IN THE SUPREME COURT OF FLORIDA

Case No. SC03-1318

Certified Conflict of Decisions

STATE OF FLORIDA,

Petitioner,

v.

ARTHUR FLORIDA,

Respondent.

—

ANSWER BRIEF AND APPENDIX OF RESPONDENT, ARTHUR FLORIDA

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STATEMENT OF THE CASE AND FACTS

Respondent, Arthur Florida ("Mr. Florida"), was convicted in the Broward County Circuit Court for committing multiple criminal offenses in a single episode. Two convictions were for shooting law enforcement officer Calvin Harrison in the head (Counts VI and VII). The Fourth District Court of Appeal ruled that the dual convictions violated Mr. Florida's constitutional right not to be subjected to double jeopardy, and certified express conflict with the decision of the Fifth District Court of Appeal in *Schirmer v. State*, 837 So. 2d 587, 589 (Fla. 5th DCA 2003).[1] *Florida v. State*, 855 So. 2d 109, 111 (Fla. 4th DCA) (On Motion for Rehearing), *rev. granted*, 861 So. 2d 431 (Fla. 2003). [A 1 (attaching copies of both cases).] This Court accepted jurisdiction.

[1] The State in its Initial Brief presents no argument with respect to two separate convictions for shooting at law enforcement officer William Latchford (Counts VIII and IX). Likewise, the State presents no argument with respect to the Fourth District's holding that withholding sentencing on one conviction does not cure a double-jeopardy violation. *Florida*, 855 So. 2d at 111. Thus, the State has waived any claim that these Fourth District rulings were in error. *See Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999) (stating that where defendant did not present any argument or allege on what grounds trial court erred in denying claims in his postconviction motion, claims were "insufficiently presented for review"); *Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) (explaining that the defendant's "failure to fully brief and argue" specific points on appeal "constitutes a waiver of these claims").

The Information alleged the following with respect to the shooting of Officer Harrison:

COUNT VI

> …. ARTHUR ANTHONY FLORIDA did unlawfully and feloniously, and from a premeditated design to effect the death of Calvin Harrison, a human being, did attempt to kill Calvin Harrison, and in the course of said attempt used a firearm or other deadly weapon, to-wit: a handgun, and in furtherance of said attempt did shoot Calvin Harrison in the head with a handgun, and at the time, the said Calvin Harrison was a duly qualified and legally authorized law enforcement officer … and was engaged in the lawful performance of his duties … .

COUNT VII

> …. ARTHUR ANTHONY FLORIDA did unlawfully attempt to commit murder in the first degree in that ARTHUR ANTHONY FLORIDA did unlawfully and feloniously and from a premeditated design to effect the death of Calvin Harrison, a human being, attempt to kill said Calvin Harrison by shooting the said Calvin Harrison in the head with a firearm, to-wit: a handgun, said firearm being in the possession of ARTHUR ANTHONY FLORIDA, and said ARTHUR ANTHONY FLORIDA did intend to commit murder in the first degree … .

[R 46 (A 2).][2]

[2] The record on appeal, if consecutively numbered, does not match up with the index attached to it in this Court's records. In addition, many pages in the record still bear the pagination assigned in Mr. Florida's direct appeal from his convictions, which are of course out of sequence in the more limited record presented on review of Mr. Florida's collateral attacks. In an attempt to be clear, record references in this brief will give first the page number that would apply if the record were consecutively numbered, followed by an appendix reference or other reference to identify the specific document being referenced.

The verdict form for Count VI presented the following four options [R 100 (A 3)]:

> A. The Defendant is Guilty of Attempted First Degree Murder Of [sic] Law Enforcement Officer, as charged in the Information.
>
> B. The Defendant is Guilty of Aggravated Battery Of A Law Enforcement Officer, a lesser included offense.
>
> C. The Defendant is Guilty of Aggravated Battery, a lesser included offense.
>
> D. The Defendant is Not Guilty.

The jury selected option "B," finding Mr. Florida guilty of aggravated battery of a law enforcement officer for shooting Officer Harrison. [R 100 (A 3).]

The verdict form for Count VII also presented four options, as follows [R 101 (A 3)]:

> A. The Defendant is Guilty of Attempted Murder In The First Degree, as charged in the Information.
>
> B. The Defendant is Guilty of Attempted Murder In The Second Degree With A Firearm, a lesser included offense.
>
> C. The Defendant is Guilty of Aggravated Battery, a lesser included offense.
>
> D. The Defendant is Not Guilty.

Again, the jury selected option "B," finding Mr. Florida guilty of attempted second degree murder with a firearm for shooting Officer Harrison. [R 101 (A 3).]

The trial court sentenced Mr. Florida to life imprisonment for the Count VII conviction for attempted second degree murder. [R 78 (A 4).] The trial court withheld sentencing on the Count VI conviction for aggravated battery of a law enforcement officer. [R 221 (Tr. 2441).] The arguments for withholding sentencing on Count VI

were stated as follows at the sentencing hearing:

> THE COURT: …. Now, the Court is not imposing a sentence as to Count 6.
>
> As to Count 7 –
>
> MR. HAAS (Defense): What does the Court do with a conviction in Count 6, because we are going to be asking the Court to vacate the conviction on that count. We would argue that Mr. Florida cannot be adjudged guilty of two crimes alleging the very same conduct.
>
> It is not even that one is a lesser. They allege the same exact conduct as each other. We would argue that violates his rights against double jeopardy.
>
> THE COURT: State wish to be heard?
>
> MR. SIEGEL: I ask the Court to withhold the imposition of sentence but allow the conviction to remain. I don't think it violates double jeopardy because there are certain elements attached to each offense. Aggravated battery has basically a struggle with somebody as an element without being done by ill will, hatred, spite, or malice. Where attempted second degree murder doesn't involve any contact at all necessarily but only an attempt to kill somebody with ill will, hatred, spite, or malice.
>
> I think there are different elements as to each offense. It is not a double jeopardy problem. It is just basically an attempt of [sic] legislature, according to case law I found that any one shooting is not meant to have two different crimes associated with one shooting. ….
>
> THE COURT: As to Count 6, the Court is going to withhold imposition of sentence at this time.

[R 218-221 (Tr. 2438-2441).]

Post-Conviction Proceedings

Mr. Florida's convictions and sentences were affirmed on direct appeal. *Florida v. State*, 701 So. 2d 881 (Fla. 4th DCA 1997). Mr. Florida filed a Motion for Post-Conviction Relief under Florida Rule of Criminal Procedure 3.850. [R 11 (Motion).] Among other arguments, Mr. Florida asserted that a double-jeopardy

violation occurred when he was convicted of two offenses for the single act of shooting Officer Harrison, and that the double-jeopardy violation was not cured by withholding sentence on one offense. [R 16, 23-25 (Motion and Memorandum of Law).] The trial court summarily denied Mr. Florida's Rule 3.850 Motion. *See Florida*, 855 So. 2d at 111.

On appeal, the Fourth District Court of Appeal reversed, holding that the constitutional protection against double jeopardy prohibited the dual convictions as to Officer Harrison, and that withholding sentence did not cure the double-jeopardy violation. *Florida*, 855 So. 2d at 111. The Fourth District certified that its decision conflicted with the Fifth District Court of Appeal's decision in *Schirmer*. *Florida*, 855 So. 2d at 111. The State timely invoked this Court's jurisdiction to review the decision of the Fourth District in *Florida*, and the Court granted review, appointing undersigned counsel to represent Mr. Florida.

SUMMARY OF THE ARGUMENT

Proof of an act constituting aggravated battery of a law enforcement officer; i.e., one that is reasonably certain to do serious bodily injury to another, also suffices to establish attempted second degree murder as that judge-made offense is defined in Florida's Standard Jury Instructions. Where the facts necessary to establish one crime also suffice to establish another crime, then under the rule of *Blockburger v. United States*, 284 U.S. 299 (1932), the offenses are not separate and it constitutes a double-jeopardy violation to convict separately for both offenses. Accordingly, the Court should approve the decision of the Fourth District in *Florida*, and disapprove the decision of the Fifth District in *Schirmer*.

Even if the Court concludes that attempted second degree murder requires proof of some fact that aggravated battery does not require, and, therefore, that they are separate offenses, it should approve *Florida* because aggravated battery is a recognized lesser included offense of attempted second degree murder. The Standard Jury Instructions list aggravated battery as a lesser included offense of attempted second degree murder, as did the verdict forms here. Under the final exception of section 775.021(4)(b), Florida Statutes, the Legislature has indicated that it did not intend to separately punish for these two offenses. Therefore, the proper way to charge and instruct in this case would have been to avoid setting up the possibility of a conviction for both offenses. The cure for the resulting improper dual convictions is to vacate the duplicitous conviction, as the Fourth District did. The fact that the State asserted multiple charges to capture the possibility of reclassifying the offense to a higher level of punishment because the victim was a law enforcement officer does not change the fundamental nature of the core offense charged and convicted, and thus does not change the result. Alternatively, the Court should approve the Fourth District's decision in *Florida* on the grounds that Counts VI and VII should have been presented to the jury as alternatives to eliminate any possibility of dual convictions.

The Court should revisit the issue of whether attempted second degree murder should continue to exist in Florida. Florida is one of only two jurisdictions in the country that treat attempt as a general intent crime if the underlying crime is a general intent crime. The result of adherence to that principle, as it applies to this and similar cases, is that a person can be convicted of attempted second degree murder as well as aggravated battery even though all that was intended or attempted were the

completed acts necessary to constitute aggravated battery. This result is illogical because a completed act, leaving nothing unaccomplished that was intended or attempted, cannot constitute an attempt to commit some other offense. More than merely illogical, the resulting possibility of dual convictions for a single offense violates the constitutional guarantee against double jeopardy. Accordingly, the Court should reconsider the wisdom of recognizing attempted second degree murder as a distinct crime, and should join the overwhelming majority of jurisdictions that do not recognize this crime.

ARGUMENT AND AUTHORITIES

Standard of Review. The issues are purely legal and therefore the standard of review is de novo. *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000), *cert. denied*, 532 U.S. 958 (2001).

I. A CONVICTION FOR ATTEMPTED SECOND DEGREE MURDER DOES NOT REQUIRE PROOF OF ANY FACT NOT ALSO REQUIRED TO ESTABLISH AGGRAVATED BATTERY OF A LAW ENFORCEMENT OFFICER, AND THEREFORE THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY PROHIBITS DUAL CONVICTIONS FOR THESE CHARGES.

The parties do not disagree about what legal test determines whether the State can convict someone for two separate crimes arising out of a single act involving a single victim. The disagreement lies in applying the legal test to the facts of this case. Correctly interpreted and applied, the governing test demonstrates that the dual convictions for shooting Officer Harrison violated Mr. Florida's constitutional right

to be free from double jeopardy.[3]

The governing legal test is enunciated in the seminal case of *Blockburger v. United States*, 284 U.S. 299 (1932): "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." 284 U.S. at 303. Florida has codified the *Blockburger* test in section 775.021(4), Florida Statutes (1995),[4] which provides in pertinent part as follows:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, *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.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this 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.

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[3] The Fifth Amendment of the United States Constitution provides in pertinent part that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The parallel provision of the Florida Constitution provides that "No person shall be … twice put in jeopardy for the same offense." Art. I, § 9, Fla. Const.

[4] The statutes in effect on the date of the crimes in question – here, April 1995 -- control Mr. Florida's rights and obligations. *See Clark v. State*, 790 So. 2d 1030, 1031 (Fla. 2001); *Marcado v. State*, 735 So. 2d 556, 557 (Fla. 3d DCA 1999); *Lee v. State*, 677 So. 2d 41, 43 (Fla. 1st DCA 1996).

§ 775.021(4), Fla. Stat. (1995) (emphasis added).

The State advocates resolving the issue with the rationale of the Fifth District in *Schirmer*, which the Fourth District certified as being in direct conflict with its decision in the *Florida* case under review.[5] That is, the State argues that aggravated battery of a law enforcement officer requires proof of bodily injury, while attempted second degree murder does not; and that attempted second degree murder requires proof that the act in question could have resulted in the death of the victim, while aggravated battery does not. [In. Br. 9.]

This analysis fails to acknowledge the fact that the Florida Legislature has not defined the crime of *attempted* second degree murder, but rather this crime is judge-made and its elements are set forth exclusively in the Standard Jury Instructions and prior case law, not in the statutes. This fact changes the analysis under *Blockburger*, because it is impossible to look to a Legislative definition of *attempted* second degree murder to determine the Legislative intent with respect to multiple punishments for this offense. Thus, the statutory definition of second degree murder, and the cases on which the State relies dealing with first-degree murder, are inapposite to this analysis. [In. Br. 9-12.]

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[5] The Fourth District in *Florida* spoke in terms of a single act and a single victim, which is no longer the dispositive analysis after the 1988 Legislature's amendment of section 775.021 essentially overruled this Court's decision in *Carawan v. State*, 515 So. 2d 161 (Fla. 1987). *See Florida*, 855 So. 2d at 111. Nevertheless, the Fourth District's certification of conflict with *Schirmer* makes it clear that the issue before this Court is whether the two crimes of aggravated battery of a law enforcement officer and attempted second degree murder fall within the scope of *Blockburger*'s double-jeopardy test so as to prohibit separate convictions for the two crimes arising out of a single act.

The Florida Statutes define aggravated battery of a law enforcement officer in three steps. The statutes define battery as an actual and intentional touching or striking against the will of another, or intentionally causing bodily harm to another. § 784.03, Fla. Stat. (1995). Aggravated battery, a second degree felony, is battery committed with the addition of intentionally or knowingly causing great bodily harm, permanent disability, or permanent disfigurement, or with the use of a deadly weapon. § 784.045(1), Fla. Stat. (1995). Aggravated battery committed upon a law enforcement officer is reclassified to become a first-degree felony. § 784.07(2)(d), Fla. Stat. (1995).

The Florida Statutes define second degree murder, a first-degree felony, as the "unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." § 782.04, Fla. Stat. (1995). The Statutes, however, do not define *attempted* second degree murder.

In general, an "attempt" to commit a crime is the performance of "any act toward the commission of such offense," but which stops short of completion. § 777.04, Fla. Stat. (1995). The presence of a separate statutory definition of an "attempt," however, does not mean that an attempt to commit any and all crimes stands alone as a separately-recognized offense. To the contrary, Florida does not recognize attempts to commit several crimes, including culpable negligence, extortion, perjury, corruption by threat against public servant, resisting officer with violence, and conspiracy. *See* Std. Jury Instr. (Crim.) at 338 (Schedule of Lesser Included Offenses) (Supp. 2003). If the crime itself includes the attempt or if the attempt was completed, attempt is not to be treated as a separate crime. *Id.*

Attempted second degree murder is essentially a judge-made crime, and courts must resort to the Standard Jury Instructions and to case law to determine its elements. The Standard Jury Instructions for attempted second degree murder provide as follows:

> To prove the crime of Attempted Second Degree Murder, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. (Defendant) intentionally committed an act which would have resulted in the death of (victim) except that someone prevented the defendant from killing (victim) or the defendant failed to do so.
>
> 2. The act was imminently dangerous to another and demonstrating a depraved mind without regard for human life.

Fla. Std. Jury Instr. (Crim.) at 60 (Supp. 2003). The Standard Jury Instructions go on to define an act as "imminently dangerous to another and demonstrating a depraved mind" if it is such that "a person of ordinary judgment would know [it] is reasonably certain to kill *or* do serious bodily injury to another," is done with ill will, and indicates indifference to human life (emphasis added). In this definition, the Instructions provide that the imminently dangerous/depraved mind element of attempted second degree murder can be satisfied *equally* by an act "reasonably certain to kill" *or* an act "reasonably certain to … do serious bodily injury." Thus, an act constituting aggravated battery easily satisfies the element of potentially serious bodily injury necessary to establish attempted second degree murder.

The Standard Jury Instructions do not separately define what kind of act "would have resulted in the death" of the victim, in the first element of attempted second degree murder. However, the definition of imminently dangerous/depraved mind set forth for the second element of the crime appears to satisfy the first element of the

crime as well. That is, the first aspect of the definition requires that a person of ordinary judgment would know the act is "reasonably certain to kill or do serious bodily injury." This statement of the nature of the act, and the absence of any separate definition for the act satisfying the first element of attempted second degree murder, leads to the reasonable conclusion that an act satisfying the second element will satisfy the first as well. Again, the result of this analysis is that the same underlying act would constitute aggravated battery. Dual convictions for the two crimes violate double jeopardy.

II. EVEN IF ATTEMPTED SECOND DEGREE MURDER AND AGGRAVATED BATTERY ARE SEPARATE OFFENSES, DUAL CONVICTIONS ARE PROHIBITED UNDER THE THIRD EXCEPTION TO SECTION 775.021(4)(b); ALTERNATIVELY, THE COURT SHOULD APPROVE THE DECISION BELOW BECAUSE ALLOWING BOTH CHARGES TO GO TO THE JURY WAS IMPROPER.

Even if the Court concludes that proof of some additional fact is necessary to establish attempted second degree murder that is not necessary to establish aggravated battery, the Court should affirm the decision of the Fourth District in *Florida* because the latter crime is a lesser-included offense of the former. The Florida Legislature indicated its intent that lesser-included offenses not be punished separately, when it enacted a statutory exception to the rule of *Blockburger* in section 775.021(4)(b), Florida Statutes (1995). That statute provides in pertinent part as follows:

> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this 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.

§ 775.021(4), Fla. Stat. (1995) (emphasis added).

In this case, the verdict form and the Standard Jury Instructions both indicate that the crime of aggravated battery is a lesser-included offense of attempted second degree murder. The verdict form for Count VII presented the option of attempted second degree murder, immediately followed by the option of aggravated battery, which it described as "a lesser included offense," as follows:

A. The Defendant is Guilty of Attempted Murder In The First Degree, as charged in the Information.

B. The Defendant is Guilty of Attempted Murder In The Second Degree With A Firearm, a lesser included offense.

C. The Defendant is Guilty of ***Aggravated Battery, a lesser included offense***.

D. The Defendant is Not Guilty.

[R 138 (emphasis added).] The verdict form gave the jury the opportunity to exercise its inherent pardon power and convict Mr. Florida of what it was told was a lesser-included offense.

The Standard Jury Instructions specifically list aggravated battery as a lesser included offense of attempted second degree murder. In the instructions for attempted second degree murder, the Standard Jury Instructions set forth a chart of lesser included offenses. That chart lists aggravated battery as a lesser included offense. Fla. Std. Jury Instr. (Crim.) 61. The separate section of the Standard Jury Instructions devoted to lesser included offenses again lists aggravated battery as a lesser included

offense under second degree murder. *Id.* at 340. Thus, the Standard Jury Instructions, and its schedule of lesser included offenses, both of which this Court has approved, support the argument that aggravated battery is a lesser included offense of attempted second degree murder, thus bringing the two crimes within the final exception of 775.021(4)(b), Florida Statutes, and prohibiting dual convictions for them.

In this case, the analysis is complicated by the fact that the State failed to present as alternatives the two charges arising out of the single act of shooting Officer Harrison. The charges in Counts VI and VII are identical except that in Count VI Officer Harrison is identified as a law enforcement officer and in Count VII he is not. [R 47-48 (A 2).] Apparently the State presented the two counts this way because there was some question about whether Officer Harrison was outside of his jurisdiction. [R 123 (Initial Brief in Fourth DCA).] These charges required the threshold resolution of a factual issue as to whether or not Officer Harrison was a law enforcement officer as defined in the reclassification statute governing crimes against such officers, section 784.07(2)(d), Florida Statutes (1995). The jury should have been instructed to resolve this factual issue first, and then proceed to Count VI only if they found that Officer Harrison was a law enforcement officer, in such case rendering Count VII moot (or vice versa). *See Desire v. State,* 829 So. 2d 948, 950 (Fla. 4th DCA 2002) ("To insure that no double jeopardy violation occurs, it is preferable for the court to either separate or narrow the alternatives in the instructions and jury form when a defendant is charged under an alternative conduct statute … ."). In this case, the charges in Count VII need not have been presented separately at all, because the verdict form for Count VI alone included two possible lesser included offenses in the event that the jury determined

Officer Harrison did not satisfy the statutory definition of a law enforcement officer. [R 100 (A 3) (options C and D).] Because Counts VI and VII were not presented to the jury as alternatives, the jury convicted Mr. Florida of both the first-degree felony of aggravated battery of a law enforcement officer, and the second-degree felony of attempted second degree murder.[6] [R 100-01 (A 3).]

Under these circumstances, the fact that the ultimate convictions were such that the "lesser included" offense of aggravated battery of a law enforcement officer was a first degree felony and the "greater" offense of attempted second degree murder was a second degree felony should not change the outcome. *Blockburger* requires analysis of the elements of the core offenses; and likewise, the focus of the exceptions under section 775.021(4)(b), Florida Statutes, is on the nature of the underlying offense – the act committed. Here, the jury found that Mr. Florida fired a handgun at Officer Harrison, shooting him in the head. That single act constituted both attempted second degree murder and the lesser included offense of aggravated battery as those crimes are defined in the Standard Jury Instructions. The constitutional analysis is not subverted when the degree of the offense changes as a result of enhanced punishment because the victim was a law enforcement officer. The Legislature in section 775.021(4)(b) has indicated its intent not to punish separately for lesser included offenses, and thus the dual convictions in this case were improper, and the Court should affirm the decision of the Fourth District. Alternatively, the Court should affirm the Fourth District's decision in *Florida* for the separate reason that the two counts at

[6] Second degree murder is a first degree felony. § 782.04(2), Fla. Stat. (1995). *Attempted* second degree murder, however, is reduced one level to a second degree felony. § 777.04(4)(c), Fla. Stat. (1995).

issue were improperly presented to the jury as cumulative charges rather than alternatives.

III. THE COURT SHOULD REVISIT THE QUESTION OF WHETHER FLORIDA SHOULD RECOGNIZE THE CRIME OF ATTEMPTED SECOND DEGREE MURDER.

Courts have struggled with attempted second degree murder issues over the years, many finding it counter-intuitive as a practical matter to conclude that a single act constituting aggravated battery does not also provide the central element of attempted second degree murder. The Court recently addressed the problematic nature of attempted second degree murder, deciding by a narrow margin and over a vigorous and well-reasoned dissent to continue to recognize this judge-made crime. *See Brown v. State*, 790 So. 2d 389 (Fla. 2001) (Harding, J., dissenting, with Anstead and Pariente, JJ.). This case, however, presents another opportunity for the Court to consider this issue and to recede from *Brown*, embracing instead the views expressed in the dissent.

As Justice Harding substantiated in his dissent in *Brown*, Florida is one of only two jurisdictions that treat attempt as a general intent crime if the underlying crime is a general intent crime. *Brown*, 790 So. 2d at 393 (Harding, J., dissenting).[7] All other jurisdictions treat attempt as requiring proof of a specific intent to commit the underlying crime. *Id.* Under this approach, the crime of attempted second degree murder cannot exist, because by definition second degree murder does not involve an intent to kill.

[7] The other state is Colorado. *Brown*, 790 So. 2d at 393 (Harding, J., dissenting).

This result is logical from the standpoint of examining the nature of second degree murder. The essence of second degree murder, and what distinguishes it from first-degree murder, is the *absence* of intent to kill. The only intent required in second degree murder is the intent to commit an act of a character reflecting a depraved mind and without regard for human life, which ultimately results in death. The same act is legally sufficient to constitute the core element of the judge-made crime of attempted second degree murder, which does not require death.

The only intent required to prove the offense of attempted second degree murder is the intent to do the act that was in fact done. The underlying offense of second degree murder does not require an intent to kill and so an attempt to commit second degree murder could not involve an intent to kill. Thus, under the elements necessary to prove an attempt to commit second degree murder, nothing must be intended or attempted other than the act that was accomplished. A completed act, leaving nothing unaccomplished that was intended or attempted, cannot constitute an attempt to commit some other offense. Thus, there were not two separate offenses committed, and there cannot be two separate convictions.

If the crime of attempted second degree murder is to continue to exist in Florida, however, then the Court must give full effect to the fundamental constitutional right to be free of double jeopardy arising from a single offense. The Court can accomplish that by ruling that where *both* aggravated battery (or, as in this case, aggravated battery of a law enforcement officer) *and* attempted second degree murder are charged as a result of a single act involving a single victim, the State, under the constitutional protections against double jeopardy, cannot allow convictions on both

crimes to stand.

CONCLUSION

The constitutional right to be free from double jeopardy forbids dual convictions for the crimes of aggravated battery of a law enforcement officer and attempted second degree murder of the same officer arising out of the same act. The State has waived any argument on other issues raised by the Fourth District's decision. *See supra* p. 1, n.1. Accordingly, the Court should approve the decision of the Fourth District below and disapprove the decision of the Fifth District in *Schirmer*.

Respectfully submitted this 1st day of March, 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing with its appendix has been furnished by United States mail to counsel for Petitioner, Celia Terenzio and Don M. Rogers, Office of the Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401, this 1st day of March, 2004.

_____

Attorney

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief was prepared using the Times New Roman font in 14 point, and therefore is in compliance with the Florida Rules of Appellate Procedure.

_____

Attorney

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