IN THE SUPREME COURT OF FLORIDA

ROBERT J. REARDON, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	Supreme Court Case No. SC00-1395 5th DCA Case No. 5D97-2926

INITIAL BRIEF ON BEHALF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged by Information with attempted first degree murder as count one, and with burglary with assault or battery and with a dangerous weapon as count two (R 237). At trial, it was shown that Petitioner had a homosexual relationship with the victim, Thomas Rawson (T. vol. 5, 244-245). At some point before the offense, the victim broke off the relationship and Petitioner kept calling him and trying to contact him (T Vol 5, 252-253). On July 2, 1997, Petitioner broke into a residence while the victim was in the shower, and attacked him with a knife (T Vol. 6, 366-403). The victim was stabbed in the stomach (Id.).

The jury returned a verdict of guilty to the lesser included offense of aggravated battery on count one, and found Petitioner guilty as charged in count two of "burglary with an assault or battery and/or burglary while armed" (R 405-407). This charging error, and the verdict form employed, made it unclear which specific enhancement of the offense the jury found.

At sentencing, Petitioner renewed a motion for judgment of acquittal alleging that a conviction on both counts of the information violates the double jeopardy provisions of the federal and state constitutions (T Vol. 6, 503). After a hearing on the motion, the trial court granted the motion, relying on Crawford v.

State, 662 So.2d 1016 (Fla. 5th DCA 1995), and acquitted Petitioner of the aggravated battery conviction in count one, as being the same ground for the enhancement of the burglary to a first degree felony (R 418-419). The State timely appealed.

The Fifth District Court of Appeal ruled that both burglary with assault or battery, and aggravated battery, each contain an element that the other does not, and in their view of Blockburger v. United States, 284 U.S. 299 (1932), and Section 775.021 (4)(b), Florida Statutes (1997), convictions on both charges did not violate double jeopardy.

A timely notice to invoke this Court's discretionary jurisdiction was filed on June 20, 2000.

During the pendency of this matter, Petitioner was re-sentenced by the trial court, in accordance with the District Court's reinstatement of the conviction for the additional count. Petitioner's sentence was increased by 14 months, from 100 months in prison, to 114 months, and the 20 years of probation to follow remained.[1]

That sentence, however, was unclear with regard to the term imposed on

[1]Simultaneously herewith, Petitioner is filing a Motion to Supplement the Record on Appeal, to include the District Court's record of the appeal taken from this re-sentencing.

each distinct count, and, on motion pursuant to Rule 3.800(b), Florida Rules of Criminal Procedure, the trial court corrected the same to distinguish the counts and run the terms concurrently. An appeal from that re-sentencing, then, resulted in a brief filed pursuant to Anders v. California, 386 U.S. 738 (1967). [2]

[2] Id.

SUMMARY OF THE ARGUMENT

The Petitioner herein argues that the District Court erred in concluding, under the facts of his specific case, that dual convictions for both enhanced, first degree burglary "with assault or battery and while armed", together with aggravated battery based on a single occurrence of battery, are permissible under double jeopardy provision of Article 1, Section 9 of the Florida Constitution, and Section, 775.21(4), Florida Statutes (1998).

Petitioner further asserts that, to the extent the decision below relied upon the decisions in Billiot v. State, 711 So. 2d 1277 (Fla. 1st DCA 1998), and Washington v. State, 752 So.2d 16 (Fla. 2nd DCA 2000), those decisions are erroneous as neither took into account this Court's July 16, 1998, amendments to the Standard Jury Instructions and the Schedule of Lesser Included Offenses, which specifically list aggravated battery as a category two, permissive lesser included offense of burglary with assault or battery.

Lastly, Petitioner argues that the legislative intent is unclear whether the burglary enhancement statute is meant to require simple, misdemeanor battery exclusively, or whether the legislature used the terms "assault and battery" to encompass all degrees of those offenses as described in Chapter 784, Florida

Statutes. On that basis, Petitioner also argues that the court below erred in its decision to recede from its earlier holding in Crawford v. State, 662 So. 2d 1016 (Fla. 5th DCA 1995).

ARGUMENT

WHETHER, UNDER THE SPECIFIC CHARGING DOCUMENT AND JURY VERDICT IN THIS CASE, SENTENCES FOR ENHANCED "BURGLARY WITH ASSAULT OR BATTERY WHILE ARMED", AND FOR AGGRAVATED BATTERY, BASED ON THE SAME CONDUCT, VIOLATE DOUBLE JEOPARDY?

The issue in this case, never specifically addressed by this Court, is whether the enhancement of burglary, from a second degree to a first degree felony, based on an associated "assault or battery", was intended by the legislature to mean only simple assault and simple battery (misdemeanor offenses), or whether, instead, it incorporates all levels of those offense in Chapter 784, Florida Statutes, such as aggravated assault and aggravated battery. Petitioner respectfully submits that the latter is the case. Any other result is illogical, especially in light of the 1998 amendment to the Standard Jury Instructions schedule of lesser included offenses, which clearly lists aggravated assault and aggravated battery as schedule two, permissive lesser included offenses. [3]

In this case, the Fifth District below did not consider this, but ruled otherwise, holding that the aggravating element of use of a deadly weapon removed aggravated battery from the battery referred to in the burglary

[3] Standard Jury Instructions in Criminal Cases (97-2), 723 So.2d 123 (Fla. 1998).

enhancement, Section 810.02 (2)(a), Florida Statutes (1997). Under that section, a conviction for both burglary with battery, and for simple battery, is clearly double jeopardy under Section 775.021 (4)(b), Florida Statutes (1997). Lewis v. State, 740 So. 2d 82 (Fla. 3rd DCA 1999); Rohan v. State, 696 So. 2d 901 (Fla. 4th DCA 1997). Petitioner asserts that the District Court stopped short of the mark in deciding based on the "same elements" test of Blockburger v. United States, 284 U.S. 299 (1932), and misapplied the exceptions thereto contained in Section 775.21(4)(b)(1-3).

Unlike other cases were dual convictions for first degree burglary, enhanced on other grounds, and aggravated battery do not violate double jeopardy (discussed infra.), the problem specific to this case is the charge itself as brought in the Information, and the corresponding general verdict by the jury. Here, the State's charging error, and error in the requested verdict form, are the reasons why aggravated battery is the lesser included offense and why double jeopardy precludes dual convictions. Had Petitioner been charged only with armed burglary and aggravated battery, for example, rather than "burglary with assault or battery while armed", both convictions would be permissible.

Here, the Fifth District did not discuss this difference, but instead expressly receded from its earlier opinion directly on point in Crawford v. State, 662 So. 2d

1016 (Fla. 5th DCA 1995), upon which other Districts have relied (e.g. Rohan and Lewis, supras.). It did so, in part, because the Second District in Washington v. State, Case Number 2D99-00913 (Fla. 2nd DCA, January 12, 2000), receded from its earlier case of Henderson v. State, 727 So. 2d 284 (Fla. 2nd DCA 1999), on the same issue. This was, in turn, based on the First District's decision in Billiot v. State, 711 So. 2d 1277 (Fla. 1st DCA 1998), which expressly disagreed with Crawford, supra.

Petitioner intends to show that the conclusions in Billiot and Washington were incorrect, for the same reasons as the opinion below, but that they differ in their temporal relation to the amendment of the Standard Jury Instructions which disprove their reasoning.

What none of these decisions address, and what is the lynchpin to the outcome of this case, is the fact that aggravated battery is, and at the time of Petitioner's trial had just been listed as, a category two, permissive lesser included offense of first degree burglary with assault or battery.[4] Prior to that time, publication of the amendment had not caught up to the legislature's statutory enhancement. This fact was overlooked in the decisions to date, and is the principal cause of the error Petitioner alleges.

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[4] Id.

A. Recent Historical Background of Double Jeopardy and the "Single Act" Theory.

As this Court is aware, the major turning point in the interpretation of double jeopardy pursuant to Article 1, Section 9, of the Florida Constitution, resulted from this Court's decision in Carawan v. State, 515 So. 2d 161 (Fla. 1987), where, in the absence of clearly expressed legislative intent, this Court employed a "same evil" test when weighing the considerations of Blockburger, supra., against the rule of lenity.

In Chapter 88-131, § 7, Laws of Florida, the legislature amended Section 775.021(4), in direct response to the Carawan decision. This Court first recognized this abrogation in State v. Smith, 547 So. 2d 613 (Fla. 1989), holding that the amendment would not be applied retroactively. The revised section expressed intent to impose penalties for as many separate offenses as may occur in a single criminal episode (additions underlined):

> (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.

However, the revisions specifically included the final three exceptions, which go beyond the pure "same elements" test of Blockburger. This important distinction has sometimes gone unrecognized, leading to some of the lower court opinions claimed to be erroneous. See, e.g., Washington v. State, 752 So.2d 16 (Fla. 2nd DCA 2000) (holding that application of the Blockburger "same elements" test is the **sole** method of determining whether multiple punishments are double jeopardy violations [emphasis added]).

These decisions fail to take into account the issues beyond "same elements" which arise from the exceptions, as explained by Justice Kogan's concurring opinion in Sirmons v. State, 634 So.2d 153, 1554 (Fla. 1994):

I concur fully with the majority. I think it now is plain that the legislature's primary objection to our opinion in *Carawan v. State*, 515

So.2d 161 (Fla.1987), abrogation recognized, *State v. Smith*, 547 So.2d 613 (Fla.1989), was in our broad application of the rule of lenity through a "separate evils" analysis. In the place of *Carawan*, the legislature erected a four-tiered analysis that deserves some explication, because it obviously stops a good deal short of throwing Florida into what might be called a "strict *Blockburger* " (FN4) approach to multiple punishments law.

* * *

The third tier of the analysis (Element [C.]), which is critical to the present case, provides that multiple punishments for the same act are not permitted if the offenses in question "are degrees of the same offense as provided by statute." Section 775.021(4)(b)2., Fla.Stat. (1989). I think the construction placed on this language by the majority and the cases upon which the majority relies is the only correct one. Florida's criminal code is full of offenses that are merely aggravated forms of certain core underlying offenses such as theft, battery, possession of contraband, or homicide. It seems entirely illogical, as I believe the legislature recognized, to impose multiple punishments when all of the offenses in question both arose from a single act and were distinguished from each other only by degree elements.

As the fourth and final tier (Element [D.], the legislature has determined that offenses cannot be separately punished if they are "lesser offenses the statutory elements of which are subsumed by the greater offense." Section 775.021(4)(b)3., Fla.Stat. (1989) (emphasis added). This exception obviously deals with the problem of "permissive lesser included offenses." (FN5) As I noted in *Cave*,

> [t]he statute does not say that the exception applies only to lesser offenses the statutory elements of which are subsumed by the statutory elements of the greater offense. Thus, if the statutory elements of the lesser offense are subsumed by the greater offense, separate convictions and sentences cannot result. That is by

> definition the state that exists whenever a greater offense is charged in a manner that subsumes the statutory elements of a permissive lesser included offense, whether or not the latter is charged. Accordingly, the legislature itself has recognized the continued viability of permissive lesser included offenses as they existed prior to *Carawan*. The only possible conclusion is that permissive lesser included offenses cannot result in separate convictions and sentences in addition to those for the greater offense, whether or not the lesser offenses are charged.

Unfortunately, in evolving later interpretations, the "degree elements" test related to the second exception has caused confusion among the Districts. This Court has subsequently employed that test in the following cases: Goodwin v. State, 634 So. 2d 157 (Fla. 1994) (holding vehicular homicide and UBAL manslaughter, stemming from the death of one individual, were aggravated forms of a single, underlying offense, distinguished only by degree factors); and Thompson v. State, 650 So. 2d 969 (Fla. 1995) (multiple convictions arising from a single unlawful sexual act were prohibited as they were distinguished only by degree elements).

Petitioner respectfully submits that this problem of "degree elements" under the second exception, however, has less bearing on the question at hand than does the problem of lesser included offenses subsumed by the greater offense under the third exception. Here, again, lies the error which was not addressed in the decision below: aggravated battery is a permissive lesser included offense of burglary with

assault or battery. The enhancement of burglary from a second to a first degree felony, from 15 to 30 years in prison as a maximum sentence, is based on proving the elements of the lesser included offense of aggravated battery.

Petitioner further submits that this is in direct accord with this Court's holding in Cleveland v. State, 587 So.2d 1145 (Fla. 1991). There, the defendant's robbery charge was enhanced for the use of a firearm. In holding that an additional conviction and sentence for use of a firearm while committing a felony violated double jeopardy, the Court said (Id., at 1146):

> In *Hall v. State*, 517 So.2d 678 (Fla.1988), we ruled that the imposition of convictions for both robbery with a firearm and the display of a firearm during a criminal offense was improper when the convictions arose out of a single act. Our rationale in *Hall* was predicated in large part on *Carawan v. State*, 515 So.2d 161 (Fla.1987). The special concurring opinion in the decision under review and the state both contend that the legislature's enactment of the 1988 amendment to section 775.021(4) of the Florida Statutes repudiated the rationale supporting *Carawan*. They further contend that because the *Hall* decision utilized the *Carawan* holding, *Hall* is no longer valid and we should return to *State v. Gibson*, 452 So.2d 553 (Fla.1984), in which similar dual convictions were permitted.
>
> We disagree and hold that *Hall* still controls. It should be noted that Cleveland's attempted robbery conviction was enhanced from a second-degree felony to a first-degree felony because of the use of the firearm. Upon this enhancement Cleveland was punished for all the elements contained in section 790.07(2) and appropriately sentenced. Although such an enhancement was properly recognized by the Third District Court of Appeal in *Perez v. State*, 528 So.2d 129 (Fla. 3d DCA 1988), as a material factor in deciding whether there has been improper cumulative punishment for the same act, it was

apparently overlooked in this case.

> We hold that when a robbery conviction is enhanced because of the use of a firearm in committing the robbery, the single act involving the use of the same firearm in the commission of the same robbery cannot form the basis of a separate conviction and sentence for the use of a firearm while committing a felony under section 790.07(2).

Petitioner argues that here, as in Cleveland, he has been punished by the enhancement for all of the elements of the lesser included offense of aggravated battery.

B. Recent District Court Decisions and the Opinion Below.

As stated earlier, the decision below in this case specifically recedes from the Fifth District's previous holding in Crawford v. State, 662 So.2d 1016 (Fla. 5th DCA 1995). That court believed it was following the revised interpretations of the double jeopardy issue created by the First District in Billiot v. State, 711 So.2d 1277 (Fla. 1st DCA 1998), and the Second District in Washington v. State, 752 So.2d 16 (Fla. 2nd DCA 2000).

Although the reasoning was not clear and definitive, Petitioner submits that, based on all of the foregoing cases, the opinion in Crawford reached the correct conclusion (Id at 1017):

> In *Bradley v. State*, 540 So.2d 185 (Fla. 5th DCA 1989), this court held that it was improper to convict and sentence a defendant for both first degree burglary, and the battery which was used to enhance the burglary, from a second degree to a first degree felony crime. Judge Cowart observed that the Legislature has made the offense of burglary punishable on three different levels. It is punishable at the highest level, a first degree felony, if in the course of the burglary the defendant makes an assault or battery on any person, or is armed or arms himself. Thus the battery element of a first degree burglary crime can be viewed either as an enhancement factor of that crime, necessarily included in it, or as a species of a degree of the same crime of burglary.
>
> Pursuant to section 775.021(4)(b), the Florida Legislature has expressly stated its intent not to impose multiple punishments for:
>
> (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.
>
> However one chooses to analyze the crimes involved in this case, as being a degree crime of the same crime or subsumed because the battery was used to enhance the burglary, (FN3) or one being necessarily included in the other, (FN4) it is improper under this statute to convict for both.

The first case to take issue with this holding was Billiot, supra. The first

problem with Billiot is that the judgment and sentence of the trial court entered on defendant's knowing and voluntary plea, not after trial by jury. The second distinction is that in Billiot, the battery was enhanced to aggravated battery based upon wearing a mask and committing battery on a person over 65 years of age, separate and apart from the burglary. The First District then mistakenly relied on only the Blockburger "same elements" test, citing a limited portion of this Court's holding in Gaber v. State, 684 So.2d 189 (Fla. 1996) [Id. at 1279], and found that the charges contained different elements.

More importantly, however, Billiot was decided on May 20, 1998, **prior** to the July 16, 1998, effective date of Standard Jury Instructions in Criminal Cases (97-2), 723 So.2d 123 (Fla. 1998). That opinion revised the Schedule of Lesser Included Offenses, and specifically added aggravated battery as a category two, permissive lesser included offense of first degree burglary with assault or battery (723 So.2d at 130-131).

Because the First District was unaware of this impending change, they reached the following erroneous conclusion (711 So.2d at 1279):

> 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 category three as lesser offenses the statutory elements of which are subsumed by the greater.** But see *Whatley v. State*, 679 So.2d 1269 (Fla. 2d DCA 1996)(issue of whether prohibition against double jeopardy was violated when defendant was

> convicted of first degree burglary and also convicted of aggravated battery used to enhance burglary had sufficient merit that appellate counsel's failure to raise issue violated defendant's right to effective assistance of counsel).
>
> There are numerous cases holding that simple battery is a lesser included offense of burglary with a battery because the elements of simple battery are subsumed in the first degree burglary charge. See, e.g., *Bronson v. State*, 654 So.2d 584 (Fla. 2d DCA 1995); *Watson v. State*, 646 So.2d 288 (Fla. 2d DCA 1994); *Bradley v. State*, 540 So.2d 185 (Fla. 5th DCA 1989); *Spradley v. State*, 537 So.2d 1058 (Fla. 1st DCA 1989). Although the elements of simple battery are subsumed in first degree burglary, the elements of aggravated battery are not. First degree burglary for purposes of this case is the unauthorized entering or remaining in a dwelling with the intent to commit an offense therein and commission of a battery during the course of the offense. § 810.02(2)(a), Fla. Stat. (1995). Aggravated battery (with a deadly weapon) on an elderly victim, unlike simple battery, requires that the offender use a deadly weapon, section 784.045(1)(a)2., Florida Statutes, and that the battery be committed on a person 65 years of age or older, section 784.08, Florida Statutes. These elements distinguish the offense here from a simple battery, upon which first degree burglary must be predicated. [Emphasis added.]

Thus, the fundamental failing of distinguishing aggravated battery, as a lesser included offense, from simple battery for the purposes of the enhancement statute was born. In the instant case, the Fifth District relied directly on the language above. This, again, resulted in confusion of the Blockburger "same elements" test, with the necessity of also examining the statutory exceptions - here, that this Court had specifically made aggravated battery a lesser included offense.

Consequently, the third exception of 775.21(4)(b), applies, and the elements of the aggravated battery are subsumed by the greater offense - the enhanced, first degree felony.

The reasoning behind this false distinction between simple and aggravated battery was challenged by the dissents below. As Judge Cobb noted (763 So.2d at 425):

> The majority opinion states: "While simple battery is a lesser included offense of burglary with a battery ... the same is not true of aggravated battery." In my view, the same *is* true of aggravated battery, or any other form of battery established by the facts. In the instant case only one form of battery was established by the facts: aggravated battery. If the battery referred to in § 810.02(2)(a) defining burglary with a battery does not encompass aggravated battery, then the instant conviction of burglary with a battery cannot stand because only aggravated battery was proven. I do not read section 810.02(2)(a) as narrowly as does the majority herein; rather I agree with Judge Harris that the legislature used the term "battery" in that statute in the generic sense intending that any type of battery would suffice to elevate the degree of burglary charged.

The other, intervening case relied upon by the Fifth District herein, was Washington v. State, 752 So.2d 16 (Fla. 2nd DCA 2000). Agreeing with, and relying on Billiot, the Second District ruled as well that, while simple battery is subsumed in burglary with assault or battery, aggravated battery is not, because it is not a lesser included offense. The same error of failing to analyze the lesser included offense exception, and recognizing the amendment adding aggravated

battery as a lesser, is apparent in this decision.

The court in Washington was perhaps misled by the reference cited in the opinion to United States v. Dixon, 509 U.S. 688 (1993), which overruled Grady v. Corbin, 495 U.S. 508 (1990), and disapproved the earlier "same conduct" test for double jeopardy. However, these cases are not on point to the question presented, which is one of state law, interpreting the legislative intent of Section 775.021(4), including its exceptions not present in the federal claims, in the context of Article 1, Section 9, of the Florida Constitution. On that issue, this Court remains the final arbiter of what constitutes legislative definition of offenses and punishment, as opposed to what constitutes being "twice put in jeopardy for the same offense".

On that issue, Petitioner raises one point not discussed in earlier opinions and directly relevant to the specific facts of this case. That is, whether the statutory phrase in 775.21(4)(a): "without regard to the accusatory pleading or the proof adduced at trial", unduly and unconstitutionally limits this Court's, and lower courts', ability to interpret double jeopardy in specific instances. This problem arose at oral argument in this case before the District Court, and is cited in the Billiot opinion.

Here, as set forth in the Statement of Facts, the State's Information charged the Petitioner with burglary, enhanced to a first degree felony, because Petitioner

"made an assault or battery upon [the victim] **and** was armed or became armed with ... [a] dangerous weapon, to wit: knife" [emphasis added] (R 237). How else can this Court, or any other, determine what the elements of the offense are, for the purpose of the "same elements" test, without referring to the accusatory instrument to determine what statute section and sub-sections contain the referenced elements? By use of the conjunctive above, the State alleged aggravated battery by the use of a weapon.

In this case, Sections 810.02(1), 810.02(2)(a)(b), and 810.07, were all listed in the count of the Information. Therefore, the elements of aggravated battery were both present. The jury verdict did not distinguish one or the other, but read "and/or" (R 406). The jury also returned a verdict of guilty of aggravated battery as a lesser offense of the charged attempted first degree murder (R 237; R 405).

As both the majority and the dissents below recognized, this charging error must be construed to the Petitioner's benefit (763 So.2d at 425, 427 [FN 3]) . Valentine v. State, 688 So.2d 313 (Fla. 1996); Cf.: Torna v. State, 742 So.2d 366 (Fla. 3rd DCA 1999). In his dissenting opinion below, Judge Cobb summed it up as follows (763 So.2d at 425):

> As I see it, Reardon cannot be convicted of both burglary with a battery (a first-degree felony) and aggravated battery (a second-degree felony) when the proof shows that only one battery occurred. In my view, the State dropped the ball by not narrowing its allegation

> and the verdict form in count II to burglary while armed. Had it done so, there would have been no problem in affirming both convictions in this case. Instead, we must construe the verdict in count II most favorably to Reardon. *Torna v. State*, 742 So.2d 366 (Fla. 3d DCA 1999). This means construing the first-degree burglary conviction as being based upon the commission of a battery rather than being based on a finding that Reardon was armed. Moreover, if there is a conflict between the two convictions, we must affirm the more serious of the two, which in this case is the burglary count. See *State v. Barton*, 523 So.2d 152 (Fla.1988). This first-degree offense has incorporated the offense of battery (irrespective of the degree of the battery) as a necessary core element. A conviction of this degree of burglary precludes a separate conviction of the incorporated offense. See *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980); *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977).

On this score, this case is clearly distinguishable from other cases in which first degree burglary and aggravated battery do not violate double jeopardy, based upon the language of the charging document. In Cave v. State, 613 So.2d 454 (Fla. 1993), for example, the charges of burglary while armed and aggravated battery, in the same occurrence, were valid due to their separate elements. Likewise, in Bronson v. State, 768 So.2d 1274 (Fla. 1st DCA 2000), similar charges of burglary with a deadly weapon and aggravated battery passed double jeopardy muster.

Therefore, it is only where, as here, the State has charged burglary with a battery, and compounded the problem by also charging use of a weapon, such that the weapon equally applies to the aggravation of the battery, that the greater charge

of first degree battery with assault or battery subsumes the elements of the lesser included offense of aggravated battery, since that is the sole premise for the enhancement.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully submits that the District Court erred in concluding that the charges herein do not violate double jeopardy, and he respectfully requests that the decision below be reversed, and the judgment of the trial court dismissing count one be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Robert J. Reardon E07337, Charlotte C.I., 33123 Oil Well Road, Punta Gorda, FL 33955, on this 16th day of April, 2001.

_____
JOHN M. SELDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

_____
John M. Selden
Assistant Public Defender