IN THE SUPREME COURT OF THE STATE OF FLORIDA

PATRICK JOSEPH KELSO,

Petitioner,

vs. CASE NO. SC05-597

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S SUPPLEMENTAL INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and appellant in the Fourth District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and appellee in The Fourth District Court of Appeal. In this brief the parties will be referred to as they appear before the Court.

The following symbols will be used:

"R"	Record proper, contained in Volume 1 of the record on appeal
"T"	Transcript of proceedings in the lower tribunal, contained in Volumes 2-4 of the record on appeal, followed by the appropriate volume and page numbers

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case and facts contained in his initial brief on the merits, but adds the following:

In an order dated August 25, 2005, this Court accepted jurisdiction of the instant case without oral argument.

In an order dated December 15, 2005, this Court subsequently scheduled the instant case for oral argument and further directed that supplemental briefs be filed "with regard to the issue of the impact and application of Florida Statutes §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."

This supplemental initial brief follows.

SUMMARY OF THE ARGUMENT

The legislature has expressly *excluded* offenses which are "degree of the same offense as provided by statute" from those crimes for which multiple convictions and sentences may be returned even if they are all committed in a single criminal episode or transaction. Because that statute was enacted after the issuance of this Court decision in State v. Getz, 435 So. 2d 789 (Fla. 1983), the interpretation of legislative intent contained in Getz does not apply to the instant case. Construction of the statute consistent with its express terms and with decisions of the district courts of appeal like Wilson v. State, 776 So. 2d 347 (Fla. 5th DCA 2003) does not present any issue of retroactivity. Even if retroactivity is involved in any holding in Petitioner's favor, a decision affirming Wilson and rejecting the application of Getz to the amended statute would necessarily apply to Petitioner's appeal and all cases involving convictions for which the appellate mandate has not yet issued.

ARGUMENT

POINT

BECAUSE THEFT OF A FIREARM AND THEFT OF PROPERTY ARE DEGREES OF THE SAME OFFENSE OF THEFT, CONVICTIONS FOR BOTH CRIMES ARISING FROM A SINGLE CRIMINAL EPISODE ARE NOT AUTHORIZED BY THE LEGISLATURE AND THUS ARE BARRED BY THE DOUBLE JEOPARDY CLAUSE.

Effective July 1, 1988, the Florida legislature has amended §775.021(4), Fla. Stat., which defines separate offenses for which the legislature intends that a defendant may be separately convicted, even where all the offenses arise in a single criminal episode. Ch. 88-131 §7, Laws of Florida. Generally, the statute provides, as previously stated in the predecessor §775.021(4)(a), Fla. Stat.:

> 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.

However, the Florida legislature, after initially stating its intent that a person be convicted of and sentenced for every separate crime he commits in "one

criminal transaction or episode," specifically defines three critical *exceptions* to that general principle for:

> 1. Offenses which require identical elements of proof;
> 2. *Offenses which are degrees of the same offenses provided by statute;*
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

§775.021(4)(b), Fla. Stat. (emphasis added). Pursuant to this statute, then, the legislature has expressed its intent that separate convictions *not* be imposed for offenses which are mere degree variants of the same crime.

§812.014, Fla. Stat., defines the offense of theft:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:
> (a) Deprive the other person of a right to use the property or a benefit from the property.
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

The statute then goes on to define the different degrees of the basic theft offense, including:

> (2)(b) 1. If the property stolen is valued at $20,000 or more, but less than $100,000...
> the offender commits grand theft in the second degree, punishable as a felony of the second degree....
>
> (c) It is grand theft of the third degree and a felony of the third degree ... if the property stolen is:

1. Valued at $300 or more, but less than $5,000.
2. Valued at 5,000 or more, but less than $10,000.
3. Valued at $10,000 or more, but less than $20,000.
4. A will, codicil, or other testamentary instrument.
5. A firearm.
6. A motor vehicle, except as provided in paragraph (2)(a).
7. Any commercially farmed animal....
8. Any fire extinguisher.
9. Any amount of citrus fruit consisting of 20,000 or more individual pieces of fruit.
10. Taken from a designated construction site iden-tified by the posting of a sign as provided for in s. 810.09(2)(d).
11. Any stop sign.
12. Anhydrous ammonia.

(d) It is grand theft of the third degree and a felony of the third degree ... if the property stolen is valued at $100 or more, but less than $300, and is taken from a dwelling as defined in s. 810.011(2) or from the unenclosed curtilage of a dwelling pursuant to s. 810.09(1).

Obviously, theft is a crime which is divided into degrees based on the nature and value of the property stolen. Consequently, the specific and unambiguous statutory directive contained in §775.021(4)(b) provides that each theft which is no more than a degree variant of the general crime of theft is the "same" crime for purposes of determining whether multiple convictions and sentences are permitted. Thus, only a single conviction for theft is authorized where property is taken during a single criminal episode.

This was the result reached in Wilson v. State, 776 So. 2d 347 (Fla. 5th DCA 2003), where the defendant was convicted of two counts of theft based on charges that he committed theft of property worth more than $300 and theft of a firearm during the course of a single burglary of a residence. In light of the express terms used by the legislature to define its intent in such situations, Wilson held that multiple convictions for theft were not permitted.

> Section 812.014 establishes various degrees of seriousness for thefts of different kinds and values of property. It is clearly an example of a statutory degree crime, and not a separate offense statute for each possible degree delineated in the statute. *See Sirmons v. State*, 634 So. 2d 153 (Fla. 1994); *Johnson v. State*, 597 So. 2d 798 (Fla. 1992). Thus we agree with Wilson that only one grand theft offense can stand for each burglary.

See also Scarola v. State, 889 So;. 2d 108 (Fla. 5th DCA 2004) (en banc) (holding that double jeopardy violation present when defendant was convicted of theft of property worth more than $300 and theft of a firearm, all stolen during a single burglary, could be raised and corrected on direct appeal from unconditional no contest plea, even absent objection below); *cf.* Taylor v. State, 801 So. 2d 173, fn. 1 at 175 (Fla. 5th DCA 2001).

Wilson's straightforward statutory analysis has been followed by the Second District Court of Appeal in Thompson v. State, 888 So. 2d 89 (Fla. 2d DCA 2004) (reversing dual convictions for theft of property worth more than $300 and theft of

firearm). The First District Court of Appeal has likewise applied the same analysis to preclude multiple convictions for theft for different types of property stolen during a single burglary. Mixson v. State, 857 So. 2d 362 (Fla. 1st DCA 2003).

The decisions of those three district courts of appeal are entirely justified in their legal conclusions. It is well established that construction and interpretation of a statute are unnecessary when it is unambiguous. Baker v. State, 636 So. 2d 1342 (Fla. 1994). "It is settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language." Overstreet v. State, 629 So. 2d 125 (Fla. 1993). Even where the legislature itself may have really meant something not expressed in the words of the act, a court will not deem itself authorized to depart from the plain meaning of the statute. Lamont v. State, 610 So. 2d 435 (Fla. 1992). It is neither the function not the prerogative of courts to speculate on constructions which are more or less reasonable when the plain words of the statute convey an unequivocal meaning. Statutes must be strictly construed according to their letter: words and meanings beyond the literal language may not be entertained. Blount v. State, 581 So. 2d 604 (Fla. 2d DCA 1991).

In the present case, Petitioner was convicted of theft of property worth more than $20,000 and theft of a firearm, even though both takings occurred during a

single residential burglary. Despite the clear statutory mandate set out in §775.021(4)(b), the Fourth District Court of Appeal refused to direct that his convictions for all but one multiple degrees of theft be vacated, relying on this Court's prior decision in State v. Getz, 435 So. 2d 789 (Fla. 1983). In Getz this Court examined the *then-existing* version of §775.021(4) in addressing the propriety of the defendant's convictions for both grand theft of a firearm and petit theft of other property when both takings occurred during a burglary. Recognizing that legislative intent was the controlling factor in that case as in all others involving questions of double jeopardy, this Court in Getz found that the statute reflected an intent to punish the defendant for each separate theft committed, even if all the crimes were accomplished during the course of a single criminal episode.

> 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 added). Thus, even though the various degrees of theft are all defined in one criminal statute, this Court believed that the intent of the legislature, *as enacted in the then-existing law*, required it to authorize the multiple convictions. *See also* Grappin v. State, 450 So. 2d 480 (Fla. 1984), where this Court held, based on essentially the same rationale, that the defendant

could be convicted of five separate counts of stealing a firearm, even though all the thefts occurred during a single burglary because the legislature made theft of "a" firearm an offense. This Court reasoned that the legislature therefore intended for each theft of a gun to constitute a separate offense which could be separately punished. This result was required

> because *the legislature unambiguously intended* that the taking of each firearm be treated as a theft. Multiple thefts of firearms which occur in a single episode are to be considered separate crimes under the statute.

The decisions in Getz and Grappin are based on this Court's recognition that, although it is the Fifth Amendment of the United States Constitution and Article I §9 of the Florida Constitution which guarantee an accused the right against being placed twice in jeopardy, *see* Ex Parte Lang, 85 U.S. 163, 21 L.Ed. 872, 878, 18 Wall. 163, 173, 1874), legislative intent is the sole guide by which questions determining the constitutionality of multiple convictions and sentences for offenses arising from the same criminal transaction are judged. Gordon v. State, 780 So. 2d 17, 19 (Fla. 2001); Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 1436, 63 L.Ed. 2d 715 (1980). Thus, the legislature is free under the Double Jeopardy Clause to define crimes and fix punishments, but thereafter a court may not impose more than one punishment for the "same" offense. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). If the legislature

does not fix the punishment for crime clearly and without ambiguity, then the rule of lenity applies and the ambiguity is to be resolved against turning a single transaction into multiple offenses. But where the legislative intent to punish is clear, the rule of lenity does not apply. Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958).

Thus, while the issue herein raised is generally subsumed within the subject of double jeopardy, the specific analysis to be made in order to determine whether multiple convictions are permitted is one of *statutory construction*, not constitutional interpretation. The constitutional principle involved in this case is undisputed: the legislature has the right to determine whether multiple convictions are permitted or precluded for certain offenses and categories of offenses. The question raised by he instant case is whether §775.021(4)(b), Fla. Stat. (1988) excludes offenses which are degrees of a crime from the general legislative intention to impose punishment for each crime which is committed in a single transaction. The unambiguous language of the statute permits only a single conclusion: multiple convictions for offenses which are different degrees of the same core offense are not permitted.

Consequently, this Court's statement in Getz of the jeopardy consequences of multiple convictions for crimes committed during a single episode was

appropriate, based as it was on this Court's interpretation of legislative intent expressed in the statutes in existence at the time of those decisions. *But the "same offense" statute which was at issue in Getz and Grappin is not the same statute which was in effect at the time of Petitioner's prosecution.* As of the 1988 amendment, the legislature's statement of its intent has been changed in a way which precludes the analysis this Court conducted in Getz and Grappin. Consequently, the holdings of this Court in Getz and Grappin do not control the resolution of the instant case nor of any cases where conviction and sentence were imposed after the 1988 amendment.

The decisions of the district courts of appeal which apply the post-1988 version of §774.021(4) to preclude multiple convictions for degree offenses are therefore not

"new" interpretations of the law, but merely statements of the law as it existed at the time of the defendant's post-1988 conviction and sentencing. In the absence of interdistrict conflict, these decisions of the district courts represent the law of the state and are binding on all Florida courts. *See* Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992).[1] Nor is Getz inconsistent with those decisions, since it is predicated upon a different statute.

[1]Insofar as the decision of the Fourth District Court of Appeal in the instant case creates conflict, it was obviously decided after the date of Petitioner's

Because Wilson and similar cases express the law as it existed at the time that Petitioner was convicted, its application to the instant case does not involve any issue of retroactive application. This is explained in Fiore v. White, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001), where the United States Supreme Court had before it a case where the defendant was convicted in Pennsylvania of operating a hazardous waste facility without a permit. Although Fiore had a permit, the State argued that his deviation from the terms of the permit nevertheless constituted a violation of the statute. After Fiore's conviction, the Pennsylvania Supreme Court held that deviation from a permit was not sufficient to support conviction of the crime. When Fiore brought his case in federal court, he was rebuffed on the grounds that the Pennsylvania Supreme Court decision announced a "new rule of law" which could not be retroactively applied to Fiore's conviction.

The case then came to the United States Supreme Court, which was asked to resolve the question of whether the statutory interpretation by the Pennsylvania Supreme Court should "retroactively" apply to Fiore. In response to a certified question from the United States Supreme Court, the Pennsylvania Court explained

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conviction, and cannot therefore itself add any ambiguity to the clarity of the statute's own terms, particularly in the light of the decisions of the other district courts.

that its decision was not a new rule of law but merely a clarification of the plain intent of the statute and represented a proper interpretation of the statute even on the date that Fiore's conviction became final. Based on this answer, the United States Supreme Court held that the issue presented for its review in Fiore was not one of retroactivity, but instead "whether Pennsylvania can, consistently with the Federal Due Process Clause, convict [the petitioner] for conduct that its criminal statute, as properly interpreted, does not prohibit." 531 U.S. at 228, 121 S.Ct. 712. The pertinent question from a due process perspective is not whether the law has changed, but what was the state of the law at the time of the defendant's conviction. Bunkley v. Florida, 538 U.S. 835, 840, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (2003). Because the Pennsylvania Supreme Court determined, albeit after Fiore's conviction became final, that the failure to possess a permit was, at the time of his conviction, an element of the crime for which he was convicted, the United States Supreme Court held that the State's failure to prove that element at Fiore's trial rendered his conviction unconstitutional. *See also* State v. Barnum, 30 Fla. L. Weekly S637 (Fla. Sept., 22, 2005).

In the instant case, the law in fact changed not based on a court's decision but when the legislature amended §775.021(4) in 1988. The words of the amended statute are unambiguous, and the district courts of appeal, when directly

confronted with their applicability, have interpreted them consistently with their facial import. The decisions of this Court in Getz and Grappin are inapposite because they were decided under an antecedent and different version of the statute. Consequently, the law at the time of Petitioner's conviction was the same as it is now: multiple convictions for different degrees of theft in a single criminal episode are barred by the legislative intent as stated in the amended statute and therefore by the double jeopardy clause.

The instant case is therefore in the same posture as Therrien v. State, 914 So. 2d 942 (Fla. 2005), where this Court addressed the defendant's challenge to his classification as a sexual predator. On appeal, the First District Court of Appeal held that the retroactive application of the sexual predator statute did not violate the constitutional right to due process of law, even where the offense which triggered the designation became a qualifying offense only after the defendant was sentenced. Asked to review that question, this Court determined *as a matter of statutory construction* that the legislature had not authorized imposition of the sexual predator designation on a defendant based on a predicate offense that did not qualify the defendant for sexual predator status at the time of sentencing. Consequently, the defendant, who therefore did not fit the statutory definition of a sexual predator at the time of sentencing, did not qualify for that designation, and

the trial court was without jurisdiction to impose the sexual predator designation. Crucially, this Court's determination of the retroactive application of the sexual predator statute was thereby obviated:

> Because this resolution makes it unnecessary to decide whether a procedural due process violation results from the retroactive imposition of the employment restriction without a hearing on future dangerousness, we decline to answer the certified question.

914 So. 2d at 944.

Resolution of the instant case likewise does not involve a new interpretation or change in the law as stated in State v. Getz, but only the application of well-accepted principles of statutory construction to determine the legislative intent expressed by a different statute. As such, this case involves no issue of retroactivity, and the analysis developed in Witt v. State, 387 So. 2d 922 (Fla. 1980) does not govern the result of this appeal.

In addition, even if this Court were to hold that a decision adopting the holding of Wilson v. State, 776 So. 2d 347, Thompson v. State, 888 So.2d 89, Mixson v. State, 857 So. 2d 362, and similar cases amounted to a "new rule of law" and a departure from State v. Getz, it is well-settled that a new law announced by the Court applies to all non-final criminal cases, that is, to all cases involving convictions for which an appellate court mandate has not yet issued. *See* Johnson

v. State, 904 So. 2d 400, 407 (Fla. 2005); Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992). Under any interpretation of retroactivity, then, Petitioner's own multiple convictions for theft must be set aside.

As to the viability of multiple convictions in cases which are already final at the time that this appeal is decided. Petitioner suggests that those defendants actually placed in that position are best able to address the applicability of any decision in this appeal to them. Petitioner notes, however, that under Witt v. State, 387 So. 2d at 925, such questions are determined by balancing the State's interest in the finality of convictions and the fairness and uniformity of the court system. A new rule of law will not be retroactively applied unless it (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a "development of fundamental significance."

A decision by this Court adopting Petitioner's argument is (a) from this Court and (b) obviously implicates the constitutional guarantee against being placed twice in jeopardy. In addition, it would be of fundamental significance since it limits the imposition of punishment for more than one degree variant of a crime committed in a single episode, thereby placing "beyond the authority of the state the power to regulate certain conduct or impose certain penalties," 387 So. 2d at 929. Thus, it would satisfy the Witt requirements for retroactivity.

Accordingly, Petitioner requests that this Court correct the erroneous decision of the Fourth District Court of Appeal by ordering that his conviction for theft of a firearm be vacated.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, Petitioner requests that this Court reverse the decision of the Fourth District Court of Appeal below and remand this cause to require that Petitioner's conviction for theft of a firearm be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Jeanine M. Germanowicz, Assistant Attorney General, 1515 N. Flagler Drive, ninth floor, West Palm Beach, Florida 33401 by courier this ___ day of JANUARY, 2006.

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Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

Assistant Public Defender