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IN THE SUPREME COURT OF FLORIDA

DIEGO TAMBRIZ-RAMIREZ,

Petitioner, CASE No.: SC17-713

vs.

STATE OF FLORIDA, L.T. Case No.: 4D15-2957

Respondent.

______________________________/

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Review from the District Court of Appeal, Fourth District
State of Florida

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INTRODUCTION

This cases arises for a postconviciton motion. Petitioner alleged his convictions for burglary with an enhancement based on an assault or battery, aggravated assault, and attempted sexual battery violate the double jeopardy clause of the United States Constitution and the Florida Constitution. The two non-burglary convictions formed the basis for his enhancement in the burglary conviction. Petitioner cannot have dual convictions imposed for these offenses and the burglary offense. Therefore, as detailed more fully below, these two convictions should be vacated.

PRELIMINARY STATEMENT

Petitioner, DIEGO TAMBRIZ-RAMIREZ, the Appellant in the Fourth District and the defendant in the trial court, will be referenced in this brief as Petitioner or by his proper name. Respondent, the State of Florida, the Appellee in the Fourth District Court of Appeal, and the prosecution authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. References to the record will be designated with an "R." followed by the volume and page number and enclosed in brackets. Petitioner has included one appendix with this initial brief. References to the appendix with be designated with a "Pet.'s App." and enclosed in brackets.

STATEMENT OF THE CASE AND FACTS

The Fourth District held a double jeopardy violation did not occur in this case. The Fourth District erred. However, this decision, and the Fourth District's analysis, did not occur in a vacuum. To understand why, one must first understand the double jeopardy protections found in both the United States and Florida Constitutions, *infra* Statement, Part I, at 2, and Florida's interpretation and application of these principles. *Infra* Statements, Part II, at 4. Finally, one can review the Fourth District's decision in light of these background. *Infra* Statements, Part III, at 15.

I. Double jeopardy protections generally

The double jeopardy clause in both the United States Constitution and the Florida Constitution prohibit multiple punishments for the same offense. U.S. Const., Amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb"); Art. I, § 9, Fla. Const. ("No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."). This prohibition on multiple punishments for the same offense "has deep historical roots" that go back thousands of years. *See* Carissa B. Hessick and F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 Cornell L. Rev. 45, 50 (Nov. 2011) (discussing that "some limitation on the imposition of multiple punishments" go as far back as ancient Athens) (footnotes omitted).

These clauses provide protection from three separate types of double jeopardy: "[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)). The scope of the double jeopardy clause is the same under both the United States and Florida Constitutions. *Trotter v. State*, 825 So. 2d 362, 365 (Fla. 2002).

"[T]the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent" because the legislature possesses the substantive power to define criminal offenses and determine punishments as a legislative prerogative. *Johnson*, 467 U.S. at 499. The question for every court when considering an alleged double jeopardy violation is whether the legislature "intended to authorize separate punishments for [ ] two crimes," *M.P. v. State*, 682 So. 2d 79, 81 (Fla. 1996), because "[l]egislative intent is the polestar that guides [the court's] analysis in double jeopardy issues[.]" *State v. Anderson*, 695 So. 2d 309, 311 (Fla. 1997).

The interpretation and application of the double jeopardy clause protections has been anything but clear. *See Albernaz v. United State*, 450 U.S. 333, 343 (1981) ("[t]he decisional law in the double jeopardy area is a veritable Sargasso Sea which

could not fail to challenge the most intrepid judicial navigator.”). In Florida, the difficulty of interpreting and applying these protections is not lessened. To place this case in context, and as background for explaining the double jeopardy violations in this case, the following section outlines the double jeopardy jurisprudence in Florida and the two types of double jeopardy protections still available to criminal defendants: statutory and non-statutory.

II. Double jeopardy jurisprudence in Florida

A. Statutory basis for double jeopardy analysis and this Court’s interpretation and application of section 775.021(4), Florida Statutes

Where it is undisputed that charges are predicated on the same acts, and have occurred within the same criminal episode, the reviewing court must decide if the charges survive a same elements test as defined by section 775.021, Florida Statutes. In enacting this statute, the legislature codified the United States Supreme Court decision *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). In section 775.021(4), Florida Statutes, the legislature has provided the following:

> (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. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

§ 775.021, Fla. Stat. (2009).

Subsection (1) protects against the legislature producing identical offenses. Subsection (2) has been interpreted by this Court in various ways through the years, but this section sets forth the limitation on multiple convictions for degree variants of the same offense. Subsection (3) is a restatement of the *Blockburger* rule and relates to a determination of what offenses are subsumed by a greater offense based on double jeopardy principles.

This Court has in the past stated that the statutory limitations, as put forth under section 775.021, Florida Statutes, is the only basis for finding a double jeopardy violation. *See e.g.*, *Gaber v. State*, 684 So. 2d 189, 192 (Fla. 1996) ("[A]bsent an explicit statement of legislative intent to authorize separate punishments for two crimes, application of the *Blockburger* 'same-elements' test pursuant to section 775.021(4) . . . is the sole method of determining whether

multiple punishments are double-jeopardy violations.") (footnote omitted). However, this Court, and the district courts of appeal, recognize there are several non-statutory bases that provide double jeopardy protections.

B. Non-statutory basis for double jeopardy protections in Florida

This Court has found there are at least two prohibitions to dual convictions that do not arise from section 775.021, Florida Statutes. First, this Court has held that double jeopardy is violated when multiple homicide convictions result from a single death. *Houser v. State*, 474 So. 2d 1193 (Fla. 1985). When deciding *Houser*, this Court stated the following:

> [W]hile the First District is correct in its *Blockburger* analysis that the two crimes are separate, *Blockburger* and its statutory equivalent in section 775.024(1), Fla. Stat. (1983), are only tools of statutory interpretation which cannot contravene the contrary intent of the legislature. And "the assumption underlying the *Blockburger* rule is that [the legislative body] ordinarily does not intend to punish the same offense under two different statutes." This assumption should apply generally to statutory construction. While the legislature is free to punish the same crime under two or more statutes, it cannot be assumed that it ordinarily intends to do so.

Houser, 474 So. 2d at 1196 (internal citations omitted).

Although *Houser* was decided prior to the current version of section 775.021, Florida Statutes, the district courts have often, and recently, relied on its holding as a basis to preclude multiple convictions on double jeopardy grounds. *See, e.g., Linton v. State*, 212 So. 3d 1100, 1102 (Fla. 5th DCA 2017) (relying on *Houser* and stating,

"we find that Appellant was properly found guilty and sentenced to life in prison on Count I, the first-degree murder of his passenger; however, Counts II and IV cannot be enhanced by that same homicide.").

Second, this Court has held that double jeopardy convictions occur when a defendant receives cumulative punishments based on enhanced conviction by use or possession of a firearm and a separate conviction based on the same act. *Cleveland v. State*, 587 So. 2d 1145 (Fla. 1991). A second firearm enhancement imposed on a second count, based on the same act, is also a prohibited cumulative punishment *Id.* This holding has been used by various district courts through the years to prohibit cumulative firearm enhancements even in light of section 775.021(4)(b), Florida Statues. *See e.g., Bush v. State*, 140 So. 3d 707 (Fla. 1st DCA 2014) (citing *Cleveland* and holding that "[i]n finding him guilty of armed robbery, the jury determined Bush was in actual possession of a firearm during the offense. As such, the additional conviction for use of a firearm while committing felony grand theft resulted in a double jeopardy violation.").

District courts have also used *Cleveland* in non-firearm contexts to prohibit cumulative punishments were the fact enhancing one conviction is used as a basis to establish or enhance another conviction. *See, e.g.*, *Schoonover v. State*, 176 So. 3d 994 (Fla. 5th DCA 2015) (applying *Cleveland* to enhancement for use of a destructive device); *Davila v. State,* 26 So. 3d 5 (Fla. 3d DCA 2009) (relying on

Cleveland to reverse an order denying post-conviction relief and remanding for a determination whether the same act of child abuse impermissibly underlay both a degree enhancement of kidnapping and a separate child abuse conviction); *Ivey v. State*, 47 So. 3d 908, 911 (Fla. 3d DCA 2010) (applying *Cleveland* when vacating defendant's conviction for leaving the scene because defendant was also convicted of DUI Manslaughter and "a separate conviction for leaving the scene of a fatal accident constitutes a double penalty, and violates double jeopardy.").

Similarly, in *State v. Brown*, 633 So. 2d 1059 (Fla. 1994), and while acknowledging section 775.021, Florida Statutes, this Court held it violates double jeopardy when a defendant is convicted of possession of a firearm during the commission of a felony and receives an enhanced sentence for carrying that same firearm during the commission of a robbery when both crimes arose from the same criminal episode. *Id.* As noted in Justice McDonald's concurring opinion: "The use of the firearm enhanced the degree of the robbery conviction and, hence, Brown has been punished for its use." *Id.*

These non-statutory bases for establishing a double jeopardy violation have been applied repeatedly in Florida's Court through the years. *Linton*, 212 So. 3d at 1102; *Bush*, 140 So. 3d at 707. As such, the legislature is presumed to be aware of this long-standing case law, and where it has not acted to repudiate that case law, it

is presumed not to object to the intent imputed to it in those cases. *See, e.g.*, *White v. Johnson*, 59 So. 2d 532 (Fla. 1952).

With this background in mind, this Court has in the past, on at least two occasions, considered resolving the burglary enhancement with an assault or battery issue. *Blevins v. State*, 756 So. 2d 1052, 1055 (Fla. 4th DCA 2000), 829 So. 2d 872 (Fla. 2002) and *State v. Reardon*, 763 So. 2d 418 (Fla. 5th DCA 2000) (en banc), 806 So. 2d 446 (Fla. 2002). After initially granting review, this Court discharged jurisdiction as improvidently granted. However, these cases, and the issues and analysis presented in them, present important considerations in this case.

C. *Blevins*, *Reardon*, and other district courts prior attempts to resolve the issues arising from the burglary enhancement offense based on an assault or battery under the burglary statute

In the Fourth District's decision on review, it relied on *Blevins* for the proposition that "the district courts have come into agreement that double jeopardy does not bar a defendant's convictions for burglary with a battery and aggravated battery committed in one criminal episode." *Tambriz-Ramirez v. State*, 213 So. 3d 920, 923 (Fla. 4th DCA 2017) (citing *Blevins v. State*, 756 So. 2d 1052, 1055 (Fla. 4th DCA 2000). Although other district courts may have come to this conclusion, this Court has not, nor has it resolved convictions for burglary with an assault and a conviction for aggravated assault committed in one criminal episode.

Following the decision in *Blevins*, this Court initially accepted review of *Blevins* pursuant to article V, section 3(b)(4), of the Florida Constitution based on a certified conflict with *Crawford v. State*, 662 So. 2d 1016 (Fla. 5th DCA 1995) (en banc). *Crawford* held it was improper to convict a defendant for first-degree burglary with a battery and aggravated battery where the facts of the aggravated battery formed the basis for enhancing the burglary charge. *Id.* at 1017. In reaching this holding, and discussing section 775.021(4)(b)1.-3., the Fifth District stated that, "However one chooses to analyze the crimes involved in this case, as being a degree crime of the same crime or subsumed because the battery was used to enhance the burglary, or one being necessarily included in the other, it is improper under this statute to convict for both." *Id.* at 1017 (footnotes omitted). As stated above, this Court did not resolve this certified conflict because it discharged jurisdiction as improvidently decided. 829 So 2d at 872.

In *Reardon*, 763 So. 2d at 418, the Fifth District receded from *Crawford*, the case this Court accepted to review in certified conflict with *Blevins*. In *Reardon*, the Fifth District held that, for dual convictions of an enhanced burglary and aggravated battery, the subsumed exception was inapplicable because "[w]hile simple battery is a lesser included offense of burglary with a battery the same is not true of aggravated battery. Aggravated battery requires the use of a deadly weapon, an element not required for the offense of burglary with a battery." *Reardon*, 763 So. 2d at 420.

Although this was the majority opinion, three Fifth District judges authored dissenting opinions. Judge Harris authored a lengthy opinion concurring in part and dissenting in part. *Id.* at 420. Additionally, Judge Cobb and Judge W. Sharp authored dissenting opinions. *Id.* at 420-427.

In Judge Harris's opinion, he primarily relied on *United States v. Dixon*, 509 U.S. 688 (1993) and *Harris v. Oklahoma*, 433 U.S. 682 (1977) for his position that *Crawford* was correctly decided. *Id.* at 420. In *Dixon*, the United States Supreme Court held that subsequent convictions for offenses that contained the same elements violate the double jeopardy clause. 509 U.S. at 688. In *Harris*, the United States Supreme Court also held the double jeopardy clause prohibits a separate prosecution of a defendant for a lesser crime following the conviction of a greater crime because the prior conviction could not be had without a conviction of the lesser crime. 433 U.S. at 682. Both cases relied on *Blockburger*, and in *Dixon*, the Court recognized that "both the multiple punishment and multiple prosecution contexts" the *Blockburger* bar applies. *Dixon*, 509 U.S. at 696.

In his opinion, Judge Harris stated that it appeared to him the legislature authorized burglary with a battery as an enhancement with a "generic sense" of the term battery for purposes of establishing it as a qualifying offense for the enhancement. *Id.* at 424. Specifically, he believed it used the term in "a generic sense intending that any battery - simple, aggravated or sexual - could justify the

enhancement of a burglary" and therefore "all of the elements of each qualifying offense (battery, aggravated battery and sexual battery) are incorporated within the compound felony, burglary with a battery." *Id.* at 424. As a result Judge Harris concluded, "if aggravated battery was intended by the legislature to be a qualifying offense under the burglary with a battery offense and if the battery alleged was the same battery relied on in the count of aggravated battery, then the answer to the question as to whether defendant may be punished twice for the same battery is no." *Id.* at 424. Judge Cobb's dissent also echoed Judge Harris's sentiments in his reliance on *Dixon* and *Harris*. He stated, "[t]his first-degree offense has incorporated the offense of battery (irrespective of the degree of the battery) as a necessary core element. A conviction of this degree of burglary precludes a separate conviction of the incorporated offense." *Id.* at 425-426 (citing *Dixon*, *Harris*, and *Illinois v. Vitale*, 447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 (1980)).

In Judge Sharp's dissenting opinion, he stated that "in cases where it is appropriate to convict for first degree burglary, by proving a battery, that same simple battery should not be available thereafter to provide the necessary element of battery for an aggravated battery conviction." *Id.* at 427. Judge Sharp then stated,

> aggravated battery has separate and additional elements above and beyond simple battery. But battery is a lesser included offense, and hence is subsumed in the greater offense. If it is the same battery, it should not be available to serve as the basis for an additional conviction under the *Blockburger* test[.] [Finally, he noted that if the case were to be remanded for a retrial,] "allowing a conviction for aggravated battery

> to stand and conducting a *subsequent* prosecution for burglary with a battery, clearly would invoke the double jeopardy bars of the federal and state constitutions.

Id. (footnote omitted).

Following the Fifth District's decision, this Court accepted jurisdiction to review *Reardon* based on an express and direct conflict with three of this Court's prior decisions: *Sirmons v. State*, 634 So. 2d 153 (Fla. 1994), *Goodwin v. State*, 634 So. 2d 157 (1994), and *Thompson v. State*, 650 So. 2d 969 (Fla. 1994).

In *Sirmons*, the defendant was convicted of grand theft of an automobile and robbery with a weapon that arose from a single taking of an automobile at knife point. 634 So. 2d at 153. Sirmons argued that because the offenses differed not in substance but only in degree, the dual convictions and sentences were improper and violated double jeopardy. *Id.* This Court held that

> *these offenses are merely degree variants of the core offense of theft*. The degree factors of force and use of a weapon aggravate the underlying theft offense to a first-degree felony robbery. Likewise, the fact that an automobile was taken enhances the core offense to grand theft. *In sum, both offenses are aggravated forms of the same underlying offense distinguished only by degree factors*. Thus, Sirmons' dual convictions based on the same core offense cannot stand.

Sirmons, 634 So. 2d at 153-154 (emphasis added).

This Court next decided *Goodwin* by relying on *Sirmons*.

In *Goodwin*, this Court reviewed the Fourth District's certified question of great public importance: "Whether a defendant can be convicted and sentenced for

UBAL manslaughter and vehicular homicide arising out of one death?" 634 So. 2d at 157. The Court, relying on *Sirmons*, held "that the two offenses at issue here are aggravated forms of a single underlying offense distinguished only by degree factors. Multiple punishments thus are not allowed. § 775.021(4)(b)2., Fla. Stat. (1989). *See also Houser v. State*, 474 So. 2d 1193 (Fla. 1985)." *Id.* Finally, *Thompson* was decided based on the holdings of both *Sirmons* and *Goodwin*.

In *Thompson*, the defendant, based on a single sexual act, was "convicted of sexual battery on a physically incapacitated victim in violation of section 794.011(4)(f), Florida Statutes (1991), and sexual activity while in custodial authority of a child, in violation of section 794.041(2)(b), Florida Statutes (1991)." 650 So. 2d at 969. He was sentenced on both counts and the First District found "no multiple-punishments problem in this sentencing scheme[.]" *Id.* However, the Court stated that in finding

> independent conflict with *Sirmons* and *Goodwin* … [this Court held that these] … multiple punishments [were] impermissible based on a single act [because] the various offenses are distinguished only by degree elements, which clearly is the case here. Accordingly, we find that the prohibition against multiple punishments has been violated. Art. I, § 9, Fla. Const. The decision below is quashed, and this cause is remanded for further proceedings consistent with our views here and in *Sirmons* and *Goodwin*. Dual convictions and sentences are not permissible here.

Id.

Thereafter, this Court discharged jurisdiction of *Reardon* as improvidently granted. *Reardon*, 806 So. 2d at 466. Since that time, based on the undersigned's review, no

other cases similarly situated have come before this Court for its review. However, *Sirmons* was mostly recently cited by this Court in *Gil v. State*, 118 So. 3d 787, 793 (Fla. 2013).

In *Gil*, Court relied on *Sirmons* to discuss "the standard by which Florida courts evaluate whether two statutory offenses are variants of each other—thereby falling under the exception provided in subsection (4)(b)(2)[.]" *Id.* This Court went on to state that "[i]n *Sirmons v. State*, 634 So. 2d 153 (Fla. 1994), this Court held that dual prosecutions were prohibited by subsection (4)(b)(2) because the two crimes at issue—robbery with a weapon and grand theft of an automobile—were degree variants of the 'core offense' of theft." *Id.* at 793. *Gil* went on to discuss the evolution of this Court's jurisprudence to include the "primary evil" test, *Gordon v. State*, 780 So. 2d 17, 23-24 (Fla 2001); *State v. Florida*, 894 So. 2d 941, 949 (Fla. 2005), and this Court's decision to recede from this test in its 2009 decision *Valdes v. State*, 3 So. 3d 1067, 1075 (Fla. 2009).

As stated in *Gil*, in the *Valdes* decision, this Court "adopted an approach that tracked the language of the statute" and "prohibits separate punishments *only* when a criminal statute provides for variations in degree for a violation of two or more degrees of a single offense." *Id.* at 1075. This Court concluded "degree" to mean "a level based on the seriousness of an offense." *Id.* at 1075 (quoting Black's Law Dictionary, 456 (8th ed. 2004)). This Court has not again cited *Sirmons* or *Gil*, but

it later decided *Roughton v. State*, 185 So. 3d 1207 (Fla. 2016). This Court held that "a double jeopardy analysis must—in accordance with section 775.021(4)—be conducted without regard to the accusatory pleading or the proof adduced at trial, even where an alternative conduct statute is implicated." 185 So. 3d at 1211. With this precedent in mind, the case before this Court raises double jeopardy issues for this Court's resolution based on statutory and non-statutory grounds.

III. Facts and proceedings in this case

A. The facts of the underlying offense and Petitioner's motion for postconviction relief

The factual and procedure basis for this case was aptly described in the Fourth District's decision giving rise to this petition:

> Armed with a knife and using a shirt as a mask, appellant broke into the victim's home at night and attempted to sexually batter her. The victim testified that during the attack, appellant put the knife to her face and neck. The victim fought off the attacker and, after pulling off the mask, recognized appellant, whom she knew. Appellant ultimately confessed his guilt to police and sent letters to the victim before trial, apologizing and asking her to drop the charges.
>
> The State charged appellant as follows: Count 1, Burglary of a Dwelling with an Assault or Battery While Armed and Masked; Count 2, Aggravated Assault with a Deadly Weapon While Masked; and Count 3, Attempted Sexual Battery — Person 12 Years of Age or Older — Using Great Force or a Deadly Weapon.
>
> The jury convicted appellant as charged on all counts and in a special interrogatory on the verdict form for Count 1 found that during the commission of the burglary he was armed or became

> armed with "a deadly weapon." The court sentenced him to life in prison for the burglary, a consecutive 15 years in prison for the aggravated assault, and a consecutive 30 years in prison for the attempted sexual battery. Following this Court's remand on direct appeal, appellant was resentenced to 15 years in prison for the attempted sexual battery. *See Tambriz-Ramirez*, 112 So. 3d at 768.
>
> Appellant filed a timely amended motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 raising various issues, including a claim that his trial attorney was ineffective in failing to raise a double jeopardy violation. The trial court held an evidentiary hearing and entered an order denying all of appellant's claims.

Tambriz-Ramirez v. State, 213 So. 3d 920, 921 (Fla. 4th DCA 2017).

The three offenses at issue in this case are burglary, § 810.02, Fla. Stat. (2009), aggravated assault, § 784.021, Fla. Stat. (2009), and attempted sexual battery, § 794.011, Fla. Stat. (2009). Additionally, Petitioner was charged with an enhancement for being masked during the offense. § 775.0845, Fla. Stat (2009).

In relevant part, the burglary statute provides:

> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender:
>
> (a) Makes an assault or battery upon any person; or
>
> (b) is or becomes armed within the dwelling, structure, or conveyance, with explosives or a dangerous weapon; or
>
> (c) Enters an occupied or unoccupied dwelling or structure, and

1. Uses a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the offense, and thereby damages the dwelling or structure; or

2. Causes damage to the dwelling or structure; or to property within the dwelling or structure in excess of $1,000.

§ 810.02(2), Fla. Stat. (2009).

Burglary is enhanced to a life felony if a burglary is committed and the defendant also commits an "assault" or "battery." *Id.*

An "aggravated assault" is an assault: "(a) with a deadly weapon without intent to kill; or (b) With an intent to commit a felony." § 784.021(1)(a)-(b), Fla. Stat. (2009). A simple "assault" is "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." § 784.011(1), Fla. Stat. (2009).

A sexual battery means "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object[.]" § 794.011(1)(h), Fla. Stat. (2009). Sexual battery is enhanced to a life felony when "[a] person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury[.]" § 794.011(3), Fla. Stat. (2009).

When a defendant wears a mask while committing an offense, the offense is reclassified to a higher degree. § 775.0845(2)(a)-(b), Fla. Stat. (2009) ("In the case of a felony of the third degree, the offense is reclassified to a felony of the second degree … In the case of a felony of the second degree, the offense is reclassified to a felony of the first degree."). Each of Petitioner's charges included enhancements for use of a deadly weapon, §§ 810.02(2)(a)&(b) (burglary), 784.021(1)(a) (aggravated assault), 794.011(3), Florida Statutes and the first and second counts included an enhancement under section 775.0845 (mask enhancement), Florida Statutes. [Pet.'s App.] The Petitioner filed a motion pursuant to Florida Rule of Criminal Procedure 3.850 alleging ineffective assistance of counsel for failure to raise this double jeopardy issue. [R. Vol. I 1-35] The trial court denied this motion. [R. Vol. I 73-80] Thereafter, the Petitioner appealed to the Fourth District.

C. The Fourth District's Decision

On review, the Fourth District held there was no double jeopardy violation in this case. *Tambriz-Ramirez*, 213 So. 3d at 921. This decision rested solely on its application of 775.021(4) finding the different offenses have different elements. *Tambriz-Ramirez*, 213 So. 3d at 923 ("Examining strictly the statutory elements and the entire range of conduct proscribed by these statutes demonstrates that these are separate offenses for which the Legislature intends separate punishments."). In its opinion, the Fourth District certified conflict with several decisions arising from the

First and Fifth District Courts of Appeal that held aggravated assault was subsumed by a conviction for burglary with an assault. *Id.* at 924.[1]

In these certified decisions, there is little, if any, discussion regarding the reasoning for *why* a double jeopardy violation occurred. *Supra* n. 1. For the most part, the courts only briefly stated that that all of the elements for aggravated assault were subsumed by the enhanced burglary conviction. *See e.g.*, *Hankins*, 164 So. 3d at 738 ("convictions for aggravated battery with a firearm and aggravated assault with a firearm violate double jeopardy because they were subsumed into the greater offense of burglary of a dwelling with an assault or battery with a firearm."); *White*, 753 So. 2d at 669 ("[A]ll of the elements of the crime of aggravated assault with a firearm are contained within the crime of burglary with assault while armed with a firearm.").

Following the Fourth District's decision affirming the trial court's denial of his 3.850 motion, Petitioner filed a motion for rehearing that was also denied. Undersigned counsel, thereafter filed his notice of appearance, and filed a jurisdictional brief on Petitioner's behalf seeking this Court's discretionary review.

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[1] *See Hankins v. State*, 164 So. 3d 738, 738 (Fla. 5th DCA 2015); *McGhee v. State*, 133 So. 3d 1137 (Fla. 5th DCA 2014); *Estremera v. State*, 107 So. 3d 511, 512 (Fla. 5th DCA 2013); *Green v. State*, 120 So. 3d 1276, 1278 (Fla. 1st DCA 2013); *Baldwin v. State*, 790 So. 2d 434 (Fla. 1st DCA 2000); *Smith v. State*, 154 So. 3d 523 (Fla. 1st DCA 2015); *White v. State*, 753 So.2d 668, 669 (Fla. 1st DCA 2000); *Dykes v. State*, 200 So. 3d 162 (Fla. 5th DCA 2016).

The Respondent's agreed this Court had jurisdiction and this Court accepted review. This brief follows.

SUMMARY OF ARGUMENT

Petitioner's convictions for aggravated battery and attempted sexual battery are prohibited by the double jeopardy clauses of both the U.S. Constitution and Florida Constitution because of his enhanced burglary conviction on the same conduct. As such, Petitioner's counsel was ineffective for failing to raise these issues, and Petitioner has been prejudiced because of these convictions. These convictions should be vacated for three reasons.

First, based on *Valdes*, and this Court's prior precedent, although contained within different statutes, burglary with an enhancement based on assault or battery are degree variants because the legislature prohibits convictions based on degree variants pursuant to section 775.021(4)(b)2., this requires the other statute's to prove the enhancement under burglary these convictions should be vacated.

Second, because the legislature used the generic terms "assault" and "burglary" in section 810.02, Florida Statutes, any form of these two offenses is the basis for the enhancement of burglary with an assault or battery. Therefore, based on the U.S. Supreme Court's precedent in *Dixon* and *Harris*, convictions for burglary with an assault or battery and a conviction for a separate offense of any

form of assault or battery are prohibited as the lesser offense are subsumed into the greater offense pursuant to section 775.021(4)(b)3., Florida Statutes.

Third, and finally, pursuant to this Court's decision in *Cleveland*, cumulative punishments for the same conduct are prohibited and violate double jeopardy. Petitioner's convictions for burglary with an assault or battery, aggravated assault, and attempted sexual battery are cumulative because each offense arises from the same act, and because the aggravated assault and attempted sexual battery were the bases for the burglary enhancement. Therefore, this Court should vacate Counts 2 and 3 of Petitioner's judgment and sentence as violating the double jeopardy clauses of the United States and Florida Constitution.

ARGUMENT

Issues presented.

I. Whether convictions for an enhanced burglary based on an assault or battery, and a separate conviction (in any form) of assault or battery, violates section 775.021(4)(b)2., Florida Statutes?

II. Whether convictions for an enhanced burglary based on an assault or battery, and a separate conviction (in any form) of assault or battery, violates section 775.021(4)(b)3., Florida Statutes?

III. Whether convictions for an enhanced burglary based on an assault or battery, and a separate conviction (in any form) of assault or battery, violates the prohibition for cumulative punishments as articulated in *Cleveland v. State*, 587 So. 2d 1145 (Fla. 1991)?

Preliminary matters.

(i) Jurisdiction. This Court granted discretionary review based on a certified conflict between the Fourth District's decision and decisions from the First and Fifth District Courts' of Appeal. Art. V, Sec. 3(b)(iv), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(vi).

(ii) Standard of Review. Determining whether double jeopardy is violated based on undisputed facts is purely a legal determination. The standard of review is *de novo*. *Binns v. State*, 979 So. 2d 439, 441 (Fla. 4th DCA 2008).

<u>Merits.</u>

I. Convictions for an enhanced burglary based on an assault or battery, and a separate conviction (in any form) of assault or battery, violates section 775.021(4)(b)2., Florida Statutes.

A. Separate statutes can be degree variants of the same offense when both statutes either explicitly or implicitly rely on the other for purposes of establishing an enhancement

This Court most recently addressed the limitation for multiple convictions in section 775.021(4)(b)2., Florida Statutes in *Valdes* and *Gil*. In *Valdes*, this Court held that "[t]he 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." *Id*. at 1076 (quoting *State v. Paul*, 934 So. 2d 1167, 1176 (Fla. 2006) (Cantero, J., specially concurring)). This was based on the Court's reliance on the plain language of section 775.021(4)(b)2., which states it is not the intention of the legislature to impose multiple convictions on "[o]ffenses which are degrees of the same offense as provided by statute." In coming to this conclusion, this Court stated, "It is not necessary for the Legislature to use the word 'degree' in defining the crime in order for the degree variant exception to apply. *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." *Valdes*, 3 So. 3d at 1076 (emphasis added) (citation omitted).

Petitioner submits there is at least one "other statutory designations that can evince a relationship of degree" beyond the legislature drafting one statute that encapsulates all degrees of the same offense. *Id.* When a statute implicitly (or explicitly) relies on another statute's elements for purpose of an enhancement, and can only establish that enhancement by tracking the other statute's language, then the legislature has established a relationship of degrees between the same offense. *See, e.g.*, § 784.011(1), Fla. Stat. (2009) (simple assault statute); § 784.021(1)(a)-(b), Fla. Stat. (2009) (aggravated assault statute). As an example, assault and aggravated assault are two offenses that are degrees of one another but are both contained in different statutes. *See id.,* Fla. Std. Jury Instr. (Crim.) 8.2, Aggravated Assault (stating assault is a category one lesser included offense). Therefore, section 775.021(4)(b)2.'s variant degrees exception should not include *only* offenses contained within the same statute. The legislature has clearly established some statutes are degrees of the same offense but found in different statutes.

Identifying this as an additional basis under section 775.021(4)(b)2., Florida Statutes is consistent with Justice Cantero's special concurrence in *Paul*, and as this Court stated in *Valdes*, is "both easy to apply in practice and deferential to the legislative prerogative inherent in defining crimes and crafting punishments." *Valdes*, 3 So. 3d at 1076. Additionally, this inclusion is consistent with the principles espoused by this Court in *Roughton*. The determination that separate statutes are

degree variants can be accomplished by viewing *only* the statutory language without a need to review the accusatory pleadings or evidence adduced at trial. *Roughton*, 185 So. 3d at 1207. Therefore separate statutes can in fact be degree variants of one another, and as discussed below, pursuant to section 775.021(4)(b)3., convictions for burglary enhanced based on an assault or battery and a conviction for any form of assault or battery are prohibited.

B. Burglary with an assault or battery and aggravated assault and attempted sexual battery are degree variants of burglary with an assault or battery

Although burglary, assault, and battery are contained within different statutes, the legislature clearly intended for burglary with an assault or battery to rely on the elements found within these separate statutes to prove the enhanced offense. *See, e.g.,* § 810.02(2)(a), Fla. Stat. (2009) ("Burglary is a felony of the first degree … if, in the course of committing the offense, the offender: *Makes an assault or battery upon any person*[.]"). But the burglary statute makes no explicit reference to section 784.011, nor are the legal elements of "assault" or "battery" contained within section 810.02, Florida Statutes. Rather, the statute relies on the general term "assault" and "battery" as a basis for a significant enhancement. *See Reardon*, 763 So. 2d at 420 (Harris, J., concurring in part dissenting in part) ("generic" term discussion). The reliance on this separate statutory language for purposes of proving this enhancements is evidenced by the standard jury instructions for burglary. *See* Fla.

Std. Jury Instr. (Crim.) 13.1, Burglary. When a jury considers whether an assault or battery was proven for an enhancement the statutory language forms the basis for the jury instruction. *Id.* If this Court authorizes the degree variant analysis to include separate statutes, as discussed above, then a conviction for burglary with an assault or battery and a separate conviction for assault and battery (in any form) is impermissible under *Valdes*.

Here, although the offenses are found within separate statutory provisions, each is a degree variant of the other. The burglary statute must rely on any form of the assault and battery statutes as a basis to establish its enhancement. Thus, the burglary enhancement is an aggravated form of the other as demonstrated by the fact burglary with an assault or battery is a heightened offense. The legislature intended to disallow separate punishments for degree variants of one another, regardless of whether they are contained within separate statutes. Thus, this Court should hold a double jeopardy violation prohibits a conviction for an offense of burglary with an assault or battery and a separate conviction for any form of an assault or battery pursuant to section 775.021(4)(b)2., Florida Statutes.

II. Convictions for an enhanced burglary based on an assault or battery, and a separate conviction (in any form) of assault or battery, violates section 775.021(4)(b)3., Florida Statutes

A. The legislature used the generic term of "assault" and "battery" as a basis to enhance the burglary charge

"The fundamental rule of construction in determining legislative intent is to first give effect to the plain and ordinary meaning of the language used by the Legislature." *State v. Sousa*, 903 So. 2d 923, 928 (Fla. 2005). The plain language of section 810.02 does not define assault or battery beyond the plain use of the words. 810.02(2)(a), Fla. Stat. (2009). It neither defines assault or battery as "simple," "aggravated," or as "sexual battery." *See, e.g.*, 784.021(1)(a); 794.011(h), Fla. Stat. (2009). Nor do courts require that only simple battery or simple assault may be used for enhancing the burglary offense. Therefore, when courts have deduced the legislature only meant to prohibit punishments for "simple battery" or "simple assault" when reading section 810.02, Florida Statutes, these courts are not adhering to this fundamental principle of statutory construction. *Sousa*, 903 So. 2d at 928.

The legislature used the "generic" term of assault and battery in section 810.02, Florida Statutes for a purpose. *See Reardon*, 763 So. 2d at 420 (Harris, J., concurring in part dissenting in part) ("generic sense intending that any battery - simple, aggravated or sexual - could justify the enhancement of a burglary" and therefore "all of the elements of each qualifying offense (battery, aggravated battery and sexual battery) are incorporated within the compound felony, burglary with a

battery."). As Judge Harris noted in his separate opinion in *Reardon*, "if aggravated battery was intended by the legislature to be a qualifying offense under the burglary with a battery offense and if the battery alleged was the same battery relied on in the count of aggravated battery, then the answer to the question as to whether defendant may be punished twice for the same battery is no." *Id.* at 424. Based on the fact the legislature used the "generic" term to describe the enhancement, then any form of assault or battery can form a basis for an enhancement. The legislature clearly did not intend to *only* have a simple battery or simple assault enhance a defendant's sentence. Thus, the burglary stattue relies on *any* form of assault or battery to prove an enhancement. As discussed more fully below, once a greater or lesser offense is proven, double jeopardy prohibit the conviction of a defendant also being punished for the separate offense that made up the greater or lesser conviction. *See Harris* and *Dixon*.

B. Because the legislature relied on the generic terms of assault and battery, under *Harris* and *Dixon*, a defendant cannot be convicted of both an enhanced burglary charge and for any other form of an assault or battery that was the a basis for enhancing the burglary conviction

In *Harris*, the U.S. Supreme Court held that "[w]hen … [a] conviction of a greater crime …cannot be had without conviction of the lesser crime … the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." 433 U.S. 682, 682-683*; see also Lewis v. United States*, 523 U.S. 155, 177

(1998) (J., Scalia and Thomas concurring in judgment) ("*Thus, for example, double-jeopardy law treats greater and lesser included offenses as the same*, *see, e.g., Harris v. Oklahoma*[.]") (emphasis added). In *Dixon*, the United States Supreme Court held that subsequent convictions for offenses that contained the same elements violate the double jeopardy clause. 509 U.S. at 688. As noted in *Dixon*, this holding is consistent with *Blockburger* and applies to two double jeopardy protections. *Dixon*, 509 U.S. at 696. Therefore, having once been convicted of the generic form of either "battery" or "assault" when that same battery or assault constituted an enhancement under section 810.02, Florida Statutes prohibits a conviction for a lesser offense for this same assault or battery, in any form. This analysis thus equally applies when determining whether a crime has been subsumed by another pursuant to section 774.021(4)(b)3., Florida Statutes.

As the Fourth District noted, under section 775.021(4)(b)3., a simple assault or a simple battery is subsumed as a necessarily included offense of burglary with an assault or battery offense. *See, e.g., Blevins*, 756 So. 2d at 1055. However, the same elements that make up a "simple" battery or "simple" assault also make up the aggravated version of those same statutes when based on the same conduct. Those same elements are therefore used to establish the enhanced burglary conviction. Based on both *Harris* and *Dixon*, the subsumed exception analysis is not complete following a review of whether the offenses have different elements. Rather, the

analysis should continue until it is clear the elements used as a basis to convict for one crime have not been used to enhance another crime. Although not as explicitly, this this Court has come to a similar conclusion in *Brown*, 633 So. 2d at 1059.

In *Brown*, this Court held a defendant cannot be convicted of possession of a firearm during the commission of a felony when also receiving an enhanced sentence for carrying a firearm during the commission of a robbery if both crimes took place during the same criminal episode. *Id.* As noted in Justice McDonald's concurring opinion: "The use of the firearm enhanced the degree of the robbery conviction and, hence, Brown has been punished for its use." *Id.* Thus, burglary with an assault battery involves two separate offenses- burglary and an assault (or battery), all the elements of which must be proved in order to convict for the new greater offense. Based on *Dixon*, *Harris*, and *Brown*, because all the elements had to be proved in order to convict the enhanced burglary conviction, aggravated assault or attempted sexual battery, cannot be used again in a separate count, and both Petitioner's convictions for aggravated assault and attempted sexual battery are subsumed into the enhanced burglary offense.

III. Convictions for an enhanced burglary based on an assault or battery, and any separate conviction for assault or battery (in any form) that form the basis for that enhancement, violates the prohibition for cumulative punishments as articulated in *Cleveland v. State*, 587 So. 2d 1145 (Fla. 1991)

This Court's decision in *Cleveland*, and other court's interpretation of that holding, properly prevents a defendant from receiving cumulative punishments based on the same conduct. *Cleveland*, 587 So. at 1145; *Schoonover*, 176 So. 3d at 994; *Davila,* 26 So. 3d at 5; *Ivey*, 47 So. 3d at 911. Here, Petitioner was charged with three counts; two of those counts were the basis for enhancing his burglary conviction to a life felony. [Pet.'s App.] Because Petitioner was charged, and convicted based on the same conduct in three different counts, Petitioner is receiving cumulative punishment for the same conduct. Equally, when Petitioner was charged with committing the crime while wearing a mask in separate counts, he again received a cumulative punishment for the same conduct. [Pet.'s App.] Therefore, pursuant to *Cleveland*, and its progeny, these cumulative punishments cannot stand, and this Court should vacate counts 2 and 3 of Petitioner's convictions.

CONCLUSION

Wherefore, Petitioner, DIEGO TAMBRIZ-RAMIREZ, based on the foregoing, requests this Court vacate Counts 2 and 3 of his convictions on double jeopardy grounds. As aptly noted by the Fifth District in *Crawford*, "However one chooses to analyze the crimes involved in this case, as being a degree crime of the

same crime or subsumed because the battery was used to enhance the burglary, or one being necessarily included in the other, it is improper under this statute to convict for both." 662 So. 2d at 1017 (footnotes omitted). Petitioner submits this statement is correct and requests this Court vacate Petitioner's judgment and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail on this 16th day of August 2017.

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CERTIFICATE OF COMPLIANCE

I HEREBYCERTIFY that this brief has been prepared with Times New Roman 14 point type and complies with the font requirements of Rule 9.210.

Respectfully submitted,

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