IN THE SUPREME COURT OF THE STATE OF FLORIDA

NOUMAN KHAN RAJA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC21-997
Fourth District Court of Appeal Case No. 4D19-1210

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# RESPONDENT'S BRIEF ON JURISDICTION

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## STATEMENT OF THE ISSUES

Petitioner argues that the Fourth District Court of Appeal construed a constitutional provision in analyzing his double jeopardy claim. He contends that the Fourth District's opinion conflicts with this court's opinion in *Valdes v. State*, 3 So. 3d 1067, 1069 (Fla. 2009), on the degree variants of homicide.

Petitioner also maintains that the Fourth District opinion conflicts with opinions of other district courts, *Partch v. State*, 43 So. 3d 758 (Fla. 2d DCA 2010) and *Aubuchon v. State*, 110 So. 3d 55 (Fla. 2d DCA 2013), which Petitioner contends hold that attempt offenses are subsumed in the completed offense.

Respondent does not intend to raise any affirmative issues on cross-appeal if review is granted.

## STATEMENT OF THE CASE AND FACTS

In the opinion, the Fourth District set out the prohibition of the Double Jeopardy Clause as stated in *Valdes v. State*, 3 So. 3d 1067, 1069 (Fla. 2009) (A. 8).[1] It applied the double jeopardy bar

[1] "A" denotes the Appendix submitted with Respondent's brief which contains the slip opinion of the Fourth District.

contained in section 775.021(4), Florida Statutes, which codifies the elements test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932), to the statutory elements for manslaughter and attempted first degree murder (A. 8-10). It determined that the crime of manslaughter requires the element of death, which attempted first degree murder does not, and that attempted first degree murder requires a premeditated design to cause the death of a human being, which is not required for manslaughter (A. 10). The Fourth District further concluded that the merger doctrine does not apply since each offense requires an element that the other does not (A. 11). It rejected a claim that the single homicide rule was violated by noting that this Court in *State v. Maisonet-Maldonado*, 308 So. 3d 63, 70 (Fla. 2020) held that the single-homicide rule is no longer applicable in Florida (A. 11).

## SUMMARY OF THE ARGUMENT

Petitioner's jurisdictional brief fails to establish a basis for Florida Supreme Court discretionary review. The district court did not construe a constitutional provision but instead applied a statute and recent precedent to the facts. The decision of the

district court is not in express and direct conflict with any decision of this Court or any other court. As such, this Court should decline review.

## ARGUMENT

### THERE IS NO BASIS FOR DISCRETIONARY REVIEW OF THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL BECAUSE THE COURT DID NOT CONSTRUE A CONSTITUTIONAL PROVISION AND ITS OPINION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OF ANOTHER DISTRICT COURT OF APPEAL.

#### 1. Jurisdiction premised on the district court's having expressly construed a constitutional provision

Petitioner first seeks review of the Fourth District's decision in this case based on the district court's having expressly construed a constitutional provision. This Court may exercise its discretion to review any decision that "expressly construes a provision of the state or federal constitution." Art. V, §3(b)(3), Fla. Const. In this case, however, the Fourth District did not "construe" a constitutional provision.

This Court has explained that for purposes of establishing jurisdiction of this Court, an opinion does not construe a provision of the Constitution unless it undertakes to explain, define or

otherwise eliminate existing doubts arising from language or terms of a constitutional provision. *Ogle v. Pepin*, 273 So. 2d 391, 392 (Fla. 1973). Where a district court does not explain, define or overtly state a view which eliminates some existing doubt as to a constitutional provision, but instead applies a provision to the facts before it, the jurisdiction of this court is not invoked. *Dykman v. State*, 294 So. 2d 633, 635-636 (Fla. 1974). "Applying is not synonymous with Construing; the former is NOT a basis for our jurisdiction…" *Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973).

The Fourth District in this case did not mention the Florida constitutional provision or the federal constitutional provision setting out the prohibition against double jeopardy and did not discuss, define or explain the language of either provision. Rather, it applied section 775.021(4), Florida Statutes, which codifies the elements test articulated in *Blockburger*, as well as this court's recent decision in *Maisonet-Maldonado,* to the statutory elements of the offenses for which Petitioner was convicted (A. 8-11).

**2. Jurisdiction premised on the district court's opinion expressly and directly conflicting with a decision of this Court or of another district court.**

Petitioner also seeks review of the Fourth District's decision in this case based on alleged conflict. Conflict jurisdiction arises where a decision "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const.

In this circumstance, "[t]he question of a conflict is of concern to this Court only in those cases where the opinion and judgment of the district court announces a principle or principles of law that are in conflict with a principle or principles of law of another district court or this Court." *N&L Auto Parts Co. v. Doman*, 117 So. 2d 410, 412 (Fla. 1960). This Court has made clear that conflict jurisdiction exists only to prevent a lack of uniformity of the application of the law to the same set of facts or to prevent a district court of appeal from adopting a contrary legal principle than one announced by this Court. *See Jenkins v. State*, 385 So. 2d 1356, 1357-58 (Fla. 1980).

Petitioner contends that the Fourth District's opinion conflicts with case law that holds that an attempt to commit an offense is

subsumed within the completed offense. Respondent advances that the facts and circumstances of this case are distinguishable from those of the instant case.

Petitioner cites to *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009). The passage of the *Valdes* opinion that Petitioner references sets out a quote from Justice Cantero's special concurrence in *State v. Paul*, 934 So. 2d 1167 (Fla. 2006), a case which this Court receded from in *Valdes* because of its reliance on the "primary evil" test. *Valdes*, 3 So. 3d at 1076-1077.

Neither Va*ldes* nor *Paul* involved an attempted offense. This Court in *Valdes* addressed whether dual convictions for discharging a firearm from a vehicle within 1000 feet of a person and shooting into an occupied vehicle violated double jeopardy and in *Paul* this court considered multiple offenses for completed acts of lewd and lascivious conduct in a criminal episode. Moreover, the special concurrence in *Paul* states that degree variants are sometimes provided by statute and pointed to the homicide statute. Paul, 934 So. 2d at 1177. The attempted murder in this case, though, does not fall under the homicide statute. *See Grindine v. State*, 175 So.3d 672, 674 (Fla. 2015)("Long-standing precedent unambiguously

instructs that attempted first-degree murder is deemed a nonhomicide offense under Florida law.").

Petitioner also asserts that the Fourth District's opinion conflicts with *Partch v. State*, 43 So. 3d 758 (Fla. 2d DCA 2010). In *Partch*, the Second District analyzed whether convictions for sexual battery by vaginal penetration and attempted sexual battery on a person helpless to resist violated double jeopardy. It decided that the offenses did violate double jeopardy because they fell within the degrees of the same offense exception to the *Blockburger* test. It pointed to the "statutory trigger" which rendered the two offenses degrees of one another. *Partch*, 43 So. 3d at 763-764. The court did not independently address the attempt aspect of the one sexual battery offense. It explained, though, that the offenses were violations of sections 794.011(4) and 790.011(5) and that section 794.011(6), Florida Statutes, provides that "[t]he offense described in subsection (5) is included in any sexual battery offense charged under …subsection (4)."

In the instant case, however, the offenses are under separate statutes, sections 782.07, manslaughter, and section 782.04(1)(a)(1), attempted murder (A. 9). There is no statutory

language under Chapter 782 that makes "any" offense under one statute, including an attempt, a degree of the other offense.

Petitioner, though, cites to *Rodriguez v. State*, 2021 WL 3008221 (Fla. 2d DCA), in which the court found second-degree and third-degree murder to be degree variants of each other. *Rodriguez*, however, dealt with dual convictions of completed homicides under different subsections of the same statute, section 782.04. *Rodriguez*, 2021 WL 30083221 *3 ("Second-degree murder and third-degree murder are degree variants of each other as they are in the same statute and are degree variants of the same offense, murder"). Notably, neither offense in the instant case is a necessarily lesser included offense of the other under the Florida Standard Criminal Jury Instructions 7.7, on manslaughter, or 6.2, on attempted murder. *See Sanders v. State*, 944 So. 2d 203, 206 (Fla. 2006)(necessarily lesser included offenses are those offenses in which the statutory elements of the lesser included offense are always subsumed withing those of the charged offense).

Finally, Petitioner maintains that the Fourth District's opinion conflicts with *Aubuchon v. State*, 110 So. 3d 55 (Fla. 2d DCA 2013), in which the Second District held that the sentences for attempting

to traffic in oxycodone, 28 to 30 kilograms, and simple possession violated double jeopardy. The court explained that the comparison of statutory elements of crimes is more complex when dealing with an "alternative conduct statute," like the trafficking statute, when the dual offenses are based on the same, single possession of the controlled substance. *Aubuchon*, 110 So. 3d at 57-58. While the court in *Aubuchon* found that neither of the offenses where strictly subsumed into the others or where strictly degrees of the same offense, it decided that the brief possession of 39.5 pills was not a separate completed offense but was an intermediate part of the offense of attempting to possess 400 pills. *Id*. at 59.

This case does not involve an alternative conduct statute or a single possession or act. Here, the charges were not based on the same act. Petitioner fired six shots, three in rapid succession followed by a ten to twelve second delay and then three more shots (A. 6, 9). The medical examiner opined that the victim's homicide was caused by the one shot to the chest (A. 6). While the Fourth District determined that the offenses occurred in the same criminal episode, it did not assert that the offenses were based on the same act. *See Hayes v. State*, 803 So. 2d 695 (Fla. 2001)("the prohibition

against double jeopardy does *not* prohibit multiple convictions and punishments where a defendant commits tow or more distinct acts").

## CONCLUSION

Based on the foregoing arguments and authorities cited therein, Respondent respectfully requests this Court decline to exercise discretionary jurisdiction.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was electronically filed with this Court and served via the Florida Courts E-Filing Portal to Steven H. Malone, Esquire, 707 North Flagler Drive, West Palm Beach, FL 33401, stevenhmalone@bellsouth.net, on September 8, 2021.

s/ *Melynda L. Melear*
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## CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.210(a)(2) and 9.045(e), I hereby certify that this brief was computer generated using 14-point Bookman Old font and complies with the applicable word count.

s/ *Melynda L. Melear*
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