IN THE SUPREME COURT OF FLORIDA

HAROLD EUGENE BROWN,

Petitioner,

vs. **CASE NO. SC00-721**

STATE OF FLORIDA,

Respondent.
_______________________/

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

HAROLD EUGENE BROWN,

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vs. **CASE NO. SC00-721**

STATE OF FLORIDA,

Respondent.
_________________________/

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Defendant in the circuit court for Duval County, where he was convicted of the offenses of attempted first degree murder with a firearm and causing bodily injury in the commission of a felony. Petitioner was the Appellant in the First District Court of Appeal. He will be referred to in this brief as Petitioner or Harold Brown.

The record consists of four volumes, and will be referred to as "R," followed by the appropriate volume and page number, e.g., (R.I,1).

The opinion of the District Court and the Order of the District Court certifying a question of great public importance are attached as an appendix and will be referred to as "App".

STATEMENT OF FONT SIZE

Undersigned counsel hereby certifies that this brief has been

prepared using 12 point Courier New, a font that is not proportionally spaced.

STATEMENT OF THE CASE

By information filed May 6, 1998, appellant Harold Eugene Brown was charged in Count I with the April 14, 1998, attempted

premeditated murder with a firearm of Carletha Brown, in contravention of section 782.04(1)(a), 777.04(1), and 775.087, Florida Statutes. (R.I,8). Specifically, Count I charged that appellant attempted to kill Carletha Brown "by shooting" her with a pistol. (R.I,8).

In Count II, appellant Harold Brown was charged with the April 14, 1998, causing bodily injury while in the commission of a felony, "to-wit: attempted murder and/or any lesser included felony offense,..." in contravention of section 782.051(2), Florida Statutes. (R.I,8).

A jury trial was held September 9, 1998, through September 11, 1998. Mr. Brown was found guilty on both counts. (R.IV,414). A sentencing hearing was held on October 16, 1998. (R.I,152). Appellant was sentenced to concurrent guidelines sentences of 14 1/2 years on each count. (R.I,166).

On direct appeal to the First District Court of Appeal, Petitioner challenged only his sentence on double jeopardy grounds. Petitioner's conviction and sentence were affirmed by the district court's revised opinion issued March 27, 2000. (App.) By separate order issued March 27, 2000, on motion for rehearing, the district court certified the following question as one of great public importance:

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

(App.).

Notice of intent to seek discretionary review was filed by Petitioner on March 30, 2000. On April 5, 2000, this Court issued an Order Postponing Decision on Jurisdiction and Briefing Schedule, ordering Petitioner to file his initial brief on the merits on or before May 1, 2000.

Petitioner notes that the first issue raised herein has been raised by the parties in Gordon v. State, 744 So. 2d 1112 (Fla. 5th DCA 1999), review granted, Florida Supreme Court Case No. SC96834, February 10, 2000.

STATEMENT OF THE FACTS

Prior to trial, appellant moved to dismiss Count II on the ground that convictions for both Count I and Count II would violate double jeopardy principles. (R.I,37). The trial court denied the motion. (R.I,40; R.II,8).

The victim, Carletha Brown, testified at trial. Carletha Brown was married to appellant Harold Brown. (R.II,66). Her

boyfriend, however, was Kenny Dennison. (R.II,66). Carletha and Harold stopped living together in December, 1997. (R.II,67). Harold Brown knew that Carletha had a boyfriend; Carletha made no secret of that fact. (R.II,68). Harold Brown moved back in with Carletha in February, 1998, because Harold needed a place to stay after having knee surgery. (R.II,69). Harold and Carletha were just roommates at that point. (R.II,69). By the end of February, Carletha wanted Harold Brown to move out. (R.II,66).

On April 13, 1998, Carletha was visiting her friend Barbara Williams. Her boyfriend, Kenny Dennison was with her. (R.II,75). Carletha noticed her car missing from the parking lot. Carletha then received a phone call from Harold Brown, and learned that he had busted the windshield of her car prior to returning it. (R.II,76-78). Appellant phoned Carletha many times that evening, calling her names. (R.II,79-80). Carletha went home with a police escort that evening. (R.II,80-81). According to Carletha, appellant left messages on her voice mail stating that if he caught her with her boyfriend he would kill both of them. (R.II,82). Carletha went back to Barbara Williams house to spend the evening. (R.II,82).

Appellant phoned Carletha at Williams' house and said he would fix the car. Carletha drove the car to work the next morning. (R.II,85). Against her wishes, appellant took the car, stating that he brought it to a glass repair shop. (R.II,86). Because she did not have a car, Carletha agreed to let Harold pick her up for

lunch. (R.II,86). The two purchased lunch. Harold drove Carletha back to work, and she ate her lunch at work. (R.II,87). Later, appellant told Carletha that her car still was not ready, so he picked her up from work. (R.II,87). Appellant did not arrive at the appointed time, however, and Carletha started walking. (R.II,88). Appellant picked her up on the way, however. (R.II,89). Appellant said he was taking her to pick up the car, but Carletha suspected otherwise. (R.II,90). When she tried to open the car door, appellant "swerved real hard." (R.II,90). Carletha called her son, Curtis, using her cell phone. (R.II,90). Carletha told Curtis to put her mail up for her because she was expecting a check. (R.II,91). According to Carletha, Harold then looked at her and stated: "You-all plotting against me." Harold then picked up a gun from between the seats, put it to her side, said "Bitch," and shot her. (R.II,91). Carletha said that Harold then shoved her out of the car and into the middle of the street. (R.II,93,94). When she looked up, Harold was coming toward her with the car. Carletha said she rolled out of the way and claimed that Harold ran over her purse. (R.II,94). Carletha was taken to the hospital where surgery was performed. (R.II,97).

On cross-examination, Carletha said she did not remember whether the car was going the wrong way down a one-way street. (R.II,121). Carletha, in the past, had 48 convictions for crimes involving dishonesty, pertaining to worthless checks. (R.II,122).

By stipulation, the parties agreed that appellant did, in

fact, take the car to have the windshield repaired. (R.II,131).

Jeremy Simmons testified that on April 13, 1998, about 3:30 p.m., he noticed a car driving the wrong way on Adams Street, swerving back and forth. (R.II,132-133). The car made a U-turn. Simmons then noticed the door open and a female fell out. (R.II,134). The car then drove back around the woman and drove away. (R.II,134). Simmons could not tell whether the vehicle tried to hit the woman. (R.II,138). The street has three lanes. (R.II,167). Carletha was lying in the center lane. (R.II,167). When the car drove back towards Carletha, it was driving on the sidewalk. The driver then drove quickly around Carletha, coming very close to her, about 1 to 2 feet in distance. (R.II,169-170,177).

In discussing objections to a physician's deposition, the state made clear that the act of attempted murder was the shooting and not attempting to run over the victim. (R.II,151). The medical testimony was relevant to show that the victim would have died but for the medical treatment. This was relevant to prove the third element of attempted first degree murder. (R.II,151).

Dasha Green assisted Careltha after the shooting. Carletha told Ms. Green that her husband shot her. (R.II,156). According to Officer Wilson, Carleth'a purse had not been run over. (R.II,188). The deposition testimony of Dr. Simon Lampard was admitted into evidence. (R.II,193). Lampard is the surgeon who operated on Carletha Brown. (R.II,197). Lampard said Carletha would probably

have bled to death without the surgery. (R.II,198). The state rested after the reading of Dr. Lampard's testimony.

Harold Brown testified in his defense. (R.III,211). Harold said that he busted the windshield on Carletha's car because she failed to pick her son up from a scout meeting. (R.III,217). Appellant claimed that he did not threaten to kill Carletha on April 13, 1998. (R.III,219). Harold Brown testified that he picked up Carletha after work and was driving her to the repair shop. Appellant testified that the two got into an argument when Carletha "grabbed the steering wheel, and we went down a one-way street, and I hit her on her hand because I was upset because it was rush hour traffic." (R.III,225).

Appellant testified that he has known Carletha for 8 1/2 years and has seen her smoke crack cocaine and use powder cocaine. (R.III,231). Appellant said Carletha gets "real paranoid" when she takes cocaine. In addition, her eyes get glazed and "her mouth is always like she's sucking something up." (R.III,233). Appellant opined that Carletha was high on something on the afternoon of April 14, 1998, because her eyes were glazed as in the past and she was unresponsive. (R.III,233). Appellant said Carletha was paranoid and grabbed the steering wheel. (R.III,234). After appellant hit her hand, he saw the gun come up, and Carletha said: "I'm going to fuck you up." (R.III,235). Appellant said he had one hand on the wheel and one hand struggling with Carletha when he heard the gun go off. (R.III,236). Defense counsel asked appellant

what went through his mind when he first saw the gun. Appellant stated that Carletha had pulled a gun on him before, said she was going to kill him, and cracked him in the head with a vase. (R.III,236). The state's objection was sustained. (R.III,236). Defense counsel argued that appellant's knowledge of her prior acts was relevant to demonstrate reasonable apprehension of harm. (R.III,236).

Appellant proffered the following testimony. Appellant stated that he grabbed her hand and they started struggling. Appellant was steering with his left hand and trying to take the gun away from her with his other hand. During this process, the gun went off. (R.III,241). Appellant said Carletha produced the gun. Appellant did not have it in the car. (R.III,242). Appellant said the gun was coming toward him. He grabbed the gun while it was in her hand. Appellant was trying to pull the gun from her, and it went off. (R.III,243). The trial judge said he would permit the testimony. (R.III,245). The judge, however, stated that he would not permit defense counsel to inquire as to what was going through Mr. Brown's mind (reasonable apprehension) when he saw the gun. (R.III,249). That is, appellant would not be able to introduce evidence of Carletha's former attacks upon him.

After the jury was seated, appellant testified that after he hit Carletha's hand, she said "I'm going to fuck you up." (R.III,250). Appellant then saw the gun coming toward him. With one hand still on the steering wheel, he grabbed her hand with his

right hand. They struggled with the gun, and the gun went off. (R.III,250). Appellant said he did not push Carletha out of the car. (R.III,251). Appellant said he never intended to shoot Carletha. (R.III,251). Rather, appellant was simply trying to protect himself. (R.III,251). Appellant threw the gun away out of panic or fear. (R.III,252).

The trial court then reversed his ruling on the prior bad acts of the victim. (R.III,275-278). Once, when they were having an argument, Carletha retrieved a gun from the bedroom and told appellant to "[g]et the fuck out of here or I'm going to kill you." (R.III,283). On another occasion, Carletha struck appellant in the head with a vase. (R.III,284). The defense rested.

In reviewing the jury instructions, it was noted that the lesser included offenses on the attempted murder charge included attempted voluntary manslaughter, aggravated battery, aggravated assault, battery, and assault. (R.III,296). The prosecutor noted that if appellant were convicted of aggravated battery and causing injury during the commission of a felony, that would be a double jeopardy violation because "one would be included in the other because of the injury element." (R.III,298).

The court instructed the jury on Count II as follows:

> Before you can find the defendant guilty of felony causing injury, the State must prove the following element beyond a reasonable doubt:
>
> 1. Harold Eugene Brown, while perpetrating or attempting to perpetrate the felony of attempted murder, attempted manslaughter, aggravated battery and/or aggravated

> assault did commit, aid or abet an act that caused bodily injury to Carletha Brown.

(R.III,391).

The jury found appellant guilty on Count I of attempted first degree murder with a firearm. (R.I,88; IV,414). Appellant was also found guilty on Count II for causing injury during the commission of a felony. (R.IV,414).

At sentencing, the parties agreed that the appropriate guidelines range was 105 months to 176.25 months. (R.I,166). On counts I and II, the trial court sentenced appellant to concurrent terms of 14 1/2 years. (R.I,166). The court reserved jurisdiction to determine restitution. (R.I,167).

SUMMARY OF ARGUMENT

ISSUE I

WHETHER APPELLANT'S DUAL CONVICTIONS FOR THE CHARGES OF ATTEMPTED PREMEDITATED MURDER WITH A FIREARM AND CAUSING BODILY INJURY DURING THE COMMISSION OF A FELONY VIOLATE FEDERAL AND STATE CONSTITUTIONAL PROHIBITIONS AGAINST

DOUBLE JEOPARDY AS CODIFIED IN SECTION 775.021,(4)(b)2., FLORIDA STATUTES?

Florida’s constitutional protection against multiple punishments for the same offense is codified in section 775.021, Florida Statutes. With this provision, the Florida legislature expressed its intention to permit separate prosecutions for multiple offenses committed in the course of one criminal transaction or episode, with three exceptions. Excepted from this general 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.

Appellants dual convictions for the offenses of attempted premeditated murder with a firearm and causing bodily injury during the commission of a felony (attempted premeditated murder with a firearm) violate section 775.021(4)(b)2., because the offense of causing bodily injury during the commission of attempted premeditated murder with a firearm is but a “degree variant” of the offense of attempted premeditated murder with a firearm.

ISSUE II

WHETHER APPELLANT’S DUAL CONVICTIONS FOR THE CHARGES OF ATTEMPTED PREMEDITATED MURDER WITH A FIREARM AND CAUSING BODILY INJURY DURING THE COMMISSION OF A FELONY VIOLATE FEDERAL AND STATE CONSTITUTIONAL PROHIBITIONS AGAINST

DOUBLE JEOPARDY AS CODIFIED IN SECTION 775.021,(4)(b), FLORIDA STATUTES, BECAUSE THE ATTEMPTED MURDER WITH A FIREARM OFFENSE WAS RECLASSIFIED TWICE DUE TO THE COMMISSION OF THE LESSER INCLUDED OFFENSE OF AGGRAVATED BATTERY?

Appellant was convicted under Count I of attempted first degree murder with a firearm. The proof showed that appellant also committed the permissive lesser included offense of aggravated battery, and the record reveals that appellant’s conviction on Count I was enhanced pursuant to section 775.087, Florida Statutes, which would permit enhancement due to the commission of an aggravated battery. Under such a circumstance, appellant’s conviction for causing bodily injury during the commission of a felony should be regarded as a second enhancement for the aggravated battery and should be precluded by double jeopardy considerations. <u>See</u> <u>Cleveland v. State</u>, 587 So. 2d 1145 (Fla. 1991); <u>Crawford v. State</u>, 662 So. 2d 1016 (Fla. 5th DCA 1995).

ISSUE III

WHETHER APPELLANT’S DUAL CONVICTIONS FOR THE CHARGES OF ATTEMPTED PREMEDITATED MURDER WITH A FIREARM AND CAUSING BODILY INJURY DURING THE COMMISSION OF A FELONY VIOLATE FEDERAL AND STATE CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY AS CODIFIED IN SECTION 775.021,(4)(b)3., FLORIDA STATUTES, BECAUSE FELONY CAUSING BODILY INJURY IS A PERMISSIVE LESSER INCLUDED OFFENSE OF ATTEMPTED PREMEDITATED MURDER WITH A FIREARM?

Dual convictions for attempted premeditated murder with a firearm and felony causing bodily injury are precluded by section

775.021(4)(b)3., Florida Statutes, because felony causing bodily injury was, in this case, a permissive lesser included offense to attempted premeditated murder with a firearm. See Sirmons v. State, 634 So. 2d 153, 155 (Fla. 1994)(Kogan, J., concurring).

ARGUMENT

ISSUE I

WHETHER APPELLANT'S DUAL CONVICTIONS FOR THE CHARGES OF ATTEMPTED PREMEDITATED MURDER WITH A FIREARM AND CAUSING BODILY INJURY DURING THE COMMISSION OF A FELONY VIOLATE FEDERAL AND STATE CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY AS CODIFIED IN SECTION 775.021,(4)(b)2., FLORIDA STATUTES?

Appellants dual convictions for the offenses of attempted premeditated murder with a firearm and causing bodily injury during the commission of a felony (attempted premeditated murder with a firearm) violate section 775.021(4)(b)2., because the offense of causing bodily injury during the commission of attempted

premeditated murder with a firearm is but a "degree variant" of the offense of attempted first degree murder with a firearm.

Perhaps the most widely accepted and quoted explanation of the three statutory exceptions found in section 775.021(4)(b), Florida Statutes, is the concurring opinion of Justice Kogan in Sirmons v. State, 634 So. 2d 153 (Fla. 1994). In Sirmons, the supreme court found that dual convictions for grand theft of an automobile and robbery with a weapon arising from the single taking of an automobile at knife point violated 775.021(4)(b)2., because the two offenses were merely "degree variants of the core offense of theft." Id. at 153. The second exception, as explained by Justice Kogan:

> 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." 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 lies 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.

Sirmons v. State, 634 So. 2d 153, 155 (Fla. 1994) (Kogan, J., concurring).[1]

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[1] Justice Kogan's analytical framework was approved of and applied in Beebe v. Foster, 661 So. 2d 401 (Fla. 1st DCA 1995).

In Johnson v. State, 712 So. 2d 380 (Fla. 1998), this Court explained that when determining whether two offenses are "degree variants" of one another, the court must examine the specific conduct charged when applying an "alternative conduct statute." Tommie Johnson was charged and convicted of trafficking possession of cocaine and simple possession of the same amount of cocaine with intent to sell. In determining whether these two offenses were degree variants, the Court did not examine the broad range of conduct proscribed by the trafficking statute, i.e., the alternative elements of sale, purchase, manufacture, or delivery of cocaine. Rather, the Court found it appropriate to consider only the "particular component" of the statute at issue. Thus, the Court opined that an alternative conduct statute "requires an analysis that breaks the conduct elements into the specific alternative conduct which is in the other statute being compared." Johnson v. State, 712 So. 2d at 381, quoting Gibbs v. State, 698 So. 2d 1206, 1209-10 (Fla. 1997). Thus, in Johnson v. State, when comparing the drug trafficking possession statute to the simple possession statute, the Court did not consider the alternatively proscribed conduct such as sale, purchase and delivery, in concluding that Johnson's dual convictions violated double jeopardy principles by punishing Johnson for trafficking possession of a specific amount of cocaine (more than 28 grams) and punishing him a second time for possession with intent to sell the same quantity of cocaine.

The present case also involves "alternative conduct" statutes, so the same analysis would applies. First, section 777.04(1), Florida Statutes, the "attempt" statute, provides in pertinent part:

> (1) A person who attempts to commit an offense prohibited by law <u>and</u> in such attempt <u>does</u> <u>any</u> <u>act</u> toward commission of the offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt,....

§ 777.04(1), Fla. Stat. (1997)(emphasis added). Thus, section 777.04(1), requires as an essential element of an "attempt" the performance of an "act" toward the commission of the offense. <u>See</u> <u>Rogers v. State</u>, 660 So. 2d 237, 241 (Fla. 1995). Because a broad range of conduct may satisfy the second element of "attempt", section 777.04(1) is an alternative conduct statute. That is why the charging document in the present case identified the specific act or conduct on the part of appellant which constituted the "attempt," i.e., the "shooting" of appellant's wife. Because the "shooting" is an element of the "attempt" offense, appellant's conduct in shooting his wife with intent to kill constitutes the "core offense" which should be compared with the elements of the Count II offense to determine whether dual convictions for both offenses are prohibited by principles of double jeopardy as codified in section 775.021(4)(b)2., Florida Statutes.

Here are the elements of the offenses for which appellant was convicted. As properly instructed by the trial court, the offense

of attempted first degree murder with a firearm has three elements:

1. Appellant actually did some act [shooting] intended to cause death;

2. Appellant acted with premeditated design to kill;

3. The act would have resulted in death if successful or if prevented by someone else.

(R.III,382; § 782.04(1)(a); § 777.04(1)).

Turn now to the offense of causing bodily injury during the commission of a felony. The elements are (1) causing bodily injury; (2) during the commission of a felony. § 782.051(2), Fla. Stat. The trial court described this offense, without objection, as one element:

> 1. Harold Eugene Brown, while perpetrating or attempting to perpetrate the felony of attempted murder, attempted manslaughter, aggravated battery and/or aggravated assault did commit, aid or abet an act that caused bodily injury to Carletha Brown.

(R.III,391).

For purposes of our analysis, the underlying felony supporting the "causing bodily injury" offense was attempted first degree murder by shooting. In determining whether two offenses are "degree variants" or "degrees of the same crime as provided by statute," it is improper to assume that the "degree variants" will be found in the same statutory section. Often times, offenses set forth in different statutory sections will be found to be aggravated forms of the same "core offense" or "core conduct".

State v. Anderson, 695 So. 2d 309, 311 (Fla. 1997). Similarly, where the crime charged in Count I includes an act, i.e., shooting, as an element, the "underlying felony" used for comparative purposes must be attempted first degree murder by shooting. In the present case, therefore, the statutory elements of the underlying felony are: (1) shooting at the victim (2) with a premeditated design to kill, (3) which act would have caused death if successful. To prove Count II, the only additional aggravating element to be proven is that the shooting resulted in "bodily injury" to the victim.

The facts of the present case are very simple. Appellant was convicted of the premeditated shooting of his wife. The evidence further showed that his wife may have died but for emergency surgery. The only critical distinction between Count I and Count II is that appellant could have been convicted of attempted first degree murder by shooting even if he had fired at her and missed. Causing bodily injury is not an element of attempted first degree murder by shooting. Stated in Justice Kogan's terms, it is illogical to assume that the legislature intended multiple punishments where the two "offenses" arise from a single act (firing one shot), and are distinguishable only by degree elements. In the present case, the two "offenses" are distinguishable only by degree. That is, the offense of attempted first degree murder by shooting does not require that the perpetrator hit his or her target, whereas the bodily injury statute requires the perpetrator

to satisfy the one additional element of hitting the mark. Moreover, the actual "core conduct" forming the basis of both convictions is identical, i.e., appellant shot his wife with a single shot, and with the intent to kill.

The fact that section 782.051(2) does not require proof of a specific underlying felony does not alter the analysis. Section 782.051(2), Florida Statutes, states in pertinent part:

> Any person who perpetuates or attempts to perpetuate any felony other than a felony enumerated in s. 782.04(3) and who commits, aids, or abets an act that causes bodily injury to another commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, which is an offense ranked in level 8 of the sentencing guidelines.

While section 782.051(2) requires as an essential element the commission of a felony, a broad class of criminal conduct may satisfy this predicate offense requirement, i.e., any felony not enumerated in section 782.04(3), Florida Statutes. Because a broad class of felonies may satisfy this element of the offense, section 782.051(2), is itself an "alternative conduct statute." As stated previously, in determining whether two offense are "degree variants," it is not proper to compare the broad range of conduct proscribed by the statute. Rather, it is proper only to compare the specific conduct relevant for purposes of comparison. Johnson v. State. In the present case, therefore, it is proper to compare the elements of attempted first degree murder by shooting to the elements of causing bodily injury in the commission of attempted

first degree murder by shooting, the specific conduct at issue in Count II.

Following this analysis, Paccione v. State, 698 So. 2d 252 (Fla. 1997), requires that one of appellant's convictions be reversed. James Paccione was charged and convicted of one count of possession of marijuana with intent to sell and one count of simple possession of the same marijuana. The first count consisted of two elements: (1) knowing possession of marijuana with (2) intent to sell. The second count consisted of only one element: knowing possession of marijuana. Because the second count contained no element not found in the first count, or stated alternatively, all the elements of the second offense were subsumed within the first, Paccione's conviction on both counts arising from a single criminal episode was found inconsistent with the legislative intent of section 775.021(4), Florida Statutes.

In the present case, every element of attempted first degree murder by shooting was proved to establish the predicate offense necessary to support a conviction under the "causing bodily injury" statute. The only element necessary in addition to the elements of attempted first degree murder by shooting, however, was the element of bodily injury. In the present case, the attempted murder conviction and the bodily injury conviction arose from the singular act of shooting the victim with one shot. Because both convictions arose from a singular event and the element of bodily injury was the only additional element necessary to support the conviction for

causing bodily injury in the commission of a felony (attempted murder by shooting), appellant's conviction on Count II (causing bodily injury in the commission of a felony), cannot stand. Paccione.

Stated alternatively, based upon a strict view of the elements of the two offenses, appellant's conviction for causing bodily injury in the commission of a felony is merely an aggravated form of attempted first degree murder by shooting because the attempted murder charge could have been sustained merely upon a finding that appellant shot at his wife with the intent to kill -- but missed. The "causing bodily injury" offense is but an aggravated form or "degree variant" of the attempted murder offense because it required proof of all the elements of attempted first degree murder by shooting with the additional requirement that appellant actually strike his intended target, thereby causing bodily injury.

The following case law, strikingly similar to the present case and still good law, also compels reversal. Hall v. State, 517 So. 2d 678 (Fla. 1988) (dual convictions for robbery with a firearm and display of firearm during criminal offense improper where convictions arise out of same transaction); State v. Boivin, 487 So. 2d 1037 (Fla. 1986) (dual convictions for attempted first degree murder and aggravated battery improper); Mills v. State, 476 So. 2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986) (dual convictions for homicide and aggravated battery arising out of single act improper). Hall,

Boivin, and Mills are still good law. See Cleveland v. State, 587 So. 2d 1145 (Fla. 1991).

The cases finding dual convictions for attempted murder and aggravated battery impermissible are particularly instructive and persuasive. In Mills v. State and Boivin v. State, this Court found no legislative intent to impose dual convictions for attempted murder and aggravated battery where the charges stemmed from a single shooting, and found that these statutes were intended to address the same evil. In the present case, appellant was convicted on Count I due to the shooting of his wife. This shooting certainly constituted an aggravated battery as well as attempted murder. To punish appellant a second time under Count II for causing bodily harm would be to punish appellant twice for the same aggravated battery included in Count I. This is not permissible under Mills and Boivin. At trial, even the state conceded that if appellant were convicted on Count I of the lesser included offense of aggravated battery, a conviction on Count II would constitute a double jeopardy violation. (R.III,298). The rule articulated in Mills and Boivin is still good law. See Williams v. State, 625 So. 2d 994 (Fla. 1st DCA 1993) (dual convictions for attempted second degree murder and aggravated battery based on same gunshot violates constitutional prohibition against double jeopardy as codified in section 775.021(4)(b), Florida Statutes). In the present case, since appellant's conviction for attempted murder by shooting also established an

aggravated battery, a second conviction for causing bodily injury is likewise prohibited because the "bodily injury" element is duplicative of the aggravated battery used to prove guilt on Count I. See also, Davis v. State, 559 So. 2d 707 (Fla. 4th DCA 1990)(dual convictions for attempted first degree murder and aggravated battery arising out of same transaction violates constitutional prohibition against double jeopardy as codified in section 775.021(4)(b), Florida Statutes).

Also instructive are the following cases: State v. Anderson, 695 So. 2d 309 (Fla. 1997) (dual convictions for perjury in an official proceeding and providing false information in application for bail arising out of same transaction violates constitutional prohibition against double jeopardy as codified in section 775.021(4)(b), Florida Statutes); Thompson v. State, 650 So. 2d 969 (Fla. 1994) (dual convictions for sexual battery on physically incapacitated victim and sexual activity while in custodial authority of a child arising out of same transaction violates constitutional prohibition against double jeopardy as codified in section 775.021(4)(b), Florida Statutes); LaRoche v. State, 23 Fla. L. Weekly D2681 (Fla. 4th DCA, December 9, 1998) (dual convictions for grand theft and filing fraudulent insurance claim arising out of same transaction violates constitutional prohibition against double jeopardy as codified in section 775.021(4)(b), Florida Statutes); Vasquez v. State, 711 So. 2d 1305 (Fla. 2d DCA 1998)(dual convictions for grand theft and obtaining vehicle with

intent to defraud arising out of same transaction violates constitutional prohibition against double jeopardy as codified in section 775.021(4)(b), Florida Statutes); State v. McDonald, 690 So. 2d 1317 (Fla. 2d DCA 1997) (dual convictions for fraud in the provision of goods or services and grand theft arising out of same transaction violates constitutional prohibition against double jeopardy as codified in section 775.021(4)(b), Florida Statutes); Wolf v. State, 679 So. 2d 351 (Fla. 5th DCA 1996) (dual convictions for petit theft and felony fraudulent use of a credit card arising out of same transaction violates constitutional prohibition against double jeopardy as codified in section 775.021(4)(b), Florida Statutes); Crawford v. State, 662 So. 2d 1016 (Fla. 5th DCA 1995) (dual convictions for first degree burglary and aggravated battery on occupant of dwelling arising out of same transaction violates constitutional prohibition against double jeopardy as codified in section 775.021(4)(b), Florida Statutes).

The trial erred court erred, therefore, in denying the motion of defense counsel to dismiss Count II, and in convicting and sentencing appellant on Count II.

[NOTE: Petitioner notes that the same issue raised herein is pending review by this Court in Bryon Gordon v. State, Case No. 96,834 (Oral argument May 9, 2000). Petitioner has reviewed the briefs filed in that case and would request that the court take judicial notice of the following distinction which *may* be relevant

to the court’s analysis. Petitioner Bryon Gordon was convicted of four offenses: (1) attempted first degree murder with a firearm; (2) felony causing bodily injury; (3) aggravated battery causing bodily injury; and (4) robbery with a firearm. In its answer brief, the state contended that it was the armed robbery offense that constituted the “felony” supporting the conviction for felony causing bodily injury. (Respondent’s Answer Brief at 3). If the court adopts the state’s argument in Gordon, and finds the armed robbery conviction to be germane to the legal analysis, Petitioner Harold Brown would merely point out that the present case is distinguishable in that Petitioner Brown was neither charged with nor convicted of armed robbery or any other felony which might support the felony causing bodily injury charge.]

ISSUE II

WHETHER APPELLANT'S DUAL CONVICTIONS FOR THE CHARGES OF ATTEMPTED PREMEDITATED MURDER WITH A FIREARM AND CAUSING BODILY INJURY DURING THE COMMISSION OF A FELONY VIOLATE FEDERAL AND STATE CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY AS CODIFIED IN SECTION 775.021,(4)(b), FLORIDA STATUTES, BECAUSE THE ATTEMPTED MURDER WITH A FIREARM OFFENSE WAS RECLASSIFIED TWICE DUE TO THE COMMISSION OF THE LESSER INCLUDED OFFENSE OF AGGRAVATED BATTERY?

Appellant was convicted of attempted first degree murder with a firearm. The evidence showed that appellant also committed the permissive lesser included offense of aggravated battery, and the record reveals that appellant's conviction was reclassified pursuant to section 775.087(1), Florida Statutes, which would permit reclassification due to the commission of an aggravated battery. Section 775.087, Florida Statutes, provides in pertinent part:

> (1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, <u>or during the commission of such felony the defendant commits an aggravated battery</u>, the felony for which the person is charged shall be reclassified as follows:
>
> (a) In the case of a felony of the first degree, to a life felony.

§ 775.087(1), Fla. Stat. (1997)(emphasis added). Under such a circumstance, appellant's conviction for causing bodily injury during the commission of a felony should be regarded as a second enhancement for the aggravated battery and should be precluded by

double jeopardy considerations. See Cleveland v. State, 587 So. 2d 1145 (Fla. 1991)(where robbery conviction enhanced for use of firearm, single act involving use of same firearm cannot form basis for separate conviction and sentence for use of firearm in commission of felony); Crawford v. State, 662 So. 2d 1016 (Fla. 5th DCA 1995) (dual convictions for first degree burglary and aggravated battery on occupant of dwelling arising out of same transaction violates constitutional prohibition against double jeopardy as codified in section 775.021(4)(b), Florida Statutes). The trial erred court erred, therefore, in denying the motion of defense counsel to dismiss Count II, and in convicting and sentencing appellant on Count II.

ISSUE III

WHETHER APPELLANT'S DUAL CONVICTIONS FOR THE CHARGES OF ATTEMPTED PREMEDITATED MURDER WITH A FIREARM AND CAUSING BODILY INJURY DURING THE COMMISSION OF A FELONY VIOLATE FEDERAL AND STATE CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY AS CODIFIED IN SECTION 775.021,(4)(b)3., FLORIDA STATUTES, BECAUSE FELONY CAUSING BODILY INJURY IS A PERMISSIVE LESSER INCLUDED OFFENSE OF ATTEMPTED PREMEDITATED MURDER WITH A FIREARM?

The question squarely presented is whether section 775.021(4)(b)3., Florida Statutes, precludes dual convictions for a principal offense and a permissive lesser included offense, as expressly stated by Justice Kogan in his concurring opinion in Sirmons v. State, 634 So. 2d 153, 155 (Fla. 1994). The district courts of appeal are in conflict on this question. In Duhart v. State, 724 So. 2d 1223 (Fla. 1st DCA 1998), the district court held that section 755.021(4)(b)3., Florida Statutes, encompasses only *necessarily* lesser included offenses, relying on this Court's opinions in State v. Johnson, 601 So. 2d 219, 221 (Fla. 1992), State v. McCloud, 577 So. 2d 939, 941 (Fla. 1991), and Gaber v. State, 684 So. 2d 189, 190-191 (Fla. 1996). To the contrary are Gresham v. State, 725 So. 2d 419 (Fla. 4th DCA 1999)(barring dual convictions for attempted second degree murder and category 2 (permissive) lesser included offense of aggravated battery), and Davis v. State, 559 So. 2d 707 (Fla. 4th DCA 1990)(barring dual convictions for attempted first degree murder and aggravated battery).

In its opinion below, the district court announced that the question whether the statutory elements of "felony causing bodily injury" are subsumed by the offense of attempted murder (or vice versa), must be answered "without regard to the accusatory pleading or the proof adduced at trial," quoting section 775.021(4)(a), Florida Statutes. (App. at 6-7). In so stating, the court misapprehended the fact that the stated rule applies only: "[f]or the purposes of this subsection," meaning subsection (4)(a). Subsection (4)(a) is a simple restatement of the Blockburger test. Sirmons v. State, 634 So. 2d 153, 154 (Fla. 1994)(Kogan, J., concurring); see also, Gresham v. State, 725 So. 2d 419 (Fla. 4th DCA 1999). The district court below overlooked the fact that the strict Blockburger test has no application in the present case and appellant did not rely on it. The exceptions under which appellant sought relief fell under subsection (4)(b). See § 775.021(4)(b), Fla. Stat. The district court, thus, misapprehended the decisional rule that under section 775.021(4)(b), the question whether the elements of one offense are subsumed by the other must be resolved, in the case of "alternative conduct" statutes such as felony causing bodily injury and attempted first degree murder, by reference to the specific conduct charged. See Johnson v. State, 712 So. 2d 380 (Fla. 1992). In addition, the district court wrongly construed section 775.021(4)3., which includes within its ambit according to Justice Kogan, permissive lesser included offenses.

This court's decisions in State v. Johnson, 601 So. 2d 219, 221 (Fla. 1992), State v. McCloud, 577 So. 2d 939, 941 (Fla. 1991), and Gaber v. State, 684 So. 2d 189 (Fla. 1996), do not undercut the correctness of Justice Kogan's concurrence in Sirmons. State v. McCloud involved an application of section 775.021(4)*(a)*, rejected the defendant's contention that 775.021(4)*(b)* applied, and rejected defendant's double jeopardy argument under a strict Blockburger[2] analysis. Gaber v. State is to the same effect. In State v. Johnson, 601 So. 2d 219 (Fla. 1992), this Court stated that "[n]ecessarily lesser included offenses were listed in section 775.021(4)(b)(3)...." This statement does appear to conflict with Justice Kogan's concurrence in Sirmons which reasons that only permissive lesser included offenses are referenced in (4)(b)3. The Court's pronouncement in State v. Johnson, however, appears to be dictum since the Court's holding pertained to the state's right to a jury instruction on a permissive lesser offense over the defendant's objection. To the extent that the law is unclear on the subject, as evidenced by the conflict among the district courts, appellant requests that the Court adopt Justice Kogan's concurring opinion in Sirmons as the law of this state, since it the only decisional authority which gives logical meaning and effect to all parts of section 775.021(4), Florida Statutes.

In the present case, since felony causing bodily injury is a

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

permissive lesser included offense to attempted first degree murder with a firearm, one of appellant's convictions should be reversed.

CONCLUSION

In light of the foregoing argument and authority presented in either ISSUE I, ISSUE II, or ISSUE III, appellant respectfully requests that the Court issue an opinion reversing one of his convictions, and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Edward C. Hill, Jr., Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to Appellant, Harold E. Brown, #313424, Jefferson C. I., Rt. 1, Box 225, Monticello, Florida, 32344, on this ____ day of April, 2000.

____
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