IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC04-637**

BLEKLEY COICOU,

Petitioner/Cross-Respondent,

v.

THE STATE OF FLORIDA,

Respondent/Cross-Petitioner.

ON PETITION AND CROSS-PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL
L.T. No.: 3D03-271

REPLY BRIEF OF CROSS-PETITIONER

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I. *REPLY ARGUMENT ON STATE'S CROSS-PETITION:* ANALYSIS OF THE ESSENTIAL ELEMENTS OF ROBBERY MUST BE BASED SOLELY UPON THE STATUTORY ELEMENTS WITHOUT REGARD TO THE CONDUCT CHARGED OR PROVED.

Defendant's argument on the State's cross-petition is that the court below was correct in holding that "shooting the firearm was [an] essential element of the robbery" and therefore could not form the basis of a conviction for attempted felony murder. (Answer Brief of Cross-Respondent at 9). This admits that what is or is not an "essential element" of robbery is the correct focus of this Court's analysis. But the failure of Defendant's argument on this point is telegraphed in his first paragraph, in that it is made, "[i]n accordance with the charge and the proof adduced at trial." *Id*. at 7.

What is or is not an essential element is well-traveled ground in double jeopardy jurisprudence, where the courts flirted with but ultimately rejected a "same conduct" test in favor of the well-entrenched "same elements" test of *Blockburger v. United States*, 284 U.S. 299 (1932). *See, e.g., United States v. Dixon*, 509 U.S. 688 (1993)(overruling "same conduct" test first established three years earlier in *Grady v. Corbin*, 495 U.S. 508 (1990)); *State v. Johnson*, 676 So. 2d 408, 410 (Fla. 1996)("same-conduct rule was a continuing source of confusion

and lacked constitutional roots").

One of the two cases examined by the Supreme Court in *Dixon* was a successive prosecution for assaultive conduct, which conduct had already formed the basis for a contempt conviction on a violation of a civil protection order. 509 U.S. at 692-93. In rejecting *Grady* and applying *Blockburger*, the Court founded its reasoning on "deep historical roots" that spoke: "[w]hile it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other." *Id*. at 704 (*quoting, Gavieres v. United States*, 220 U.S. 338, 345 (1911)). The historical roots re-affirmed in *Dixon* demonstrated that the conduct of the accused was not material to an analysis of the elements embraced in each charge. Just so here, where the conduct of the accused, Defendant shooting the victim with a firearm, was one and the same, but two offenses resulted. *See, e.g., Boler v. State*, 678 So. 2d 319 (Fla. 1996)(Florida defendant may be separately convicted and sentenced for felony murder and the qualifying felony – robbery).

As this Court noted in *Johnson*, the *Blockburger* test has been codified in Florida at *Section 775.021, Florida Statutes*, which provides 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***." *Johnson*, 676 So. 2d at 410; § 775.021(4)(a), Fla. Stat. (*emphasis added*). This

Court has characterized the *Blockburger* test as an abstract test in which "two statutory offenses are essentially independent and distinct if each offense can ***possibly*** be committed without necessarily committing the other offense." *State v. Weller*, 590 So. 2d 923, 925 (Fla. 1991)(*emphasis added, quotation omitted*). Both the Legislature and this Court have thus demonstrated conclusively that the plain meaning of any analysis of "elements" involves an abstract test of possible proofs, not an actual comparison of conduct charged or proved at trial. Therefore, the conduct here, Defendant's shooting of the victim with a firearm, is not material to the analysis of what is an essential element of the underlying robbery, and should not have been considered by the court below.

Refusing to be distracted by the actual conduct of a defendant, charged or proven, when analyzing the elements of an offense, is a course that has been followed by this Court in contexts other than double jeopardy. In *State v. Hearns*, 961 So. 2d 211 (Fla. 2007), this Court was presented with the issue of whether or not Battery on a Law Enforcement Officer (BOLEO) was a forcible felony for purposes of sentencing as a Violent Career Criminal. The issue turned on that portion of *Section 776.08, Florida Statutes* which defined a forcible felony as, *inter alia*: "any other felony which involves the use or threat of physical force or violence against any individual." This Court disapproved of the district court's reasoning, in that it analyzed "not the necessary elements of the crime of BOLEO,

but the State's proof." *Hearns*, 961 So. 2d at 215-216. The Court cited its earlier decision in *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991), in its holding:

> To the extent the district court held that *Perkins* allows courts to look beyond the statutory elements of an offense and analyze the evidence in a particular case, the court's opinion conflicts with *Perkins*. We disapprove that part of the opinion. We reiterate that the only relevant consideration is the statutory elements of the offense. If "the use or threat of physical force or violence against any individual" is not a necessary element of the crime, "then the crime is not a forcible felony within the meaning of the final clause of *section 776.08*."

Hearns, 961 So. 2d at 216.

This Court should once again decline the invitation to take a *Grady* detour in looking beyond the statutory elements of the offense to determine what is or is not an essential or necessary element of the offense of robbery in this case. The actual conduct here, Defendant having shot the victim with a firearm, is not a relevant consideration. Only an abstract analysis of the essential elements of the crime is called for. Here, the shooting was an act that was not an essential element of robbery, because it is ***possible*** to prove the crime of robbery merely by showing that the victim was put in fear by verbal threats or showing other violent acts that did not involve shooting or even the use of a firearm. Therefore, this Court should quash the decision below and affirm the conviction for attempted felony murder.

CONCLUSION

Based upon the arguments and authorities cited herein, the State of Florida respectfully requests this Court quash the decision below and affirm the conviction for attempted felony murder. In the alternative, the State requests that the Court approve the decision of the court below.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief of Appellee was mailed this 22nd day of October, 2008, to Harvey J. Sepler, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

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CERTIFICATE OF COMPLIANCE WITH TYPE AND FONT

I hereby certify that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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