

IN THE SUPREME COURT OF THE STATE OF FLORIDA

PATRICK JOSEPH KELSO,

Petitioner,

vs.

CASE NO. SC05-597

STATE OF FLORIDA,

Respondent.

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PETITIONER'S SUPPLEMENTAL REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	i
AUTHORITIES CITED .....	ii
PRELIMINARY STATEMENT .....	1
STATEMENT OF THE CASE AND FACTS.....	2

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. ....	3
CONCLUSION.....	5
CERTIFICATE OF SERVICE.....	5
CERTIFICATE OF FONT SIZE.....	6

AUTHORITIES CITED

CASES CITED

PAGE

Goodwin v. State, 634 So. 2d 157  
(Fla. 1994) .....4

Sirmans v. State, 634 So. 2d 153  
(Fla. 1994) .....4

FLORIDA STATUTES

Section 775.021.....4

Section 812.014 .....3

Section 812.014(1) .....3

Section 812.014(2)(a) .....3

Section 812.014(2)b .....3

Section 812.014(2)c .....3

Section 812.014(2)(d) .....4

## 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.

## 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.

Respondent maintains that the theft crimes at issue in the instant case are not degree crimes “as provided by statute.” Supplemental answer brief at 13.

Respondent appears to have overlooked the theft statute itself, §812.014, Florida Statutes, which first defines theft generally. §812.014(1), Florida Statutes, and then designates the “degrees” of theft, depending on what property is stolen. Thus, theft of property valued at more than \$100,000 or if the perpetrator uses a motor vehicle as an instrumentality in the commission of the theft is first degree grand theft. §812.014(2)(a), Florida Statutes. If the property is valued at more than \$20,000 or if it is emergency medical equipment valued at \$300 or more, then the crime is grand theft of the second degree. §812.014(2)(b), Florida Statutes.

Finally, it is grand theft of the third degree if the stolen property is valued at \$300 or more, \$5,000 or more, \$10,000 or more, a will, *a firearm*, a motor vehicle, or a fire extinguisher. §812.014((2)(c), Florida Statutes. It is also third degree grand

theft if the property stolen is valued at between \$100 and \$300 and taken from a dwelling. §812.014(2)(d), Florida Statutes.

It is hard to imagine how the legislature could have made it more clear that the various thefts defined are “degree” offenses. The State’s attempt to maintain otherwise in the face of the terms of the theft statute itself must fail.

Nor can the State obtain comfort from the fact that the various degrees of theft are not lesser included offenses of each other. Supplemental answer brief at 14. After all, neither are the various degrees of murder, which are, as the State concedes, degree offenses of murder. Supplemental answer brief at 13; *see Goodwin v. State*, 634 So. 2d 157 (Fla. 1994); *Sirmans v. State*, 634 So. 2d 153 (Fla. 1994).

Consequently, Petitioner’s convictions for both grand theft of property worth more than \$5000 and of a firearm constitute convictions for different degrees of the same crime. Because the legislature has excluded such convictions from the operation of §775.021, Florida Statutes, Appellant’s convictions for both offenses violate the double jeopardy clause and one of them must 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 MARCH, 2006.

\_\_\_\_\_  
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).

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Assistant Public Defender