IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2556

ELI ENRIQUE VALDES,

Petitioner,

-vs.-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

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

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INTRODUCTION

Petitioner, Eli Enrique Valdes, was the appellant in the district court of appeal and the defendant in the circuit court. Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the circuit court. In this brief, the symbol "R" will be used to designate the record on appeal, and the symbol "T" will be used to designate the transcript of the trial proceedings.

STATEMENT OF THE CASE AND FACTS

Eli Enrique Valdes was charged with three counts of attempted second degree murder; discharging a firearm from a vehicle within a thousand feet of a person in violation of section 790.15, Florida Statutes; shooting at, within or into an occupied vehicle in violation of section 790.19, Florida Statutes; and possession of a firearm by a felon, all stemming from a single shooting incident (R. 7-14). Counts I through III of the information charged that Valdes attempted to kill three individuals, Nathalie Gianelli, Rocio Rodriguez, and A.R. (a child) by discharging a firearm or shooting at their vehicle (R. 8-10).

The following evidence was presented by the state at trial: Nathalie Gianelli testified that she was riding as a passenger in Rocio Rodriguez's vehicle when Eli Valdes positioned his car alongside them at a traffic light (T. 297-300). Gianelli and Valdes, who knew each other and had prior disputes, began arguing (T. 297-300). Valdes pulled out a firearm, and Gianelli laughed at him (T. 300). When Gianelli laughed Valdes shot at the car four times, hitting Gianelli's arm and foot (T. 301). The investigating detective testified that Rodriguez's car had three bullet holes on the passenger side (T. 354-6). There was no physical evidence linking Valdes to the shooting, and no eyewitnesses testified other than Gianelli (T. 365).

The jury found Eli Valdes guilty as charged of three counts of second degree murder, discharging a firearm from a vehicle, and shooting at an occupied vehicle[1] (R. 92-7). He was sentenced to serve 30 years in prison as to each count running concurrently (R. 105).

Mr. Valdes appealed the trial court's ruling, contending as one of his grounds that dual convictions for the offenses of shooting a deadly missile at a vehicle and discharging a firearm from a vehicle (counts IV and V), arising from the same criminal act, violate double jeopardy because these crimes are degrees of the same core offense. *Valdes v. State*, 970 So. 2d 414 (Fla. 3d DCA 2007). Valdes relied principally on the Fifth District's decision in *Lopez-Vazquez v. State,* 931 So. 2d 231 (Fla. 5th DCA 2006), which held that dual convictions for these offenses violate double jeopardy. The Third District Court of Appeal rejected this argument, and certifed conflict with *Lopez-Vazquez,* on the following grounds:

> A thorough examination of sections 790.15 and 790.19 reveals completely different core offenses intending to punish different evils. The core offense of section 790.15 is the discharge of a firearm in public. The statute . . . **increases the penalty** if the offender discharges the firearm while in a vehicle within 1000 feet of another person . . . The core offense, therefore, is the discharge of the firearm

[1] On the bifurcated count VI, possession of a firearm by a felon, Mr. Valdes pled nolo contendere after the trial, reserving his right to vacate the plea if the case were to be reversed on appeal (R. 207).

> into the public domain, not battery, and the primary evil is the potential for someone in the pubic domain to be injured or killed without any malice or intent to inflict bodily harm. In contrast, the core offense of section 790.19 is the shooting or throwing of any deadly missile into or at a building or vehicle with malice . . . What the Legislature is attempting to protect in enacting section 790.19 is the safety and peace of mind of people in this state within their homes, vehicles, and other buildings. The evil that section 790.19 punishes is not thoughtless or otherwise innocent conduct, but malicious acts which destroy our sense of safety within structures and vehicles . . . [A] violation of section 790.19 is a second degree felony, even if no person is within the structure or vehicle when the object is thrown at or into the structure or vehicle at the time, because it is not just the potential to cause injury that section 790.19 addresses, but the evil intent.

Id. at 421. Thus, the Third District concluded that dual convictions for shooting from a vehicle under section 790.15, and shooting within or into a vehicle under 790.19 do not violate double jeopardy because the former "punishes the discharge of a firearm in public, whereas section 790.19 punishes the intent to injure or to cause fear." *Id*.

Notice of invocation of this Court's discretionary jurisdiction was filed on December 3, 2007. On February 25, 2008 this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

Petitioner's dual convictions for discharging a firearm from a vehicle under section 790.15(2), Florida Statutes (2003), and shooting within or into a vehicle under section 790.19, Florida Statutes (2003), violate double jeopardy because the crimes are degree variants of the same underlying offense. These offenses, found within the same statutory chapter entitled "Weapons and Firearms," address the same core or primary evil, the endangerment of the safety of those who may be struck by the discharge of a firearm or other deadly missile in certain commonly occupied places. Contrary to the decision of the Third District Court of Appeal, the fact that the offenses contain different mental-state elements does not prove that they are not degree variants of the same fundamental offense. The Fifth District Court of Appeal correctly applied the "primary evil" test established by this Court to find that dual violations under 790.15 and 790.19 violate double jeopardy. Therefore, the decision of the Third District Court to the contrary in the instant case must be reversed.

ARGUMENT

DUAL CONVICTIONS FOR SHOOTING A DEADLY MISSILE AT OR WITHIN A VEHICLE AND DISCHARGING A FIREARM FROM A VEHICLE ARISING FROM THE SAME CRIMINAL ACT VIOLATE DOUBLE JEOPARDY

The Double Jeopardy Clause of both the federal and Florida constitutions protects criminal defendants from multiple convictions and punishments for the same offense. *See* Amend. V, U.S. Const.; Art. I, § 9, Fla. Const. In determining the constitutionality of multiple convictions for offenses arising from the same criminal episode, courts examine whether the legislature intended to separately punish the offenses at issue. Absent a clear statement of legislative intent to separately punish two offenses, courts apply the "same elements" test of *Blockburger v. United States,* 284 U.S. 299 (1932), now codified in section 775.021, Florida Statutes (2007). Under this test, offenses are considered separate if each has an element that the other does not. *See* § 775.021(4)(a), Fla. Stat. (2007). However, Florida Statute 775.021(4)(b) contains three exceptions to the this rule. Specifically, dual convictions violate double jeopardy where: 1) the offenses at issue require identical elements of proof, 2) the offenses "are degrees of the same offense," or 3) the offenses are lesser offenses the statutory elements of which are subsumed by the greater offfense. *See* § 775.021(4)(b), Fla. Stat. (2007).

Petitioner maintains that the second statutory exception precludes his dual convictions for the offenses of discharging a firearm from a vehicle within 1000 feet of any person under section 790.15(2), Florida Statutes (2003), and shooting at or within a vehicle under section 790.19, Florida Statutes (2003). In construing the second exception to the *Blockburger* rule this Court has explained that dual convictions for two offenses that are aggravated forms of the same basic or "core offense," arising from a single criminal episode, cannot stand. *See Sirmons v. State,* 634 So. 2d 153 (Fla. 1994) (holding that convictions for grand theft and armed robbery violated double jeopardy because the offenses are aggravated forms of the same underlying crime of theft distinguished by degree factors); *State v. Anderson,* 695 So. 2d 309 (Fla. 1997) (holding that double jeopardy precludes convictions for perjury in an official proceeding and providing false information in application for bail arising from one act because both statutes punish same basic crime of violating legal obligation to tell truth). The test that has emerged from this Court's most recent opinions addressing this issue is whether the two offenses at issue address the same "primary evil." *See Gordon v. State,* 780 So. 2d 17, 23 (Fla. 2001); *State v. Paul,* 934 So. 2d 1167, 1175 (Fla. 2006).

In *Lopez-Vazquez v. State,* 931 So. 2d 231 (Fla. 5th DCA 2006), the Fifth District Court of Appeal correctly found that the offenses of discharging a

firearm from a vehicle under section 790.15, Florida Statutes, and shooting at or within a vehicle under section 790.19 address the same core or primary evil, the endangerment of the safety of those who may be struck by the discharge of a firearm or other deadly missile. *Id* at 235. The statutes differ, and in certain respects overlap, as to the **physical location** where the same dangerous conduct of discharging a firearm is prohibited from taking place. Specifically, section 790.15, Florida Statutes (2007) prohibits shooting a firearm in any public place or street, or over a street or "any occupied premesis," as well as shooting while occupying a vehicle within 1000 feet of any other person.[2] Similarly, section 790.19, Florida Statutes (2007) prohibits shooting within, at, or into any public or private building, or any public or private occupied vehicle.[3] The primary

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[2]The statute reads in pertinent part: "(1). . . [A]ny person who knowingly discharges a firearm in any public place or on the right -of-way of any paved public road, highway, or street, or whosoever knowingly discharges any firearm over the right -of-way of any paved public road, highway, or street or over any occupied premises is guilty of a misdemeanor . . . (2) Any occupant of any vehicle who knowingly and willfully discharges any firearm from the vehicle within 1,000 feet of any person commits a felony of the second degree . . . " § 790.15, Fla. Stat. (2007).

[3]The statute reads in pertinent part: "Whoever, wantonly or maliciously, shoots at, within, or into, or throws any missile or hurls or projects a stone or other hard substance which would produce death or great bodily harm, at, within, or in any public or private building, occupied or unoccupied, or public or private bus or train . . . or vehicle of any kind which is being used or occupied by any person, or any boat, vessel [or] ship . . . or aircraft . . . shall be guilty of a felony of the second degree." § 790.19, Fla. Stat. (2007).

evil to be avoided-- the potential for individuals to be seriously injured as a result of the discharge of a firearm or deadly missile -- remains the same. Therefore, dual convictions for these offenses arising from a single shooting incident violate double jeopardy principals. *See Paul,* 934 So. 2d at 1175 (applying "primary evil" test to determine constitutionality of multiple convictions).

It is significant that the two offenses at issue, shooting while occupying a vehicle and shooting within or into a vehicle, appear within the same chapter of the Florida Statutes, Chapter 790 entitled "Weapons and Firearms." This Court has found that inclusion within the same chapter is oftentimes an indicator that crimes are degree variants of the same core offense, as contemplated by the double jeopardy statute. *See Anderson,* 695 So. 2d at 311. *See also Duff v. State,* 942 So. 2d 926 (Fla. 5th DCA 2006).

Permitting convictions for both of these offenses arising from one criminal episode could lead to absurd results. For example, where an individual is driving an automobile with a passenger, and discharges a firearm within that car, that conduct violates both section 790.15, prohibiting shooting while on the street or occupying a vehicle, as well as 790.19, prohibiting shooting within or into any vehicle. Yet the legislature could not have intended this single discharge to result in separate convictions and punishments under both sections

of this chapter. Similary, the act of discharging a firearm in an indoor shopping mall violates both sections 790.15 (prohibiting discharge in a "public place") and 790.19 (prohibiting discharge within or into any "public or private building"). Yet dual convictions and punishments for this singular discharge would violate principles of fundamental fairness. *Cf. Rodriguez v. State,* 875 So. 2d 642, 645 (Fla. 2d DCA 2004) *(*"[T]his principle [that only one homicide conviction may be imposed for one death] is based on notions of fundamental fairness which recognize the inequity that inheres in multiple punishments for a singular killing). These offenses address the same primary evil, the potential for injury or death resulting from the discharge of a firearm in certain commonly occupied places, and thus dual convictions arising from one episode violate double jeopardy.

The Third District Court of Appeals incorrectly held that a double jeopardy violation did not occur in this case because the statutes punish separate evils. The Third District notes that the primary evil addressed by section 790.15 is "the potential for someone in the public domain to be injured or killed . . . " *Valdes v. State,* 970 So. 2d 414, 420 (Fla. 3d DCA 2007). The Third District then acknowledges, as it must, that section 790.19 similarly protects against the potential for injury to persons in public or private buildings or vehicles as a result of the shooting of deadly weapons. *Id.* at 421. *See also*

Golden v. State, 120 So. 2d 651, 653 (Fla. 1st DCA 1960), *receded from in part on different grounds in Polite v. State*, 454 So. 2d 769 (Fla. 1st DCA 1984) ("The intent of the statute [790.19] is obvious. It was enacted for the purpose of perserving the life and safety of anyone occupying a dwelling or other house. . ."). Although the offenses address the same core or primary evil, the Third District nevertheless concludes that dual convictions for these crimes do not violate double jeopardy because section 790.19, unlike 790.15, addresses not only the potential for injury to individuals, but also the evil "intent to injure or to cause fear." *Valdes* at 421.

The Third District's conclusion is flawed in several respects. First, section 790.19 prohibits "wonton" or "malicious" shootings. Contary to the Third District's holding, this language "does not require that the defendant's malevolent attitude be that of a specific intent . . . to harm the object involved." *Johnson v. State*, 436 So. 2d 248 (Fla. 5th DCA 1983). Rather, the statute requires only reckless disregard of potential deadly consequences. *Id. See also Polite v. State*, 454 So. 2d 769, 771 (Fla. 1st DCA 1984). Similarly, section 790.15 prohibits "knowing" or willful discharge of a firearm in any public place or street, or over any occupied premesis. § 790.15, Fla. Stat. (2007). Such knowing discharge of a firearm in commonly (or currently) occupied public

places is prohibited precisely because such an act recklessly disregards public safety.

The Third Districts's conclusion in this case is also incorrect because the fact that two offenses contain different mental-state elements, or levels of intent, does not prove that the crimes are not degree variants of the same offense. For example, second degree murder requires that the defendant act with a depraved mind regardless of human life, while felony murder omits this requirement in lieu of the act being an intentional act perpetrated during the commission of a felony. Yet, because both crimes punish the same primary evil -- an act that may inflict death -- convictions for both crimes resulting from the same act constitute a double jeopardy violation. *See Mitchell v. State*, 830 So. 2d 944 (Fla. 5th DCA 2002), *citing Gordon v. State*, 780 So. 2d 17 (Fla. 2001).

Similary, the same argument regarding different mental-state elements has also been rejected in the context of dual convictions for the offenses of driving while license suspended, and driving while license revoked as a habitual traffic offender. *See Duff*, 942 So. 2d at 931. In *Duff*, the state argued that no double jeopardy violation existed because the crimes address different types of drivers. Specifically, the state pointed to the fact that one offense punishes "knowingly" driving with a suspended license, while the other has no

guilty knowledge requirement. The reviewing court reject this argument, stating:

> The State's distinctions do not change the fact both offenses address the dual concerns of promoting public safety and punishing those who ignore the law and drive without a valid license. Thus, they represent degree variants of the same offense rather than fundamentally different offenses.

Id.

The same logic applies here. The language of section 790.19, requiring that the defendant's act of shooting within or into a building or vehicle be wanton or malicious, does not change the fact that this section addresses the same primary evil as section 790.15, prohibiting shooting in public places, from vehicles, or over occupied premises. Because these sections address the same core or primary concern, the endangerment of the safety of those who may be struck by the discharge of a firearm or other deadly missile, the offenses represent degree variants of the same offense as contemplated by the double jeopardy statute, section 775.021(4)(b), Florida Statutes. Petitioner's dual convictions for both offenses arising from the same conduct must therefore be reversed.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal finding no violation of double jeopardy principles.

Respectfully submitted,

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BY:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Jill K. Traina, Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this ____day of April, 2008.

_____
MARIA E. LAUREDO
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

_____
MARIA E. LAUREDO
Assistant Public Defender