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STATEMENT OF THE CASE AND FACTS

The State shall continue to rely upon the facts as set forth in its jurisdictional brief.

POINT

THE DISTRICT COURT ERRED IN  
VACATING THE RESPONDENT'S  
CONVICTION FOR GRAND THEFT

Tom O'Hara, the Respondent, was convicted of the separate statutory crimes of extortion and grand theft. The District Court, looking only at the "bottom line" (only one sum of money was taken) decided that only one offense had been committed and reversed the theft conviction.

In a telling dissent, Judge Cowart revealed that:

"since the Florida Supreme Court disapproved use of single transaction analysis and approved substantive analysis in a double jeopardy case from this court, this court has only covertly flirted with the theory of substantive analysis and has adamantly refused to openly recognize or adopt it, preferring any other theory."  
(Appendix A)

and

"whatever other ratio decidendi is claimed, the underlying method is always to quote from other cases and not to analyze and compare the elements of the two statutory offenses involved but, instead, to make a single transaction analysis by searching for a factual commonality. That method, in effect, equates double jeopardy with a finding

that each of two prosecutions is based on some one or more of the same facts and to find that, for that reason, only one conviction should result." (Appendix A).

The lower court was transfixed with the fact that "one sum of money" was taken to the extent that it ignored the fact that two crimes were committed; extortion and grand theft.

The elements of extortion are:

- (1) a communication
- (2) a threat (to ignore, expose or impute)
- (3) with malice
- (4) to extort some advantage or compel either action or inaction.

None of these elements are elements of grand theft. Similarly, grand theft has elements not found in extortion; to wit:

- (1) Obtaining or using
- (2) property
- (3) of a certain value or character
- (4) with an intent to deprive

Thus, the crimes are different statutory offenses even when linked by a common or single transaction.

The majority below relied upon (dicta) in Bell v. State, 437 So.2d 1057 (Fla. 1983) which implied that an analysis of the allegations and evidence of a particular case might be proper. That decision was corrected in State v. Baker \_\_\_ So.2d \_\_\_ (Fla. 1984) [9 FLW 209, 210] wherein this Court said:

"For double jeopardy purposes this court is bound to consider only the statutory elements of the offenses, not the allegations or proof in a particular case. Where an offense is not a necessarily lesser included offense, based upon its statutory elements, the intent of the legislature clearly is to provide for separate convictions and punishments for two offenses" see, Gibson v. State, \_\_\_ So.2d \_\_\_ (Fla. 1984) [ 9 FLW 234]

These decisions relate back to the rules established in Borges v. State, 415 So.2d 1265 (Fla. 1982) which, Judge Cowart's dissent notes, the District Court refused to consider. (Borges, of course; has its legal roots in Albernaz v. United States, 450 U.S. 333 (1981) and Blockburger v. United States 284 U.S. 299 (1932), both of which upheld statutory-element analysis).

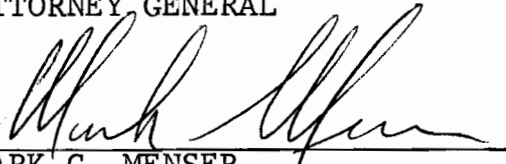
Of course, the Fifth District's decision, to the extent it relied upon Bell, brought itself into a conflict which hopefully State v. Baker, (supra) has ended. Any simple good faith reliance on Bell cannot justify the promulgation of incorrect or bad law, however, so the decision of the lower court should be reversed.

CONCLUSION

The District Court erred in determining that it was not bound to conduct a statutory-element analysis of the defendant's two convictions but, rather, was free to examine the evidence and charging documents at bar and, based upon a single transaction analysis, vacate the conviction for grand theft.

Respectfully submitted,

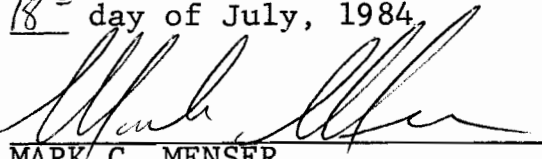
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Brief on Merits has been furnished, by delivery, to David A. Henson, Assistant Public Defender for Respondent. this 18<sup>th</sup> day of July, 1984.

  
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