

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC18-1108
L.T. No. 2D16-3542;
532015CF003622A000XX

ELIZABETH F. MARSH,

Respondent.

DISCRETIONARY REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Defendant Marsh crashed into another car while impaired by numerous controlled substances, severely injuring three teenagers. Defendant crashed into the victims' Kia Optima with her Ford Explorer, rear-ending the Kia with great force at a high rate of speed, propelling the Kia into the intersection. R11,90.

The occupants in the Kia included a 17-year-old driver and another 17 and 15-year-old as passengers. Id. One of the juveniles suffered severe skull fractures and brain bleeding. R11-13. The crush damage on the Kia was so significant that the trunk compartment of the Kia was pushed into the back seat. R11.

The driver suffered a head injury and was transported to Lake Wales Medical Center. The Kia's rear passenger (A.R.) was flown to Palmer Hospital for Children as he had sustained a skull fracture and brain bleed. A.R. was incapacitated after the crash and not alert or coherent on scene. R11;90. A.R. suffered an injury that created of a substantial risk of death, serious disfigurement, or protracted loss or impairment of the function of a bodily member or organ if he did not get medical treatment. R11. A.R. suffered a "frontal skull fracture, subdural bleed, concussion, and a post head trauma seizure;" a year and a half after the incident at sentencing, A.R. still experiences a lot

of headaches. R107. Another victim (M.M.) had permanent scarring as well as stitches and stapling on the back of his head. R99.

The juveniles in the Kia had been traveling with their parents (who were in a separate car just ahead of them) and had been planning to visit universities, at which they had scheduled campus tours. R103. One of the victims' parents was a paramedic, so she arrived almost instantly at the crash scene after turning her own car around. The victim's mother stated at sentencing: "I serve the City of Hollywood as a firefighter/paramedic and I respond to calls like this all the time, and I have never, ever come across a motor vehicle collision with a vehicle with that much damage and there not be a fatality." R105. She treated her own children at the scene, until first responders arrived and transported them, flying A.R. to the hospital by airlift. R106. The victim's mother also noted that, if her son in the rear seat had been sitting on the left instead of the right side, he would have been killed based on the greater damage to that side. R109.

The victims' father was Fire Chief of the Village of Tequesta, FL, and he testified that his son, M.M., "had an evulsion laceration which constituted about 22 or so staples and sutures. He lost a significant amount of blood, and he was unconscious when I found him." R113. M.M. had just received a congressional nomination to attend the Air Force Academy; he

planned to serve in the military like his father, who served in three wars. However, due to this incident, he was medically eliminated from the United States Air Force Academy, and M.M. lost out on a \$400,000 scholarship to the academy. R114-17.

The responding officer who arrived at the scene also learned that Defendant was on probation for DUI and she had the following drugs in her system after a blood draw: oxycodone, alprazolam, diazepam, medazepam, nordizepam, temazepam, and oxazepam. R92-95,12-13. An expert informed police that the drugs and the drug levels found in Defendant's blood were at a level that would impair a normal person's ability to drive. R12.

Witnesses to the crash noted that after the crash, Defendant was acting oddly, and was clearly "on either drugs or alcohol." R12. Defendant was dazed and disoriented and had trouble focusing and standing in one place. R12. Defendant was observed going back and forth from her car, picking up papers. R12. Deputies later located two empty prescription bottles in Defendant's glove box, and the bottles appeared to have blood on the labels--as if Defendant had recently touched them with bloody hands. R12. The bottles were now empty, but had been recently filled. R12. In addition to Defendant's state of impairment, she did not have a driver's license. R11-13. Defendant's license had been suspended for one year for refusing

to submit to a breath test; it was also suspended for one year for a prior DUI with property damage/personal injury. R11.

The State explained at sentencing: "These are certified copies of conviction from Highlands County that denote that on July 24, 2014, Ms. Marsh was placed on probation for DUI, and then on August 20 of 2014 she pled to concurrent probation and pled from a [another] DUI, as charged, to a lesser of reckless driving with alcohol as a factor." R133. The State noted Defendant had received several chances before:

"if this was Ms. Marsh's first offense, the State would not have offered such a steep prison sentence. Ms. Marsh was given an opportunity in July of 2014, when she was placed on probation for 12 months with alcohol and drug conditions, to get help, to seek help, and I'm certain, as a standard condition of that probation, there was a drug and alcohol evaluation and treatment as a term of that probation, and yet less than a month later she found herself in the same position driving under the influence and found herself in front of the Court in Highlands County for the second time in 30 days, for the same charge.

She was placed on concurrent probation and again given an opportunity to get a drug and alcohol evaluation and receive help. Rather than do that, after a judge had told her, "You are on probation, you are not to drive and your driver's license is suspended," she got in a vehicle after taking medications and chose to drive a car and rear-ended a group of kids who were stopped at a traffic light."

R157. Thus, this crash marked the third impaired driving incident for Defendant in a short time. The State also admitted photos of the crash scene for the judge to view. R94.

Information: Defendant was charged with two counts of driving while license suspended (DWLS) with serious injury, under Fla. Stat. 322.34 (one count for each passenger injured). She was also charged with two counts of DUI with serious bodily injury (one for each passenger) under Fla. Stat. 316.193. R43. Counts one and two alleged that Defendant, on Dec. 15, 2014, did knowingly drive while her license was suspended, and by careless or negligent operation did cause the death of, or serious bodily injury to: A.R. and M.M. Id.

Counts three and four alleged that Defendant drove or was in actual physical control of a vehicle while under the influence of alcohol, chemical substances, or controlled substances, to the extent that her normal faculties were impaired, and during the course of the driving, she did cause or contribute to causing serious bodily injury to A.R. (in count three) and M.M. (count four). R43-44.

Plea: Defendant entered an open plea, as charged, to all four counts above, on July 15, 2016. R168.

Sentencing Hearing: At sentencing, the defense admitted that Defendant was a Habitual Offender and the State would be

seeking Habitual sentencing if the case went to trial. R70. However, if Defendant pled open the State volunteered not to seek Habitual Offender sentencing. R71. The defense acknowledged that Habitual sentencing would change the statutory maximums. R77. (It normally doubles the maximums).

Defendant pled open and fully admitted to a factual basis as stated above. R89. The defense stipulated to the Arrest Affidavit as the factual basis for the plea. R85. The factual basis was set forth in the Affidavit, R11, but was supplemented by additional testimony from a deputy and witnesses at sentencing, who testified to the facts of the crash as summarized in the first portion of this section.

At sentencing, the victims' parents and families expressed strong outrage over the severe injury to these teenagers. They asked for a long sentence, noting the outrageousness of Defendant's repeated and extreme DUI conduct, resulting in these injuries to their children. R120-35. As Defendant had committed this crime while on probation, the State submitted certified convictions showing she was placed on probation for prior DUI, and reckless driving reduced from DUI. R133.

Sentence: The trial court sentenced Defendant to five years Florida State Prison on count one, five years prison on count

two, five years on count three and five years on count four, all counts consecutive, for a total of 20 years. R182; 190.

Scoresheet: Defendant's scoresheet reflects that she has a prior DUI, prior reckless driving, prior grand theft motor vehicle, prior false name to law enforcement officer, and prior DWLS. R188.

Appeal: Defendant appealed, claiming her convictions for DUI with serious bodily injury and DWLS with serious bodily injury violated double jeopardy when the convictions were for the same victim. The Second District agreed and reversed, holding "this case is controlled by our decision in Kelly v. State, 987 So.2d 1237, 1238 (Fla. 2d DCA 2008), in which this court addressed a double jeopardy challenge to dual convictions for DUI with serious bodily injury and driving without a valid license with serious bodily injury, both convictions being based on the same injury." Marsh v. State, 253 So. 3d 674, 676 (Fla. 2d DCA 2018), reh'g denied (June 19, 2018).

Thus, after prevailing in her appeal, Defendant will receive the benefit of having half of her counts vacated as violating double jeopardy, effectively halving her sentence exposure. The Second District affirmed Marsh's convictions for two counts of DUI causing serious bodily injury (one for each victim) but reversed the convictions for two counts of DWLS

causing serious bodily injury as violating double jeopardy, and then remanded with directions to enter convictions for two lesser counts of mere misdemeanor DWLS, a lesser included. Marsh, 253 So. 3d at 678. The State filed a motion for rehearing and a motion for stay, but the Second District denied the motions. (See Docket, 2D16-3542).

The State then filed a petition for discretionary review in this court, arguing that the Marsh opinion conflicts with the Fifth District's opinion in Lott v. State, 74 So.3d 556 (Fla. 5th DCA 2011), and with the Fourth District's opinion in Anguille v. State, 243 So. 3d 410 (Fla. 4th DCA 2018).

SUMMARY OF THE ARGUMENT

Marsh's convictions do not violate double jeopardy even when the injury is to the same victim, as each crime has a unique element. DUI with injury has the unique element of driving while impaired, and DWLS with injury has the element of having a suspended license. Marsh's convictions pass the Blockburger test. The legislature codified Blockburger under Fla. Stat. 775.021(4), making it the default test in Florida.

Both Marsh and its predecessor Kelly, which hold that these crimes violate "equitable" double jeopardy and violate the spirit of the "Single Homicide Rule," were incorrectly decided

because they ignore the legislative intent in 775.021(4). Marsh and Kelly are in conflict with two District Court opinions, Lott and Anguille, which hold that the ban on dual convictions for a homicide (the Single Homicide Rule) is unique to homicide regulation and does not apply to "with injury" crimes. Double jeopardy does not bar multiple injury convictions if the charges satisfy the Blockburger test, which Marsh's charges do satisfy.

Thus, the Marsh opinion expanded the Single Homicide Rule to injury crimes, in violation of the statutory Blockburger test. Marsh was wrongly decided and should be quashed.

ARGUMENT

ISSUE I

WHETHER THE SECOND DISTRICT ERRED IN APPLYING THE "SINGLE HOMICIDE RULE" TO A NON-HOMICIDE TRAFFIC CRASH, BY FINDING THAT DUAL CONVICTIONS FOR DUI WITH SERIOUS INJURY AND DWLS WITH SERIOUS INJURY VIOLATE DOUBLE JEOPARDY?

In Marsh, the Second District applied the Single Homicide Rule to Defendant's non-homicide crash offenses, reasoning:

"the [dual] convictions were impermissible because they punished the defendant twice for causing injury to a single victim by one act... the longstanding double jeopardy principle applied in State v. Cooper, 634 So. 2d 1074 (Fla. 1994)... preclude[s] dual convictions for the single death of a victim that occurred as a result of one act of operating a vehicle while under the influence... this principle had been applied in Cooper to determine that convictions for

both DUI manslaughter and DWLS causing death were impermissible....

[Thus,] dual convictions for DUI causing serious bodily injury and driving without a valid license causing serious bodily injury were analogous to those [homicides] in Cooper in that they imposed two penalties for causing serious injury to a single victim by one act of operating a vehicle while under the influence... Thus, the dual convictions violated defendant's double jeopardy rights."

Marsh v. State, 253 So. 3d 674, 676 (Fla. 2d DCA 2018).

Marsh's holding was incorrect: dual convictions for DUI with Serious Injury and Driving While License Suspended (DWLS) with Serious Injury do not violate double jeopardy, nor violate the Single Homicide Rule. That rule applies only to homicides, not to any crime with an injury. The Second District's expansion of that rule by rote "analogy" is impermissible. The rule is called the Single Homicide Rule, not the Single Injury Rule.

A. The Single Homicide Rule and the Statutory Test.

The Second District summarized the origin of the Single Homicide Rule ("SHR") in its Marsh opinion:

The rule set forth in Cooper and Chapman is referred to as the "single homicide rule." See McCullough v. State, 230 So. 3d 586 (Fla. 2d DCA 2017). The rule, which is based on the premise "that the legislature did not intend to punish a single homicide under two different statutes," applies even in circumstances where the double jeopardy analysis set forth in Blockburger v. United States, 284 U.S. 299 (1932), may not grant

relief. McCullough, 230 So. 3d at 591 (quoting Houser v. State, 474 So. 2d 1193, 1197 (Fla. 1985)).

The single homicide rule was first adopted by the supreme court in Houser to preclude dual convictions for DWI manslaughter and vehicular homicide based on a single death. Id. The Houser court recognized that the two crimes passed muster under Blockburger, but it explained that "Blockburger and its statutory equivalent in section 775.024(1), Fla. Stat. (1983), are only tools of statutory interpretation which cannot contravene the contrary intent of the legislature." Houser, 474 So. 2d at 1196. Because "Florida courts have repeatedly recognized that the legislature did not intend to punish a single homicide under two different statutes," these dual convictions were impermissible regardless of whether the offenses satisfy the Blockburger test. . . .

The single homicide rule "is based on notions of fundamental fairness which recognize *the inequity* that inheres in multiple punishments for a singular killing."

Marsh v. State, 253 at 676 (emphasis added).

In contrast, our Legislature has codified Blockburger as the test for double jeopardy under Fla. Stat. 775.021(4):

"(4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses ... shall be sentenced separately for each criminal offense; ... For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.
2. Offenses which are degrees of the same offense as provided by statute.
3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Florida Supreme Court opinions hold that the Single Homicide Rule still governs. See State v. Chapman, 625 So.2d 838, 839-40 (Fla. 1993) (explaining that the legislature's codification of Blockburger did not affect its jurisprudence on the Single Homicide Rule, and sentences for both DUI manslaughter and vehicular homicide violated that rule, and section 775.021(4) did not abrogate Houser); State v. Cooper, 634 So.2d 1074 (Fla. 1994) ("[T]here can be but one penalty imposed for causing the death of a single victim") citing Houser v. State, 474 So.2d 1193, 1196 (Fla. 1985) (only one homicide conviction and sentence may be imposed for a single death; Florida courts have repeatedly recognized that the legislature did not intend to punish a single homicide under two statutes).

Even under Cooper and Chapman, the Single Homicide Rule

must apply narrowly, only to homicides. Our legislature codified Blockburger as the test for double jeopardy in 774.021(4). This statute contains a clear statement of legislative intent and applies to any ambiguous-intent situation by default. Thus, 774.021(4) must apply by default to any non-homicide crime.

B. DUI and DWLS with injury are not homicide crimes.

Marsh faces an impossible hurdle to invoking the Single Homicide Rule: her crimes were not homicides. All other District Courts that have ruled on this issue have taken the State's position, finding the SHR is for homicides, not injuries.

The Second District stands alone: in Marsh, the Second District felt compelled to follow its prior precedent, Kelly. In Kelly, the Court had concluded that convictions for DUI with serious bodily injury and driving without a valid driver's license with serious bodily injury violated double jeopardy based on the analysis of the Florida Supreme Court in State v. Cooper, 634 So. 2d 1074 (Fla. 1994), which relied on Houser v. State, 474 So. 2d 1193 (Fla. 1985), and State v. Chapman, 625 So.2d 838 (Fla. 1993). (Cooper and Chapman held "the legislature did not intend to impose more than one penalty for causing the death of a single victim."). Kelly and Marsh conflict with two cases that are better reasoned: Lott and Anguille.

Lott v. State, 74 So. 3d 556 (Fla. 5th DCA 2011):

The Fifth District came to a contrary conclusion in Lott, limiting application of Cooper and Chapman to homicides. Lott fled from the police in a stolen car and crashed into the victim's car, causing serious injury. Lott was convicted of DWLS causing serious bodily injury and reckless driving causing serious bodily injury. Denying a claim that such convictions violated double jeopardy, the Fifth District rejected the analysis in Kelly and concluded that because the statutes at issue were not homicide statutes, the analysis in Cooper did not apply. Lott, at 560. Lott explained why Kelly was incorrect, namely that the SHR is only for homicides. Id.

The Lott court noted that both of Lott's "with injury" crimes clearly satisfy Blockburger and have unique elements, other than the element of causing injury. "We conclude that there is no clear statement of legislative intent in the two statutes at issue to either authorize or prohibit separate convictions and punishments based on a single injury to the same victim... Therefore, Blockburger analysis under section 775.021(4) must be utilized, and under that analysis, there is no double jeopardy violation." Id. at 561. While noting and rejecting Kelly, Lott did not certify conflict.

Anguille v. State, 243 So. 3d 410 (Fla. 4th DCA 2018):

Five days after the Marsh opinion (and without citing to

it, Kelly or Lott) the Fourth District concluded in Anguille v. State, 243 So. 3d 410 (Fla. 4th DCA 2018), that convictions for both DUI with serious injury and reckless driving with serious injury do not violate double jeopardy. In footnote 3, the court noted the contrary holding of cases involving a death under the Single Homicide Rule.

Anguille concluded double jeopardy did not bar dual convictions for DUI with serious injury and reckless driving with serious injury, where both crimes resulted in injury to a single victim. The court relied on Fla. Stat. 774.021(4), codifying Blockburger. Since 1988, that statute has included paragraph (4)(b), which overruled the rule of lenity announced in Carawan v. State, 515 So. 2d 161 (Fla. 1987). As the Florida Supreme Court later observed in Valdes v. State, 3 So. 3d 1067, 1072-73 (Fla. 2009), that statutory amendment added the following statement of legislative intent to convict and sentence for each separate offense committed in a single episode, with three limited exceptions. See F.S. 774.021(4).

After observing that the statute "expressly states an inherent desire to punish under separate statutory schemes unless otherwise so defined," the Fourth District concluded that the serious bodily injury enhancement did not change the elements of the underlying crimes of DUI and reckless driving.

Anguille, at 413. Instead, it merely added an element to enhance the penalties. The court concluded: "reckless driving and DUI do not require identical elements of proof, they are not degrees of the same offense, nor is either a lesser offense that is subsumed within the other. Therefore, separate convictions for DUI with serious bodily injury and reckless driving with serious bodily injury, where the injury is to the same person, falls firmly within approved boundaries of double jeopardy principles and is expressly allowed within the legislative scheme." Id. Note that Anguille was also appealed to this Court by both parties and was stayed pending this case. (See SC18-1002).

The Existing Conflict: Currently the Fourth and Fifth Districts hold that dual convictions for non-homicide offenses causing injury do not violate double jeopardy when the crimes pass the Blockburger test (Lott and Anguille). The Second District concludes that dual convictions do violate double jeopardy because the Court expanded the SHR to non-homicide crimes. (Marsh and Kelly). This court should adopt Lott and Anguille and overrule Marsh and Kelly.

C. Marsh is wrongly decided.

Marsh did not use a Blockburger analysis. Instead, the court's analysis rests on the Single Homicide Rule: "The rule, which is based on the premise 'that the legislature did not

intend to punish a single homicide under two different statutes,' applies even in circumstances where the double jeopardy analysis in Blockburger... may not grant relief.'" Marsh, supra (citing Houser).

The problem with Marsh's reliance on Houser is that Houser states that the "assumption" is that the legislature "ordinarily does not intend to punish the same offense under two different statutes." But Houser noted the legislature can do so: "While the legislature is free to punish the same crime under two or more statutes, it cannot be assumed it ordinarily intends to do so." Houser, at 1196 (emphasis added). But in 1988, the legislature made clear in 774.021(4)(b) an intent to always do so. Houser, and its language to the contrary, is obsolete and no longer valid as it relates to a "general" claim of legislative intent not to punish the same offense twice under lenity; our legislature explicitly abolished lenity in 774.021(4)(b).

The abolishment of lenity: The idea of "lenity" abolished by 775.021(4)(b) is detailed in Carawan, which explained it is:

a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose... we stated: 'This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress

intended.'

Carawan, at 166. In short, the common-law "policy" of lenity was that unless it was clear that congress intended dual punishment for the same act, the doubt should be resolved in favor of the accused. To be clear, this policy was abolished by amending 775.021(4)(b), which makes legislative intent undeniable: there are no longer any circumstances in which it is "unclear" if the legislature intends dual punishment, because that is the default intent as codified in the statute (with three exceptions). Thus, 775.021(4)(b) leaves no room for lenity to ever be applied.

This court in Smith held exactly that, noting how forcefully our legislature rejected this Court's Carawan rule of lenity-based double jeopardy jurisprudence:

It is readily apparent that the legislature does not agree with our interpretation of legislative intent and the rules of construction set forth in Carawan. More specifically:

(1) The legislature rejects the distinction we drew between act or acts. Multiple punishment shall be imposed for separate offenses even if only one act is involved.

(2) The legislature does not intend that (renumbered) subsection 775.021(4)(a) be treated merely as an "aid" in determining whether the legislature intended multiple punishment. Subsection 775.021(4)(b) is the specific, clear, and precise statement of legislative intent referred to in Carawan as the controlling polestar. Absent a statutory degree crime or a contrary clear and specific statement of legislative intent in

the particular criminal offense statutes, all criminal offenses containing unique statutory elements shall be separately punished.

(3) Section 775.021(4)(a) should be strictly applied without judicial gloss.

(4) By its terms and by listing the only three instances where multiple punishment shall not be imposed, subsection 775.021(4) removes the need to assume that the legislature does not intend multiple punishment for the same offense, it clearly does not [in those three instances]. However, the statutory element test shall be used for determining whether offenses are the same or separate. Similarly, there will be no occasion to apply the rule of lenity to subsection 775.021(4) because offenses will either contain unique statutory elements or they will not, i.e., there will be no doubt of legislative intent and no occasion to apply the rule of lenity.

State v. Smith, 547 So. 2d 613 (Fla. 1989).

Valdes: In State v. Chapman, 625 So. 2d 838 (Fla. 1993), this Court reaffirmed the SHR, stating, "Florida courts have repeatedly recognized that the legislature did not intend to punish a single homicide under two different statutes." The Court cited Houser for this proposition and stated, "We see nothing more in the 1988 amendment than that it was intended to limit the rule of lenity and to override Carawan." The Court added: "Especially we do not read the amendment as an overruling of Houser... that a single death cannot support convictions of both DUI manslaughter and vehicular homicide." Id.

Developing at this same time were cases trying to interpret Section 775.021(4)(b) (1988) and its three exceptions to the legislature's intent to punish for each crime committed in a single episode, except for: 1. Offenses which require identical elements of proof; 2. Offenses which are degrees of the same offense; and 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

As explained in Valdes v. State, 3 So.3d 1067 (Fla. 2009), courts had no difficulty in applying subparagraphs 1. and 3. The difficulty came in applying subparagraph 2.: offenses which are degrees of the same offense as provided by statute. Valdes at 1075. In applying the test, this Court had previously directed courts to look at whether the crimes "constituted degrees of the same 'core' offense;" whether they were "degree variants" of the same underlying crime; or whether the two crimes targeted the same underlying "primary evil." Id. at 1073.

Such was the test until Valdes, where this Court fully abolished this Carawan "primary evil" test:

"By applying the 'primary evil' gloss to the second statutory exception, we have added words that were not written by the Legislature in enacting the double jeopardy exceptions of section 775.021(4) and specifically subsection (4)(b)(2). Rather, this exception simply states that there is a prohibition against multiple punishments for offenses which are 'degrees of the same offense.' There is no mention of 'core

offense' and certainly no mention of
'primary evil.'"

Valdes, at 1075. The Court receded from the "primary evil" test and concluded "the only offenses that fall under subsection (4)(b)(2), are those that constitute different degrees of the same offense, as explicitly set forth in the relevant statutory sections." Id. at 1077. Valdez held: "We conclude that the 'primary evil' test defies legislative intent because it strays from the plain meaning of the statute." Id. at 1075.

Marsh resurrects the primary evil test: It is arguable that the Marsh opinion conflicts not only with Lott and Anguille, but Valdes too. After all, the Single Homicide Rule is conceptually a form of the primary evil test, and also appears to be a form of "lenity," which was abolished in 775.021(4)(b). And Valdes wholly abandoned the primary evil test and Carawan's lenity jurisprudence. So even accepting in Chapman that the SHR survives as the *sole form* of the primary evil test that endures after 775.021(4), (*i.e.*, as an exception to Valdes), that rule must remain limited to homicides. If not, the SHR becomes the primary evil test in all but name, conflicting with Valdes.

In Marsh, the Second District expanded the Single Homicide Rule into a broader "with injury" form, akin to the primary evil test and similar to Carawan's lenity doctrine, abolished by statute. This was error for two reasons. First, the broader form

of the primary evil test was clearly abolished by statute and cannot be used, per Valdes. Second, even if the primary evil test still governed, it is debatable whether the primary evil in DUI and DWLS (with injury) is really the injury, rather than the core crime of DUI or DWLS, or the collective occurrence of both the core crime and the injury. DUI is a public nuisance, so the impaired driving is the primary evil or "core" offense. Likewise, the primary evil in DWLS is the suspended driving, while any injury or property damage is just an aggravator. So even if a court used the "primary evil" test for DUI and DWLS, it would not warrant "equitable" double jeopardy relief.

Marsh resurrected the primary evil test in all but name, violating Valdes. Then (worse still) Marsh misapplied the primary evil test by equating all injuries to deaths (which are surely the primary evil in a homicide) but ignored the fact that there are other "core" evils in a DUI or DWLS.

And while Marsh did not use the primary evil terminology, the court's logic uses exactly that test. Marsh boils down the SHR to its core concept (causing death), and then analogizes to a similar core concept in another situation (causing injury), and then holds that there is no "logical distinction," so the same rule must apply.

But the reason the Marsh court thinks the same rule must

apply is because the SHR is a *form* of a primary evil/core evil test. Marsh found the core evils to be “analogous.” So Judge Badalamenti’s footnote 6 in McCullough (opining that the SHR is a form of the primary evil test) is very insightful in that respect. See McCullough v. State, 230 So. 3d 586, n.6 (Fla. 2d DCA 2017). This footnote illuminates exactly how the Marsh court erred: Marsh took the core evil concept inherent in the Single Homicide Rule, logically generalized it, and applied it to a non-homicide injury crime (which Valdes forbids).

The courts cannot ignore stated legislative intent: Next, the touchstone of a double jeopardy analysis is legislative intent. The most basic flaw in Marsh is that the Second District expanded the Single Homicide Rule by rote analogy, ignoring the binding effect of legislative intent set forth in 775.021(4)(b). The courts cannot expand the SHR to all crimes with “injury” elements because that would be such a massive expansion that it would amount to the SHR overshadowing the statutory test. For the SHR to endure as an “exception” to the Blockburger test, it must remain just that: a narrow exception, unique to homicide crimes. The Second District’s freewheeling application of the SHR to non-homicide crimes ignores the plain words of 775.021.

As explained in Lott and Anguille, 775.021(4) states that the intent of the legislature is to punish crimes with unique

elements twice, with three exceptions. Put another way, Blockburger is the "default" test in Florida. If there is an exception, it must be delineated in the statute (or must fall within the narrow SHR exception grandfathered in Chapman, an exception for homicides only).

The sole actual statement of legislative intent we have is 775.021(4)(b), namely: the legislature does intend to allow multiple punishments on every crime, with three exceptions. Marsh's expansion of the SHR to apply to crimes with injuries contradicts the plain intent stated in 775.021(4). Indeed, it is telling that neither Marsh nor Kelly even cite to 775.021(4), nor do they try to explain why that statute does not preclude their unprecedented expansion of the SHR.

C. Chaos could ensue if courts expand the SHR to injury crimes.

The holding of the Marsh opinion is broad and unqualified, and is not limited to only traffic statutes (i.e., DUI "with injury.") The "expanded" SHR could be applied to any two crimes where any form of "injury" is an element, including batteries of all types, child abuse, or molestation (those are injuries too), as well as general injuries such as property damage or theft.

Marsh held: "The 'notions of fundamental fairness which recognize the inequity that inheres in multiple punishments for a singular killing,'... apply with equal force to multiple

punishments for a singular serious bodily injury committed during a single act." Marsh, at 677 (emphasis added).

If these "notions of fundamental fairness" (whatever that means to any particular judge) are the guiding test for relief, then Marsh has completely torn up 775.021(4) as the governing test for double jeopardy. After all, the Second District held that because it is "unfair" to impose "multiple punishments" for a "singular killing," then it is also unfair to impose multiple punishments for any form of singular injury. If true, the exception has just swallowed the rule.

The Marsh holding was not limited to traffic statutes, and there is no obvious logical basis to limit its reasoning to only traffic crimes, or to only serious bodily injury as opposed to "any" injury. As the Marsh court analogized: "The fact that Marsh did not kill the victims in the vehicle she rear-ended does not distinguish this case from Cooper in any meaningful way. If enhancement of the Cooper defendant's charge for DWLS was improperly cumulative, then enhancement of Marsh's charge for DWLS was likewise improperly cumulative." Id..

Kelly's holding is equally broad: the Kelly court did not limit its expansion of the SHR to only traffic statutes, nor to only "serious" injuries. Instead, the crux of the double jeopardy violation was that "Kelly was punished twice for

causing injury to a single victim.” Kelly v. State, 987 So. 2d 1237 (Fla. 2d DCA 2008) (emphasis added). The court noted, “convictions for both DUI with serious bodily injury and driving without a valid license with serious bodily injury based on the *injury to only one victim* are not permissible.” Id. at 1239 (emphasis added). The Second District is again using a simple analogy: because Cooper says the courts cannot punish a death twice (the ultimate injury), it logically follows that the courts cannot punish any injury twice.

But again, Blockburger is the default test, per 775.021(4). The courts cannot simply expand the pool of double jeopardy violations by using an “A is similar to B” analogy. The courts are bound by the statutory test in 775.021(4) and can only ignore it if there is 1. an exception listed in the statute, or 2. a valid and established non-statutory exception (meaning: only if Chapman applies and the SHR is invoked).

If the Second District is correct that the State cannot punish any injury twice, this might cover not only physical injuries but mental injuries as well (i.e., assaults). It might also cover property injuries or financial injuries--in fact, most criminal statutes involve an “injury” of some sort. (And again, if this feels like the primary evil test, that is because it is). Yet case law abounds with cases in which the law allows

an injury/harm/battery to be punished twice if it satisfies Blockburger.

For example: sexual battery. The State highly doubts that the legislature "did not intent to punish an injury twice" if that injury is rape or sexual abuse to a child. See Young v. State, 762 So. 2d 595 (Fla. 5th DCA 2000) (upholding dual convictions for sexual battery and burglary with a battery (the same sexual battery)); Binns v. State, 979 So. 2d 439, 442 (Fla. 4th DCA 2008) ("Based upon a Blockburger analysis, the crimes of lewd and lascivious act and sexual battery each contain an element that the other does not"; so dual convictions do not violate double jeopardy).

The Second District's logic in Marsh and Kelly is a resurrection of the primary evil test and of lenity as an alternative double jeopardy analysis (i.e., "notions of fundamental fairness"). But such equitable "notions of fairness" were explicitly abolished by section 775.021(4) and by Valdes.

And Marsh's policy may seem "fair" in the abstract, because it might seem logical that one should not be punished twice for the same injury. But that is not how most legislatures construct statutory schemes. Legislatures do not assume that any "injury" element they list--in any statute, for any injury, whether for battery or bodily harm or property damage--will be punished only

once for the same act, no matter how many statutes that injury element appears in. Florida simply does not have a statutory scheme where an injury is presumed to be the "primary evil" and presumed fully punished upon a single occurrence of that injury element, in any statute.

In fact, Blockburger embodies the exact opposite policy: Blockburger reflects the idea that a single unique element renders the entire crime sufficiently unique to allow dual convictions. And our legislature adopted that principle as its intent in 775.021(4), a principle that then permeates every single criminal statute. Blockburger clearly states:

the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . [T]his court quoted from and adopted the language of the Supreme Court of Massachusetts in Morey v. Commonwealth, 108 Mass. 433:

'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'

Blockburger v. United States, 284 U.S. 299, 304 (1932). This Blockburger rule may appear harsh in some situations, but this is the law adopted by the legislature and we must follow it.

"The question of the justice [or fairness] of punishing the

offender for two distinct offences growing out of the same act was a matter for the consideration of ... the attorney for the Commonwealth in the presentment and prosecution, of the court below in imposing sentence, or of the executive in the exercise of the pardoning power. It is not within the jurisdiction of this court as a court of error." Morey v. Com., 108 Mass. 433, 436 (1871). Put another way, the District Courts' more lenient "notions of fairness" cannot supplant the legislature's stricter policy adopted under 775.021(4)(b).

And in that light, Marsh does not even really make sense anyway. Marsh effectively holds that if a person is driving on a suspended license (DWLS), she may as well be impaired too, because if she crashes and injures someone, the State will only be able to prosecute a single enhanced count of either DWLS with injury or DUI with injury (either of which has a five-year maximum). Because, according to Marsh, the legislature intends to punish an injury only once, no matter how many enhanced crimes with other unique elements the person was committing simultaneously. So the maximum exposure remains five years for DUI with injury (plus a trivial misdemeanor form of DWLS, which does not properly acknowledge the legislative intent to enhance DWLS whenever it occurs with an injury).

Under Marsh's logic, only one enhanced conviction for a

"with injury" element may stand for a single victim, regardless of whether Marsh had a suspended license, or was impaired, or both. For that matter, only a single conviction may stand even if Marsh had committed *four* kinds of "with injury" crimes at once, such as fleeing or eluding with injury, reckless driving with injury, DUI, and DWLS with injury, all at once. Marsh holds the State cannot prosecute each crime fully, even though Marsh committed multiple unique nuisances as reflected in each charge's unique element. Yet the misdemeanor forms of those crimes are simply inadequate when an injury results.

In this case, Defendant Marsh was extremely impaired and was driving on a suspended license, so applying the Marsh rule here would completely sweep under the rug half of Defendant's outrageous conduct that the legislature intended to punish. The doubly-infuriating occurrence of these two bad acts at once (DUI and DWLS) during Marsh's crash, which terribly injured these two teenagers, should be doubly punishable, not singly punishable.

It is simply not clear the legislature intended to adopt a merciful, lenient "single injury rule" as applied to traffic injury crimes that are not homicides. Each traffic crime punishes an independent nuisance. There are great policy reasons why the legislature would want to punish Marsh's conduct fully, if two forms of traffic negligence crimes simultaneously result

in a single injury, under the idea that Marsh's dual crimes reflect a higher level of overall negligence. (Consider the civil metaphor of gross negligence allowing for punitive/treble damages, which may be a loose analogy to Blockburger as it applies here). Dual convictions seem perfectly fair under these facts, and in light of Marsh's outrageous conduct.

So, whether or not this court agrees that a strict Blockburger policy is "fair," we know the legislature thinks it is because it adopted Blockburger as the default test in 775.021(4). And if mercy, based on some contrary "notion of fairness," is to be granted, it is for the legislature alone to amend section 775.021(4). It is not for the courts of appeal to expand the SHR or to ignore 775.021 based on their own notions.

And finally, not only should the Single Homicide Rule not be expanded, Valdes mandates that it is time to recede from the rule entirely. The SHR no longer has any place in Florida jurisprudence given our current understanding of legislative intent as codified in 775.021(4). The Single Homicide Rule violates both Valdes and 775.021, so this court should recede from Cooper, Chapman, Houser, and all pre-Valdes cases. These cases arose in a bygone era in which the court treated 775.021 as a mere "aid" or suggestion in double jeopardy analysis, rather than the binding statute it is. The SHR was always a form

of the primary evil test, and of lenity--which were explicitly abolished in 775.021. Double Jeopardy analysis now begins and ends in 775.021(4), as the statute is complete and closed-ended and leaves no room for any "non-statutory" exception such as the SHR. This would be the simplest basis to decide this case: Marsh cannot utilize the Single Homicide Rule if it no longer exists.

Summation: Marsh was wrongly decided. It was wholly improper for the Second District to apply the Single Homicide Rule to Marsh's dual convictions for DWLS with injury and DUI with injury. The Second District used an expanded form of the SHR, which ignores the statutory Blockburger test and amounts to the abolished "primary evil" test. Marsh conflicts with Anguille and Lott, and Valdes too. This Court should quash the Marsh opinion and reinstate Marsh's convictions for DWLS with injury, and reinstate all original sentences for DWLS with injury, which were consecutive to her sentences for DUI with injury on each victim. This Court should recede from the Single Homicide Rule or, at a minimum, clarify that the SHR is limited to homicides.

CONCLUSION

Based upon the foregoing authorities and arguments, Appellee respectfully requests that this court quash and reverse the Second District's opinion in Marsh and Kelly and reinstate the original counts of Marsh's convictions for both DUI with injury and DWLS with injury, even on a single victim, and thus reinstate all Marsh's original sentences and convictions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Michael Ufferman, 2022-1 Raymond Diehl Road, Tallahassee, Florida 32308, at ufferman@uffermanlaw.com, by email (using the court's e-filing portal service), on this 12 day of June, 2019.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and font used in this brief complies with Fla. R. App. P. 9.210(a)(2).

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