IN THE SUPREME COURT OF FLORIDA

CASE NO. 00-936

DARRELL WAYNE BUTLER,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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STATEMENT OF THE CASE AND FACTS

The petitioner/defendant adopts the Statement of the Case and Facts set forth in his initial brief on the merits.

SUMMARY OF ARGUMENT

The Third District's decision holding the defendant was properly convicted and sentenced for both the separate offenses of robbery and carjacking is incorrect and should be quashed. The record is clear there was only one forceful taking of the one victim's keys, purse, venetian blinds and car at one time, in the same place in just a few seconds; it was indisputably one episode and one criminal transaction. Consequently, the separate convictions and sentences of robbery in count 2 and carjacking in count 1 are in violation of double jeopardy under the United States and Florida Constitutions and his conviction and sentence for robbery must be reversed.

ARGUMENT

THE STATE'S ARGUMENT THAT THERE WERE TWO SUCCESSIVE AND DISTINCT FORCEFUL TAKINGS AND THUS TWO SEPARATE CRIMINAL TRANSACTIONS IS NOT SUPPORTED BY THE EVIDENCE AND CONSEQUENTLY, THERE WAS A SINGLE CRIMINAL OFFENSE AND DUAL CONVICTIONS FOR ROBBERY AND CARJACKING ARE IN VIOLATION OF DOUBLE JEOPARDY UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The petitioner/defendant has asserted in his initial brief that the dual convictions for robbery in count 2 and carjacking in count 1 for offenses that occurred during a single criminal episode are a violation of double jeopardy under the United States and Florida Constitutions and consequently, the decision of the Third District must be quashed and his conviction and sentence for robbery must be reversed.

In its answer brief, the state argues that "because in the instant case there were separate criminal offenses committed in the course of one episode, each offense committed by the Defendant warrants a separate conviction" under §775.021(4)(b), Fla. Stat. (1999). (State's brief, pg. 6) According to the state, the defendant was properly convicted of both robbery and carjacking because separate crimes occurred: "The first crime, the robbery, took place and was completed when the Defendant took her purse and items from her person by striking her on the face. The second crime, the carjacking, took place and was completed when

the Defendant drove off in the victim's car." (State's brief, pg. 6) The state argued "there was a robbery committed, and a separate, later carjacking," and thus a "successive and distinct forceful taking with a separate and independent intent for each transaction" and that while the temporal separation between the acts was "very minimal," it was sufficient to support two separate acts that justified convictions for both crimes. (State's brief, pg. 6-7)

The state's argument has no merit. If the state's argument were true - that the facts in the present case amount to "two successive and distinct forceful takings with a separate and independent intent for each" - then it would be virtually impossible to conceive of a robbery-with-carjacking situation that would NOT amount to two separate takings. As previously argued in the nearly identical case pending in this Court, Cruller v. State, Case No: 1999-49, the facts in these cases are as close to a simultaneous taking of both personal items and a car as could be. Here, the taking of Sanchez's purse, keys and venetian blinds and the taking of her car happened immediately at the same time and place in only a few seconds and was indisputably a single episode. The defendant walked up to Sanchez as she was entering her car, hit her, then took her keys, purse and venetian blinds, and immediately WITHIN SECONDS took the car and drove away. (T: 260-263, 326-327, 313-314) There was one continuous transaction with one victim at one time

during which he took her property. It was one robbery.

As queried in Cruller, if this is not one transaction, one criminal offense, then what would be? The only "more simultaneous" situation would have to be a defendant literally taking the victim's property as the defendant was in the very process of getting in the victim's car to drive away, i.e., an "all in one fell swoop" action, getting in the car and reaching out and grabbing the other property as he drove off. There could not be a shorter time frame than the present case unless the defendant was literally pulling the victim's purse off her shoulder at the same time the defendant was opening the car door and driving away.

That is too much. While the question what is a "separate criminal transaction or episode" depends on the facts of the case, this case does not even fall close to the dividing line. Compare Simboli v. State, 728 So.2d 792 (Fla. 5th DCA 1999) (separate convictions of robbery and carjacking not violate double jeopardy where defendant first stole money then forced taxi driver out of the car and drove the car away); Howard v. State, 723 So.2d 863 (Fla. 1st DCA 1998) (armed robbery and armed carjacking involved two discrete offenses where defendant took victim's car at gunpoint then later, while in a different location, took victim's personal effects); Mason v. State, 665 So.2d 328 (Fla. 5th DCA 1995) (where robbery occurs first, then carjacking, two separate crimes are committed independently of

each other).

Thus, here there is only one criminal episode. As set out in defendant's initial brief, the test for determining whether, in the absence of an express statement of legislative intent to punish them separately, offenses arising out of a single criminal transaction or episode may be separately punished is the Blockburger test, adopted in Florida in §775.021(4)(a), Florida Statutes (1995), which states that offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial. See Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180 (1932). Under this test, it is clear, as the courts in Ward v. State, 730 So.2d 728 (Fla. 1st DCA 1999) and Fryer v. State, 732 So.2d 30 (Fla. 5th DCA 1999) noted, that robbery and carjacking do not each require proof of an element that the other does not and that they are not separate offenses under Blockburger. Accordingly, absent a clear expression of legislative intent, which does not exist here, a defendant may only be convicted of one of the two offenses unless each offense arose out of a separate criminal transaction or episode, which, as outlined above, is not the case here. Ball v. United States, 105 S.Ct. 1668 (1985); M.P. v. State, 682 So.2d 79 (Fla. 1996).

Consequently, the defendant's conviction and sentence is in violation of double

jeopardy under the United States and Florida Constitutions, the decision of the Third District should be quashed and the defendant's conviction and sentence for robbery should be vacated.

CONCLUSION

Based upon the foregoing, the defendant requests that this Court quash the decision of the Third District and reverse the defendant's conviction and sentence for the robbery in count 2.

Respectfully submitted,
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CERTIFICATE OF FONT

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

By:_____
MARTI ROTHENBERG #320285
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, 444 Brickell Ave., #950, Miami, Florida 33131, this _____ day of August, 2000.

By:_____
MARTI ROTHENBERG
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