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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ELIZABETH FRANCIS MARSH, A/K/A ELIZABETH FRANCES MARSH,

Respondent.

SC_____

Case No. 2D16-3542

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent Elizabeth Marsh rear-ended a vehicle while under the influence of illegal substances. Two of that vehicle's passengers were seriously injured. Marsh was convicted of driving under the influence (DUI) with serious bodily injury and driving while license suspended (DWLS) with serious bodily injury as to each passenger. Marsh v. State, No. 2D16-3542, 2018 WL 1660225, at 1 (Fla. 2nd DCA Apr. 6, 2018). (Appendix A) On appeal, the Second District vacated the DWLS causing serious bodily injury convictions directing convictions for DWLS reasoning the "dual enhancements for causing serious bodily injury for each victim violate the constitutional prohibition against double jeopardy" where Marsh was already punished for those injuries by the DUI causing serious bodily injury convictions. Marsh at 3.

SUMMARY OF ARGUMENT

Whether double jeopardy protections preclude separate punishments for separate crimes turns on the legislature's intent. The cases in conflict arrive at legislative intent using different methods. The Fourth [Anguille v. State, No. 4D16-3706, 2018 WL 1747814 (Fla. 4th DCA Apr. 11, 2018)] and Fifth [Lott v. State, 74 SO.3D 556 (FLA. 5TH DCA 2011)] Districts apply the

Blockburger[1] test to divine legislative intent and find no double jeopardy violation in these nonhomicide cases. The Second District rejects the Blockburger test and extends the single homicide rule to conclude the legislature did not intend to twice punish the infliction of injury by a single act. Because the Second District expressly rejected a Blockburger analysis to determine legislative intent and applied the single homicide rule to a nonhomicide case, the court's opinion is in direct and express conflict with Lott and Anguille and improperly extends this Court's single homicide rule cases (Chapman, Cooper, Houser) to this nonhomicide case. This Court should accept jurisdiction to resolve the conflict. Fla. R. App. P. 9.030(a)(2)(A)(iv), (2017); Art. V, § 3(b)(3), Fla. Const. (2017)

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH LOTT V. STATE, 74 SO.3D 556 (FLA. 5TH DCA 2011) AND ANGUILLE V. STATE, NO. 4D16-3706, 2018 WL 1747814 (FLA. 4TH DCA APR. 11, 2018).

Where a district court opinion acknowledges, without certifying conflict, another jurisdiction may hold a contrary view, the petitioner must show the "decision actually 'expressly

[1] Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

and directly' conflicts with the decision of another court." See State v. Vickery, 961 So.2d 309 (Fla. 2007):

> The difference is that a certification of conflict provides us with jurisdiction per se. On the other hand, when a district court does not certify the conflict, our jurisdiction to review the case depends on whether the decision actually "expressly and directly" conflicts with the decision of another court.

State v. Vickery, 312.

Express and direct conflict jurisdiction must be evidenced in the four corners of the opinion. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Here, the Second District acknowledged the contrary holding in Lott v. State, 74 So.3d 556 (Fla. 5th DCA 2011) on the issue of whether double jeopardy protections prevented dual convictions for reckless driving causing serious bodily injury and DWLS causing serious bodily injury, but found it unpersuasive. Rejecting the reasoning and holding of Lott, the Second District reaffirmed its commitment to its own precedent in Kelly v. State, 987 So.2d 1237 (Fla. 2nd DCA 2008). Those cases are discussed below, as is the subsequently issued Anguille, to illustrate the conflict between the Second and Fifth Districts which has existed since Lott and which has been brought into sharper focus with Marsh and the new conflict with the Fifth District in Anguille.

Kelly v. State, 987 So.2d 1237 (Fla. 2d DCA 2008)

In Kelly, the Second District concluded convictions for DUI

with serious bodily injury and driving without a valid driver's license with serious bodily injury violated double jeopardy protections based on this Court's single homicide rule analyses 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). Both Cooper and Chapman held that "the legislature did not intend to impose more than one penalty for causing the death of a single victim." Lawrence v. State, 801 So. 2d 293, 294 (Fla. 2d DCA 2001). The Second District, without addressing a Blockburger analysis, applied the "single homicide rule" of Cooper and Chapman, with a focus on the causation element of each crime, to preclude dual convictions for DUI with serious bodily injury and driving without a valid license with serious bodily injury. Kelly at 1239-40.

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

Lott crashed into the victim's seriously injuring the victim. Lott was thereafter convicted of DWLS causing serious bodily injury and reckless driving causing serious bodily injury. Against a claim such convictions violated his double jeopardy protections, the Fifth District rejected the Second District's analysis in Kelly and its application of Cooper, Chapman and Houser. The Fifth District concluded that because the statutes at issue were not homicide statutes, the analyses

in those cases did not apply. Lott at 560.

Instead, Lott analyzed the issue under Blockburger, codified in s. 775.021(4), Fla. Stat., and found there was no double jeopardy problem because the crimes were separate, each having an element the other did not. Lott at 558-59. The Lott court then examined the statutory exceptions to the Legislature's intent to punish separate crimes separately once they pass the Blockburger test and found none applied. Since the crimes passed the Blockburger test, dual convictions and punishments did not violate double jeopardy. (While noting and rejecting Lott's reliance on Kelly, the Lott court did not certify conflict between the opinions.) Lott at 559-60.)

Marsh v. State, No. 2D16-3542, 2018 WL 1660225 (Fla. 2nd DCA Apr. 6, 2018)

As set forth above, Marsh was convicted of DUI with serious bodily injury and DWLS with serious bodily injury as to each of two passengers injured when she crashed into their car. Marsh at 1. On appeal, the Second District vacated the DWLS causing serious bodily injury convictions directing convictions for DWLS reasoning the "dual enhancements for causing serious bodily injury for each victim violate the constitutional prohibition against double jeopardy" where Marsh was already punished for those injuries by the DUI causing serious bodily injury convictions. Marsh at 3. In so ruling, the Second District did not rely on a Blockburger analysis. Instead, its analysis was

predicated on the single homicide rule which it found controls even when crimes pass the Blockburger test. Marsh at 2.

In so holding, the Second District acknowledged the contrary holding in Lott, found it unpersuasive, and reaffirmed its commitment to Kelly:

> The State asserts that Kelly was erroneously decided because it improperly extended the rule precluding dual punishment for a single homicide to dual punishment for a single injury. In support of its argument, the State relies on the Fifth District's decision in Lott v. State, 74 So.3d 556, 559–60 (Fla. 5th DCA 2011), in which the court determined that convictions for both reckless driving and DWLS that were enhanced for causing serious bodily injury to the same victim did not place the defendant in double jeopardy.
>
> In so doing, the Fifth District rejected the defendant's argument that dual convictions were impermissible under Cooper and Chapman as interpreted in Kelly because they imposed dual penalties for causing serious bodily injury to only one victim during a single act. Lott, 74 So.3d at 559–60. The court found no legal support "to extend the reasoning from Cooper and Chapman, both of which involved a single homicide, to the instant case where a single serious injury occurred." Lott, 74 So.3d at 559.
>
> We remain unconvinced that Kelly was wrongly decided. 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, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), may not grant relief. McCullough, 230 So.3d at 591 (quoting Houser v. State, 474 So.2d 1193, 1197 (Fla. 1985)).

Marsh at 2.

The Second District went on to observe that 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 at 2 quoting from Gordon v. State, 780 So.2d 17, 25 (Fla. 2001), receded from on other grounds by Valdes v. State, 3 So.3d 1067 (Fla. 2009). The Marsh court observed that Gordon applied the single homicide rule to an *attempted* homicide. The Marsh opinion then explained that it had applied this "same principle to preclude enhancements to dual convictions for single acts of operating a vehicle that cause serious bodily injury to another." Marsh at 3.

The court then compared the facts of Cooper with those in Marsh. In Cooper, the defendant had rear-ended a vehicle while driving under the influence. A passenger in that vehicle was killed. Marsh notes, "The supreme court determined that the defendant could be convicted of both DUI manslaughter and DWLS as long as the latter charge was not enhanced for causing death as provided in section 322.34(3), Florida Statutes (1991). Cooper, 634 So.2d at 1075." Marsh at 3. The Second District, however, completely overlooks the reasoning of the Fifth District's opinion in Cooper, expressly approved by this Court, that turned on the fact the crimes in that case were both homicide offenses. Therefore, under Chapman, they both could not stand. Cooper v. State, 621 So. 2d 729, 732 (Fla. 5th DCA 1993), approved, 634 So. 2d 1074 (Fla. 1994).

The Marsh opinion observes that the enhancement statutes at issue in Cooper and Marsh both provide for enhanced penalties when the defendant "causes the death of or serious bodily injury to another." Marsh at 3. The court concludes, "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." Marsh at 3. The court found Kelly was properly decided based on Cooper and Chapman and rejected the State's claim Kelly "improperly extended the rule precluding dual punishment for a single homicide to precluding dual punishment for a single injury." Marsh at 3.

Anguille v. State, 2018 WL 1747814 (Fla. 4th DCA April 11, 2018)

Five days after the Second District's opinion in Marsh, the Fifth District issued its opinion in Anguille, (review pending before this Court in SC18-1056 and SC18-1002). Without citing to either Marsh, Kelly or Lott, the Fourth District concluded that convictions and sentences for both DUI with serious bodily injury and reckless driving with serious bodily injury *do not* violate double jeopardy protections. [In footnote 3, the court observed the contrary holding of cases involving a death—"the

single homicide rule"—and cited to Houser and McCullough v. State, 230 So.3d 586 (Fla. 2d DCA 2017). The court suggested its result might be different in a homicide case.]

In concluding there was no double jeopardy violation for the dual convictions for DUI with serious bodily injury and reckless driving with serious bodily injury, both crimes resulting in injury to a single victim, the Fourth District, like the Fifth in Lott, relied on s. 775.021(4), Fla. Stat. (2014), codifying the Blockburger test. Anguille at 2-3.

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) and added the statement of legislative intent to convict and sentence a defendant for each separate offense committed in a single episode with three limited exceptions. Valdes v. State, 3 So. 3d 1067, 1072-73 (Fla. 2009). After observing that the statute "expressly states an inherent desire to punish under separate statutory schemes unless otherwise so defined", Anguille at 3, the Fourth District concluded that the serious bodily injury enhancement did not change the elements of the underlying crimes of DUI and reckless driving. Id. at 3. Instead, it merely added an element to enhance the resulting 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. at 3.

The Conflict

Because Marsh rejects a Blockburger analysis to determine legislative intent for double jeopardy purposes and instead finds the single homicide rule applies in a nonhomicide-injury case, Marsh expressly and directly conflicts with Lott and Anguille which both apply Blockburger. The cases are in further conflict because Lott expressly rejects the single homicide rule and Anguille suggests its ruling might be different in a homicide case based on Houser.

CONCLUSION

Based on the foregoing, the State asks this Court to accept jurisdiction in this case.

CERTIFICATE OF SERVICE

I certify that the foregoing has been furnished to Michael Ufferman, ufferman@uffermanlaw.com, 2022-1 Raymond Diehl Rd., Tallahassee, FL 32308, by email on this 6th day of July, 2018.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12-point font.

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