IN THE SUPREME COURT OF FLORIDA

ROBERT J. REARDON, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC00-1395

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CARMEN F. CORRENTE
Assistant Attorney General
Florida Bar No. 304565
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118-3951
(386)238-4990
Fax (386)238-4997

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITY:

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is substantially accurate for the purpose of this appeal, with the following additions and corrections:

The victim's testimony at trial (see first excerpt attached) reflects that the Petitioner assaulted him with a knife prior to the commission of any aggravated battery. In fact, after Petitioner broke the window and entered the house, the victim saw Petitioner coming at him with the knife and attempted to retreat to the bathroom and lock the door. In addition, Petitioner continued to assault the victim after the stab wound was inflicted. (R5 257-265)

It was the defense who requested an instruction on aggravated assault because "[Petitioner] held the knife over his head and threatened [the victim]." The trial court found that the instruction was supported by the evidence. (R6 422, second excerpt attached) Thus, there is ample evidence to prove burglary with assault and aggravated battery.

SUMMARY OF THE ARGUMENT

It is the schedule of lesser included offenses in effect at the time the crime was committed which control the instructions given to the jury. Moreover, if Petitioner's contention is correct, criminals could escalate their crimes with impunity by committing aggravated batteries (instead of simple batteries) with a burglary; there would be no fear of a greater penalty. The District Court should be affirmed.

ARGUMENT

ISSUE

PETITIONER COMMITTED A BURGLARY WITH ASSAULT OR BATTERY AND AGGRAVATED BATTERY. THESE ARE TWO DISTINCT OFFENSES; OTHERWISE NO BURGLAR COULD EVER BE CONVICTED OF AGGRAVATED BATTERY.

Essentially, Petitioner argues that even though he committed an aggravated battery, his offense must be "capped" at simple battery because he was also convicted of burglary with a battery. Not only does this fly in the face of the legislature's stated intent to punish an offender for every crime committed in a single criminal episode, it defies logic and completely ignores the fact that Petitioner also committed a separate assault.

Petitioner first relies on the fact that aggravated battery was listed as a permissive lesser included offense as of the date of trial. Nevertheless, the trial court properly utilized the jury instructions and lesser included offense schedule in effect at the time the crime was committed (July 2, 1997). It is firmly established law that the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed. See State v. Smith, 547 So.2d 613, 616 (Fla. 1989). In addition, aggravated battery is listed only as a permissive lesser included offense. It is well settled that a

permissible lesser included offense is one which may or *may not* be included in the charged offense. Wilcott v. State, 509 So.2d 261 (Fla. 1987).

Moreover, in the amendment of the lesser included offenses, this Court noted that burglary with an assault or battery is "similar to the concept of lesser included offenses, but...couched in terms of enhancement." See Standard Jury Instructions in Criminal Cases(97-2), 723 So.2d 123, 124 (Fla. 1998). Burglary is enhanced with the commission of a simple assault or battery. An aggravated assault or aggravated battery is a more severe crime and, as with felony battery, subjects the perpetrator to additional punishment.

Just over two months ago this Court outlined the complete analysis to be used in determining double jeopardy issues. In Gordon v. State, 26 Fla. L. Weekly S90 (Fla. February 22, 2001) this Court began its analysis by stating that

> Absent a clear statement of legislative intent to authorize separate punishments for two crimes, courts employ the Blockburger test, as codified in section 775.021, Florida Statutes (1997), to determine whether separate offenses exist. ...Section 775.021 provides:
>
> (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, upon conviction and adjudication of

> guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. 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.

Section 775.021, Fla. Stat. (1997)(emphasis supplied). Thus, the Blockburger[1] test, or "same-elements" test, inquires whether each offense has an element that the other does not.

Clearly, as in Gordon, supra, each of the offenses in this case contain an element not found in the other. Aggravated battery

[1] 284 U.S. 299 (1932).

does not require a burglary; a burglary with a battery does not require the use of a weapon, an assault, or great bodily harm. In fact, the argument must be made that if Petitioner were correct in his claim, a perpetrator would be free to "aggravate" the assault or battery during the commission of a burglary without fear of any additional penalty. It is doubtful that the legislature, amid its expressed desire to punish each and every crime, intended to allow "aggravated" felonies to go unpunished.

As in Gordon, the real question in this case involves the second statutory exception listed above: offenses which are degrees of the same offense as provided by statute. This is also known as the "core offense" doctrine. Petitioner, however, argues that the "core offense" problem in this case involves the wording of the charging document. But, as emphasized above, the double jeopardy analysis must be conducted "without regard to the accusatory pleading or the proof adduced at trial." Otherwise, factors irrelevant to the objective analysis will taint the conclusion. Contrary to Petitioner's claim, this is not merely a statutory rule, but an established common-law principle which has been embraced by the courts. ("Further, courts may not examine facts in the record, but must look only to the statutory elements of the offenses to determine whether a double-jeopardy violation exists.") See Gaber v. State, 684 So. 2d 189, 190

(Fla. 1996); State v. McCloud, 577 So. 2d 939, 941 (Fla. 1991). Section 775.021 has been repeatedly recognized and accepted as the legislative embodiment of Blockburger.

Petitioner further contends that the third statutory exception of lesser offenses subsumed within the greater is more applicable under the facts of this case. He argues that if aggravated battery is truly a permissive lesser included offense, then it should be subsumed into the burglary with a battery. But two thresholds must first be met before his argument would be meritorious: (a) it is the law (and the jury instructions) in effect at the time of the crime which control; and (b) permissive lesser included offenses may or ***may not be*** included in the charged offense. Wilcott, supra. Additionally, in this case an assault was committed which supports a jury determination that both burglary with assault and aggravated battery occurred. Therefore, Petitioner is incorrect in his conclusion that the jury must have used the aggravated battery to enhance the burglary; the evidence strongly supports burglary with assault. As noted in the statement of case and facts, the defense requested an aggravated assault instruction because Petitioner "held the knife over his head and threatened [the victim]."

Moreover, although Petitioner makes a valiant effort to distinguish Billiot v. State, 711 So.2d 1277 (Fla. 1st DCA 1998),

the opinion is clear in its analysis:

> Aggravated battery and first degree burglary do not require identical elements of proof, are not degrees of the same offense and do not fall within ... lesser offenses the statutory elements of which are subsumed by the greater.

Billiot, supra, 711 So.2d at 1279. Similarly, in Washington v. State, 752 So.2d 16 (Fla. 2d DCA), review granted, 717 So.2d 464 (Fla. 2000) the Second District agreed with the reasoning in Billiot and found no double jeopardy violation in convictions for first degree burglary and aggravated battery stemming from a single blow with a hammer.

Under the burglary statute, a simple battery is sufficient to enhance the burglary penalty 15 years. What then, is the punishment for an aggravated battery with burglary? It is illogical to presume that the legislature intended that aggravated battery, in the burglary context, is no more severe than simple battery. Under the "same-elements" Blockburger test, it is clear that aggravated battery is not a lesser included offense of simple battery. Until the legislature creates a new crime titled burglary with aggravated battery or assault, double jeopardy does not prohibit convictions for burglary with a simple assault or simple battery, and aggravation of said simple assault or simple battery.

Therefore, it is apparent under the facts of this case that

aggravated battery should not be listed as a permissive lesser included offense of burglary with simple assault or battery. But regardless of the fact that the schedule of lesser included offenses was amended, the courts of this state have always refrained from expressing any opinion on the correctness of said schedule. In fact, in spite of what is listed in the schedule of lesser included offenses, courts are never relieved of the responsibility under law to charge the jury properly and correctly in each case. See Linehan v. State, 442 So.2d 244, 255-256 (Fla. 2d DCA 1983). As a result, the amended schedule of lesser included offenses so heavily relied upon by Petitioner is not the final word in this matter. This Court may well determine that clarification or modification of the schedule is necessary, but this does not alter the fact that Petitioner was properly convicted of both offenses. The district court's ruling should be affirmed.

CONCLUSION

The District Court's opinion should be upheld.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by basket delivery to John Selden, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114-4347, this 7th day of May, 2001.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____

CARMEN F. CORRENTE
Assistant Attorney General
Florida Bar No. 304565

_____

KELLIE A. NIELAN
Assistant Attorney General
Florida Bar No. 618550
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118-3951
(386)238-4990
Fax (386)238-4997

COUNSEL FOR RESPONDENT