IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC03-1318

STATE OF FLORIDA,

Petitioner,

vs.

ARTHUR FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the appellee in the Fourth District Court of Appeal. Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State or prosecution.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On June 26, 1996, a jury in Broward County convicted Respondent, Arthur Florida, of 12 felonies including two counts of armed burglary, robbery with a firearm, armed sexual battery, armed kidnaping, attempted sexual battery, aggravated battery of a law enforcement officer, attempted second degree murder with a firearm, attempted aggravated battery of a law enforcement officer, attempted aggravated battery, resisting an officer with violence, shooting within a dwelling, and armed burglary with a dangerous weapon. Four of the counts are life felonies. Respondent took a direct appeal to the Fourth District Court of Appeal which appeal was per curiam affirmed without written opinion in Florida v. State, 701 So. 2d 881 (Fla. 4th DCA 1997).

The present case arises from the summary denial of a motion filed pursuant to Fla. R. Crim. P. 3.850 and the direct appeal to the Fourth District Court of Appeal. Florida v. State, 855 So. 2d 109(Fla. 4th DCA 2003). In the opinion the Fourth District stated the relevant facts as follows.

> In ground three, appellant alleged that his convictions for aggravated battery of a law enforcement officer in count six and attempted second degree murder with a firearm in count seven violated double jeopardy as the crimes involved the same victim and same act. See Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), codified in § 775.021(4), Fla. Stat. (1995); Johnson v. State, 744 So. 2d 1221, 1221 (Fla. 4th DCA 1999); Gresham v. State, 725 So. 2d 419, 420 (Fla. 4th DCA

> 1999). We have held that where a defendant kills a single victim with a series of murderous blows, it is a violation of due process to convict on both aggravated battery and second degree murder. See Campbell-Eley v. State, 718 So. 2d 327, 329 (Fla. 4th DCA 1998).
>
> In this case, the record before us indicates that appellant was convicted of both aggravated battery of a law enforcement officer and attempted second degree murder for shooting at the officer. We acknowledge that our decision in this case expressly conflicts with Schirmer v. State, 837 So. 2d 587, 589 (Fla. 5th DCA 2003), in which the fifth district concluded that double jeopardy did not bar dual convictions for aggravated battery with a deadly weapon and attempted second degree murder where both criminal charges related to the same act--the stabbing of the victim with a knife.
>
> We reject the state's argument, asserted at trial and here on appeal, that there is no prejudice from these dual convictions because appellant was not sentenced on count six for aggravated battery of a law enforcement officer. Harmless error analysis is not applied to this type of fundamental error. See Johnson v. State, 460 So.2d 954, 958 (Fla. 5th DCA 1984). Thus, the record of appellant's conviction constitutes the violation of double jeopardy.
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> 855 So. 2d at 111.

The limited record which was before the Fourth District Court of Appeal on the 3.850 summary appeal from which the case arises reveals the following facts relevant to the issue presented.

On April 26, 1995 Officer Harrison was dispatched to a home in Hollywood, Florida where a violent crime was taking place. Harrison entered the home and found Respondent hiding in the

shower. Respondent pulled a pistol and shot twice, in rapid succession, striking Harrison once in the head. As a result of shooting Officer Harrison, Respondent was charged with attempted first degree murder of a law enforcement officer in count 6 and attempted first degree murder in count 7. The jury convicted Respondent of aggravated battery of a law enforcement officer in count 6 and attempted second degree murder with a firearm in count 7. At the sentencing hearing the prosecutor asked the trial judge not to impose sentence on count 6. The prosecutor argued:

> 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 necessary 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 the legislature, according to case law I found, that any one shooting is not meant to have two different crimes associated with one shooting.

(see sentencing hearing transcript pages 2446-2247)

At the urging of the prosecutor the trial judge did not impose a sentence in count 6.

SUMMARY OF THE ARGUMENT

Respondent's right against double jeopardy was not violated by his convictions for the statutorily separate and distinct offenses of aggravated battery of a law enforcement officer and attempted second degree murder with a firearm. Since each offense requires proof of an element that the other does not, separate convictions and sentences for these two offenses are permissible under §775.021(4)(a), Fla. Stat. (1995). Moreover, these two offenses are not merely degree variants of the same core offense and are not lesser included offenses of each other so as to fall within the exceptions set forth in §775.021(4)(b)2 and 3, Fla. Stat. (1995). Nowhere in the Florida statutes is aggravated battery made a degree of attempted second degree murder, or vice versa. The two offenses are totally separate crimes. Consequently, since no exception to the Blockburger rule reiterated in §775.021(4)(a) Fla. Stat., applies here, Respondent's convictions for the separate crimes did not violate the prohibition against double jeopardy.

The issue presented in this appeal is controlled by this court's opinion in Gordon v. State, 780 So. 2d 17 (Fla. 2001) where this court upheld convictions for 1) attempted first degree murder with a firearm, 2) causing bodily injury during a felony with a weapon, and 3) aggravated battery causing great

bodily harm with a firearm, all arising from one gunshot.

ARGUMENT

DOUBLE JEOPARDY IS NOT VIOLATED IN THE PRESENT CASE WHERE RESPONDENT WAS CONVICTED OF AGGRAVATED BATTERY OF A LAW ENFORCEMENT OFFICER AND ATTEMPTED SECOND DEGREE MURDER FOR SHOOTING A POLICE OFFICER

On April 26, 1995 Officer Harrison was dispatched to a home in Hollywood, Florida where a violent crime was taking place. Harrison entered the home and found Respondent hiding in the shower. Respondent pulled a pistol and shot twice, striking Harrison once in the head. For shooting Officer Harrison, Respondent was charged with attempted first degree murder of a law enforcement officer in count 6 and attempted first degree murder in count 7. The jury convicted Respondent of aggravated battery of a law enforcement officer in count 6 and attempted second degree murder with a firearm in count 7. The trial judge did not impose a sentence in count 6. The Fourth District Court of Appeal, reviewing the summary denial of a motion filed pursuant to Fla. R. Crim. P. 3.850 found that the two convictions, "violated double jeopardy as the crimes involved the same victim and the same act." Florida v. State, 855 So. 2d 109, 111 (Fla. 4th DCA 2003). The State of Florida asserts that this conclusion is incorrect and contrary to the holding of this

court in Gordon v. State, 780 So. 2d 17 (Fla. 2001). The State asserts that the convictions for aggravated battery of a law enforcement officer and attempted second degree murder are separate offenses and do not violate double jeopardy principles.

"The prevailing standard for determining the constitutionality of multiple convictions for offenses arising from the same criminal transaction is whether the Legislature 'intended to authorize separate punishments for the two crimes.'" Gordon v. State, 780 So. 2d 17, 19 (Fla. 2001), citing, M.P. v. State, 682 So. 2d 79, 81 (Fla. 1996); see State v. Anderson, 695 So. 2d 309, 311 (Fla. 1997) ("Legislative intent is the polestar that guides our analysis in double jeopardy issues...."). Absent a clear statement of legislative intent to authorize separate punishments for two crimes, courts employ the test from Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) to determine if separate offenses exist. Gordon v. State, 780 So. 2d 17, 20 (Fla. 2001). In determining whether multiple convictions are valid, Blockburger requires courts to examine the offenses to ascertain whether each offense requires proof of an element that the other does not. See State v. Carpenter, 417 So. 2d 986 (Fla. 1982). Courts applying this "same elements" test can only review the statutory elements of the crimes involved and may not

examine the pleadings or the proof introduced at trial to determine if a double jeopardy violation exists. Gaber v. State, 684 So. 2d 189, 190 (Fla. 1996); Gordon v. State, 780 So. 2d 17, 21 n. 3 (Fla. 2001). "If each offense contains an element that the other does not, Blockburger is satisfied, even though a substantial overlap in proof is used to establish the crimes." State v. Carpenter, 417 So. 2d 986, 987 (Fla. 1982); Austin v. State, 852 So. 2d 898 (Fla. 5th DCA 2003).

The Blockburger same-elements test, along with guidance from the legislature concerning its legislative intent to authorize multiple crimes arising out of the same episode, is codified in § 775.021(4), Fla. Stat. (1995), which reads as follows:

> (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.

"Thus, the Blockburger test, or 'same-elements' test, inquires whether each offense has an element that the other does not. If so, then they are considered separate offenses, and the defendant may be convicted and punished for each offense." Gordon v. State, 780 So. 2d 17, 20 (Fla. 2001).

At bar the two crimes involved, aggravated battery of a law enforcement officer and attempted second degree murder, have dramatically different elements. Compare Fla. Stat. § 784.045[1] with §§ 782.04(2)[2] and 784.07. According to the Standard Jury

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[1]784.045. Aggravated battery-
(1)(a) A person commits aggravated battery who, in committing battery:
1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
2. Uses a deadly weapon.

[2]777.04(1) criminalizes an attempt "to commit an offense prohibited by law."
§ 782.04(2) defines second degree murder as,
[t]he 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.

Instructions the elements of second degree murder are: 1) that the defendant intentionally committed an act which would have resulted in the death of the victim except that someone prevented him from killing the victim or he failed to do so; 2) the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life. The Standard Jury Instructions give the elements for aggravated battery of a law enforcement officer as: 1) the intentional touching or striking of the victim against his will or intentionally causing bodily harm to the victim; 2) Defendant in committing the battery intentionally or knowingly caused great bodily harm, permanent disability, permanent disfigurement or used a deadly weapon; 3) the victim was a law enforcement officer; 4) the defendant knew the victim was a law enforcement officer; and 5) the victim was engaged in the lawful performance of his duties when the battery was committed; See Standard Jury Instructions (Crim); See McKowen v. State, 792 So. 2d 1251 (Fla. 5th DCA 2001)(“Battery on a law enforcement officer is actually and intentionally touching or striking a law enforcement officer against his will, while he is engaged in the lawful execution of his duties. Attempted second degree murder requires the intentional commission of an imminently dangerous act which demonstrates a depraved mind that could have resulted in the death of the

victim.") There are no elements that are common to the two crimes at issue. Therefore, the two convictions do not violate the same elements test, which is the first statutory exception found in section 775.021(4)(b)1.

In Gordon v. State, 780 So. 2d 17, 21 (Fla. 2001), this court advised that its construction of the second statutory exception found in section 775.021(4)(b)2 requires a two-step analysis. First, it must be determined whether the crimes constitute separate offenses under Blockburger, as codified in § 775.021(4)(a). If they do, a court must next examine whether the crimes are "degree variants" or aggravated forms of the same core offense.

The State already explained above that each crime has an element the other does not and are therefore separate offenses under Blockburger. The two crimes involved in this case are quite different and arise from different core offenses. One arises from the core offense of homicide and the second arises from the core offense of battery. Mitchell v. State, 830 So. 2d 944, 946 n. 7 (Fla. 5th DCA 2002) ("Review of this concept indicates that the core offenses are basically theft, battery, possession of contraband, or homicide.") Since the two offenses grow out of different core crimes, they cannot be "degree variants" or aggravated forms of the same core offense.

Therefore, the second exception of section 775.021(4)(b)2 is not applicable.

The third exception, found in section 775.021(4)(b)3, focuses on whether one crime is a necessarily lesser included offense of the other. The exception for lesser included offenses applies only to category one or necessarily lesser included offenses and not to category two or permissive lesser included offenses. Gaber v. State, 684 So. 2d 189, 192 (Fla. 1996); Gordon v. State, 780 So. 2d 17, 21 n. 3 (Fla. 2001); State v. Johnson, 601 So. 2d 219, 221 (Fla. 1992)("Necessarily lesser included offenses were listed in section 775.021(4)(b)3 as an exception to the stated legislative intent to convict for each criminal offense committed in the course of one criminal transaction..."); Aiken v. State, 742 So. 2d 811 (Fla. 2nd DCA 1999).

There is no category one or necessarily lesser included offense for attempted second degree murder. See Fla. Std. Jury Instr.(Crim.) Aggravated battery is not a category one lesser included offense of attempted murder because each crime contains an element not contained in the other. State v. Johnson, 601 So. 2d 219, 220 (Fla. 1992). Therefore, the third exception is not applicable to the present case.

The legislature set forth its rule of statutory construction

in § 775.021(4)(b) Fla. Stat. (1995), which clearly states that "[t]he intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction." This court reviewed that section and stated, "section 775.021(4) makes it clear that a defendant may be convicted of two or more criminal offenses arising out of the same transaction as long as each criminal offense contains at least one separate element." State v. Johnson, 601 So. 2d 219 (Fla. 1992). The Fourth District apparently overlooked this rule of statutory construction when it held petitioner could not be "convicted of both aggravated battery of a law enforcement officer and attempted second degree murder for shooting at the officer." Florida v. State, 855 So. 2d 109, 111 (Fla. 4th DCA 2003). In the instant case, legislative intent dictates that double jeopardy presents no constitutional bar to convictions for aggravated battery on a law enforcement officer and attempted second degree murder with a firearm arising out of the same incident.

In Gordon v. State, 780 So. 2d 17 (Fla. 2001) the defendant was convicted of three felonies, 1) attempted first degree murder with a firearm, 2) causing bodily injury during a felony with a weapon, and 3) aggravated battery causing great bodily harm with a firearm, all arising from one gunshot. This court

upheld the three convictions against a double jeopardy challenge. The holding of Gordon directly applies to the present case. The holding in Gordon is consistent with the holding in Schirmer v. State, 837 So. 2d 587 (Fla. 5th DCA 2003), which the Fourth District cited as being in express conflict with their opinion in this case. In Schirmer the Fifth District upheld convictions for aggravated battery and attempted second degree murder arising from one stab wound.

This court should reverse that portion of the opinion in Florida that invalidates the conviction for aggravated battery of a law enforcement officer.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, Petitioner respectfully submits that this court must reverse the portion of the opinion below that holds respondent could not be "convicted of both aggravated battery of a law enforcement officer and attempted second degree murder for shooting at the officer."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "PETITIONER'S INITIAL BRIEF" has been furnished by mail to: Susan Kelsey, Holland and Knight, P.O. Box 810, Tallahassee, FL. 32302, this _____day of February, 2004.

_____
Of Counsel

Certificate of Font and Type Size

I certify this brief is typed using Courier New 12 font.

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Don M. Rogers