IN THE SUPREME COURT OF FLORIDA

MICHAEL BLEVINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC00-929
	)	DCA No.
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

On Review from the District Court
of Appeal, Fourth District,
State of Florida

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INTRODUCTION

This is the Initial brief on the merits of Petitioner/ defendant Michael Blevins on conflict jurisdiction from the Fourth District Court of Appeal.

Citations to the record are abbreviated as follows:

R - Clerk's Record on Appeal

T - Trial and Sentencing Transcript.

CERTIFICATE OF TYPE AND SIZE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE

Petitioner, Michael Blevins, was charged by way of an amended information filed in the Nineteenth Judicial Circuit, in and for St. Lucie County , with a number of criminal offenses. R5, 7, 82.

In Count I of the amended information, Petitioner was charged with the January 22, 1996, burglary of a dwelling, the property of Georgette Leenher or Neil Leenher and in the course thereof did commit a battery. R 7.

In Count II, Petitioner was charged with the January 22, 1996, attempted murder of Georgette Leenher. R7.

In Count III of the amended information, Petitioner was charged with robbery. R7. The amended information alleged that Petitioner on January 22,1996, "did take certain property, to wit :NECKLACE AND/ OR BRACELET AND/ OR RING, from the person or custody Georgette Leenher with the intent to permanently or temporarily deprive the said person or owner of the property, and in the course of the taking there was the use of force, violence, assault, or putting in fear" in violation of Section 812.13(1). R7.

In Count IV, Petitioner was charged grand theft. R7. This count alleged that Petitioner on January 22, 1996, "did unlawfully and knowingly obtain or use or endeavor to obtain or to use the property of another, to-wit: JEWELRY, the property of GEORGETTE LEENHER AND/OR NEIL LEENHER as owner or custodian, of the value of $300 dollars or more . . . in violation of Florida Statute

812.014." R7.

Petitioner went to jury trial on the four(4) charges. At the conclusion of the State's case -in- chief, Petitioner's trial counsel moved for a judgment of acquittal. T 252-253,260. Said motion was denied by the trial judge except as to Count II wherein the trial judge reduced the charge to the lesser included offense of attempted second degree murder. T 260. Petitioner's renewed motion for judgment of acquittal at the conclusion of all the evidence was denied by the trial judge. T 262-263.

Petitioner was convicted of Count I , burglary of a dwelling, and did commit a battery therein as charged in the amended information. R86;T313.

Petitioner was convicted of the lesser included offense of aggravated battery under Count II of the information. R86, Petitioner was convicted of robbery under Count III of the information. R87,T313. Petitioner was also was convicted of Count IV, grand theft. R87, T313.

Petitioner was scored pursuant to the *Fla. R. Crim. P.* 3.703 sentencing guidelines to a "total sentence points" of 224.8 which results in 246 maximum state prison months and 147.6 minimum state prison months. R 106;T 319. The State requested the Trial Court to depart upward from Petitioner's guidelines range. R94-96;326-327.The Trial Judge over defense objection (T

327-328, 330)departed upward from Petitioner's guideline sentence range. R 107; T 329.

The Trial Judge sentenced Petitioner, Mr. Blevins, for Count I, burglary of a dwelling with a battery to **LIFE** in prison with credit for time previously served. R 106,111; T 329. The Trial Judge sentenced him under Count II, aggravated battery, to fifteen years in prison with credit for time served. R113; T 329.

The Trial Judge sentenced Petitioner for Count III, robbery, to fifteen years in prison with credit for time served. R115; T 329. The Trial Judge sentenced Petitioner for Count IV, grand theft, to five years in prison with credit for time served. R113; T 329. Said sentences were to run concurrent. R118; T 329.

Timely Notice of Appeal was filed by Petitioner-Appellant to the Fourth District Court of Appeal. R 108.

Petitioner appealed his conviction and sentence to the Fourth District Court of Appeal, arguing that his dual convictions for COUNT I, aggravated battery(as a lesser of attempted murder) was a lesser included offense of Count III, burglary with a battery under Count II. And further that Petitioner's conviction for Count IV, grand theft as a lesser included offense of the greater crime robbery and that occurred at the exact time and place of the robbery for which Petitioner was convicted under Count III.

On April 12, 2000,the Fourth District in a written opinion *Blevins v. State*, 25 Fla. L. Weekly D 921 (Fla. 4th DCA April 12,

2000) (See Appendix), affirmed the dual convictions for Count II, burglary with a battery and Count I, aggravated battery(the lesser of attempted murder charged under Count I of the information.)

The Fourth District also rejected Petitioner's double jeopardy challenge to his dual convictions for Count III, robbery, and Count IV, grand theft, holding:

> It is well-settled that a defendant may not be convicted of robbery of property and grand theft of the same property because "both offenses are simply aggravated forms of the same underlying offense, distinguished only by degree factors." *Sirmons v. State*, 634 So.2d 153 (Fla.1994). Thus, if the jewelry described in the robbery count is the same jewelry referred to in the grand theft count, the two convictions cannot stand. Here, however, the robbery count pertained to the jewelry worn by Mrs. Leenher, while the grand theft count involved other stolen items. Where the property which is the subject of the robbery is different from the property taken in the grand theft, the double jeopardy analysis is less well defined and "necessarily depends upon chronological and spatial relationships." *Castleberry v. State*, 402 So.2d 1231 (Fla. 5th DCA 1981).
>
> We have recently recognized that multiple convictions for robbery and carjacking may constitute separable crimes, even where the temporal separation between the two acts may be minimal. See *Consiglio v. State*, 743 So.2d 1221 (Fla. 4th DCA 1999). In *Consiglio*, the defendant beat the victim, first demanded her keys, then shortly thereafter demanded money. When the robbery was complete, the defendant drove off with the victim's car. This court found that the intentions and actions in stealing the money and the car were separate; hence, convictions for robbery and carjacking did not violate double jeopardy. See *id.* Similarly, in *Simboli v. State*, 728 So.2d 792 (Fla. 5th DCA 1999), the defendant, a taxicab

> passenger, demanded the driver's money and threatened to stab him, then had the driver exit the cab, whereupon the defendant drove away in the cab. The court held that two crimes, robbery and carjacking, were committed. Id. See also *Howard v. State*, 723 So.2d 863 (Fla. 1st DCA 1998).
> As in *Consiglio, Simboli, and Howard*, we deem Blevins' intent and actions in committing the robbery and grand theft to be sufficiently separate to constitute separate criminal offenses.
> *Id.* [1]

Petitioner filed a timely notice to invoke discretionary jurisdiction. This Brief on the merits follows.

STATEMENT OF THE FACTS

On January 22, 1996, Ms. Georgette Leenher resided at 1205 B Bentley Circle with her husband, Neil Leenher.T30,56. Her husband left the residence that morning at approximately 10:30 am. T31. Georgette Leenher heard a knock at her front door and then a loud noise in her kitchen. T32. She went to investigate. T31. She was shocked to find a man identified as Petitioner by her kitchen door. T33,46-47. Petitioner told Georgette Leenher that he was a maintenance man. T33. She immediately realized that this was a lie. T33.

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[1] *Consiglio v. State*, 743 So.2d 1221 (Fla. 4th DCA 1999),is presently pending before this Honorable Court in *Consiglio v. State*, Case No. SC99-125.

Petitioner grabbed a ceramic lamp and struck her on the head. T34. Georgette Leenher fell to the floor. T35. When she got back up to her feet, Petitioner struck her again .T35-36. Petitioner pulled her up back up on her feet. T36. He demanded to know where the jewelry was located. T36. She pointed to her bedroom. T36. The man identified as Petitioner by Ms. Leenher dragged her into the bedroom. T36. He threw her on the bed.T37. Georgette Leenher was bleeding profusely from her head injuries. T36.

Petitioner demanded that she remove her diamond rings from her finger. T39. He threatened to cut the rings from her fingers. T39. She quickly removed her rings and handed it to him.T39. Petitioner yanked a diamond heart necklace from her neck. T39-40. He also pulled a diamond bracelet from her arm. T40. After taking the items from her person, Petitioner then took jewelry from her jewelry box including watches.T40. He also took a number of jewelry items that belonged to her husband. T40. Petitioner took all these items and went into the kitchen area. T42.

Georgette Leenher testified that the man identified Petitioner picked up a window screen located in the kitchen and walked outside the premises. T43. He took the window screen and wiped it down then placed it back in the window. T43. She then immediately called the police. T43.

Detective Beck testified that on February 1, 1996, he showed Georgette Leenher a photographic lineup of six(6) photographs which

contained Petitioner's photograph.T168-169. Beck testified that she selected Petitioner's photograph. T170. However, she indicated to Detective Beck that she was not 100 percent certain.T170.

Neil Leenher, Georgette Leenher's husband, testified that on the date in question he left their residence at 10:15am. T56. Mr. Leenher testified that his diamond ring and two of his watches were taken by the burglar. T60.

SUMMARY OF THE ARGUMENT

POINT I

Petitioner's dual convictions for Count II, aggravated battery (as a lesser of attempted murder) and Count I, burglary with **a battery** violate the double jeopardy clause.

In Count I, Petitioner was charged and convicted of the January 22, 1996, burglary of a dwelling and committing a battery in the course thereof in violation of Section 810.02(a), *Florida Statutes*(1995). Petitioner was also convicted of aggravated battery as a lesser offense of attempted murder under Count II of the information. R86, 313.

Petitioner respectfully submits that the double jeopardy clause prohibits his conviction for aggravated battery under Count II because it represents a lesser included offense of the

greater offense, Count I, first degree burglary of a dwelling with a battery. *See Crawford v. State,* 662 So.2d 1016 (Fla. 5th DCA 1995).

The *Crawford* court held that multiple convictions for burglary with a battery and aggravated battery were improper. The opinion noted that regardless of whether burglary with a battery is viewed as an enhanced degree of the crime of burglary, or subsumes any battery charge based on the same factual act, multiple convictions would be improper under Section 775.021(4)(b), *Florida Statutes*(1997). Although not raised in the trial court, a double jeopardy violation represents fundamental reversible error. Therefore, the lesser aggravated battery conviction and sentence thereto must be set aside.

POINT II

Petitioner's conviction for Count IV, grand theft, must likewise be vacated under the double jeopardy clause because said offense is part of the "core offense" or "one forceful taking" that comprised the robbery charged in Count III. There was one forceful taking of various property. There was not a grand theft committed by Petitioner in the middle of his alleged robbery of Ms.Leenher.

At bar, Petitioner applied a single continuous use of force to obtain the jewelry, money, bracelet, and watches from Ms. Leehner. This is one offense. Therefore, the decision of the Fourth District on this issue should be quashed and Petitioner's grand theft

conviction under Count IV and sentence thereto should be vacated on remand.

POINT III

Petitioner was sentenced under the 1995 Florida sentencing guidelines held unconstitutional by this court in *Heggs v. State, 25* Fla. L. Weekly S137 (Fla. Feb. 17, 2000). Petitioner's offense date of January 22, 1996, falls within the window period established by this Court in *Salters v. State,* 25 Fla. L. Weekly S365 (Fla. May 11,2000). Although the trial court departed upward from Petitioner's guidelines sentence range and said departure was affirmed by the district court, Petitioner respectfully requests that his LIFE sentence for Count I, burglary with a battery should be vacated and this cause remanded to the trial court for resentencing.

POINT I

PETITIONER'S DUAL CONVICTIONS FOR BURGLARY WITH A BATTERY AND AGGRAVATED BATTERY VIOLATE THE DOUBLE JEOPARDY CLAUSE

At bar, Petitioner was convicted and sentenced for both the *enhanced* burglary of burglary with a battery, a first degree felony under Florida law and aggravated battery. Dual convictions violate the double jeopardy provisions of both the United States and Florida Constitutions. Petitioner's lesser aggravated battery conviction which was used by the State to enhance Petitioner's burglary conviction under Count I, a first degree felony should be set aside.[2]

In Count I, Petitioner was charged and convicted of the January 22, 1996, burglary of a dwelling and committing a battery in the course thereof in violation of Section 810.02(a), *Florida Statutes* (1995). Petitioner was also convicted of aggravated battery as a lesser offense of attempted murder under Count II of the information. R86, 313.

Although not raised in the lower court, a double jeopardy violation is fundamental error that may be raised for the first

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[2] The appropriate procedure in cases involving dual convictions for the same conduct is to vacate the lesser crime. *See Fjord v. State*, 634 So.2d 714, 716 (Fla. 4th DCA 1994. Robbery is a second degree felony and grand theft in an amount lesser then $20,000 and more than $300.00 is a third degree felony. Sections 812.13(2)(c), *Florida Statutes(1997).*

time on appeal. *Hardy v. State*, 705 So. 2d 979, 981 (Fla. 4th DCA 1998); *Pruett v. State*, 731 So. 2d 113, 114 (Fla. 1st DCA 1999).

In *Crawford v. State,* 662 So.2d 1016 (Fla. 5th DCA 1995), the defendant was convicted of burglary with a battery and aggravated battery. The Fifth District vacated the aggravated battery conviction because the same facts which established the aggravated battery charge (i.e., the same blow) also formed the basis for the battery element of the burglary charge.

The *Crawford* court held that multiple convictions for burglary with a battery and aggravated battery were improper. The opinion noted that regardless of whether burglary with a battery is viewed as an enhanced degree of the crime of burglary, or subsumes any battery charge based on the same factual act, multiple convictions would be improper under Section 775.021(4)(b), *Florida Statutes* (1997). *See also 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).

The Fourth District relies on the First District's decision in *Billiot v. State*,711 So. 2d 1277 (Fla. 1st DCA 1998),in support of its decision that the dual convictions do not violate the double jeopardy clause. Petitioner requests this Court to adopt the

rationale of the Fifth District in *Crawford.*

In *State v. Cooper*, 634 So.2d 1074 (Fla.1994), the defendant was convicted in the Circuit Court of five separate offenses arising from one motorcycle collision. The District Court of Appeal, reversed in part, and state petitioned for review to this Court. This Court in an opinion authored by Justice McDonald, held that, while it was entirely appropriate to convict a defendant of both driving under influence (DUI) manslaughter and driving while license was suspended, it was inappropriate to enhance the degree of both crimes by using single homicide.

In *Senteno v. State*, 737 So. 2d 1120 (Fla.2nd DCA 1999), the defendant challenged his judgments and sentences for two counts of DUI manslaughter, DUI with personal injury, DUI with property damage, leaving the scene of an accident involving injury or death, and driving while license suspended **and causing serious injury or death**. On appeal, he argued that he was improperly convicted of both DUI manslaughter and driving while his license suspended and causing death or injury to the same victim. The Second District agreed and reversed citing this Court's decision in *Cooper v. State*, supra,:

> According to *State v. Cooper*, 634 So.2d 1074 (Fla.1994), a defendant may not be convicted of both DUI manslaughter and driving while license suspended or revoked and causing death, with respect to the same victim. See also *Jackson v. State*, 702 So.2d 607 (Fla. 5th DCA 1997). A defendant may, however, be convicted of both DUI manslaughter and driving while license suspended or revoked, arising from the same incident. *Cooper.* For that reason, this cause is reversed and remanded

> for resentencing on all counts with a corrected scoresheet, which deletes the conviction for driving while license suspended and causing death. Senteno's remaining convictions are otherwise affirmed.
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> *Id*. at 1121.

Here Petitioner's conviction for aggravated battery under Count II should be vacated under the double jeopardy clause because the aggravated battery was used to enhance Petitioner's first degree burglary conviction under Count I of the information to a crime punishable by life in prison. Petitioner's conviction for aggravated battery and sentence thereto under Count II of the information must be vacated under the double jeopardy clause.

POINT II

PETITIONER'S CONVICTION FOR GRAND THEFT MUST BE VACATED UNDER THE DOUBLE JEOPARDY CLAUSE.

Under Count III of the amended information, Petitioner was charged with robbery of three(3) items of jewelry from Ms. Georgette Leenher. R7 Specifically, Count III of the amended information alleged that Petitioner on January 22,1996,"did take certain property, to wit: **NECKLACE AND/ OR BRACELET AND/ OR RING**, from the person or custody of **GEORGETTE LEENHER** with the intent to permanently or temporarily deprive the said person or owner of the property, and in the course of the taking there was the use of force, violence, assault, or putting in fear" in

violation of Section 812.13(1). R7-9 [Emphasis Supplied].

In Count IV, Petitioner was charged with the grand theft of jewelry as follows. Petitioner on January 22, 1996, "did unlawfully and knowingly obtain or use or endeavor to obtain or to use the property of another, to-wit: **JEWELRY**, the property of **GEORGETTE LEENHER AND/OR NEIL LEENHER** as owner or custodian, of the value of $300 dollars or more . . . in violation of Florida Statute 812.014." R 7-9. [Emphasis Supplied].

Petitioner's grand theft conviction should be vacated under the double jeopardy clause because said conviction was subsumed under his conviction for robbery as charged in Count II of the amended information.

Initially, Respondent argued in the lower court that this double jeopardy or dual conviction issue was "not preserved for appellate review, as the issue was not raised below. Although not raised in the lower court, a double jeopardy violation is fundamental error that may be raised for the first time on appeal. *Hardy v. State*, 705 So. 2d 979, 981 (Fla. 4th DCA 1998). Further, a double jeopardy violation represents fundamental reversible error that can be raised on appeal even after the passage of the Criminal Appeal Act of 1996. See *Pruett v. State*, 731 So. 2d 113, 114 (Fla. 1st DCA 1999); *Laboo v. State*, 715 So. 2d 1034, 1035 (Fla. 1st DCA 1998).

DOUBLE JEOPARDY/ CORE CRIME ANALYSIS[3]

No person shall . . . be twice put in jeopardy for the same offense . . . . Article I, Section 9 *Florida Constitution* (1968). The scope of these protections, and the corresponding protections of the Fifth Amendment, turn upon the meaning of the term "same offense."

To determine whether two offenses are the same or separate under article I, section 9, this Honorable Court has relied upon two sources-- state statutory rules of construction and federal case law.

In *M.P. v. State*, 682 So.2d 79 (Fla.1996), this Court summarized the approach to be taken in deciding whether double jeopardy applies:

> In determining the constitutionality of multiple convictions and sentences for offenses arising from the same criminal trans- action, the dispositive question is whether the legislature "intended to authorize separate punishments for the two crimes." *Albernaz v. United States*, 450 U.S. 300, 344, 101 S.Ct. 1137, 1145 (1981); accord *State v. Smith*, 547 So.2d 613, 614 (Fla.1989).
>
> Legislative intent to authorize separate punishments can be explicitly stated in a statute, *Albernaz v. United States*, 450 U.S. 300, 340, 101 S.Ct. 1142-43 (1990) , or can be discerned through the Blockburger test of statutory construction. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180,182, 76 L.Ed. 306 (1932).

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[3]Florida double jeopardy law has been described as "curiouser and curiouser." *Carawan v. State*, 495 So. 2d 239, 240 (Fla. 5th DCA 1986) (quoting L. Carroll, *Alice's Adventures in Wonderland*, Vol. II (1865)) acknowledging confusion in the field and remanding on other grounds,515 So. 2d 161 (Fla. 1987).See also *Bell v.State,*437 So.2d 1070, 1079 (Fla.1983) describing the rules as leading to an *ad hoc* approach).

> The Blockburger test, which is also called the "same- elements" test, inquires whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy bars subsequent punishment or prosecution.

Id. at 81.

The Blockburger test has been codified in Florida at Section 775.021(4), *Florida Statutes* (1997), which sets forth that it is the Florida Legislature's intent to "convict and sentence for each criminal offense committed in the course of one criminal episode," but listing **three enumerated exceptions** to this test:

1. offenses that require identical elements of proof,

2. offenses that are degrees of the same offense as provided by statute; and

3. offenses where the statutory elements of the lesser offense are subsumed by the greater offense. See Section 775.021(4)(b)1.-3., *Florida Statutes* (1997).

The State of Florida is not and has never been a "pure" Blockburger rule State when it comes to double jeopardy analysis. There are **express statutory exceptions** to the so-called Blockburger test.

This Court in *Sirmons v. State*, 634 So. 2d 153 (Fla.1994), construed section 775.021(4), *Florida Statutes* (1989), as **prohibiting** dual convictions of robbery with a weapon and grand theft of an automobile all arising out of the same taking of an automobile at knife point. This Court noted that grand theft is

a *permissive* lesser included offense of robbery with a weapon. See *Fla. Std. Jury Instr.* (Crim.) (Schedule of Lesser Included Offenses.) Justice Kogan, in a concurring opinion explained subparagraph 775.021(4)(b)2. as follows: "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*, 634 So.2d at 155. See also *State v. Anderson,* 695 So.2d 309 (Fla.1997) ("We conclude that subsection 775.021(4)(b)(2) means just what it says: Multiple punishments are barred for those 'crimes' that are degrees of the same underlying 'crime.' As a general rule, degree crimes, or 'degree variants,' are oftentimes denoted in the same statutory chapter, but such is not always the case.")

In a similar vein, this Court held in *Thompson v. State*, 607 So.2d 400, 422 (1992), that a defendant cannot be convicted of both fraudulent sale of a counterfeit controlled substance and felony petit theft where both charges arose from the same fraudulent sale. This Court agreed with the Fifth District that section 775.021(4)(b)2. *Florida Statutes* (1989), bars the dual convictions because both fraudulent sale and felony petit theft are simply aggravated forms of the same underlying offense distinguished only

by degree factors. *Thompson v. State*, 585 So.2d 492, 493-94 (Fla. 5th DCA 1991), *approved & adopted by, State v. Thompson, supra.*

This Honorable Court in *Houser v. State*, 474 So. 2d 1193 (Fla. 1985), expressly held that only one homicide sentence and conviction may be imposed for a single death even though under the so-called Blockburger analysis first degree murder, second degree murder, and manslaughter clearly have "elements" the other crimes do not possess. This Court explained to the lower courts and the bar that

> We agree with the Fifth District in *Vela* that only one homicide conviction and sentence may be imposed for a single death. The First District in the instant case determined that sections 316.1931(2) (DWI manslaughter) and 782.071 (vehicular homicide) were separate crimes, "each requiring proof of an element which the other does not." 456 So.2d at 1267. The court reasoned that DWI manslaughter was framed as an enhancement of the penalty for driving while intoxicated, and driving while intoxicated is a crime distinct from vehicular homicide. We do not agree.
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> * * * *
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> Second, while the First District is correct in its *Blockburger* analysis that the two crimes are separate, see, e.g., *State v. Baker*, 452 So.2d 927 (Fla.1984), *Blockburger* and its statutory equivalent in section 775.024(1), Fla. Stat. (1983), **are only tools of statutory interpretation which cannot contravene the contrary intent of the legislature.** *Garrett v. United States*, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985); *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983); *Rotenberry v. State*, 468 So.2d 971 (Fla.1985); *State v. Gibson*, 452 So.2d 553 (Fla.1984). And "[t]he assumption underlying the Blockburger rule is that [the legislative body] ordinarily does

> not intend to punish the same offense under two different statutes." *Ball v. United States,* 470 U.S. 856, 105 S.Ct. 1668, 1672, 84 L.Ed.2d 740 (1985). **This assumption should apply generally to statutory construction. While the legislature is free to punish the same crime under two or more statutes, it cannot be assumed that it ordinarily intends to do so.**
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> *Id.* at 1196-1197. [Emphasis Added].

Petitioner notes that in *State v. Getz*,435 So. 2d 789 (Fla. 1983),this Court held that the theft of a firearm and the petit theft of a calculator and coins from the property at the same time constituted separate offenses under the theft statute for which the defendant could be separately convicted. However, the *Getz* court made clear that it relied on statutory construction to conclude "that as the theft statute is written, the legislature intended to make theft of a firearm under subsection (2)(b)3 and theft of property worth less than one hundred dollars under subsection (2)(c) **separate and distinct offenses**, even when the thefts occur in a single criminal episode." *Getz,*435 So. 2d at 791.

In *Johnson v. State*, 597 So. 2d 798 (Fla. 1992), this Court held that the theft of a purse which contained a firearm could only be charged as a single crime. The Court pointed out that the defendant could not be separately convicted and sentenced for grand theft of cash and grand theft of a firearm accomplished by means of snatching a purse that contained both the cash and

firearm, when the defendant did not know nature of purse's contents.

At bar, Ms. Georgette Leenher testified that the man identified as Petitioner forced her into the bedroom. Petitioner demanded that she remove her diamond rings from her finger. T39. He threatened to cut the rings from her fingers. T39. She quickly removed her rings and handed it to him. T39. Petitioner tore a diamond heart necklace from her neck. T39-40. He also pulled a diamond bracelet from her arm. T40. After taking the items from her person, Petitioner then took jewelry from her jewelry box including watches.T40. He also took a number of jewelry items that belonged to her husband. T40. Petitioner according to Ms. Leenher took all these items and left the bedroom area.

Respondent argued in the lower tribunal in its Answer Brief that the " two charges are based on the taking of different items and two different victims. Count III is premised upon the taking of Georgette Leenher's bracelet, ring and necklace. Appellee's Answer Brief.

Count III of the information filed against Petitioner does not include Neil Leenher as a victim, nor does Count III include any property owned by Neil Leenher.(R 7). Moreover, Georgette Leenher's property in Count III is limited to Geogette Leenher's necklace, ring, and bracelet. Whereas, Count IV, the grand theft charge, is based upon the taking of jewelry from Georgette Leenher

and/or Neil Leenher.

Here the taking of the jewelry from the person of Georgette Leenher and the jewelry the subject of the grand theft was, in essence, one crime, the robbery of property from custody of Ms. Leenher. There was but one taking. The robbery did not end at one point and then the grand theft commenced. The grand theft information charged that the property taken was "jewelry" the property of Geogette Leenher and/or Neil Leehner. Since the grand theft count charged the ownership of the "jewelry" in the disjunctive the jury could have found that the jewelry forming the basis of the grand theft taken belonged solely to Ms. Leenher not to Mr. Neil Leenher. See *Harris v. State*, 549 So. 2d 1183, 1184 (Fla. 5th DCA 1989) ("We conclude that both aggravated assault convictions must be vacated in this case because the information charged the underlying felony of the firearm count in the disjunctive; that is, the information charged the underlying felony as being either the aggravated assault on Officer Blais or the aggravated assault on Officer Foley. Since the underlying felony was charged in the disjunctive, we are unable to ascertain which aggravated assault the jury relied on in reaching its verdict on the firearm charge.")

In any event, ownership of the property taken, jewelry, is **not** relevant for a robbery conviction. The property only need be in the custody of the person subject to the robbery. See *Hamrick*

v. State, 648 So. 2d *274* (Fla. 4th DCA 1995). Here the property the subject of both of the robbery and grand theft was in the custody of Ms. Georgette Leehner at the time of the taking.

In *Morgan v. State*, 407 So.2d 962 (Fla. 4th DCA 1981), the defendant was convicted of two counts of robbery . The District Court held that where one individual had property taken from him, and some of the property was his and some was that of his employer, there was only one robbery. See also *Anderson v. State*, 639 So. 2d 192(Fla. 4th DCA 1994).

In *J.M. v. State*, 709 So.2d 157 (Fla. 5th DCA 1998), the court found that dual convictions for robbery and grand theft auto were improper where both charges were based on an incident in which the defendant had snatched some keys from the victim's hand, ran out the door, and drove off in the victim's girlfriend's car. In finding that the dual convictions for robbery and grand theft were improper because only "one crime" had been committed, the Fourth District explained:

> When robbery is accomplished by a defendant entering a residence and taking car keys *along with other property* and then proceeding immediately to the stolen vehicle, only one taking has occurred. *Castleberry v. State*, 402 So.2d 1231 (Fla. 5th DCA 1981). In *Castleberry*, we held that because possession of the vehicle was obtained as a product of the same force and fear involved in the robbery, the taking of the car was a lesser included offense of the robbery charge.
> In *Sirmons v. State*, 634 So.2d 153 (Fla.1994), the Florida Supreme Court held that a defendant cannot be convicted separately for the offenses of armed robbery and grand theft

> auto because they are merely a degree variance of the same core offense of theft. Id. at 154. Multiple punishments or convictions are not permitted if the offenses in question are degrees of the same offense pursuant to section 775.021(4)(b)2, Florida Statutes (1989). See also *Crittenden v. State,* 684 So.2d 857 (Fla. 5th DCA 1996), *rev. denied*, 690 So.2d 1300 (Fla.1997); *Ricks v. State,* 656 So.2d 633 (Fla. 5th DCA 1995).
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> Here, the same property was charged as having been taken as a result of *both the robbery and the theft* (i.e., a motor vehicle and vehicle keys) and there was only one "taking" of that property charged and proven at trial. Thus there was only one crime committed.
>
> Id. at 157-158. (Emphasis supplied.)

The Fifth District holding in *J.M.* was based in large part on *Castleberry v. State*, 402 So.2d 1231 (Fla. 5th DCA 1981), *review denied*, 412 So.2d 470 (Fla.1982). Cases such as *J.M.* and *Castleberry* suggest that a defendant who steals car keys and other property during the course of a robbery, and who then subsequently takes the person's vehicle without any additional act of violence, can be convicted only of a single count of robbery and **cannot** be separately convicted for the theft of the vehicle.

Similarly, in *Hamilton v. State,* 487 So.2d 407 (Fla. 3d DCA 1986), the Third District reversed the defendant's conviction for grand theft, where the defendant had also been convicted of robbery for holding the victim up at gunpoint and stealing "the victim's cash and automobile--all in a single transaction." *Id.* at 408. The Third District reasoned that only one crime had been committed, explaining:

> The grand theft conviction, however, must be reversed because it merges, for double jeopardy purposes, with the robbery conviction. The record affirmatively demonstrates that the defendant held up the victim at gunpoint and stole the victim's cash and automobile--all in a single transaction. **One robbery was therefore committed--not a grand larceny of the automobile and a robbery of the cash as adjudicated below.** See *Castleberry v. State*, 402 So.2d 1231, 1232 (Fla. 5th DCA 1981), pet. for review denied, 412 So.2d 470 (Fla.1982); *McClendon v. State*, 372 So.2d 1161, 1162 (Fla. 1st DCA 1979); see generally *Brown v. State*, 430 So.2d 446, 447 (Fla.1983).

Id. at 408(e.s.); See also *Butler v. State*, 711 So.2d 1183 (Fla. 1st DCA 1998) (vacating one of two convictions for armed robbery, where undisputed evidence disclosed that property of the convenience store and property of the store's employee was taken from the employee during one continuous episode), *approved,* 735 So.2d 481 (Fla.1999); *Nordelo v. State*, 603 So.2d 36 (Fla. 3d DCA 1992) (vacating one of two convictions for armed robbery because taking money from a cash register and then beating the clerk and taking his wallet were parts of one "comprehensive transaction to confiscate the sole victim's property").

In *Anderson v. State*, 639 So. 2d 192 (Fla. 4th DCA 1994), a case on point the same Fourth District on a confession of error by the State held that only one robbery not two robberies of two separate clerks took place at a convenience store. The Court explained:

> In the present case, two employees were in the gas station/convenience store that was robbed. The state chose to charge appellant in Count I with taking the employer's currency from one of the employees, Charles Bowling. In Count II, it charged appellant with the robbery of a gold chain from the other employee, Robert Bridges.
>
> * * * *
>
> At trial, the evidence showed that appellant took the gold chain and the currency from Bridges. The state now concedes and we conclude that only one robbery therefore occurred. Accordingly, we affirm the conviction and sentence for Count II (Bridges); but reverse the conviction and sentence for Count I (Bowling) and remand with direction to vacate the latter.
>
> *Id.* at 193.

In *Horne v. State*, 623 So.2d 777 (Fla. 1st DCA 1993),the defendant was was convicted of five counts of armed robbery and six counts of armed kidnaping. The defendant argued on appeal whether two of the robbery counts involving the same victim constituted one crime. The First District agreed holding: " The first two counts of the information involved property taken from one individual. The separate counts resulted because **some of the property** belonged to the individual and some belonged to her employer. There was **little or no** temporal or geographic break between the two takings. Under these circumstances, there is only one robbery." *Id.* at 777.

For double jeopardy purposes, robbery and grand theft are the same offense or part of the ***same "CORE OFFENSE."*** See

Sirmons v. State, supra,; *Fryer v. State,* 732 So. 2d 30 (Fla. 5th DCA 1999).

In *Fryer*, the Fifth District concluded that the offense of robbery was subsumed within the more limited offense of car-jacking in that every carjacking is also a robbery, albeit a specialized form of robbery, and held that robbery, a second degree felony, is a necessarily lesser included offense of carjacking.

Here, there is only **one** criminal transaction, episode, or core criminal offense. In the leading case in double jeopardy jurisprudence, *Brown v. State,* 430 So.2d 446, 447 (Fla. 1983), the defendant robbed one cashier and then ordered her to open another cash register. The cashier did not have the key so she summoned the employee who did. This employee refused to believe a robbery was in progress and would not open the register until Brown displayed his firearm to her. When Brown obliged, so did she. This court held this was two robberies. "[W]here property is stolen from the same owner from the same place by a series of acts, if each taking is a result of a separate independent impulse, it is a separate crime." *Brown,* 430 So.2d at 447 (citation omitted). "What is dispositive is whether there have been successive and distinct forceful takings with a separate and independent intent for each transaction." *Id.* Thus, each offense arose out of a separate criminal transaction or episode.

B. **Chronological and spatial relationships.**

In *Castleberry v. State*, 402 So.2d 1231, 1232 (Fla. 5th DCA 1981), the Fifth District observed: "Whether an item is taken as part of one theft or robbery, or two, necessarily depends upon chronological and spatial relationships. If a defendant thrusts a pistol into a victim's ribs and says, 'Give me your watch, your wallet, and your tie!' and the person complies, only one statutory violation, one robbery, has been committed."

In *Sessler v. State*, 740 So.2d 587 (Fla. 5th DCA 1999), the Fifth District held that robbery of money and theft of a gun from a store clerk were not two (2) separate and distinct acts. The Fifth District ruled that the defendant could **not** have been separately convicted of robbery of cash and robbery of handgun. *See also Fraley v. State*, 641 So.2d 128 (Fla. 3d DCA 1994) (vacating one of defendant's two convictions for armed robbery where defendant took money from register and clerk's personal firearm; "Because the two acts of taking 'were part of one comprehensive transaction to confiscate the sole victim's property,' only one of those convictions can stand.")

At bar, the Fourth District misconstrued or misapplied this Court's *Sirmons* decision in reaching their erroneous conclusion that no double jeopardy violation occurred. Judge Stone writing for the Court stated the following:

> It is well-settled that a defendant may not be convicted of robbery of property and grand theft of the **same property** because "both offenses are simply aggravated forms of the

> same underlying offense, distinguished only by degree factors." *Sirmons v. State*, 634 So.2d 153 (Fla.1994). Thus, if the jewelry described in the robbery count is the same jewelry referred to in the grand theft count, the two convictions cannot stand. Here, however, **the robbery count pertained to the jewelry worn by Mrs. Leenher, while the grand theft count involved other stolen items.** Where the property which is the subject of the robbery is **different** from the property taken in the grand theft, the double jeopardy analysis is less well defined and "necessarily depends upon chronological and spatial relationships." *Castleberry v. State*, 402 So.2d 1231 (Fla. 5th DCA 1981).
>
> * * * *
>
> As in *Consiglio*, *Simboli*, and *Howard,* we deem Blevins' intent and actions in committing the robbery and grand theft to be sufficiently separate to constitute separate criminal offenses.
>
> *Id. (Emphasis Added.)*

Here the Fourth District dreamed up its own "same property" "same crime" test for double jeopardy violations involving all degrees of theft and robbery unsupported by any controlling authority but its own degree of flawed reasoning in their case pending before this Honorable Court, *Consiglio v. State,* Case No. SC99-125.

What the *Blevins* Court overlooked in focusing on the "property taken" is the fact that the gravamen of robbery is the *force* used to take something, not the actual thing taken. *See Taylor v. State*, 138 Fla. 762, 190 So. 262 (1939). For example, robbing someone of a pencil is just as serious an offense as robbing someone of an expensive watch. Thus, to sustain more than one conviction for

robbery, grand theft and/or petty theft based on the value of the property taken there should be more than one application of force, i.e., there should be "successive and distinct forceful takings." *Brown, supra*.

At bar, Petitioner, Mr. Blevins, instead of saying, "Give me your watch, your wallet, and your tie!", took jewelry (a number of items of personal property) from the person of Ms. Leenher in the bedroom and jewelry and watches from the jewelry box located on the bureau in the bedroom. This is one forceful taking a robbery. One "core crime" robbery, an aggravated form of theft. Nothing more and nothing less.

Petitioner urges this court to quash the decision of the Fourth District and hold that in the instant circumstances his grand theft conviction should be vacated under the double jeopardy clause.

POINT III

PETITIONER'S CRIME FELL WITHIN THE "WINDOW" PERIOD DURING WHICH THE 1995 GUIDELINES WERE IN VIOLATION OF THE "SINGLE SUBJECT" RULE OF THE FLORIDA CONSTITUTION

On February 17, 2000, this Court found unconstitutional in violation of the Single Subject Rule of the *Florida Constitution,* the 1995 amendments to the 1994 Florida sentencing guidelines. *Heggs v. State,* 25 Fla. L. Weekly S137 (Fla. Feb. 17, 2000). This

court reversed the sentence imposed upon Mr. Heggs and remanded the cause for resentencing in accordance with the valid laws in effect on the dates his crimes were committed. *Id.* at 140.

Petitioner's offense date is January 22, 1996, and he was sentenced pursuant to the 1995 Florida sentencing guidelines. *See* Ch. 95-184, Section 6, *Laws of Fla.* (1995); Section 921.0014(1), *Florida Statute* (1994).

This Court in *Salters v. State,* 25 Fla. L. Weekly S 365 (Fla. May 11, 2000), ruled that *Heggs* applied to crimes committed between October 1, 1995, and May 24, 1997. Here Petitioner's offense date of January 22, 1996, falls within the window period established by this Court for a *Heggs* violation. Although the trial court departed upward from Petitioner's guidelines sentence range to impose a LIFE sentence upon him for Count II, burglary with a battery , since Petitioner's criminal offense date is within the applicable window period, this Court should reverse his upward departure life sentence and remand for resentencing.

CONCLUSION

Petitioner respectfully requests this Honorable Court to grant the relief sought in the Brief on the Merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Gentry Benjamin, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, Florida 33401 by courier this _____ day of May, 2000.

Attorney for Michael Blevins