

SC19-1947

In the Supreme Court of Florida

STATE OF FLORIDA,
Petitioner,

v.

JOSE MAISONET-MALDONADO,
Respondent.

On Petition for Discretionary Review from the
Fifth District Court of Appeal
DCA No. 5D18-492

PETITIONER'S INITIAL BRIEF ON THE MERITS

Ashley Moody
Attorney General

Amit Agarwal (FBN 125637)
Solicitor General

Jeffrey Paul DeSousa (FBN 110951)
Deputy Solicitor General

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
amit.agarwal@myfloridalegal.com
jeffrey.desousa@myfloridalegal.com

February 19, 2020

Counsel for State of Florida

RECEIVED, 02/19/2020 04:31:30 PM, Clerk, Supreme Court

TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Case and Facts	1
A. Respondent’s prosecution for murder, vehicular homicide, and aggravated fleeing or eluding.....	1
B. Postconviction proceedings in circuit court	3
C. Appeal to the Fifth District.....	4
Summary of Argument	8
Argument.....	10
I. This Court Should Recede from Its Cases Establishing the Single- Homicide Rule	10
A. The Legislature determines what it means to be the “same offense” for double jeopardy purposes	10
B. In section 775.021(4), the Legislature mandated that “separate criminal offenses” under the same-elements test “shall be sentenced separately,” and <i>Houser</i> is inconsistent with that statute’s plain language	13
C. This Court’s subsequent decisions have repudiated the rationale, if not the result, of <i>Houser</i> and the single-homicide rule.....	21
II. Vehicular Homicide and Aggravated Fleeing or Eluding Do Not Implicate Double Jeopardy	27
Conclusion	32
Statutory Appendix	33
Certificate of Font	35
Certificate of Service	35

TABLE OF AUTHORITIES

Cases

<i>Advisory Op. to Governor re Implementation of Amendment 4, The Voting Restoration Amendment,</i> No. SC19-1341, 2020 WL 238556 (Fla. Jan. 16, 2020)	23
<i>Allen v. State,</i> 684 So. 2d 819 (Fla. 1996)	24
<i>Anders v. California,</i> 386 U.S. 738 (1967)	4
<i>Anguille v. State,</i> 243 So. 3d 410 (Fla. 4th DCA 2018)	21
<i>Ball v. United States,</i> 470 U.S. 856 (1985)	6
<i>Blockburger v. United States,</i> 284 U.S. 299 (1932)	4, 11
<i>Boler v. State,</i> 678 So. 2d 319 (Fla. 1996)	24
<i>Borges v. State,</i> 415 So. 2d 1265 (Fla. 1982)	12
<i>Brown v. Ohio,</i> 432 U.S. 161 (1977)	11
<i>Brown v. State,</i> 371 So. 2d 161 (Fla. 2d DCA 1979).....	6, 7
<i>Carawan v. State,</i> 515 So. 2d 161 (Fla. 1987)	19, 27
<i>Carr v. State,</i> 338 So. 2d 267 (Fla. 1st DCA 1976).....	6

<i>Daniel v. State,</i> 271 So. 3d 1214 (Fla. 1st DCA 2019)	4, 8, 17, 27, 30
<i>Gaber v. State,</i> 684 So. 2d 189 (Fla. 1996)	12, 16, 24, 25
<i>Gaulden v. State,</i> 195 So. 3d 1123 (Fla. 2016)	16
<i>Gordon v. State,</i> 780 So. 2d 17 (Fla. 2001)	12, 17, 20
<i>Goss v. State,</i> 398 So. 2d 998 (Fla. 5th DCA 1981)	6
<i>Hayes v. State,</i> 803 So. 2d 695 (Fla. 2001)	11
<i>Houser v. State,</i> 474 So. 2d 1193 (Fla. 1985)	5, 6, 7, 8, 22, 23
<i>Johnson v. State,</i> 660 So. 2d 637 (Fla. 1995)	17
<i>Jones v. Fla. Parole Com’n,</i> 48 So. 3d 704 (Fla. 2010)	16
<i>Kelly v. State,</i> 987 So. 2d 1237 (Fla. 2d DCA 2008)	21
<i>Lott v. State,</i> 74 So. 3d 556 (Fla. 5th DCA 2011)	21
<i>Maisonet-Maldonado v. State,</i> 149 So. 3d 34 (Fla. 5th DCA 2014)	3, 4, 5
<i>Marsh v. State,</i> 253 So. 3d 674 (Fla. 2d DCA 2018)	8, 20, 21

<i>McCullough v. State</i> , 230 So. 3d 586 (Fla. 2d DCA 2017).....	17, 25
<i>McKinney v. State</i> , 51 So. 3d 645 (Fla. 1st DCA 2011).....	4
<i>Miller v. State</i> , 339 So. 2d 1129 (Fla. 2d DCA 1976).....	6
<i>Muszynski v. State</i> , 392 So. 2d 63 (Fla. 5th DCA 1981).....	6
<i>North Carolina v. Pearce</i> , 395 U.S. 711 (1969)	10
<i>North Fla. Women’s Health and Counseling Servs., Inc. v. State</i> , 866 So. 2d 612 (Fla. 2003)	26, 27
<i>Perry v. State</i> , 953 So. 2d 459 (Fla. 2007)	27
<i>Phillips v. State</i> , 289 So. 2d 769 (Fla. 2d DCA 1974).....	6
<i>Roughton v. State</i> , 185 So. 3d 1207 (Fla. 2016)	29, 30
<i>Service Employees Int’l Union, Local 16, AFL-CIO v. Public Employees Relations Com’n</i> , 752 So. 2d 569 (Fla. 2000)	15, 19
<i>State v. Anderson</i> , 695 So. 2d 309 (Fla. 1997)	10, 12
<i>State v. Chapman</i> , 625 So. 2d 838 (Fla. 1993)	17
<i>State v. Cooper</i> , 634 So. 2d 1074 (Fla. 1994)	17, 18

<i>State v. Goode</i> , 830 So. 2d 817 (Fla. 2002)	14
<i>State v. Johnson</i> , 676 So. 2d 408 (Fla. 1996)	30
<i>State v. McCloud</i> , 577 So. 2d 939 (Fla. 1991)	30
<i>State v. Poole</i> , No. SC18-245, 2020 WL 370302 (Fla. Jan. 23, 2020)	25, 26
<i>State v. Smith</i> , 547 So. 2d 613 (Fla. 1989)	16, 21, 22
<i>Stricklen v. State</i> , 332 So. 2d 119 (Fla. 1st DCA 1976)	6
<i>Thomas v. State</i> , 380 So. 2d 1299 (Fla. 4th DCA)	6
<i>Ubelis v. State</i> , 384 So. 2d 1294 (Fla. 2d DCA 1980)	6
<i>Valdes v. State</i> , 3 So. 3d 1067 (Fla. 2009)	11, 12, 22, 24, 31
<i>White v. Mederi Caretenders Visiting Servs. of Southeast Fla., LLC</i> , 226 So. 3d 774 (Fla. 2017)	15
<i>Williams v. State</i> , 186 So. 3d 989 (Fla. 2016)	14
 Statutes, Laws, and Constitutional Provisions	
U.S. Const. amend. V	10
§ 316.1935(3)(b), Fla. Stat. (2010)	2, 29, 30

§ 775.021(4)(a), Fla. Stat.	9, 13, 14, 30
§ 775.021(4)(b), Fla. Stat.	<i>passim</i>
§ 775.021(4), Fla. Stat. (1983).....	<i>passim</i>
§ 782.071, Fla. Stat. (2010).....	28, 30
§ 782.071(1)(a), Fla. Stat. (2010)	2
§ 790.15(2), Fla. Stat. (2003).....	24
§ 827.071(5)(a), Fla. Stat.	11
Ch. 88-131, § 7, Laws of Fla.	27

Other Authorities

Adam Hersch, <i>Tragedy Behind the Wheel: Understanding Manslaughter by Culpable Negligence, Vehicular Homicide, and DUI Manslaughter</i> , 71-DEC Fla. B.J. 46 (1997).....	25
Fla. Sen. Staff Analysis and Econ. Impact Stmt., S.B. 402 (Apr. 19, 1983).....	13

STATEMENT OF THE CASE AND FACTS

A. Respondent's prosecution for murder, vehicular homicide, and aggravated fleeing or eluding.

The evidence at trial—none of which is disputed in this appeal—described a crime spree resulting in multiple deaths in Orlando. On the evening of April 24, 2010, Respondent Jose Maisonet-Maldonado stabbed his girlfriend, Berlitz Alvelo, eight times and ran her over before leaving the scene in her white BMW SUV. R. 215, 221. Ms. Alvelo was discovered lying in the roadway by a passerby. R. 215. As Ms. Alvelo was going into shock, witnesses observed tire tracks on her torso, a gash on her arm, and stab wounds on her back. R. 215-16. Based on marks on the road, it appeared she had been dragged by a car. R. 216. Before passing away she identified Respondent, her boyfriend, as the attacker. R. 215-16.

The police spotted the white BMW a few miles away and pursued it, flashing their lights and sirens. R. 215, 217. Respondent accelerated and, during a chase that lasted 11 minutes and spanned eight miles, weaved recklessly around cars and through red lights at intersections, *id.*, nearing speeds of 100 miles per hour. R. 218. During the chase, Respondent called Ms. Alvelo's mother and a friend and told them he had murdered her. R. 215, 223.

At an intersection at I-4 and Colonial Drive, Respondent was driving far in excess of the speed limit when he hit a set of railroad tracks, went airborne, and crashed into the rear of a burgundy vehicle stopped at the light. R. 215, 220, 221.

Witnesses estimated that upon impact the two cars shot forwards 200-300 feet, and that the force of the collision was such that the cars appeared to meld together. R. 219. The backseat of the burgundy car was crushed all the way to the front seat. R. 220.

There were three passengers in the burgundy car. The driver of the car, James Laconte, was rendered unconscious after suffering serious injuries. R. 219, 221. Both female passengers, Amanda Taylor and Francesca Jeffrey, were killed. R. 215. Ms. Jeffrey's spinal cord was separated from her head, her liver and spleen were lacerated, and she had bleeding in her brain. R. 222. Ms. Taylor likewise exhibited a fatal spinal column dislocation at the base of her skull and suffered damage to her legs, nose, liver, spleen, and arm. *Id.*

Prosecutors charged Respondent with six counts. In Count 1, he was accused of the first-degree murder of Ms. Alvelo. R. 24-25. In Counts 2 and 5, he was accused of vehicular homicide¹ and of fleeing or eluding with serious injury or death ("aggravated fleeing or eluding"),² naming Amanda Taylor as the victim of both offenses. R. 25, 27. In Counts 3 and 6, he was accused of vehicular homicide and aggravated fleeing or eluding for the death of Francesca Jeffrey. R. 26, 28. And in

¹ See § 782.071(1)(a), Fla. Stat. (2010).

² See § 316.1935(3)(b), Fla. Stat. (2010).

Count 4, prosecutors alleged he committed fleeing or eluding aggravated by the serious injury to James Laconte. R. 27.

A jury found Respondent guilty of all counts. R. 250. As required by statute, he was sentenced to life imprisonment for the first-degree murder. *Id.* As to the remaining counts, the circuit court imposed the following sentences, each of which represented the statutory maximum: 30 years for each of the three fleeing or eluding counts (Counts 2-4) and 15 years for the vehicular homicide counts (Counts 5-6), all to run consecutively. *Id.*

On direct appeal, Respondent sought reversal of his first-degree murder conviction on the ground that the trial court erred in denying his motion for severance. He did not challenge his conviction and sentence for any of the other offenses, and he did not invoke the Double Jeopardy Clause. The judgment was affirmed by the Fifth District in a per curiam order without written opinion. *Maisonet-Maldonado v. State*, 149 So. 3d 34 (Fla. 5th DCA 2014).

B. Postconviction proceedings in circuit court.

In 2016, Respondent filed a pro se motion to vacate his convictions and sentences under Florida Rule of Criminal Procedure 3.850. *See* R. 37-67. Among other things, he alleged that his convictions for aggravated fleeing or eluding in Counts 2-3 violated the Double Jeopardy Clause because those counts were aggravated based on the deaths of Taylor and Jeffrey, whose deaths also formed the

basis for the vehicular homicide convictions in Counts 5-6. R. 63 (“the defendant was sentenced for the deaths of both victims twice”). He also contended that the dual convictions violated double jeopardy because “the elements of vehicular homicide are subsumed” by those of aggravated fleeing or eluding. *Id.*

The circuit court rejected the double jeopardy claim without conducting an evidentiary hearing. R. 250-59. Relying on the First District’s decision in *McKinney v. State*, 51 So. 3d 645 (Fla. 1st DCA 2011),³ the circuit court found that fleeing or eluding is “not a homicide offense” because it can be committed “without causing a death or injury.” R. 258. As a result, the fact that Taylor and Jeffrey were each named as victims of both vehicular homicide and fleeing or eluding was immaterial. *See id.* As to Respondent’s *Blockburger*⁴ argument, the court explained that vehicular homicide and aggravated fleeing or eluding “are separate crimes because a death is necessary for one but not for the other.” *Id.*

C. Appeal to the Fifth District.

After filing a notice of appeal from the order denying postconviction relief, Respondent’s court-appointed appellate attorney filed a memorandum brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), attesting that he had reviewed the record on appeal and was unaware of any non-frivolous issues that might warrant

³ *McKinney* was subsequently overruled by a panel of the First District. *See Daniel v. State*, 271 So. 3d 1214, 1215 n.3 (Fla. 1st DCA 2019).

⁴ *Blockburger v. United States*, 284 U.S. 299 (1932).

reversal. Rather than accept that representation and grant counsel's motion to withdraw, however, the Fifth District asked counsel to address whether the "single-homicide rule" compelled vacatur of the aggravated fleeing or eluding convictions. Respondent, through counsel, then filed a merits brief urging reversal because "the single homicide rule applies regardless of whether two offenses satisfy the *Blockburger* test." Suppl. Init. Br., *Maisonet-Maldonado v. State*, No. 5D18-942, at *5, 8 (Nov. 20, 2018). He did not renew his trial-level claim that vehicular homicide and aggravated fleeing or eluding fail *Blockburger*'s same-elements test.

The district court reversed and ordered the circuit court to reduce Counts 2-3 from aggravated fleeing or eluding to simple fleeing or eluding, a third-degree felony. It predicated that ruling exclusively on the single-homicide rule set out in *Houser v. State*, 474 So. 2d 1193 (Fla. 1985). *See* Ptr.'s App'x 3.

In *Houser*, the defendant claimed that the Double Jeopardy Clause precluded multiple convictions and sentences for the offenses of driving while intoxicated manslaughter ("DWI manslaughter") and vehicular homicide. *See* 474 So. 2d at 1196. This Court's analysis proceeded in two parts.

First, the Court acknowledged that vehicular homicide and DWI manslaughter satisfy *Blockburger*'s same-elements test because each contains an element the other does not. *Id.* at 1196. That, however, did not end the Court's inquiry. It instead asserted that *Blockburger* and section 775.021(4), which adopts

Blockburger at the state level, “are only tools of statutory interpretation” that cannot “contravene the contrary intent of the legislature.” *Id.* Rather than apply section 775.021(4)—which mandates that defendants “be sentenced separately for each criminal offense” and defines separate offenses as those which “require[] proof of an element that the other does not,” § 775.021(4), Fla. Stat. (1983) (reproduced *infra* at 33)—the Court presumed that the Legislature “ordinarily does not intend to punish the same offense under two different statutes.” *Id.* (quoting *Ball v. United States*, 470 U.S. 856, 861 (1985)). “This assumption,” the Court wrote, “should apply generally to statutory construction.” *Id.*

Second, to bolster its presumption that the Legislature could not have intended separate punishments for vehicular homicide and DWI manslaughter, *Houser* relied on a string of district court decisions, all of which predated the Legislature’s 1983 adoption of the *Blockburger* same-elements test:

Florida courts have repeatedly recognized that the legislature did not intend to punish a single homicide under two different statutes. *Vela; Goss v. State*, 398 So. 2d 998 (Fla. 5th DCA 1981) (premeditated and felony murder); *Muszynski v. State*, 392 So. 2d 63 (Fla. 5th DCA 1981) (first-degree felony murder and second-degree murder). The principle has been applied in the case of dual charges of DWI manslaughter and manslaughter. *Thomas v. State*, 380 So. 2d 1299 (Fla. 4th DCA), *review denied*, 389 So. 2d 1116 (Fla. 1980); *Miller v. State*, 339 So. 2d 1129 (Fla. 2d DCA 1976); *Carr v. State*, 338 So. 2d 267 (Fla. 1st DCA 1976); *Stricklen v. State*, 332 So. 2d 119 (Fla. 1st DCA 1976); *Phillips v. State*, 289 So. 2d 769 (Fla. 2d DCA 1974). And the rule has been utilized in the express situation now before us. *Ubelis v. State*, 384 So. 2d 1294 (Fla. 2d DCA 1980); *Brown v. State*, 371 So. 2d 161 (Fla. 2d DCA

1979), *affirmed*, 386 So. 2d 549 (Fla. 1980).

Id. at 1197.

Without conducting an independent assessment of the Legislature’s intent with respect to vehicular homicide and DWI manslaughter, the Court created the categorical rule that “only one homicide conviction and sentence may be imposed for a single death.” *Id.* at 1196. And, because the victim of both counts in *Houser* was the same person, the Court held that the defendant could “not be punished for both DWI manslaughter and vehicular homicide.” *Id.* at 1197.

Justice Alderman dissented from that holding. He agreed with the majority that DWI manslaughter and vehicular homicide are “separate and distinct offenses, each requiring proof of an element which the other does not.” *Id.* (Alderman, J., concurring in part, dissenting in part). Thus, under *Blockburger*, “the imposition of sentences for both offenses would not violate protections against double jeopardy.” *Id.* But Justice Alderman disagreed with the majority’s treatment of section 775.021(4) as mere guidance that could be overcome by a judicial presumption that the Legislature ordinarily intends a single punishment. To him, the text of the statute set forth the “clear” “intent of the legislature”: that persons committing multiple offenses under *Blockburger* “shall be sentenced separately for each criminal offense.” *Id.* (quoting § 775.021(4), Fla. Stat. (1983)). He thus would have held that “a defendant may be sentenced for both DWI manslaughter and vehicular homicide

for effecting a single death.” *Id.* at 1197-98.

Based on the majority opinion in *Houser*, the Fifth District in this case believed it was bound to apply the “single homicide rule.” Ptr.’s App’x 3. Without further analysis, it therefore reversed and instructed the circuit court on remand to reduce the aggravated fleeing or eluding convictions to simple fleeing or eluding under section 316.1935(3)(a), *id.* at 3-4—the difference between first-degree and third-degree felonies.⁵ Its opinion did not cite section 775.021(4).

The Fifth District also certified the following question of great public importance: “Does the ‘single homicide’ rule found in *Houser v. State* preclude separate convictions of vehicular homicide and fleeing and eluding causing serious injury or death that involve the same victim?” Ptr.’s App’x 4 (internal citation omitted).

This Court exercised its jurisdiction and granted discretionary review.⁶

SUMMARY OF ARGUMENT

The Double Jeopardy Clause protects against multiple punishments for the

⁵ The First District, applying the single-homicide rule, reached the same result in *Daniel*, 271 So. 3d at 1214-15.

⁶ Also pending before the Court is *State v. Marsh*, SC18-1108. There, the Second District extended the rationale of the single-homicide rule to *non*-homicide offenses, thereby precluding multiple convictions for driving while license suspended with serious bodily injury and DUI with serious bodily injury. *Marsh v. State*, 253 So. 3d 674 (Fla. 2d DCA 2018).

“same offense,” but leaves it to the Legislature to define what offenses shall constitute separate crimes. Because lawmakers generally do not set out explicit double jeopardy directives in individual criminal enactments, the U.S. Supreme Court has long applied the *Blockburger* same-elements test, since codified by the Florida Legislature in section 775.021(4)(a), which dictates that offenses are separate if each contains proof of an element the other does not. The Florida Legislature simultaneously requires that sentencing judges impose separate punishments for offenses that are separate under that test. More recently, in section 775.021(4)(b), it further clarified its intent by abolishing the principle of lenity in the double jeopardy context and by creating an exhaustive list of exceptions to the rule mandating separate punishments.

The single-homicide rule is incompatible with the plain terms of that statute. In *Houser*, for instance, this Court acknowledged that two offenses satisfied the *Blockburger* same-elements test yet applied a presumption that the Legislature does not intend to punish similar offenses twice, therefore adopting the categorical rule that a court may impose only a single punishment for homicide offenses resulting from a single death. But where two offenses, even homicide offenses, satisfy *Blockburger*, the Legislature has said they are separate.

Because the single-homicide rule conflicts with clear expressions of legislative intent, and because it has engendered no reliance interests, the Court

should recede from *Houser* and its progeny.

The decision below rested entirely on the single-homicide rule. Accordingly, this Court should quash the Fifth District’s decision and remand to the district court for further proceedings. Should this Court elect to conduct the *Blockburger* analysis in the first instance, the offenses of vehicular homicide and aggravated fleeing or eluding are separately punishable because each requires proof of an element the other does not and are not degree-variants.

ARGUMENT

I. THIS COURT SHOULD RECEDE FROM ITS CASES ESTABLISHING THE SINGLE-HOMICIDE RULE.

A. The Legislature determines what it means to be the “same offense” for double jeopardy purposes.

The Double Jeopardy Clause of the U.S. Constitution provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Among other things, that prohibition guards against “multiple punishments for the same offense.” *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

What constitutes the “same offense” is determined by the Legislature. *See State v. Anderson*, 695 So. 2d 309, 311 (Fla. 1997). Indeed, “[d]espite this constitutional protection, there is no constitutional prohibition against multiple punishments for different offenses arising out of the same criminal transaction as

long as the Legislature intends to authorize separate punishments.” *Valdes v. State*, 3 So. 3d 1067, 1069 (Fla. 2009). Thus, when a sentencing judge imposes multiple punishments in a single proceeding, “the role of the constitutional guarantee against double jeopardy” is to assure that the judge “does not exceed its legislative authorization by imposing multiple punishments arising from a single criminal act.” *Hayes v. State*, 803 So. 2d 695, 699 (Fla. 2001) (quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977)).

Because legislatures typically do not include double jeopardy provisos within individual criminal statutes,⁷ the U.S. Supreme Court has long applied the “same-elements” test to assess legislative intent. *See Blockburger v. United States*, 284 U.S. 299 (1932). In *Blockburger*, the Court explained that “[a] single act may be an offense against two statutes” so long as “each statute requires proof of an additional fact which the other does not.” *Id.* at 304 (internal quotation marks omitted). This default rule therefore defines “same offense” as two or more offenses that do not each contain a distinct element.

Rather than rely exclusively on that federal decision to set forth its intent, the

⁷ An exception includes section 827.071(5)(a), Fla. Stat. (2020) (providing, in the context of a ban on child pornography, that “[t]he possession, control, or intentional viewing of each such photograph, motion picture, exhibition, show, image, data, computer depiction, representation, or presentation is a separate offense”).

Florida Legislature expressly codified the same-elements test. *See* § 775.021(4), Fla. Stat. (1983).⁸

This Court has since remarked, in reference to section 775.021(4), that “there is no clearer signpost of legislative purpose than the official language of Florida Statutes.” *Anderson*, 695 So. 2d at 311. Accordingly, “absent 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.” *Gaber v. State*, 684 So. 2d 189, 192 (Fla. 1996); *see also Gordon v. State*, 780 So. 2d 17, 19-20 (Fla. 2001) (“Absent a clear statement of legislative intent to authorize separate punishments for two crimes, courts employ the *Blockburger* test, as codified in section 775.021, Florida Statutes (1997), to determine whether separate offenses exist.”), *overruled on other grounds, Valdes v. State*, 3 So. 3d 1067 (Fla. 2009).

At issue in this appeal is whether vehicular homicide and aggravated fleeing or eluding are the “same offense” for double jeopardy purposes. Any assessment of that question must look to the plain text of section 775.021(4).

⁸ Section 775.021(4) was designed to “abrogate[] the single transaction rule,” which dictated that a person charged with several offenses arising from a single criminal transaction should only be convicted of the most serious offense charged. *Borges v. State*, 415 So. 2d 1265, 1266 (Fla. 1982).

B. In section 775.021(4), the Legislature mandated that “separate criminal offenses” under the same-elements test “shall be sentenced separately,” and *Houser* is inconsistent with that statute’s plain language.

1. Section 775.021(4) eliminates any doubt about the Legislature’s intent regarding multiple punishments. That statute provides that whomever commits “separate criminal offenses” “*shall* be sentenced separately for each criminal offense.” § 775.021(4), Fla. Stat. (1976) (emphasis added). For purposes of this requirement, the Legislature specified that “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.” § 775.021(4), Fla. Stat. (1983). Those provisions, set out in subsection (4)(a) of the current version of the statute, thus do two things: codify the *Blockburger* same-elements test for determining what constitutes the “same offense”⁹ while mandating that separate criminal offenses be sentenced separately.

Notably, section 775.021(4)(a) does not exempt homicide offenses from its definition of “separate criminal offenses.” The Legislature *could* have provided, but did not, that the rule mandating separate sentences applied to “separate criminal offenses, unless the offenses involve a homicide” or otherwise to “separate non-homicide criminal offenses.” Because homicides are not expressly exempt from this

⁹ See Fla. Sen. Staff Analysis and Econ. Impact Stmt., S.B. 402, at *2 (Apr. 19, 1983) (“this change codifies the *Blockburger* test”).

clear expression of legislative intent, section 775.021(4)(a) applies to *all* separate criminal offenses.

Moreover, the word “shall” is mandatory. *See, e.g., State v. Goode*, 830 So. 2d 817, 822 (Fla. 2002) (“the term ‘shall’ should be construed as mandatory where it refers to some action preceding the possible deprivation of a substantive right”); *see also Williams v. State*, 186 So. 3d 989, 996 (Fla. 2016) (Polston, J., dissenting) (“The Legislature’s use of the mandatory term ‘shall,’ coupled with the fact that the provision contains no exceptions, is a clear indication that the Legislature intended to require consecutive mandatory minimum sentences even if the offenses arise from a single criminal episode.”). Thus, rather than imbuing courts with discretion to reach their own judgments about which offenses do or do not deserve separate punishments, the statute compelled those separate penalties.

When it amended section 775.021(4) in 1988, the Legislature further clarified its intent in two ways. Adding subsection (b), it stated that “[t]he 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.” § 775.021(4)(b), Fla. Stat. (1988). By statute, “lenity” refers to the interpretive canon that “[t]he provisions of this code and offenses defined by other statutes shall be strictly construed,” and that “when the language is susceptible of differing construction, it

shall be construed most favorably to the accused.” *Id.* § 775.021(1).

The same amendment also eliminated any conceivable need for that canon in the double jeopardy context by specifying that “[e]xceptions 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”;
- and
3. “Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.”

Id. § 775.021(4)(b)1.-3.

This list of statutory exceptions is exclusive. Sometimes a list is introduced by the phrase “including” or “including but not limited to,” denoting a non-exhaustive set of examples. *See White v. Mederi Caretenders Visiting Servs. of Southeast Fla., LLC*, 226 So. 3d 774, 783 (Fla. 2017) (“Commonly, the term ‘include’ suggests that a list is non-exhaustive . . .”). This statute, however, says that the “[e]xceptions ... *are*” those enumerated in the list. § 775.021(4)(b), Fla. Stat. (1988) (emphasis added). “[A]re” indicates a comprehensive list. *Cf. Service Employees Int’l Union, Local 16, AFL-CIO v. Public Employees Relations Com’n*, 752 So. 2d 569, 571 (Fla. 2000) (holding that a list introduced by the phrase “‘Public employee’ means any person employed by a public employer except:” was

exhaustive). Moreover, under the doctrine of *inclusio unius est exclusio alterius*, “when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded.” *Jones v. Fla. Parole Com’n*, 48 So. 3d 704 (Fla. 2010) (internal quotation marks omitted).

As a result, this Court has recognized that subsection (4)(b) “list[s] the *only three instances* where multiple punishments shall not be imposed.” *State v. Smith*, 547 So. 2d 613, 616 (Fla. 1989) (emphasis added).

The Court has further described section 775.021(4) as “the specific, clear, and precise statement of legislative intent.” *Id.*; *see also Gaber*, 684 So. 2d at 192 (“In sum, the legislature set forth its rule of statutory construction in section 775.021(4)(b), which clearly states that ‘[t]he intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction.’” (internal citation omitted)). Because a court will not look behind the clear and unambiguous plain language of a statute, *Gaulden v. State*, 195 So. 3d 1123, 1125 (Fla. 2016) (internal quotation marks omitted), the text of section 775.021(4) is the beginning and end of a court’s multiple-punishments double jeopardy analysis.

2. *Houser* and its progeny¹⁰ are incompatible with these clear expressions of legislative intent for four reasons.

First, those decisions contravene the statute’s plain text. Courts have frequently described the single-homicide rule as “a judicially created extension” of the “constitutional and statutory double jeopardy bar.” *McCullough v. State*, 230 So. 3d 586, 589 (Fla. 2d DCA 2017); *see also Daniel v. State*, 271 So. 3d 1214, 1215 (Fla. 1st DCA 2019) (referring to the “judicially-created ‘single homicide rule’”). It is predicated not on any constitutional or statutory command, but on the “notion[] of fundamental fairness” that “inequity [] inheres in multiple punishments for a singular killing.” *Gordon*, 780 So. 2d at 25.

But, as discussed above, the Constitution leaves those sorts of policy judgments to the Legislature. Fair or not (and there is no reason to believe multiple punishments for multiple crimes are *not* fair), the Legislature has already concluded that offenses not falling within one of three statutory exceptions should be separately punished. A court has no authority to revisit that calculus. *Cf. Johnson v. State*, 660 So. 2d 637, 647 (Fla. 1995) (“to rewrite the statutory [language]” would be a

¹⁰ In two later opinions, this Court applied *Houser* to other homicide and attempted homicide offenses. *See State v. Cooper*, 634 So. 2d 1074 (Fla. 1994); *State v. Chapman*, 625 So. 2d 838 (Fla. 1993). The Court acknowledged the 1988 amendment to section 775.021(4) but did “not read [it] as an overruling of *Houser*.” *See Chapman*, 625 So. 2d at 839.

“violation of the separation of powers doctrine”).

Because the single-homicide rule identifies “same offenses” in a manner contrary to *Blockburger* and section 775.021(4), it defies legislative intent in a field left entirely to the Legislature.

To underscore that point, consider this Court’s “same offense” analysis of DUI manslaughter and driving while license suspended (“DWLS”) causing death in *State v. Cooper*, 634 So. 2d 1074 (Fla. 1994), a *Houser* progeny case. In the Court’s short opinion in *Cooper* it acknowledged that “[i]t is entirely appropriate to convict a person of both DUI manslaughter and [DWLS],” *id.* at 1074-75, because those offenses each contain a distinct element. “[B]ut it is inappropriate,” the Court found, “to *enhance the degree* of both crimes by using a single homicide.” *Id.* at 1075 (emphasis added). That is, no double jeopardy problem arose there until prosecutors attempted to aggravate the DWLS offense by adding a single element shared by DUI manslaughter—the fact of a death.

That lays bare the error in *Houser*. Whereas section 775.021(4) dictates that two crimes constitute “separate criminal offenses” if each is *distinguished* by a single element, the single-homicide rule asks whether the offenses *share* a single element. Simply put, the rule gets the Legislature’s intent exactly backwards.

Second, as explained above, section 775.021(4)(b) is an exclusive list of exceptions to the requirement that separate criminal offenses be punished

independently. Those exceptions include “1. Offenses which require identical elements of proof,” “2. Offenses which are degrees of the same offense as provided by statute,” and “3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.” § 775.021(4)(b)1.-3., Fla. Stat. (1988). A fourth exception—“Offenses resulting from a single death”—is not included in that list and therefore is not recognized by the Legislature. *Cf. Service Employees Int’l Union, Local 16, AFL-CIO*, 752 So. 2d at 571-72 (“Nowhere in this list of exceptions is the term ‘deputy’ mentioned.”).

Third, even assuming the single-homicide rule were somehow compatible with section 775.021(4)’s adoption of the same-elements test, the rule could not have survived the Legislature’s abolishment of lenity as an interpretive guide to double jeopardy questions. *Houser*’s rule arguably derived from the general principle of lenity: If there were any doubt as to whether the Legislature wished to permit separate penalties for multiple homicide offenses involving a single death, lenity would answer the question in the negative. Indeed, this Court has itself characterized *Houser* as “fall[ing] into the [lenity] category.” *Carawan v. State*, 515 So. 2d 161, 169-70 (Fla. 1987); *see also id.* at 170 (“In *Houser v. State* we . . . resolved all doubts in favor of lenity.” (internal citation omitted)). After the 1988 amendment, however, lenity cannot justify the single-homicide rule because the Legislature expressly disavowed that principle while resolving any outstanding doubts in its criminal

enactments in favor of multiple punishments.

Fourth, from its modest beginnings as a rule about homicide, the single-homicide rule has become even further untethered from the statutory text as district courts have applied it to other areas of the criminal code. The single-homicide rule reflects a judicially promulgated policy judgment that “inequity inheres in multiple punishments for a singular killing.” *Gordon*, 780 So. 2d at 25. Unfortunately, nothing in that broad articulation of the rule’s underpinnings distinguishes a “singular killing” from a singular injury, a singular possession of a firearm, or any other singular fact frequently used in Florida law to enhance an offense. Absent any justifiable line confining the rule’s scope, district courts have now applied its rationale—that courts may ignore section 775.021(4) and *presume* the Legislature did not intend multiple punishments—to even non-homicide crimes if those crimes share a single element.

At issue in *Marsh v. State*, for example, was whether multiple convictions for DUI with serious bodily injury and DWLS with serious bodily injury were permissible where each stemmed from the same injury. 253 So. 3d 674, 675 (Fla. 2d DCA 2018), *review pending State v. Marsh*, SC18-1108. Citing *Houser* and its progeny, the Second District observed that the logic of the single-homicide rule “appl[ies] with equal force to multiple punishments for a singular serious bodily injury committed during a single act.” *Id.* at 677 (emphasis added); *see id.*

(characterizing this holding as a “logical extension” of *Houser*). It therefore reversed the defendant’s convictions for DWLS with serious bodily injury. *Id.* at 678; *see also Kelly v. State*, 987 So. 2d 1237, 1239-40 (Fla. 2d DCA 2008) (same); *but see Lott v. State*, 74 So. 3d 556, 559-60 (Fla. 5th DCA 2011) (declining to extend *Houser* to non-homicide crimes); *Anguille v. State*, 243 So. 3d 410, 413 & n.3 (Fla. 4th DCA 2018) (same).

Although this Court will address that extension of the rule when it resolves *Marsh*, those district court decisions are made possible only because *Houser* misapprehended the import of section 775.021(4). In the meantime, the single-homicide rule threatens to swallow the *Blockburger* rule by forbidding, rather than allowing, multiple convictions whenever two or more offenses contain a single shared element regardless if a homicide is involved.

C. This Court’s subsequent decisions have repudiated the rationale, if not the result, of *Houser* and the single-homicide rule.

Though this Court has never formally receded from the single-homicide rule, its subsequent pronouncements have substantially weakened the rule’s foundations. Two lines of cases are relevant.

First, since *Houser*, this Court has recognized that section 775.021(4) may not “be treated merely as an ‘aid’ in determining whether the legislature intended multiple punishment.” *Smith*, 547 So. 2d at 616. Instead, “[s]ection 775.021(4)(a)

should be strictly construed without judicial gloss.” *Id.* And unlike *Houser*, which presumed that the Legislature “ordinarily does not intend to punish the same offense under two different statutes,” 474 So. 2d at 1194 (internal quotation marks omitted), the modern cases acknowledge that “[b]y its terms and by listing the only three instances where multiple punishment shall not be imposed, subsection 775.021(4) removes the need to assume that the legislature does not intend multiple punishment for the same offense” *Smith*, 547 So. 2d at 616 (emphasis in original).

More recently, this Court explicitly rejected the idea that courts may “add[] words that were not written by the Legislature in enacting the double jeopardy exceptions of section 775.021(4).” *Valdes*, 3 So. 3d at 1075. *Valdes* addressed the proper interpretation of the second statutory exception, “[o]ffenses which are degrees of the same offense as provided by statute.” *See id.* at 1075-77. Previously, the Court had instructed lower courts to find the exception applicable whenever two offenses were either “degree variants” of the same underlying crime or targeted the same “primary evil.” *Id.* at 1073.

Valdes abandoned the “primary evil” test. That freewheeling inquiry, requiring judges to rely on their personal intuitions about what societal ill the Legislature meant to address via each substantive criminal enactment, “stray[ed] from the plain meaning of” section 775.021(4). *Id.* at 1075. The Court also found that there is “no rule of construction” compelling a broader reading of the statutory

double jeopardy exceptions. *Id.* That was true, the Court reiterated, “precisely because there is no constitutional prohibition against multiple punishments for different offenses arising out of the same criminal episode, as long as the Legislature intends such punishments.” *Id.* at 1076. In place of the “primary evil” test, the Court instructed lower courts to look directly to the text of section 775.021(4)(b)2. by considering “only whe[ther] the [substantive criminal] *statute* itself provides for an offense with multiple degrees.” *Id.* (emphasis in original; internal quotation marks omitted).

Consistent with *Valdes*, this Court’s more recent decisions recognize the primacy of constitutional and statutory text. *See, e.g., Advisory Op. to Governor re Implementation of Amendment 4, The Voting Restoration Amendment*, No. SC19-1341, 2020 WL 238556, at *6-7 (Fla. Jan. 16, 2020).

Second, the Court has routinely approved multiple punishments in cases where the separate offenses shared a single element, holdings which undermine the doctrinal foundations of *Houser*. Indeed, *Houser* asked whether the Legislature intended multiple punishments where each offense shared a *single* element—the fact of a death—and concluded that it must be presumed that the Legislature “does not intend to punish the same offense under two different statutes.” 474 So. 2d at 1196-97 (internal quotation marks omitted). In every other context, however, this Court has held that shared elements are insufficient to signal a legislative intent to bar

multiple punishments so long as the offenses satisfy the same-elements test.

Here, again, *Valdes* is instructive. The defendant in that case was convicted of discharging a firearm from a vehicle within 1000 feet of a person and shooting into an occupied vehicle. *Valdes*, 3 So. 3d at 1068. An element of each of those offenses was the shooting of a firearm. *Compare* § 790.15(2), Fla. Stat. (2003), *with id.* § 790.19. Applying section 775.021(4), this Court nevertheless approved those dual convictions, *see id.* at 1071 (“It is undisputed that sections 790.15(2) and 790.19 contain an element that the other does not.”); *id.* at 1077-78 (finding that the two offenses “do not satisfy the second statutory exception” under section 775.021(4)(b)(2)), proof that the fact of a single shared element alone does not implicate the Double Jeopardy Clause.

The Court has repeated that analysis in the context of crimes involving the possession of a singular firearm, *see Allen v. State*, 684 So. 2d 819 (Fla. 1996) (armed burglary, armed robbery, and armed kidnapping); *Gaber*, 684 So. 2d 189 (armed burglary and grand theft of a firearm where firearm forming basis for armed burglary was same firearm stolen during the home invasion), and where a singular felony forms the basis for multiple convictions. *See Boler v. State*, 678 So. 2d 319 (Fla. 1996) (felony murder and qualifying felony). All of those separate convictions were upheld despite their shared element. As the Court wrote in *Gaber*, “[u]nder the plain meaning of section 775.021(4)(a), a court is required to examine each of a

defendant’s convictions arising out of the same incident to determine whether ‘each offense requires proof of an element that the other does not’ 684 So. 2d at 190 (internal quotation marks omitted). It was *that* test the Court looked to, not its own intuitions about what unexpressed intent the Legislature might otherwise have borne in mind.

Given all this, it is unsurprising that at least one judge has already questioned whether the single-homicide rule “will remain good law based on our supreme court’s rationale in *Valdes*,” *McCullough*, 230 So. 3d at 594 n.6 (Badalamenti, J.), while commentators have suggested that the conflict between the single-homicide rule and section 775.021(4) might warrant “revisit[ing] earlier restrictions in motor vehicle homicide cases.” Adam Hersh, *Tragedy Behind the Wheel: Understanding Manslaughter by Culpable Negligence, Vehicular Homicide, and DUI Manslaughter*, 71-DEC Fla. B.J. 46, 47 (1997).

* * *

Stare decisis does not support adhering to the single-homicide rule. While stare decisis “provides stability to the law,” this Court has said that “[p]erpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court.” *State v. Poole*, No. SC18-245, 2020 WL 370302, at *14 (Fla. Jan. 23, 2020) (internal quotation marks omitted). The Court has therefore been “willing to correct its mistakes.” *Id.* As explained

above, *Houser* and its progeny “clearly conflict[]” with valid law that courts are duty-bound to apply, and thus one “cannot escape the conclusion” that those prior decisions “got it wrong.” *Id.* at *14-15.

In deciding *Poole*, this Court explained that “the proper question” once the Court determines that a prior decision was incorrect is “whether there is a valid reason [] *not* to recede from that precedent.” *Id.* at *15. In that inquiry, “[t]he critical consideration ordinarily will be reliance.” *Id.*

Houser generated no reliance interests. Simply put, Florida residents do not make decisions with the single-homicide rule in mind. *See id.* (“No one, including Poole, altered his behavior in expectation of the new procedural rules announced in *Hurst v. State.*”). Here, for instance, Respondent cannot contend that his decision to murder his girlfriend, flee from police, and crash into another vehicle would have been made differently had he known he could be sentenced for both vehicular homicide and aggravated fleeing or eluding. Nothing in the single-homicide rule invited Respondent’s conduct, and it certainly did not suggest that his chosen course of conduct was lawful.¹¹

¹¹ To the extent Respondent might rely on other prudential considerations conceivably relevant to the stare decisis question, those factors militate in favor of overruling the single-homicide rule. *See North Fla. Women’s Health and Counseling Servs., Inc. v. State*, 866 So. 2d 612, 637 (Fla. 2003); *but see Poole*, 2020 WL 370302, at *15 (rejecting “multi-factor stare decisis tests”). First, the rule has “proved unworkable” and difficult to apply. *North Fla. Women’s Health*, 866 So. 2d

Accordingly, this Court should recede from *Houser* and its progeny and formally abolish the single-homicide rule.

II. VEHICULAR HOMICIDE AND AGGRAVATED FLEEING OR ELUDING DO NOT IMPLICATE DOUBLE JEOPARDY.

The decision below was based exclusively on the single-homicide rule. *See* Ptr.'s App'x 2-4. In his appeal to the district court, Respondent did not argue that the circuit court erred in applying the *Blockburger* same-elements test, and the district court did not address that issue. Accordingly, if this Court recedes from the precedent establishing the single-homicide rule, it should quash the decision below and remand for further proceedings. *See, e.g., Perry v. State*, 953 So. 2d 459, 459 (Fla. 2007) (“This matter . . . [is] for the Fourth District to address in the first instance under the changed legal landscape of our decision in *Tillman*.”).

If this Court chooses to address that issue in the first instance, it should hold that the circuit court correctly rejected Respondent's double jeopardy claim. To

at 637. For example, different panels of the same district court, assessing identical circumstances, have reached conflicting conclusions as to its applicability. *See Daniel*, 271 So. 3d at 1215 n.3. Second, the “factual premises underlying the decision [have] changed.” *North Fla. Women's Health*, 866 So. 2d at 637. After this Court decided *Houser*, the Legislature amended section 775.021(4) to clarify that the principle of lenity should not be used to determine legislative intent in this context, and to specify limited exceptions to the rule mandating multiple punishments. *See* Ch. 88-131, § 7, Laws of Fla. (adding section 775.021(4)(b)). Because *Houser* was based on the principle of lenity, *see Carawan*, 515 So. 2d at 170, subsequent statutory amendments undermined the premise of that case.

establish a multiple-punishments claim under the Double Jeopardy Clause, Respondent must show that his separate penalties for vehicular homicide and aggravated fleeing or eluding fall within one of the three statutory exceptions in section 775.021(4)(b). He did not even attempt to make that showing in the district court, and cannot do so here.

To begin, those offenses do not qualify for the first or third exceptions: “1. Offenses which require identical elements of proof” and “3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.” §§ 775.021(4)(b)1., 3., Fla. Stat. Rather, each crime requires an element the other does not, as a comparison of the standard jury instructions shows:

Vehicular Homicide	Aggravated Fleeing or Eluding
<ol style="list-style-type: none"> 1. Victim is dead. 2. The death was caused by the operation of a motor vehicle by defendant. 3. Defendant operated the motor vehicle in a reckless manner likely to cause the death of or great bodily harm to another person. <p><i>See</i> § 782.071, Fla. Stat. (2010); Fla. Std. Jury Instr. (Crim.) 7.9</p> <p>(represents an element unique to vehicular homicide)</p>	<ol style="list-style-type: none"> 1. Defendant was operating a vehicle upon a street or highway in Florida. 2. Defendant, knowing he had been directed to stop by a duly authorized law enforcement officer, willfully fled in a vehicle in an attempt to elude a law enforcement officer. 3. The law enforcement officer was in an authorized law enforcement patrol vehicle with agency insignia and other jurisdictional markings

	<p>prominently displayed on the vehicle and with siren and lights activated.</p> <p>4. During the course of the fleeing or the attempt to elude, defendant drove at high speed or in any manner demonstrating a wanton disregard for the safety of persons or property.</p> <p>5. As a result of defendant's fleeing or eluding at high speed or wanton disregard for safety, he caused [the death of] [serious bodily injury to] another person.</p> <p><i>See</i> § 316.1935(3)(b), Fla. Stat. (2010); Fla. Std. Jury Instr. (Crim.) 28.8(a)</p> <p>(represents an element unique to aggravated fleeing or eluding)</p>
--	---

Aggravated fleeing or eluding is an “alternative conduct statute,” *Roughton v. State*, 185 So. 3d 1207, 1210 (Fla. 2016), because it can be committed when *either* death or serious bodily injury occurs and by *either* driving at high speed or in a manner demonstrating wanton disregard for human life. Because section 775.021(4)(a) tells a court to conduct the same-elements analysis “without regard to the accusatory pleading or the proof adduced at trial,” the Court must ask whether

the “formal elements” of vehicular homicide and aggravated fleeing or eluding “are [] distinct,” even if the two offenses “will as a practical matter ordinarily—if not always”—overlap. *Id.* (emphasis omitted). Where “each offense *requires* proof of an element that the other does not,” § 775.021(4)(a), Fla. Stat., they are distinct under *Blockburger*. And, under the third exception, an offense “is not deemed to be subsumed by the greater” if the offenses “are separate under the *Blockburger* test.” *State v. Johnson*, 676 So. 2d 408, 411 (Fla. 1996); *cf. State v. McCloud*, 577 So. 2d 939, 941 (Fla. 1991) (third exception is met “only if the greater offense *necessarily* includes the lesser offense” (emphasis in original)).

Under that analysis, these offenses are distinct. Vehicular homicide requires a death, § 782.071, Fla. Stat., while aggravated fleeing or eluding can be committed simply by causing serious injury. *Id.* § 316.1935(3)(b); *see also Daniel*, 271 So. 3d at 1217 (Winokur, J., concurring in result) (“Vehicular homicide, as its name implies, requires death of a victim.”); R. 258. Likewise, the defendant’s operation of a motor vehicle must be “likely to cause” harm before the defendant will be liable for vehicular homicide, § 782.071, Fla. Stat., whereas aggravated fleeing or eluding can be committed merely by driving at high speed without regard for whether that conduct is *likely* to result in harm. *See id.* § 316.1935(3)(b). It is possible to drive at high speed in a way not likely to result in injury or even in a crash—for instance, driving 85 miles per hour on a sparsely trafficked, well-paved highway in the early

morning.

Aggravated fleeing or eluding similarly contains unique elements not shared by vehicular homicide. A defendant commits fleeing or eluding only if he knowingly disobeys an order to stop by a law enforcement officer and the officer is in a law-enforcement patrol vehicle with insignia prominently displayed and lights and siren activated, *Id.* §§ 316.1935(1), (3)(b), none of which are components of vehicular homicide.

Thus, while vehicular homicide and aggravated fleeing or eluding undoubtedly bear similarities, their elements are neither identical nor such that one offense is subsumed by the other.

The second statutory exception is similarly inapplicable. *See id.* § 775.021(4)(b)2. (“2. Offenses which are degrees of the same offense as provided by statute.”). In *Valdes*, this Court held that the second exception is present if the two offenses “constitute different degrees of the same offense[] as explicitly set forth in the relevant statutory sections.” 3 So. 3d at 1077. That is, the “*statute* itself” must “provide[] for an offense with multiple degrees.” *Id.* at 1076 (emphasis in original; internal quotation marks omitted). That is not the case here: Vehicular homicide and aggravated fleeing or eluding appear in different statutory sections of different chapters, neither of which references the other.

In short, Respondent was properly convicted and sentenced for each of these

separate criminal offenses.

CONCLUSION

This Court should quash the decision below, recede from its cases judicially creating the single-homicide rule, and remand for further proceedings.

Dated: February 19, 2020

Respectfully submitted,

/s/ Jeffrey Paul DeSousa

ASHLEY MOODY

Attorney General

AMIT AGARWAL (FBN 125637)

Solicitor General

JEFFREY PAUL DESOUSA (FBN 110951)

Deputy Solicitor General

Office of the Attorney General

The Capitol, PL-01

Tallahassee, Florida 32399

(850) 414-3300

amit.agarwal@myfloridalegal.com

jeffrey.desousa@myfloridalegal.com

Counsel for State of Florida

STATUTORY APPENDIX

§ 775.021(4), Florida Statutes (1976)

(4) Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

§ 775.021(4), Florida Statutes (1983)

(4) Whoever, in the course of one criminal transaction or episode, commits 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.

§ 775.021(4), Florida Statutes (1988) (current)

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

Credits

Laws 1974, c. 74-383, § 3; Laws 1976, c. 76-66, § 1; Laws 1977, c. 77-174, § 1; Laws 1983, c. 83-156, § 1; Laws 1988, c. 88-131, § 7. Amended by Laws 2014, c. 2014-194, § 2, eff. Oct. 1, 2014.

CERTIFICATE OF FONT

I certify that this brief was prepared in 14-point Times New Roman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Jeffrey Paul DeSousa
JEFFREY PAUL DESOUSA
Deputy Solicitor General

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal on this **nineteenth** day of February 2020, to the following:

Andrew Mich
Assistant Public Defender
444 Seabreeze Blvd., Suite 210
Daytona Beach, Florida 32118
mich.andrew@pd7.org
(386) 254-3758

/s/ Jeffrey Paul DeSousa
JEFFREY PAUL DESOUSA
Deputy Solicitor General