IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC03-1318

STATE OF FLORIDA,

Petitioner,

vs.

ARTHUR FLORIDA,

Respondent.

PETITIONER'S REPLY 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.

SUMMARY OF THE ARGUMENT

Respondent's right against double jeopardy was not violated by his convictions for 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).

The elements of the crime of attempted second degree murder are well defined by two statutes and listed in the standard jury instructions.

The decision of the Fourth District Court of Appeal is based on an erroneous expansion of an exception to the rule outlined in section 775.021. This singular homicide exception states that only one homicide conviction and sentence may be imposed for a single death. The exception is not applicable in cases, such as the one at bar, not involving a death.

The third exception found in § 775.021(4)(b)3, Fla. Stat. (1995)(Offenses which are lesser offenses the statutory elements which are subsumed by the greater offense) is not applicable to the present case as aggravated battery is not a necessarily lesser included offense of attempted second degree murder. In determining if double jeopardy has been violated with the two convictions this court is not permitted to examine the

accusatory pleading or the proof adduced at trial.

This court should not revisit the issue of whether the crime of attempted second degree murder exists in this State. The issue was not raised in the trial court in the 3.850 motion. The issue was not raised on direct appeal to the Fourth District Court of Appeal. The issue was not mentioned in the opinion of the Fourth District Court of Appeal from which the present case arises. The issue is not properly before this court.

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

In the initial brief the State argued that double jeopardy was not violated in the present case where Mr. Florida was convicted of aggravated battery of a law enforcement officer and attempted second degree murder with a firearm arising from the same act. The State relied heavily on Gordon v. State, 780 So. 2d 17 (Fla. 2001), wherein this court upheld three felony convictions all arising from one gunshot. It is interesting to note that respondent does not mention or cite Gordon in the answer brief.

Respondent initially argues that the legislature has not defined the crime of attempted second degree murder. (answer brief page 10). Although technically correct, as there is not a statute titled attempted second degree murder, the crime is based on two statutes. § 777.04(1) Fla. Stat. (1995) and § 782.04(2) Fla. Stat. (1995). This is true for all attempts. In these two statutes the legislature has defined both attempt and second degree murder. The State would note that there is a standard jury instruction for attempted second degree murder. See Florida Standard Jury Instructions (Crim). In cases

involving double jeopardy issues this court does refer to the elements of the crimes as listed in the standard jury instructions. See Gordon v. State, 780 So. 2d 17, 21 (Fla. 2001).

At bar this court is presented with a very narrow question of pure law[1]-whether a criminal defendant can be convicted of both attempted second degree murder with a firearm and aggravated battery of a law enforcement officer when both crimes arise from a single act and not violate double jeopardy. Because this analysis involves a double jeopardy analysis, this court must be guided by legislative intent. § 775.021, Fla. Stat. (1995). "Legislative intent is the polestar that guides [the] analysis in double jeopardy issues." State v. Anderson, 695 So. 2d 309, 311 (Fla. 1997). In State v. Smith, 547 So. 2d 613 (Fla. 1989), [the court] recognized the legislative intent to impose multiple punishments for separate offenses even if the offenses are based on only one act. Id. at 616. Double jeopardy is not implicated as long as the criminal offenses for which a defendant was charged contain statutory elements which the others do not, Smith, 547 So. 2d at 613, and the charged offenses are not degree variants of each other. Anderson; See

[1]The standard of review for a pure question of law is de novo. Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000).

Donaldson v. State, 722 So. 2d 177, 183 (Fla. 1998). Because the legislature has made it abundantly clear that their intent "is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction..." § 775.021(4)(b) Fla. Stat. (1995), the decision below must be reversed.

Respondent's argument clearly acknowledges that the elements of the two crimes involved in the present case are quite different. However, respondent argues that in certain cases an act constituting aggravated battery can also be an act that is imminently dangerous to another demonstrating a depraved mind that would also constitute attempted second degree murder. The State agrees this is the law of our State. § 775.021(4)(b) Fla. Stat. (1995)("The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction..."); Gordon.

The State acknowledges that this court has noted an exception to the rule outlined in section 775.021 applicable only in cases involving an actual homicide death. In Gordon this court discussed the exception as follows:

> We have held repeatedly that section 775.021 did not abrogate our previous pronouncements concerning punishments for singular homicides. See Goodwin v. State, 634 So. 2d at 157-58 (Grimes, J. concurring) ("I believe that the Legislature could not have

> intended that a defendant could be convicted of two crimes of homicide for killing a single person."); State v. Chapman, 625 So. 2d 838, 839 (Fla.1993); Houser v. State, 474 So. 2d 1193, 1196 (Fla. 1985) (noting that "only one homicide conviction and sentence may be imposed for a single death"); Campbell-Eley, 718 So. 2d at 329; Laines v. State, 662 So. 2d at 1250; Goss v. State, 398 So. 2d at 999. Indeed, this principle is based on notions of fundamental fairness which recognize the inequity that inheres in multiple punishments for a singular killing. As Justice Shaw noted in his Carawan dissent, "physical injury and physical injury causing death, merge into one and it is rationally defensible to conclude that the legislature did not intend to impose cumulative punishments." Carawan, 515 So. 2d at 173 (Shaw, J., dissenting). No death occurred in this case.

Id, at 25.

However, the decision of the Fourth District Court of Appeal is based on an erroneous expansion of this singular homicide exception to a case not involving a death. Central to the decision of the Fourth District Court of Appeal at bar is the following sentence: “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.” Florida v. State, 855 So. 2d 109, 111 (Fla. 4th DCA 2003) citing, Campbell-Eley v. State, 718 So. 2d

327, 329 (Fla. 4th DCA 1998)[2]. The present case does not involve a death. The rationale of the Fourth District Court of Appeal, as stated in the above sentence, is erroneous because the Fourth District applies the singular homicide exception to an attempted homicide case. In Gordon this court specifically rejected the expansion of the singular homicide exception to cases involving an attempted homicide. This court specifically stated: "[t]hat rationale is not applicable here, where an actual homicide did not occur as a result of Gordon's criminal actions." Gordon, 780 So. 2d at 25. Clearly, the Fourth District Court of Appeal failed to take this portion of the Gordon opinion into account in issuing the decision under review. The State asserts that the decision of the Fourth District Court of Appeal is based on an erroneous expansion of the singular homicide exception. The exception is not applicable to the present case as a death did not occur.

Respondent argues that the third exception found in § 775.021(4)(b)3, Fla. Stat. (1995)(Offenses which are lesser offenses the statutory elements which are subsumed by the greater offense) is applicable to the present case. As the State pointed out in the initial brief, this exception is not

[2]Campell-Ely involves a death as the defendant was convicted of second degree murder.

applicable to the present case because, as this court has held on numerous occasions, the exception only applies to necessarily lesser included offenses. State v. McCloud, 577 So. 2d 939, 941 (Fla. 1991)(holding that "an offense is a lesser included offense for purposes of section 775.021(4)only if the greater offense necessarily includes the lesser offense"); 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..."); See Aiken v. State, 742 So. 2d 811, 812 (Fla. 2nd DCA 1999).

Aggravated battery is not a category one lesser included offense of attempted second degree murder because each crime contains an element not contained in the other. Persaud v. State, 821 So. 2d 411, 414 (Fla. 2nd DCA 2002); Levesque v. State, 778 So. 2d 1049 (Fla. 4th DCA 2001). There is no category one or necessarily lesser included offense for attempted second degree murder listed in the chart contained in the standard jury instructions. See Fla. Std. Jury Instr.(Crim.). Therefore, contrary to the position respondent

asserts, the third exception is not applicable to the present case.

Respondent also suggests this court should examine the charging document and the facts of the case to determine if the charges could have been brought in one count rather than two. In determining if double jeopardy has been violated with the two convictions this court is not permitted to examine the "accusatory pleading or the proof adduced at trial." § 775.021(4)(a) Fla. Stat. (1995); Gaber v. State, 684 So. 2d 189, 190 (Fla. 1996)(court acknowledges it cannot examine facts from the record relevant to claim "[r]ather our double jeopardy analysis must look only to the statutory elements" of the crimes).

Finally, respondent suggests this court should revisit the question of whether the crime of attempted second degree murder exists in this state. See Brown v. State, 790 So. 2d 389 (Fla. (2000)(crime of attempted second degree murder exists in Florida) The issue was not raised in the trial court in the 3.850 motion. The issue was not raised on direct appeal to the Fourth District Court of Appeal. The issue was not mentioned in the opinion of the Fourth District Court of Appeal from which the present case arises. Florida. The issue was not preserved for review in this court. § 924.051(3) Fla. Stat.; Tillman v.

State, 471 So. 2d 32, 35 (Fla. 1985)("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.") Alternatively, the State asserts this court does not have jurisdiction over the newly raised issue as it is totally beyond what was presented to this court at the time this court made the decision to accept jurisdiction.

The State would also point out that this court has consistently cited to Brown noting that the crime of attempted second degree murder exists in this state. Holland v. State, 773 So. 2d 1065, 1071 (Fla. 2000); Rivero v. State, 790 So. 2d 1091 (Fla. 2001); Durham v. State, 790 So. 2d 1090 (Fla. 2001); Redding v. State, 845 So. 2d 892 (Fla. 2003)(unpublished opinion). Based on this reliance on Brown it is clear that this court does not want to revisit the opinion finalized less than three years ago.

In conclusion, the State asserts that this court should reverse the Fourth District's decision to invalidate the adjudication of Arthur Florida on count 6, aggravated battery of a law enforcement count. This result is consistent with the holdings of the Fifth District in Schrimer v. State, 837 So. 2d

587 (Fla. 5th DCA 2003); Gutierrez v. State, 860 So. 2d 1043, 1045-46 (Fla. 5th DCA 2003) and McKowen v. State, 792 So. 2d 1251 (Fla. 5th DCA 2001)[3] and more importantly directly in line with the decision of this court in Gordon. The Legislature has clearly expressed its intent to convict for each crime committed in the course of one criminal episode. The convictions for attempted second degree murder and aggravated battery of a law enforcement officer in the present case do not violate double jeopardy. The two convictions are consistent with clearly expressed legislative intent and case law from this court and must be upheld.

[3]In McKowen the jury found the defendant guilty of the lesser included offenses of aggravated battery on a law enforcement officer and attempted second degree murder. The Fifth District concluded the two crimes were not "subsumed, one within the other, merely because they were committed at the same time against the same officer." 792 So. 2d at 1252.

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 REPLY BRIEF" has been furnished by mail to: Susan Kelsey and Robert R. Feagin, III, Holland and Knight, P.O. Box 810, Tallahassee, FL. 32302, this _____day of April, 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