IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 05-597
4th DCA CASE NO. 4D03-2924

PATRICK JOSEPH KELSO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S SUPPLEMENTAL ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

PRELIMINARY STATEMENT

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

In this brief, the symbol AR" will be used to denote the record on appeal. Similarly, reference to the trial transcripts will be by the symbol "T."

STATEMENT OF THE CASE AND FACTS

Respondent continues to rely on the Statement of the Case and Facts contained in the original answer brief but reiterates the following facts for the convenience of the Court.

Petitioner, Patrick Joseph Kelso, was found guilty of burglary of a dwelling while armed (Count 1); grand theft of a firearm, a third degree felony, (Count 2); and theft of property greater than twenty thousand dollars, a second degree felony, (Count 3). (R 65-66, 71, 76, T 411) Petitioner was designated a Prison Releasee Reoffender and was sentenced to life in prison on Count 1, and to five years in prison on Counts 2 and 3, all to run concurrently. (R 74, 78-82, T 433)

He appealed his convictions to the District Court of Appeal, Fourth District, arguing, in pertinent part, that his right not to be subjected to double jeopardy had been violated when he was convicted of both Counts 2 and 3, grand theft of a firearm, and theft of property greater than twenty thousand dollars because both thefts occurred during the same burglary. (R 87) The Fourth District, citing to this Court's decision in State v. Getz, 435 So. 2d 789 (Fla. 1983), noted the special nature of firearms, which were to be treated by legislative intent as distinct from other property that could be stolen during a single burglary. Kelso v. State, 898 So. 2d 1023 (Fla. 4th DCA 2005). The appellate court affirmed the convictions, ruling they did not violate double jeopardy based on Getz. However, the appellate court certified conflict with

Wilson v. State, 776 So. 2d 347 (Fla. 5th DCA 2001), Scarola v. State, 889 So. 2d 108 (Fla. 5th DCA 2004), and Thompson v. State, 888 So. 2d 89 (Fla. 2d DCA 2004), as contrary to the Getz decision.

Petitioner sought the discretionary review of this Court and, during the ensuing proceeding, this Court directed the parties to file supplemental briefs with regard to the impact and application of Florida Statutes Section 775.021 (4)(b), as amended in 1988, upon State v. Getz, 435 So. 2d 789 (Fla. 1983), if any, and if a double jeopardy violation exists in this circumstance to fully address whether relief should be retroactively applied. The instant brief has been filed pursuant to that directive.

SUMMARY OF THE ARGUMENT

As this Court recognized in State v. Getz, 435 So. 2d 789 (Fla. 1983), and re-affirmed in Johnson v. State, 597 So. 2d 798 (Fla. 1992), due to the special nature of firearms, there is no double jeopardy in convicting a defendant of theft of a firearm as well as theft of other property during the same criminal episode. The 1988 amendment of Section 775.021, Florida Statutes, which abolished the single transaction rule supports, rather than detracts from, the conclusion that there was no double jeopardy violation since it continues to mandate that every act which constitutes a separate criminal offense is grounds for a separate conviction and sentence regardless of whether it was committed during the same criminal transaction or episode as another criminal offense. Therefore, this Court should uphold the decision of the Court of Appeal, Fourth District, to affirm Petitioner's convictions and sentences on Counts 2 and 3 in Kelso v. State, 898 So. 2d 1023 (Fla. 4th DCA 2005).

ARGUMENT

DOUBLE JEOPARDY IS NOT IMPLICATED IN PETITIONER'S CONVICTIONS FOR GRAND THEFT OF A FIREARM AND FOR GRAND THEFT OF PROPERTY.

Petitioner contends that a violation of his right to remain free from double jeopardy occurred when he was convicted of both grand theft of a firearm and theft of property of a value of more than twenty thousand dollars for items taken during the same burglary. The District Court of Appeal, Fourth District, relied in part on this Court's decision in State v. Getz, 435 So. 2d 789 (Fla. 1983), to determine that there was no double jeopardy violation here. Kelso v. State, 898 So. 2d 1023 (Fla. 4th DCA 2005). This Court has now directed Respondent to address the impact and application of Florida Statutes Section 775.021 (4)(b), as amended in 1988, upon State v. Getz, 435 So. 2d 789 (Fla. 1983).

The issue of double jeopardy has had a long and troubled history. This Court first propounded the single transaction rule in the seminal case of Simmons v. State, 10 So. 2d 436, 439 (1942), in which the Court set aside a sentence for attempting to have carnal intercourse with an unmarried female under the age of 18 because the defendant had also been convicted of and sentenced for assault with intent to commit rape. However, in 1976 and 1977, the Florida Legislature enacted Section 775.021(4), providing that:

> whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

Chs. 76-66 and 77-174, Laws of Florida.

In Borges v. State, 415 So. 2d 1265 (Fla. 1982), this Court expressly recognized that the Legislature had abrogated the single transaction rule by the enactment of Section 775.021(4) in 1976. The Court acknowledged that the Legislature had the power to do that, noting that "where the legislature has expressed its intent that separate punishments be imposed upon convictions of separate offenses arising out of one criminal episode, the Double Jeopardy Clause is no bar to such imposition." Borges, 415 So. 2d at 1267. "The power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the legislature." Id, citing Whalen v. United States, 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 63 L. Ed. 2d 715 (1980).

This Court then addressed the abolition of the single transaction rule and its application to the crimes of theft of a firearm and theft of other property in Getz. In Getz, the defendant was charged, under Section 812.014, with theft of a firearm and with theft of other property worth less than one hundred dollars (a calculator and some coins). Both offenses arose out of a single burglary. This Court ruled that even

though the theft of the firearm and the theft of the calculator and coins occurred at the same time, the defendant could be convicted of and sentenced for both offenses without violating double jeopardy because the offenses constituted separate offenses arising under different subsections of Section 812.014.

The Court stated:

> It is our view that **as the theft statute is written**, the legislature intended to make theft of a firearm under subsection (2)(b)3 and theft of property worth less than one hundred dollars under subsection (2)(c) separate and distinct offenses, even where the thefts occur in a single criminal episode. It is clear from a reading of section 812.014 that the legislature intended to treat the theft of different types of property as separate criminal offenses and to establish distinct punishments for the separate offenses. We note if a firearm is stolen, its value is not an element of the offense and it is grand theft even if the firearm is worth less than one hundred dollars.
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> * * *
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> The fact that the offenses for which respondent was convicted and sentenced are defined in the same statute is irrelevant because it is the intent of the legislature which controls in this situation.

Getz, 435 So. 2d at 791. (emphasis supplied).

In 1983, the Florida Legislature again amended Section 775.021(4) to read:

> whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, 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.**

Ch. 83-156, Laws of Florida (emphasis supplied to show new language).

However, in Carawan v. State, 515 So.2d 161 (Fla. 1987), the Court ignored the double jeopardy test already set forth in § 775.021(4), and created a new test to determine legislative intent. Consequently, the Legislature amended Section 775.021(4), Florida Statutes, again in 1988, in direct response to Carawan. See, State v. Smith, 547 So.2d 613 (Fla. 1989) (court acknowledged that legislature had overridden Carawan).

In the 1988 amendment, the legislature split Section 775.021(4) into subsections (a) and (b). Ch. 88-131, Laws of Florida. In Subsection (4)(a), the legislature essentially retained the language specifying that an offender should be convicted and sentenced for each of one or more separate criminal offenses committed in the course of one criminal transaction and 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. Ch. 88-131, Laws of Florida. In Subsection (4)(b), the legislature added new language stating that:

> 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.

Chapter 88-131, Laws of Florida.

In the instant case, Petitioner attempts to argue that Getz was statutorily superseded by the enactment of Section 775.021(4)(b) in 1988. Petitioner further attempts to argue that he was subjected to double jeopardy because both offenses of which he was convicted: grand theft of a firearm, and theft of property greater than twenty thousand dollars, are degree variants of the same core offense: theft, and therefore fall within one of the exceptions to Section 775.021(4). Petitioner specifically refers to Section 775.021(4)(b)2 which specifies that one of the exceptions to the rule are offenses which are degrees of the same offense as provided by statute. The State submits that Petitioner's arguments are not well taken.

As this Court recognized in Getz, the theft statute **as written** shows that stolen firearms are distinct from other stolen property and must be treated accordingly. The theft statute is substantially identical in format to the theft statute at bar in Getz and, significantly, was not amended in response to Getz nor was it amended in tandem with the enactment of Section 775.021(4)(b). The enactment of Section 775.021(4)(b) does not affect the continuing vitality of Getz.

Petitioner misinterprets the exception upon which he relies. Admittedly Section 775.021(4)(b)2 states that exceptions to the rule requiring separate convictions and sentences for each offense committed in the course of one criminal episode or

transaction include offenses "which are degrees of the same offense as provided by statute." However, the State submits that this exception was clearly intended to apply only to crimes which were expressly designated as "degree" crimes "**as provided by statute.**" For example, the murder statute, Section 782.04, Florida Statutes, specifically provides for "murder in the first degree," which constitutes a capital felony, "murder in the second degree," which constitutes a first degree felony, and "murder in the third degree" which constitutes a second degree felony. Similarly, the arson statute, Section 806.01, Florida Statutes, expressly provides for "arson in the first degree," which constitutes a felony of the first degree," and "arson in the second degree, which constitutes a felony of the second degree."

Petitioner repeatedly claims that the two offenses, theft of a firearm and theft of property worth more than twenty thousand dollars, are the same crime. However, just because an offense has elements that overlap with the elements of another offense does not mean that it violates double jeopardy. By making these statements, he is asking this Court to focus on the overlapping elements in both crimes. That is not the test; the test is the uniqueness of elements.

Each of the offenses in question requires proof of a different element: one requires the property stolen be of a certain monetary value and the other requires the property stolen be a firearm. As Section 775.021(4)(a) continues to state, 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. Here, they do because the first crime can be committed without committing the second crime and the second crime can be committed without the first.

Moreover, if Petitioner were correct that these crimes were the same crime, one would be a necessarily lesser included offense of the other, given that one carries a higher penalty than the other. However, this obviously is not the case herein.

The practical overall effect of permitting two convictions and two sentences is merely to increase an offender's sentence based upon the elements that do not overlap. In this case, Petitioner's act was more serious because it included the theft of a firearm. There is nothing wrong with increasing Petitioner's potential punishment due to the involvement of a firearm as long as the punishment does not violate the Eight Amendment and subject the offender to cruel and unusual punishment.

To interpret the statute in the way in which Petitioner attempts to interpret it would simply gut the statute; the exception would swallow the rule and return us to the days of the single transaction rule despite the legislature's express intent in Section 775.021 to abolish the single transaction rule. The plain meaning of the statute is that each offense is subject to the penalty prescribed; and, if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of

construction.

Here, the legislature's intent is clear and this Court must uphold it. That is, the legislature's intent that theft of a firearm be punished separately from theft of other property is express and implicit in the fact that, in Section 812.014, Florida Statutes (2002), the legislature specifically directed that the theft of a firearm is an offense regardless of the monetary value of the firearm. Had they not intended separate convictions and sentences for firearm thefts, the legislature would simply have lumped firearms in with the theft of other property. When the legislature wrote this statute, the legislature used phrases of singularity such as "a firearm" instead of words of plurality such as "the property" or "any property" Consequently, the theft of other forms of property are treated collectively based on the collective monetary value of all the items taken rather than their individual value. In contrast, the theft of a firearm is treated singularly, as Grappin v. State, 450 So. 2d 480 (Fla. 1984), demonstrates.

In Grappin v. State, 450 So. 2d 480 (Fla. 1984), this Court again recognized the special nature of firearms as distinct from other property that could be stolen. The Grappin Court ruled that the defendant could be charged with **five** separate acts of second degree grand larceny for stealing **five** firearms during a single burglary. The Court rightly held that it was clear that the legislature intended to make each firearm a separate unit of prosecution.

It is well worth noting that Grappin was cited with approval in this Court's

relatively recent opinion in Bautisa v. State, 863 So. 2d 1180 (Fla. 2003), in which this Court discussed the "A/Any test" before reaching the conclusion that, **pursuant to clear legislative intent**, multiple convictions were permitted in DUI manslaughter cases based on the number of victims. The fact that, as Bautisa realizes, the legislature can authorize multiple convictions for the same act without running afoul of double jeopardy principles simply by specifying the intended unit of prosecution only supports the State's position.

As a matter of social policy, the legislature's intent to distinguish firearms from other forms of property is justified given the physical danger to society inherent in firearms which is generally not inherent in other items of personal property such as the cash and jewelry which were stolen in the instant case. That the legislature has recognized that firearms, as weapons of destruction whose sole purpose is to maim or kill, are worthy of distinction and intends to so distinguish them is evident in the fact that penalties for other offenses are routinely increased based on the mere use or possession of a firearm during the offense. See, e.g., s. 921.0024, Fla. Stat. (additional points are scored on Criminal Punishment Code scoresheet for possession of firearm during the commission of a felony).

Consequently, even if Section 775.021(4)(b) did create an exception for degree variants of the same core offense, the exception would still not apply to the facts of this case. That is, this Court has stated in another case that the question of whether

offenses are degree variants of the same core offense is analyzed by looking at the primary evil the statutes intend to punish. See State v. Florida, 894 So. 2d 941 (Fla. 2005). Here, the primary evil addressed by theft of property other than a firearm is the taking of property belonging to another and the primary evil addressed by theft of a firearm is the attempt to keep firearms, inherently dangerous by their very nature as stated above, from being used in this or other crimes. Therefore, the two crimes do not, in fact, qualify as degree variants of a core offense.

In conclusion, the State submits that the Getz case retains its vitality and, therefore, this Court should uphold the Fourth District's decision in the instant case. Consequently, Petitioner's separate convictions and sentences for grand theft of a firearm and for theft of property worth more than twenty thousand dollars should be affirmed because they do not violate double jeopardy principles.

This Court has also directed Respondent to address whether relief should be retroactively applied if double jeopardy does exist. Because Petitioner's two convictions do not violate double jeopardy principles, a retroactivity analysis is not warranted. However, even if they violated double jeopardy principles, a retroactivity analysis still would not be warranted. The offenses in this case date to 2002 and do not pre-date the 1988 amendment to Section 775.021. The instant proceeding stems from a direct appeal of the convictions and sentences for these offenses. Petitioner raised the double jeopardy claim in his brief in the appellate court below. Assuming,

arguendo, Petitioner's claim had merit, relief could be directly granted to Petitioner by vacating the conviction for the lesser offense, in this case, the theft of a firearm, without applying a retroactivity analysis.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to AFFIRM the decision of the district court below.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to: TATJANA OSTAPOFF, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401, on March 10, 2006.

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is not proportionately spaced.

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