IN THE SUPREME COURT OF THE STATE OF FLORIDA

HORACE MCKINNEY,

Petitioner,

v. S. Ct. Case No. 10-140

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S BRIEF ON MERITS

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Petitioner was convicted after jury trial of grand theft and robbery with a firearm which arose from the single taking of cash and a cell phone at gunpoint. Petitioner appealed to the Fifth District of Appeal and argued that the dual convictions violated his protection against double jeopardy. The Fifth District Court of Appeal disagreed and affirmed on the basis of this Court's decision in ***Valdes v. State***, 3 So.3d 1067 (Fla. 2009). In doing so, the Fifth District expressly and directly certified conflict with Petitioner ***Shazer v. State***, 3 So.3d 453 (Fla. 4th DCA 2009), which held directly to the contrary. Petitioner timely filed his Notice to Invoke the Jurisdiction of this Court based on the certification of express and direct conflict.

STATEMENT OF THE FACTS

Bernard Vivandieu left his home at approximately 6:00 p.m. on September 11, 2007 to go to a Western Union office inside a Shell station on Orange Blossom Trail and Holden in Orlando. (Vol. I, 54) Vivandieu was going to pick up some money that his cousin in Haiti was sending him. (Vol. I, 55) Vivandieu arrived at the station, parked, went inside and waited in line to receive his money. (Vol. I, 56) Vivandieu filled out the forms necessary to receive the money and the clerk ultimately checked the information on the computer and gave Vivandieu $290.30 in cash along with a reciept. (Vol. I, 57-58, 69) Vivandieu put the money and the reciept in his van between the two front seats and then drove around the Shell station to the Sav-A-Lot next door where he bought some bread. (Vol. I, 69-70) After buying the bread, Vivandieu reentered his car and drove home pulling into his driveway. (Vol. I, 70-72) As he was pulling into his driveway, Vivendieu noticed another person drive up into a neighbor's driveway. (Vol. I, 72) As Vivendieu was getting groceries from his car, he noticed a black male walk behind the van and thought that the man might need directions. (Vol. I, 73) As Vivendieu got out of the van, the man approached him and pointed a gun at his side and said "Daddy give me the money." (Vol. I, 73) Vivendieu asked the man what he meant and the man said the money he had just received at the gas station. (Vol. I, 73) The man took Vivendieu's wallet and checked but did not find the

money there. (Vol. I, 73) The man then checked Vivendieu's pockets and again found no money and then asked where Vivendieu put the money. (Vol. I, 73) Vivendieu told the man he didn't have any money but the man kept checking and ultimately took Vivendieu's cell phone and seeing the money between the seats grabbed it and walked back to his car and then left. (Vol. I, 74) The man was wearing short pants, a beige T-shirt, and a black hat. (Vol. I, 76) Although Vivendieu stated that the man had a gun pointed at him, he was unable to describe the gun except that it was silver. (Vol. I 76-77) In fact Vivendieu could not give any description beyond silver of the gun including any size or caliber. (Vol. II, 230) After the man left, Vivendieu ran inside his house screaming that he had been robbed. (Vol. I, 89) Vivendieu's neighbor, Michael Blaise, was in his front yard and heard the commotion. (Vol. II, 253-256) Blaise looked towards Vivendieu's house and saw a car leaving and heard Vivendieu yell "Get the tag." (Vol. II, 256) The car was already past Blaise when Vivendieu told Blaise that he had been robbed, so Blaise jumped in his truck and took off after the car. (Vol. II, 257) Blaise was able to follow the car and get right behind it which enabled him to record the tag number. (Vol. II, 257) Blaise followed the car until it entered the Carlton Arms Apartment complex. (Vol. II, 258) Blaise then called Vivendieu who said the police were on the way so Blaise returned home and gave

the tag number and description of the car to the law enforcement officers. (Vol. II, 262)

When the police arrived, they interviewed Vivendieu and Blaise and ultimately put out a BOLO for the suspect and the car. (Vol. II, 276) When the officers ran the tag number through the teletype it returned as being registered to Horace McKinney who lived at the Carlton Arms Apartments. (Vol. II, 278-281)

Detective Greg McQuitter was the lead detective on the robbery investigation and developed Petitioner as a suspect. (Vol. III, 311-315) McQuitter compiled 2 photo lineups one containing a picture of Petitioner and one containing a picture of Petitioner's brother. (Vol. III, 315) McQuitter then took the photo lineups to Vivendieu and had him look at them. (Vol. III, 323) In the first lineup which contained a picture of Petitioner, Vivendieu could make no identification. (Vol. III, 324) Upon looking at the second lineup, Vivendieu picked out a picture of Petitioner's brother as being similar to his assailant. (Vol. III, 324) Petitioner is listed at being 6'2 inches tall, while his brother is listed as being 5'5 inches tall. (Vol. III, 326-327) Because Vivendieu had described his assailant as being 5'10 or taller, McQuitter believed that Vivendieu may have misidentified his assailant. (Vol. III, 328) Later that evening, Vivendieu was speaking to his credit card company when he was informed that someone was currently using his card at the Macys store in the Milennia Mall. (Vol. I, 94-95)

Vivendieu immediately called Detective McQuitter and told him about this. (Vol. II, 95; Vol. III, 328) While McQuitter was in the process of writing a warrant for Petitioner's brother, he stopped and looked at footage that had been provided from Macy's security force. (Vol. III, 330, 333) McQuitter observed Petitioner purchasing clothing from Macy's and thought that perhaps Petitioner was the assailant. (Vol. III, 333) McQuitter went back to Vivendieu to get a better description of the suspect and showed Vivendieu the security video from Macy's. (Vol. III, 336) Upon looking at the video, Vivendieu absolutely identified the person on the video as the robber and not the person whom he had previously identified from the photo lineup. (Vol. II, 221, 336) The video also showed Petitioner with Vivendieu's wallet and his identification badges. (Vol. III, 338; Vol. II, 222)

McQuitter interviewed Petitioner at the police station and Petitioner told him that he was home all day with his girlfriend but said that he had allowed someone else by the name of Sean to use his car that day. (Vol. III, 375) Petitioner denied going to Macy's that day; however, he was wearing clothes that matched the clothing that he was seen purchasing in the video. (Vol. III, 375) In a search of Petitioner's car, McQuitter found a black toy replica of a .45 caliber gun. (Vol. III, 388) However, Vivendieu testified that that gun was not the one the suspect used. (Vol. III, 426)

SUMMARY OF THE ARGUMENT

Dual convictions for robbery and grand theft of the same property from the same victim at the same taking violate the constitutional proscriptions against double jeopardy. Grand theft is a permissive lesser included offense of the offense of robbery and therefore dual convictions cannot be allowed.

ARGUMENT

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9 OF THE FLORIDA CONSTITUTION, PETITIONER'S CONVICTIONS FOR ROBBERY AND GRAND THEFT OF THE SAME PROPERTY FROM THE SAME VICTIM VIOLATE THE CONSTITUTIONAL PROSCRIPTION AGAINST DOUBLE JEOPARDY.

Petitioner was convicted of grand theft and robbery with a firearm which arose from a single taking of cash and a cell phone at gun point. He appealed his convictions to the Fifth District Court of Appeal and argued that the dual convictions violated his protection against double jeopardy. The Fifth District, relying on this Court's opinion in ***Valdes v. State***, 3 So.3d 1067 (Fla. 2009), affirmed the dual convictions. In doing so, the Fifth District recognized that the Fourth District Court of Appeal in ***Shazer v. State***, 3 So.3d 453 (Fla. 4th DCA 2009) arrived at the opposite conclusion. Petitioner contends that the Fourth District Court of Appeal has properly applied the law concerning double jeopardy with regard to dual convictions for grand theft and robbery.

The law in Florida regarding double jeopardy has undergone many revisions. The latest pronouncement from this Court was ***Valdes v. State***, 3 So.3d 1067 (Fla. 2009), wherein this Court held that the statutory exception to the ***Blockburger***[1],

[1] ***Blockburger v. United States,*** 284 U.S. 299 (1932)

"same elements" tests for offenses which were degrees of the same offense as provided by statute prohibited separate convictions for crimes arising from the same criminal transaction only when criminal statutes themselves provided for an offense with multiple degrees. This Court specifically receded from prior precedents in ***Gordon v. State***, 780 So.2d 17 (Fla. 2001), ***State v. Florida***, 894 So.2d 941 (Fla. 2005), and ***State v. Paul***, 934 So.2d 1167 (Fla. 2006), which employed a so-called "primary evil" construction in determining a double jeopardy violation. The Legislature has set forth a statute governing when dual convictions may violate the constitutional proscription against double jeopardy. Section 775.021(4), Florida Statutes (2010) provides:

> (4)(a) 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.
> (b) 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. Offense which are lesser offenses the statutory elements of which are subsumed by the greater offense.

The second exception provided by the statute above has generated the most litigation. It was this section that the Court was interpreting in ***Valdes***. In that case, the offenses it was considering were discharging a firearm in public and shooting into or throwing deadly missiles into a dwelling or vehicle. The Third District Court of Appeal had applied the primary evil test and determined that the dual convictions could stand. However, the Fifth District Court of Appeal in analyzing the same two convictions and applying the primary evil test concluded that the dual convictions could not stand. This Court, in resolving the conflict, did away with the primary evil test and instead adopted the approach proposed by Justice Cantero in his special concurrence in ***State v. Paul***, 934 So.2d 1167 (Fla. 2006), wherein he concluded that the plain meaning of the language of Subsection (4)(b)(2), providing an exception for dual convictions for offenses which are degrees of the same offense and provided by statute, is that the Legislature intends to disallow separate punishments for crimes arising from the same criminal transaction only when the statute itself provides for an offense with multiple degrees. This Court went on to offer examples of when dual convictions would be prohibited and cited the theft statute which expressly identifies three degrees of grand theft and two degrees of petit theft, the homicide statute which expressly

identifies three degrees of murder, as well as multiple forms of manslaughter, and the arson statute which expressly identifies two degrees. However, this Court went on to note that it is not necessary for the Legislature to actually use the word degree in defining the crime in order for the degree variant exception to apply and noted that there are other statutory designations that can evince a relationship of degree - for example, when a crime may have aggravated forms of the basic offense.

Petitioner contends that the Fifth District Court of Appeal has misapplied ***Valdes*** to the instant case. First, Petitioner contends that although robbery is proscribed Section 812.13 and theft is proscribed by Section 812.014, they are in essence degree variants of the same offense. The only thing that separates theft from robbery is the additional element of force. While the offense of grand theft requires a certain monetary value, this should not been seen or interpreted as an indication that the Legislature intended to allow dual punishment. Indeed, prior precedents from this Court have so indicated. In ***Pizzo v. State***, 945 So.2d 1203 (Fla. 2006) this Court analyzed a situation in which an individual was convicted of six counts of grand theft and one count of organized fraud based upon the grand thefts. Obviously the grand theft convictions were obtained in violation of Section 812.014, while the organized fraud conviction was obtained in violation of Section 817.034. Thus, they clearly were not degree variants found in the same statute.

However, this Court found the convictions to be violative of double jeopardy by comparing the statutory elements of the two offense. This Court noted that organized fraud includes the following elements: (1) engaging in or furthering a systematic ongoing course of conduct (2) with (a) intent to defraud, or (b) intent to obtain property by false or fraudulent pretenses, representations, or promises, or wilful misrepresentations of a future act, (3) resulting in temporarily or permanently depriving any person of their right to property or a benefit therefrom, or appropriating the property to one's own use or to the use of another person not entitled thereto. After analyzing the elements of grand theft, this Court concluded that all of the elements of grand theft are included in the offense of organized fraud but that organized fraud contained an element that was not an element of grand theft, namely a systematic, ongoing course of conduct with the intent to defraud or take property. Thus, the fact that grand theft required a threshold value amount, was not deemed essential to a double jeopardy analysis. This Court did not specifically recede from or overrule ***Pizzo*** in ***Valdes***. Indeed, at least one district court believes the ***Pizzo*** remains good law. In ***Beamon v. State***, 23 So.3d 209 (Fla. 4th DCA 2009), the court held that a conviction for organized scheme to defraud and multiple acts of grand theft constitute a double jeopardy violation. Importantly, the qualifying theft offenses in ***Beamon*** included a combination of both grand theft and petit theft charges. Petitioner contends that the same analysis

that was employed in ***Pizzo*** and ***Beamon*** should be applied in the instant case with the conclusion being that dual convictions for robbery and theft of the same property violate the proscription against double jeopardy. This is what the Fourth District applied in ***Shazer v. State***, 3 So.3d 453 (Fla. 4th DCA 2009). In ***Shazer*** the Court relied on a previous case, ***Ingram v. State***, 928 So.2d 1262 (Fla. 4th DCA 2006), where the Court vacated a grand theft conviction on the grounds that it constituted a permissive lesser included offense of robbery and thus the dual convictions violated double jeopardy. Thus, Petitioner contends that the Fifth District misapplied ***Valdes*** in its analysis of the double jeopardy claim regarding dual convictions for robbery and grand theft of the same property. This Court should disapprove the decision below and hold that dual convictions for grand theft and robbery of the same property violate the constitutional proscriptions against double jeopardy. Petitioner's conviction for grand theft must be vacated.

CONCLUSION

Based on the foregoing reasons and authorities cited herein, the Petitioner respectfully requests that this Honorable Court to quash the decision of the Fifth District below and approve the decision of the Fourth District Court of Appeal in ***Shazer v. State***, and hold that dual convictions for robbery and grand theft of the same property from the same victim violates the proscriptions against double jeopardy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: Office of the Attorney General and mailed to Horace McKinney, DOC #X62050, Franklin Correctional Institute, 1760 Highway 67 North, Carrabelle, FL 32322, on this 22nd day of March, 2010.

MICHAEL S. BECKER FOR:
REBECCA M. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman font.

MICHAEL S. BECKER FOR:
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