IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2256

ELI ENRIQUE VALDES,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

Petitioner Eli Enrique Valdes was the defendant and appellant and the Respondent State of Florida was the prosecution and the appellee in the proceedings below. The parties will be referred to as they stood in the trial court and the respondent may also be referred to as the state. The symbol "R" will refer to the record on appeal and the symbol, "T" will refer to the trial transcripts and "App." will refer to the petitioner's appendix.

STATEMENT OF THE CASE AND FACTS

The state adopts the defendant's statement of the case and facts in the initial brief on the merits but would also state that in Valdes v. State, 970 So.2d 414 (Fla. 3d DCA 2007) the Third District Court of Appeal certified conflict with the Fifth District Court of Appeal in Lopez-Vazquez v. State, 931 So.2d 231, (Fla. 5th DCA 2006).

QUESTION PRESENTED

I. CONVICTIONS FOR SHOOTING A DEADLY MISSILE AT OR WITHIN A VEHICLE AND DISCHARGING A FIREARM FROM A VEHICLE DO NOT VIOLATE DOUBLE JEOPARDY.

SUMMARY OF THE ARGUMENT

The defendant's convictions for discharging a firearm from a vehicle in violation of §790.15(2), Fla. Stat. and shooting into

an occupied vehicle in violation of §790.19, Fla. Stat. do not violate double jeopardy principles because the crimes are not degree variants of the same underlying offense. Unlike the improper reasoning of the Fifth District Court of Appeal, the Third District Court of Appeal applied the proper legal analysis when it decided that these offenses do not address the same core offense or primary evil and its holding should be affirmed. In the alternative, if this Court finds that the two shooting offenses are degree variants of the same core offense, the state submits that it should reconsider its prior case law construing "degree variants" in terms of core offenses and the primary evil, as is discussed by Justice Cantero in his concurring opinion, joined by Justices Wells and Bell, in State v. Paul, 934 So.2d 1167 (Fla. 2006) .

STANDARD OF REVIEW

Determining whether double jeopardy is violated based on undisputed facts is a legal determination, and the standard of review is *de novo.* State v. Paul, 934 So.2 at 1170, State v. Florida, 894 So.2d 941, 945 (Fla. 2005).

ARGUMENT

I. CONVICTIONS FOR SHOOTING A DEADLY MISSILE AT OR WITHIN A VEHICLE AND DISCHARGING A FIREARM FROM A VEHICLE DO NOT VIOLATE DOUBLE JEOPARDY.

The defendant suggests to this Court the correctness of the reasoning of the Fifth District Court of Appeal in Lopez-Vazquez v. State, 931 So.2d 231 (Fla. 5th DCA 2006) which held that dual convictions arising from one criminal episode for the offense of shooting into an occupied vehicle under §790.19, Fla. Stat. (2005) and shooting from a vehicle, in violation of §790.15(2), Fla. Stat. (2005), violate double jeopardy principles. The defendant also makes the argument that the decision in Valdes v. State, 970 So.2d 414 (Fla. 3d DCA 2007), which held that there is no violation of double jeopardy, should be reversed.

The absence of a clear statement of legislative intent to authorize separate punishments for crimes that arise from one criminal episode necessitates application of §775.021(4), Fla. Stat. which requires that separate crimes be punished separately. Separate crimes are committed "if each offense requires proof of an element that the others do not, without regard to the accusatory pleading or proof adduced at trial." §775.021(4)(a), Fla. Stat. Analysis under this section of the statute is the Blockburger test derived from Blockburger v. United States, 284 U.S. 299 (1932).

Lopez-Vasquez correctly asserts that shooting into an occupied

vehicle in violation of §790.19 requires proof of three elements: 1) the defendant shot a firearm; 2) he did so at, within or into a vehicle of any kind that was being used or occupied by any person; and 3) the act was done wantonly or maliciously, and that the crime of shooting from a vehicle which is a violation of §790.15(2) requires proof of two elements: 1) the defendant knowingly and willfully discharged a firearm from a vehicle; and 2) at the time he discharged the firearm, he was within 1,000 feet of any person. Lopez-Vazquez then properly states that an examination of these statutory elements reveals that each crime contains an element the other does not: one requires shooting into a vehicle occupied by another person and the other requires shooting from a vehicle by a person who is within 1,000 feet of another person. Lopez-Vazquez, 931 So.2d at 233-234.

Section 775.021(4) provides that convictions and sentences for offenses committed in one criminal episode violate double jeopardy when the offenses have identical elements or, having different elements, they are degree variants of the same offense, or one or more are lesser included offenses and subsumed in the greater offense. Lopez-Vazquez correctly indicates that the offenses have different elements, but then concluded that pursuant to §775.021(4)(b)(2), the offenses are degree variants of the same offense. The Third

District Court of Appeal in Valdes properly disagreed with the Fifth District's analysis on this point and held that the two crimes are not degree variants of the same offense.

In determining whether crimes are degree variants, the primary evil that each statute was intended to address must be examined. Lopez-Vazquez asserts that the primary evil addressed by §790.19 and §790.15 is the endangerment of the safety of those who may be struck by the discharge from a firearm and then reasons that the statutes thus share the core offense of battery[1], which analysis led the court in Lopez-Vazquez to conclude that the two offenses are degree variants of the same underlying offense, and that conviction of both therefore violates the prohibition against double jeopardy.

However, neither §790.19 nor §790.15 require that there either be an impermissible striking, a requisite of battery, or even an attempted striking. Under §790.15, merely firing the firearm in public, where someone is within 1,000 feet, is an offense. There need not be any intention to strike any member of the public. Someone

[1]Justice Kogan's observed in his concurring opinion in Sirmons v. State, 634 So.2d 153, 155 (Fla. 1994) that "theft, battery, possession of contraband and homicide are the type of core offenses upon which other criminal charges are based".

firing a weapon in celebration of a football team's victory commits the offense even if the shooting is away from the individuals in the area. Likewise, §790.19 requires no striking, merely that a person shoots into an occupied vehicle, not that anyone is actually shot. Battery is not the core offense here. The opinion in Valdes properly applies this reasoning in its analysis to hold that the two crimes are not degree variants of the same core offense.

Valdes reasoned that a thorough examination of §790.15 and §790.19 reveal completely different core offenses intending to punish different evils and held that the core offense of §790.15 is the discharge of a firearm in public and not battery, as there is no requirement that the discharge result in an injury or that someone be struck by a projectile, and that the primary evil is the potential for someone in the public domain to be injured or killed without any malice or intent to inflict bodily harm. (App.11, 12). Valdes then reasoned that in contrast the core offense of §790.19 is the shooting or throwing of any deadly missile into or at a building or vehicle with malice and punishes those who fire or hurl deadly objects at or into buildings and vehicles with the intent to cause fear or inflict injury to person. Unlike §790.15, which punishes

the thoughtless or otherwise innocent conduct such as revelers celebrating the New Year by shooting a gun, the evil that §790.19 punishes is the malicious act which destroys our sense of safety within our structures and vehicles, such as throwing a rock from an overpass at a passing vehicle. (App.12-13). Valdes also relied on this Court's decision in Gordon v. State, 780 So.2d 17 (Fla. 2001) which concluded that Justice Kogan's comments in Sirmons, which the Fifth District utilized in Lopez-Vasquez, if taken to its logical extreme, would render §775.021 a nullity due to the limited number of core crimes from which the plethora of criminal offenses are derived. This Court continued in Gordon that in no uncertain terms, the Legislature specifically expressed in §775.021(4)(b) its intent that criminal defendants should be convicted and sentenced for every crime committed during the course of one criminal episode. Gordon, 780 So.2d at 23. (App.10).

Valdes also relies on Gordon because in it this Court found no double jeopardy violation for convictions in attempted first degree murder, aggravated battery and felony causing bodily injury. Valdes reasoned that this Court rejected Gordon's argument that these offenses share the same core offense of injuring someone because attempted first degree murder punishes the intent to kill, whereas

aggravated battery causing great bodily harm punishes the act of seriously injuring another person and felony causing bodily injury punishes the act of injuring someone during the commission of a felony. Thus, Valdes pointed out that this Court concluded that "the separate evils of intending to kill, seriously injuring someone and injuring someone during the commission of a felony, are sufficiently distinct that they warrant separate punishment." Valdes then concluded that no double jeopardy violation exists because §790.15 punishes the discharge of a firearm in public, whereas §790.19 punishes the intent to injure or to cause fear. Moreover, §790.15 protects people outside in public places, whereas §790.19 protects people in their homes, vehicles or other structures.

The defendant argues the two offenses at issue in the instant case appear in the same chapter of the Florida Statutes, Chapter 790 entitled "Weapons and Firearms" and that inclusion in the same chapter is sometimes an indicator that crimes are degree variants of the same core offense, citing State v. Anderson, 695 So.2d 309 (Fla. 1997). Further, and even more to the point, the Fifth District in Lopez-Vazquez, the case which the defendant argues was decided correctly in contrast to Valdes, acknowledged that it is not always the case that degree variants are found in the same

statutory chapter. Lopez-Vasquez, 931 So.2d at 235. Indeed, offenses that are included in the same statutory chapter are often not degree variants of the same core offense. An example of this is M.P. v. State, 682 So.2d 79 (Fla. 1996) in which this Court held that a juvenile's convictions for carrying a concealed weapon in violation of §790.01 and possession of a firearm by a minor, in violation of §790.22(3) did not violate double jeopardy principles. A clear statement of legislative intent to punish each crime separately is contained in §790.22(7), which statement assisted this Court to make the determination that double jeopardy was not violated. However, as this Court also made clear in M.P., when there is no clear legislative statement, legislative intent to authorize separate punishments can be discerned through the Blockburger test of statutory construction. M.P., 682 So.2d at 81. Therefore, as explained above, because application of the Blockburger test resulted in the correct decision that double jeopardy was not violated, the Third District's decision in this case should be affirmed.

In the alternative, if this Court finds that the two shooting offenses are degree variants of the same core offense, the state submits that it should reconsider its prior case law construing "degree variants" in terms of core offenses and the primary evil.

As detailed by Justice Cantero in his concurring opinion, joined by Justices Wells and Bell, in State v. Paul, 934 So.2d 1167, 1176 (Fla. 2006), the concept of primary evil dates back to Carawan v. State, 515 So.2d 161 (Fla. 1987), which the Legislature superceded very quickly by statutory amendment. *See* ch. 88-131, §Laws of Fla. Justice Cantero stated in his concurring opinion that notwithstanding the clear legislative intent in §775.021(4) that the "primary evil" test has no role in double jeopardy analysis, this Court reverted back to the same concept through "core offense" language, and this Court's current case law on the subject of double jeopardy amounts to a restatement, using other words, of the clearly repudiated Carawan holding. §775.021(4)(b)(2) states that the exception to the rule that it is the intent of the Legislature to convict and sentence for each criminal offense committed in the course of one criminal episode and not to allow the principle of lenity, is for offenses which are degrees of the same offense *as provided by statute*. "Degree variants" as set forth by Justice Cantero, should be limited to offenses which, in the criminal statute, have different degrees, for example, first, second, and third degree murder or arson, which has two degrees. State v. Paul, 934 So.2d at 1176.

As Justice Cantero additionally articulated, the "same evil"

test is infinitely vague and malleable and therefore offers much less clarity than straightforward application of the statute, which is easy to apply, requiring courts to determine only whether the criminal code provides for degree variants of a single offense, compared to the "same evil" test which invites courts to reflect abstractly on the evils targeted by various crimes. State v. Paul, *Id.*

CONCLUSION

WHEREFORE, based upon the preceding authorities and arguments, Respondent **STATE OF FLORIDA** respectfully requests that this Honorable Court affirm the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's brief on the merits was mailed this 9th day of June, 2008 to Maria E. Lauredo, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in compliance with the font

standards required by Rule 9.210(a)(2), Florida Rules of Appellate Procedure, and is submitted in Courier New 12-point font.

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