepted the petitioner's statement of the facts, expressly noting that it "does not dispute that these convictions resulted from a single incident where one shot was fired." (Answer brief at

[1]The briefs filed in the District Court of Appeal have been filed with this brief as an appendix.

2) The State argued for the first time in the appeal that the trial evidence supported each of the four crimes charged in the information, noting that each of those crimes can be said to include an element the others do not.

The District Court, in its decision and opinion issued October 8, 1999, affirmed all four convictions and remanded for imposition of sentence on Counts II and III. Gordon v. State, 24 Fla. L. Weekly D2312 (Fla. 5th DCA October 8, 1999). The District Court expressly ruled that the facts of this case are as follows:

> The victim testified that the Defendant held a gun to his side, demanded his wallet, punched him in the face, then shot him while the wallet was being removed from his pocket. The injuries from the gunshot wound were life-threatening and left the victim scarred for life; there was no evidence of any injury from the punch to the face.

24 Fla. L. Weekly at D2312. The District Court also expressly ruled that Counts II and III were not subsumed in Count I charged in this case, and certified the following question as being one of great public importance:

> DOES THE DOUBLE JEOPARDY CLAUSE PRECLUDE CONVICTING AND SENTENCING A DEFENDANT ON CHARGES OF ATTEMPTED FIRST DEGREE MURDER, CAUSING BODILY INJURY DURING A FELONY, AND AGGRAVATED BATTERY CAUSING GREAT BODILY HARM?

24 Fla. L. Weekly at D2312.

The petitioner filed timely notice invoking this court's jurisdiction on October 8, 1999.

## SUMMARY OF ARGUMENT

Separate convictions for aggravated battery, attempted murder, and causing bodily injury while committing a felony do not appear to have been contemplated by the Legislature.

## ARGUMENT

THE JUDGMENT AND SENTENCING ORDERS ENTERED IN THIS CASE VIOLATE THE DOUBLE JEOPARDY CLAUSES OF THE FEDERAL AND FLORIDA CONSTITUTIONS; THE CONVICTIONS ENTERED ON COUNTS II AND III MUST BE VACATED AND THE PETITIONER RESENTENCED ON THE REMAINING COUNTS, SINCE THE DUPLICATIVE CONVICTIONS WERE SCORED ON HIS SENTENCING GUIDELINES SCORESHEET.

As noted above, the District Court of Appeal certified the following question in this case as being one of great public importance:

> DOES THE DOUBLE JEOPARDY CLAUSE PRECLUDE CONVICTING AND SENTENCING A DEFENDANT ON CHARGES OF ATTEMPTED FIRST DEGREE MURDER, CAUSING BODILY INJURY DURING A FELONY, AND AGGRAVATED BATTERY CAUSING GREAT BODILY HARM?

The question should be answered in the affirmative, and the judgments entered in the trial court as to Counts II and III should be vacated.

As to all three counts, the rule of Sirmons v. State, 634 So. 2d 153 (Fla. 1994), applies. Aggravated battery causing great bodily harm, causing bodily injury during the course of committing a felony, and attempted murder are all aggravated forms or "degree variants" of a single underlying offense–causing or trying to cause bodily harm to another person. In Sirmons, this court held that robbery is an aggravated form of theft for double jeopardy purposes; in Anderson v. State, 695 So. 2d 309 (Fla. 1997),that making a false statement in an official proceeding is a mere variant on the core offense of perjury for double jeopardy purposes; in (Joseph)

Thompson v. State, 650 So. 2d 969 (Fla. 1994), that sexual battery on a physically incapacitated person and sexual activity while in custodial authority of a child are both aggravated crimes based on sexual misconduct; in Johnson v. State, 597 So. 2d 798 (Fla. 1992), that grand theft of a firearm and grand theft of $300 in goods or cash are degree variants on the same core offense of taking the property of another; and in (Dennis) Thompson v. State, 607 So. 2d 422 (Fla. 1992), that selling counterfeit drugs is a degree variant on the core offense of theft. Accord Khan v. State, 704 So. 2d 1129 (Fla. 4th DCA 1998) (interfering with custody of a child and removing minor from state contrary to court order are variants on the same core offense).

In view of the foregoing cases, the certified question should be answered affirmatively; the Legislature has not acted to supersede the Sirmons line of cases, which is predicated on the assumption that the Legislature does not intend dual convictions to result from a single act that violates two statutes which constitute mere degree variations on the same core offense. The Fifth District Court distinguished this case from the Sirmons line of cases in reliance on Justice Shaw's dissenting opinion in Carawan v. State, 515 So. 2d 161 (Fla. 1987). In Carawan, a majority of this court held that dual convictions for aggravated battery and attempted manslaughter arising out of the same act constitute double jeopardy, citing State v. Boivin, 487 So. 2d 1037 (Fla. 1986), where this court held that dual convictions for aggravated battery and

attempted first-degree murder arising out of the same act constitute double jeopardy. The District Court panel noted in this case that Carawan was abrogated by statute, citing State v. Smith, 547 So. 2d 613 (Fla. 1989), and the 1988 amendment to Section 775.021, Florida Statutes; the panel appears to have concluded that the dissent in Carawan is now controlling law. The 1988 legislative amendment superseded the analytical underpinnings of Carawan, but not its result or the result in State v. Boivin. The result in Boivin is consistent with Sirmons and its progeny, and it should be deemed to control this case.

Johnson v. State, 24 Fla. L. Weekly D2540 (Fla. 4th DCA November 10, 1999) and Gresham v. State, 725 So. 2d 419 (Fla. 4th DCA 1999) also support an affirmative answer to the certified question. In both Johnson and Gresham the Fourth District Court vacated convictions for aggravated battery because the pleadings and proof in those cases showed that the aggravated battery was committed as part of a second charged offense, attempted second-degree murder. The same is true in this case. As to the pleadings, aggravated battery is a permissive lesser included offense of attempted first degree murder just as it is of attempted second degree murder. See Gresham, 725 So. 2d at 420-21. As to proof, the District Court correctly summarized the proof in this case as follows: the victim testified that Petitioner "held a gun to his side, demanded his wallet, punched him in the face, then shot him while the wallet was being removed from his pocket. The injuries from the gunshot wound were life-threatening and left the

victim scarred for life; there was no evidence of any injury from the punch to the face." Since the aggravated battery offense in this case was charged as aggravated battery *causing great bodily harm*, the single act that supports all three of the convictions entered on Counts I, II and III was a single gunshot.[2] The Fourth District Court correctly ruled in Johnson and Gresham that a single act does not support separate convictions for aggravated battery and attempted murder.

Also, as the State correctly conceded at trial, although not on appeal, the offense charged on Count II--causing bodily harm during a felony--is for a second reason subsumed in the offense of attempted murder. Count II charged a violation of Section 782.051 (1), Florida Statutes, which on the date of the offenses charged in this case provided:

> Any person who perpetrates or attempts to perpetrate any felony enumerated in s.782.04(3) [the felony-murder statute] and who commits, aids, or abets an act that causes bodily injury to another commits a felony of the first degree.

That statute became law in October, 1996, see Chapter 96-359, s.1, shortly after the Florida Supreme Court held in State v. Gray, 654 So. 2d 552 (Fla. 1995) that the State could not obtain a conviction for attempted felony murder under any statute in effect in 1995. Section 782.051 has, since the time the offenses involved in this case were committed, been re-titled "Attempted felony murder," and

[2]The State conceded as much in its answer brief filed in the direct appeal in this case.

the pertinent portion now reads:

> (1) Any person who perpetrates or attempts to perpetrate any felony enumerated in s.782.04(3) [the felony-murder statute] and who commits, aids, or abets an intentional act that is not an essential element of the felony and that could, but does not, cause the death of another commits a felony of the first degree.

Section 782.051(1), Florida Statutes (1998 supp.); see Chapter 98-204, s.12, Laws of Florida.

The State may not obtain convictions for both premeditated murder and felony-murder in the same prosecution where only one death takes place. Gaskin v. State, 591 So. 2d 917 (Fla. 1991), vacated on other grounds, 505 U.S. 1216, 112 S. Ct. 3022, 120 L. Ed. 2d 894 (1992); Goss v. State, 398 So. 2d 998 (Fla. 5th DCA 1991). See also Goodwin v. State, 634 So. 2d 157 (Fla. 1994), State v. Chapman, 625 So. 2d 838 (Fla. 1993), and Houser v. State, 474 So. 2d 1193 (Fla. 1985). It logically follows that the State cannot obtain convictions for attempted premeditated murder and for attempted or non-completed felony-murder when only one act of violence is perpetrated against one victim.

The convictions entered below on Count II and III should be vacated, and the decision and opinion issued by the District Court in this case should be quashed. Further, the petitioner is entitled to resentencing on the remaining counts, I and IV, since Counts II and III were included on Petitioner's sentencing guidelines score-sheet as "additional offenses at conviction," thus increasing the maximum prison term available to the judge on each count. See

Johnson, supra 24 Fla. L. Weekly at D2540(remanding for resentencing on remaining counts, where appellate court was "unable to conclude that appellant's sentence would have been the same had the trial court used a properly prepared scoresheet.")

## CONCLUSION

The petitioner requests this court to answer the certified question in the affirmative, to quash the decision and opinion issued by the District Court, to vacate the convictions entered in the trial court on Counts II and III, and to remand for resentencing on the remaining counts.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER

_____
NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR PETITIONER

## CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Assistant Attorney General Carmen F. Corrente, of 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by way of the Attorney General's in-basket at the Fifth District Court of Appeal, this _____ day of December, 1999.

_____
NANCY RYAN
ASSISTANT PUBLIC DEFENDER