IN THE SUPREME COURT OF FLORIDA

HAROLD EUGENE BROWN,

Petitioner,

v. **CASE NO. SC00-721**

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY 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).

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 AND FACTS

Nothing added.

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?

In Lukehart v. State, 25 Fla. L. Weekly S489 (Fla. June 22, 2000), this court held, inter alia, that dual convictions for felony murder and aggravated child abuse were not prohibited by double jeopardy. Id. at S494. The central basis for the court's holding was the fact that the homicide statute provides that a defendant is guilty of felony murder if the defendant causes the death of another while engaged in the commission of any one of ten enumerated felonies, including aggravated child abuse. By specifying aggravated child abuse as one of the qualifying felonies for felony murder, the legislature expressed its intention to impose multiple punishments for felony murder and the underlying felony of aggravated child abuse.

> Simply put, defendant can be convicted of both felony murder and the qualifying felony because the felony murder statute says so.

Lukehart, 25 Fla. L. Weekly S494, quoting Green v. State, 680 So. 2d 1067, 1068 (Fla. 3d DCA 1996).

In so ruling, this court took care to distinguish its earlier decision in Mills v. State, 476 So. 2d 172 (Fla. 1985), wherein the court held that dual convictions for aggravated battery and homicide as the result of one shotgun blast were barred by double jeopardy. This court noted that its decision in Mills rested on principles of legislative intent and preceded the 1988 legislative amendments to section 775.021(4), Florida Statutes, codifying the legislative intent to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction. Lukehart, 25 Fla. L. Weekly S494, n.10, citing Ch. 88-131, § 7 at 709, Laws of Fla. Because Mills is one of the cases upon which Petitioner relies, Petitioner takes great pain to point out that Lukehart does not overrule Mills. As Petitioner construes Lukehart, this court did not overrule Mills either expressly or impliedly. Nor did the court state that Mills was superseded by statute. Rather, it appears that the court's reference to Mills was made for the purpose of distinguishing Mills from Lukehart, as these cases involve sets of dual convictions seductively similar in the factual sense though easily distinguishable in the legal sense. This court distinguished Lukehart from Mills principally on the ground that the felony murder statute specifically listed aggravated child abuse as a qualifying offense which would support a conviction for felony murder -- a clear indication of legislative

intent to convict and sentence for both offenses. Next, by noting that Mills predated the 1988 statutory amendments to section 775.021(4), Florida Statutes, the court's observation informs us why Mills would not control the Lukehart case.

> Lukehart argues that our decision in Mills v. State, 476 So. 2d 172 (Fla. 1985), should control.

Lukehart, 25 Fla. L. Weekly at S494. Because of the 1988 statutory amendments, Mills would not control the outcome in Lukehart. Mills does not control Lukehart because the statutory amendments altered the legal *analysis* of double jeopardy issues rather the result or outcome of a particular case.

As a matter of legislative intent, it is not at all clear that the legislature intended multiple convictions and sentences for attempted murder by shooting with a firearm and causing bodily injury during commission of a felony which, as the First District Court of Appeal pointed out below, is now the "attempted felony murder" statute. In Lukehart, the ascertainment of legislative intent was relatively easy because the underlying felony of aggravated child abuse was listed under the felony murder statute.

In the present case, naked reliance on section 775.021(4), does not resolve the question of legislative intent. As stated in State v. Reardon, 25 Fla. L. Weekly D1336 (Fla. 5th DCA June 1, 2000)(en banc), the bare expression of legislative intent to convict and sentence a defendant for each offense committed during

the course of a single criminal episode does not end the inquiry. Paragraph 775.021(4)(b) lists three exceptions to this rule of construction under which the offenses at issue must be tested. Id. at D1336. Given this analysis, we have come full circle to the dispositive question -- whether dual convictions for attempted felony murder (bodily injury in the commission of a felony) and attempted murder with a firearm fall within one of the three statutory exceptions articulated in section 775.021(4)(b).

To square the present case "on all fours" with Lukehart, the attempted felony murder statute would have to contain a "laundry list" of underlying felonies, the commission of which would qualify the defendant for a conviction for attempted felony murder. For the following reasons, no such expression of legislative intent exists in the present case.

Applying the well established rule that subsequent amendments to a statute may be used as a guide to legislative intent, Petitioner points out that section 782.051(2), Florida Statutes (1999), provides in pertinent part:

> (2) Any person who perpetrates or attempts to perpetrate any felony other than a felony enumerated in s.782.04(3) and who commits, aids, or abets an intentional act that is not an essential element of the felony and that could, but does not, cause the death of another commits a felony of the first degree,...

§ 782.051(2), Fla. Stat. (1999). The underscored portion of the statute above represents an amendment (addition) to the 1997 version of the statute.

In this regard, Petitioner reasserts his contention that all "attempt" offenses are alternative conduct statutes. The second element of an attempt offense is the commission of an act in furtherance of the offense attempted. Since the "act" element may be satisfied in a variety of ways, the specific act offered by the state in satisfaction of this element must be regarded as an element of the offense, as Johnson v. State, 712 So. 2d 380 (Fla. 1998), requires in the case of an alternative conduct statute that the court compare the specific conduct charged in determining whether the two offenses of conviction are "degree variants" of one another. In the present case, the specific act and element of the attempted murder offense is shooting with a firearm. The element of shooting with a firearm must then be compared to the elements of felony causing bodily injury. In this light, it can be seen that the only additional element necessary to establish the offense of felony causing bodily injury is that the shooter actually hit his target, thereby causing "bodily injury." In this manner, attempted murder by shooting with a firearm is properly considered a "degree variant" of the offense of felony causing bodily injury. Perhaps more importantly, since the "act" of shooting with a firearm is an essential element of the underlying felony, the offense of attempted murder by shooting with a firearm does not invoke the

application of section 782.051(2), Florida Statutes (1997) as construed in light of the subsequent amendments codified in section 782.051(2), Florida Statutes (1999). Stated alternatively, the legislature expressed its intention not to impose dual convictions for attempted murder by shooting with a firearm and felony causing bodily injury because shooting with a firearm is the "act" which constitutes an "essential element" of the offense of attempted 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 ENHANCED TWICE DUE TO THE COMMISSION OF THE LESSER INCLUDED OFFENSE OF AGGRAVATED BATTERY?

Nothing added.

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?

Nothing added.

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 James W. Rogers, 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 July, 2000

RICHARD M. SUMMA
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