IN THE SUPREME COURT OF FLORIDA

HAROLD EUGENE BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-721

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee, in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Harold Eugene Brown, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of four volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State accepts Brown's statement of the case and facts.

SUMMARY OF ARGUMENT

As found by the lower tribunal, this case is controlled by the legislative intent expressed in the creation of the statute. The legislative clearly intended to punish individuals who commit another felony and in the course of this action injure a citizen. Therefore, the Certified Question should be answered in the negative and the decision below approved.

Alternatively, applying the rules of statutory construction created by the Florida Legislature in section 775.021(4) and acknowledged by this Court in State v. Smith, **supra**, affirmance is required. It is uncontroverted that the criminal offenses at issue contain separate statutory elements. Under those rules of construction mandated by the legislature, the offenses must be separately convicted and punished because they contain unique statutory elements, are not degree crimes, and the offense statutes do not contain a clear and specific legislative statement that they not be punished separately. State v. Smith.

Brown's arguments are flatly contrary to section 775.021(4) and should be rejected. As this Court stated in M.P. v. State, 682 So.2d 79 (Fla. 1996) while addressing this issue:

> However, the district court correctly concluded that even without such a specific legislative authorization, the statutes at issue would pass the Blockburger test. Although the offenses at issue here share the common element of possession of a firearm, carrying a concealed weapon requires the additional element of concealment and possession of a firearm by a minor requires that the person who possesses the weapon be under eighteen years of age. Thus, these are not the same offenses for purposes of double jeopardy

Id. at 82.

Application of the legislative directed rules of statutory construction shows that the offenses are separate, are not subsumed into each other, and are not degree crimes. Furthermore, use of concepts such as multiple enhancements, same evils, and permissive lesser offenses as a basis for invalidating convictions is not authorized by the statute. Therefore, multiple punishments are proper. The decision of the district court below should be affirmed and the certified question answered in the negative.

ARGUMENT

ISSUE I

DO CONVICTIONS FOR ATTEMPTED FIRST DEGREE MURDER AND FELONY CAUSING BODILY INJURY ON ACCOUNT OF THE SAME ACT AMOUNT TO DOUBLE JEOPARDY? (Restated)

Appellant asserts that the trial court erred in convicting and sentencing him for the separate offense of Attempted First Degree Murder and Causing Bodily Injury During the Commission of a Felony. Appellant is wrong and this Court should answer the certified question in the negative and deny relief.

Jurisdiction

This Court has jurisdiction based on Article V § (3)(b)(4) as the lower tribunal certified a question of great public importance. The certified question is:

> DO CONVICTIONS FOR ATTEMPTED FIRST DEGREE MURDER AND FELONY CAUSING BODILY INJURY ON ACCOUNT OF THE SAME ACT AMOUNT TO DOUBLE JEOPARDY?

As noted by Brown, this issue is before this Court in Gordon v. State, 744 So.2d 1112 (Fla. 5th DCA 1999) review granted case number SC 96,834

The Standard of Review

An appellate court reviews double jeopardy challenges *de novo*. United States v. Chacko, 169 F.3d 140, 146 (2d Cir. 1999)(stating that: a double jeopardy question is one of law); United States v. Doyle, 121 F.3d 1078, 1083 (7th Cir. 1997)(noting that an appellate court reviews the district court's double jeopardy ruling *de novo*); Falcone v. Stewart, 120 F.3d 1082, 1084 (9th

Cir. 1997)(noting whether the double jeopardy clause has been violated is a question of law, reviewed *de novo*); United States v. Watkins, 147 F.3d 1294, 1296 (11th Cir. 1998). Whether the double jeopardy clause was violated is purely a matter of law. Indeed, under Blockburger, the double jeopardy question becomes solely a matter of statutory interpretation. Thus, the proper standard of review is *de novo*.

Preservation

Appellant preserved this claim by proper objection in the trial court. The issue was raised and ruled on in the lower tribunal.

Merits

The Double Jeopardy Clause provides that no person shall "be subject for the **same** offence to be **twice** put in jeopardy of life or limb." U.S. CONST. AMEND. V., CL. 2. Florida's Constitutional provision provides that "[n]o person shall be . . . **twice** put in jeopardy for the **same** offense, FLA. CONST., ART. I, § 9. Each constitution's double jeopardy provision has been interpreted in a similar fashion. In fact, this Court held in Carawan v. State 515 So.2d 161 (Fla. 1987) that Florida's interpretation "mirrors" the federal.

However, conviction and sentence for separate offenses in the same trial is, strictly speaking, not a question of double jeopardy. It is purely a question of legislative intent: did the legislature intend that the offenses be separately convicted and

punished? See, Missouri v. Hunter, 459 U.S. 359, 74 L.Ed.2d 535, 103 S. Ct. 673 (1983):

> With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does not more than prevent the sentencing court from prescribing greater punishment than the legislature intended. 459 U.S. 366.
>
> ....
>
> Where, as here, a legislature specifically authorizes cumulative punishment under two statues, regardless of whether those two statutes proscribe the "same" conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment in a single trial. 459 U.S. 368-369.

This Court explicitly adopted the above analysis and conclusion in State v. Smith, 547 So.2d 613 (Fla. 1989) and held that the Florida Legislature by its amendments to section 775.021(4) had directed that separate offenses with unique statutory elements be subject to separate convictions and punishment: "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." 547 So.2d at 616. The state submits that the above controlling law is enough to resolve this case.

The state asserts that the addition of this offense into the extensive statutory scheme and the inclusion as an element that the state must prove the commission of another felony is a specific indication by the legislature that irrespective of other concerns, the legislature wanted this statute as an additional conviction when a felon injures a citizen in the course of

committing a felony. This Hunter based rationale was the basis for the Florida Supreme Court's decision in State v. Enmund, 476 So.2d 165 (Fla. 1985) which held that the legislature intended for the underlying felony and the felony murder to result in conviction and separate punishments. The statute involved in this case was passed because the Supreme Court found that attempted felony murder was no longer a crime in State v. Gray, 654 So.2d 552 (Fla. 1995) The district court opinion acknowledged that this broader crime was created in response to the decision in Gray. Its analysis of the legislature's intent reveals that as in Enmund the legislature desired multiple punishment. Boler, 678 So.2d 319 (Fla. 1996) Hunter Since, it is clear that the legislature intended multiple punishments, the question should be answered in the negative and the decision below approved.

This Enmund based proposition does not change because the crime is attempted felony murder and the underlying felony is bodily injury during the commission of a felony, as the lower tribunal recognized that courts of this state have consistently applied the Enmund principle to attempted felony murder and the underlying felony. See McLeod v. State, 477 So.2d 5 (Fla. 1st DCA 1985), Roulhac v. State, 648 So.2d 203 (Fla. 1st DCA 1994) Viera v. State, 532 So.2d 743 (Fla. 3d DCA 1988), George v. State, 509 So.2d 972 (Fla. 5th DCA 1987) Thus, the lower tribunal correctly determined that Brown's challenge to his convictions must fail.

The state maintains that this Court need go no further as legislative intent controls, however in the interest of completeness other matters will be addressed. The legislature created the statutory scheme found in 775.021(4) Fla. Stat. to evaluate multiple punishment issues. The legislature has repeatedly defended its enactments designed to punish separate offenses. There are only three exceptions 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.[1]

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[1] These exceptions are no different from the Blockburger test. The Legislature amended this statute to overrule Carawan v. State, 515 So.2d 161 (Fla. 1987). *See* State v. Smith, 547 So.2d 613, 616 (Fla. 1989)(the Florida Supreme Court itself noting that 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). The exceptions are merely a codification of Blockburger. Billups v. State, 690 So.2d 1381 1382 (Fla. 1st DCA 1997)(stating that section 775.021(4) is a codification of the Blockburger test). The Fifth District has stated: the legislature expressed its intent that there be a separate conviction and sentence for each criminal offense, unless one of the offenses is a degree of the other, a necessarily lesser included offense and subsumed in the other, or both offenses are identical. McAllister v. State, 718 So.2d 917 (Fla. 5th DCA 1998). This seems to imply that an offense can be a necessarily lesser included offense but not subsumed by the greater offense. No, a necessarily lesser included offense is automatically a subsumed offense. Probably what the McAllister Court means is a true necessarily lesser included offense as opposed to a category one necessarily lesser included offense. Florida lists many offenses as "necessarily lesser included offenses" for purposes of giving additional jury instructions that are not actually necessarily lesser included offenses. John F. Yetter, TRUTH IN JURY INSTRUCTIONS: REFORMING THE LAW OF LESSER INCLUDED OFFENSES, 9 St. Thomas L. Rev. 603

As the lower tribunal recognized, it is uncontroverted that the offenses at issue contain unique statutory elements. Attempted first degree murder requires the state establish a premeditated intent to kill but does not require any injury. Bodily injury in the commission of a felony requires actual injury be inflicted, but does not require a premeditated intent to kill. Thus, the offenses are separate offenses and the first exception found in § 775.021(4) does not apply.

Furthermore, these offense are not degrees of the same offense. The exception found in 775.021(4) provides that the legislature does not intend for multiple punishments for (2) offenses which are degrees of the same offense as provided by statute. Thus, under the wording of the exception, only the legislature by its use of statutory language may create degree crimes. State v. Anderson, 695 So.2d 309 (Fla. 1997).

Moreover the third exception, (3) offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense, does not apply This requires an examination of the statutory elements and requires one statutory offense to be a lesser. In Brown's case, the statutory offenses are both first degree felonies. Thus, there is no lesser. Moreover, when you combine the lesser offense requirement with the requirement that the statutory elements of the lesser must be subsumed, the only

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(1997)(explaining true lesser included offenses and arguing that Florida should follow other jurisdictions and should not create lesser included offense that in fact are not lesser included offenses).

offenses that qualify are necessarily lesser offenses. Neither of these offenses are necessarily lesser offenses of the other.

Finally, Brown argues that these offenses are alternate conduct crimes and a different analysis must be employed. Quite simply he is wrong. First he is wrong because if the legislature intended multiple punishments then whether a statute is a single conduct or alternate conduct statute is irrelevant.

Further he is wrong because this is not an alternative conduct statute. An alternative conduct statute is a statute that prohibits a variety of types of conduct. Alternative conduct statutes are several statutes "rolled" into one. For example, the controlled substance statute, § 893.13(1)(a) , Fla. Stat. (1998), is an alternative conduct statute. Bradshaw v. State, 727 So. 2d 1014 (Fla. 1st DCA 1999); Johnson v. State, 712 So.2d 380 (Fla. 1998); Gibbs v. State, 698 So. 2d 1206 (Fla. 1997). It can be violate in different ways by: (1) selling a controlled substance; (2) manufacturing a controlled substance; (3) delivering a controlled substance; (4) possessing a controlled substance with intent to sell; (5) possessing a controlled substance with intent to manufacture; (6) possessing a controlled substance with intent to deliver. This statute is, in effect, six statutes contained in one. Therefore, if a defendant violates it in multiple ways, the State is entitled to multiple convictions. See McLeod v. State, 577 So.2d 939 (Fla. 1991)(convictions for sale and possession of single quantity of drugs approved)

The bodily injury during a felony statute is not an alternative conduct statute. If you commit a felony and injure someone you are subject to prosecution. Confirmation of this assertion comes from the language of the statute. The statute employs the term "any felony" in the definition. Thus, under the well settled a/any test, See Wallace v. State, 724 So.2d 1176 (Fla. 1998), the legislatively chosen language establishes that there can be only one offense of bodily injury in the course of committing a non enumerated felony even if the individual is injured in the course of the defendant committing several simultaneous non enumerated felonies.[2]

However, even if it is an alternative conduct statute the convictions are valid. A defendant can violate the bodily injury in the commission of an non enumerated felony statute by committing various non enumerated offenses. Here, Brown committed Bodily injury in the course of committing an aggravated battery, an attempted murder and an aggravated assault[3]. Arguably three separate offenses. But he was only convicted of one. If appellant had been convicted of three counts of bodily injury in the commission of a felony, one for committing the aggravated assault, one for committing the aggravated battery and

[2] It should be noted that the statute requires only injury not great bodily harm or any other aggravated form of injury.

[3] In fact, there were several possible basis for the underlying felony, the threatening with the gun, the shooting with the gun, and the driving the car at the shot victim lying in the road after the victim exited the vehicle.

one for committing the attempted murder and was also convicted of attempted murder, then those multiple convictions might violate double jeopardy but appellant was convicted of only one count of bodily injury in the commission of a felony and there is no double jeopardy problem. McLeod.

Inportantly, attempted premeditated murder is not an alternate conduct statute. The statute precludes an attempt to commit a crime. The statute provides that in the attempt if one does any act toward the commission of the offense one has committed an attempt. Again, the statute uses the term “any”. Thus, if anyone commits several acts towards the commission of one criminal offense, the individual has committed only one attempt. The statute simply cannot be construed to create multiple offenses which can support multiple convictions. Because these statutory section do not contain multiple offenses, Brown’s alternate conduct analysis is irrelevant to the issue presented by the certified question.

Summary

As found by the lower tribunal, this case is controlled by the legislative intent expressed in the creation of the statute. The legislative clearly intended to punish individuals who commit another felony and in the course of this action injure a citizen. Therefore, the Certified Question should be answered in the negative and the decision below approved.

Alternatively, applying the rules of statutory construction created by the Florida Legislature in section 775.021(4) and

acknowledged by this Court in State v. Smith, **supra**, affirmance is required. It is uncontroverted that the criminal offenses at issue contain separate statutory elements. Under those rules of construction mandated by the legislature, the offenses must be separately convicted and punished because they contain unique statutory elements, are not degree crimes, and the offense statutes do not contain a clear and specific legislative statement that they not be punished separately. State v. Smith.

Appellant's argument is flatly contrary to section 775.021(4) and should be rejected. As this Court stated in M.P. v. State, 682 So.2d 79 (Fla. 1996) while addressing this issue:

> However, the district court correctly concluded that even without such a specific legislative authorization, the statutes at issue would pass the Blockburger test. Although the offenses at issue here share the common element of possession of a firearm, carrying a concealed weapon requires the additional element of concealment and possession of a firearm by a minor requires that the person who possesses the weapon be under eighteen years of age. Thus, these are not the same offenses for purposes of double jeopardy

Id. at 82.

Application of the legislative directed rules of statutory construction shows that the offenses are separate, are not subsumed into each other, and are not degree crimes. Therefore, multiple punishments are proper. The decision of the district court below should be affirmed and the certified question answered in the negative.

ISSUE II

DO CONVICTIONS FOR ATTEMPTED FIRST DEGREE MURDER AND FELONY CAUSING BODILY INJURY ON ACCOUNT OF THE SAME ACT AMOUNT TO DOUBLE JEOPARDY? (Restated)

Brown has chosen to break up the multiple punishments argument into several issues. The state incorporates by reference and reiterates its argument contained in issue one. The state maintains that as found by the lower tribunal the legislature intended separate punishment and under § 775.021(4) Fla. Stat. the offenses are separate. Thus, the certified question should be answered in the negative and the decision below approved.

In this issue, appellant asserts that multiple enhancements violate double jeopardy. Appellant is wrong. There is no place in the required analytic framework where multiple enhancements are factored into the equation.

Appellant argues that under Cleveland v. State 587 So.2d 1145 (Fla. 1991) the offenses are double enhanced and thus violate double jeopardy. Appellant is wrong. The statute requires the statutory elements of the offense to be examined. Gaber v. State, 684 So.2d 189 (Fla. 1996) The statutory elements of the offense are different. Brown improperly tries to compare the elements not of the offense but of the charging document. This is not proper under the statutory framework which requires examination of the statutory elements. Gaber

In fact, Brown's case does not support his assertions. In Cleveland, the court examined the statutory elements and found the offenses to be the same. Cleveland does not hold and given

the statutory language could not hold that you examine the way the offenses are charged in the information. Thus, Cleveland does not control and this Court must deny relief.

Moreover, the Court in Gayman v. State, 616 So.2d 17 (Fla. 1993) held that when the statutes are not enhancements but are separate statutory crimes the fact that the punishment is enhanced from petit theft to grand theft and then you are habitualized does not create a multiple punishment problem. Thus, the holding in Cleveland must be understood as a determination that the offenses were the same. Here the offenses are different and this Court should deny relief.

Brown's reliance on Crawford v. State, 662 So.2d 1016 (Fla. 5th DCA 1995), is misplaced. The Fifth District has en banc revisited this issue and overruled Crawford. See Reardon v. State, 25 Florida L. Weekly 1336 (Fla. 5th DCA June 1, 2000)(en banc) The other appellate courts have likewise rejected the Crawford analysis. Billiot v. State, 711 So.2d 1277 (Fla. 1st DCA 1998), Washington v. State, 752 So.2d 16 (Fla. 2nd DCA 2000)

Appellant has presented various arguments why his multiple convictions should be invalidated. Appellant's arguments should be rejected by this Court. Shortly after the Florida Supreme Court reversed its previously held position regarding the existence of an attempted felony murder offense, the legislature acted. It created a new statute which incorporated the old attempted felony murder doctrine. The statute which provided that anyone inflicting bodily injury during the course of

committing a felony committed a crime, was a legislative statement that they wanted both the underlying felony and the new bodily injury felony prosecuted. Any further analysis is unnecessary because in the multiple punishment arena what the legislature wants the legislature gets.

Alternatively, application of the statutory test establishes that the offenses are separate, and do not fit into the only authorized exceptions to the multiple punishment rule. Therefore, appellant's arguments should be rejected and the dual convictions affirmed.

Summary

As found by the lower tribunal, this case is controlled by the legislative intent expressed in the creation of the statute. The legislative clearly intended to punish individuals who commit another felony and in the course of this action injure a citizen. Therefore, the Certified Question should be answered in the negative and the decision below approved.

Alternatively, applying the rules of statutory construction created by the Florida Legislature in section 775.021(4) and acknowledged by this Court in State v. Smith, **supra**, affirmance is required. It is uncontroverted that the criminal offenses at issue contain separate statutory elements. Under those rules of construction mandated by the legislature, the offenses must be separately convicted and punished because they contain unique statutory elements, are not degree crimes, and the relevant

statutes do not contain a clear and specific legislative statement that they not be punished separately. State v. Smith.

Brown's argument is flatly contrary to legislative intent, contrary to section 775.021(4) and should be rejected. There is no legal basis for any convictions to be reversed on multiple punishment grounds because they have been doubly enhanced. Application of the legislative directed rules of statutory construction shows that the offenses are separate, are not subsumed into each other, and are not degree crimes. The district court below should be affirmed and the certified question answered in the negative.

ISSUE III

DO CONVICTIONS FOR ATTEMPTED FIRST DEGREE MURDER AND FELONY CAUSING BODILY INJURY ON ACCOUNT OF THE SAME ACT AMOUNT TO DOUBLE JEOPARDY? (Restated)

Brown has chosen to break up the multiple punishments argument into several issues. The state incorporates by reference and reiterates its argument contained in issue one. The state maintains that as found by the lower tribunal the legislature intended separate punishment and under § 775.021(4) the offenses are separate. Thus, the certified question should be answered in the negative and the decision below approved.

Brown's last argument is that the offenses are permissive lesser included offenses and therefore, multiple punishments are not authorized. In this issue, appellant asserts that multiple punishments for permissive lesser include offenses violate double jeopardy. Appellant is wrong. There is no place in the required analytic framework where permissive lesser offenses are factored into the equation.

Brown's argument relates to the third exception, (3) offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense. This exception requires an examination of the statutory elements of the crimes and requires one statutory offense to be a lesser. In Brown's case, the statutory offenses are both first degree felonies. Thus, there is no lesser. Moreover, when you combine the lesser offense requirement with the requirement that the statutory elements of the lesser must be subsumed, the only offenses that qualify are

necessarily lesser offenses. Neither of these offenses are necessarily lesser offenses of the other, thus the exception does not apply and relief must be denied.

Brown tries to avoid the rule by again declaring that the statutes are alternative conduct statutes. As this is not so, his argument is predicated on an invalid basis and must be rejected.

Summary

As found by the lower tribunal, this case is controlled by the legislative intent expressed in the creation of the statute. The legislative clearly intended to punish individuals who commit another felony and in the course of this action injure a citizen. Therefore, the Certified Question should be answered in the negative and the decision below approved.

Alternatively, applying the rules of statutory construction created by the Florida Legislature in section 775.021(4) and acknowledged by this Court in State v. Smith, **supra**, affirmance is required. It is uncontroverted that the criminal offenses at issue contain separate statutory elements. Under those rules of construction mandated by the legislature, the offenses must be separately convicted and punished because they contain unique statutory elements, are not degree crimes, and the offense statutes do not contain a clear and specific legislative statement that they not be punished separately. State v. Smith.

Brown's argument is flatly contrary to legislative intent, contrary to section 775.021(4) and should be rejected. There is

no legal basis for any convictions to be reversed on multiple punishment grounds because they are permissive lesser included offenses. Application of the legislatively directed rules of statutory construction shows that the offenses are separate, are not subsumed into each other, and are not degree crimes. Therefore, multiple punishments are proper. The district court below should be affirmed and the certified question answered in the negative.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal should be approved, and the judgements entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to **Richard Summa, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301**, this 22nd day of June, 2000.

_____
Edward C. Hill, Jr.
Attorney for the State of Florida

[C:\Supreme Court\03-15-01\00-721ans.wpd --- 3/16/01,9:41 am]

IN THE SUPREME COURT OF FLORIDA

HAROLD EUGENE BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-721

APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

Brown v. State, DCA Case # 1D98-4335
Revised opinion issued March 27, 2000

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Opinion issued March 27, 2000