

IN THE SUPREME COURT OF FLORIDA

MICHAEL CONSIGLIO, )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE NO. SC99-125  
 ) DCA No. 98-3528  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

PETITIONER'S REPLY BRIEF

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

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INTRODUCTION

This is the initial brief on the merits of petitioner/defendant Michael Consiglio on conflict jurisdiction from the Fourth District Court of Appeal.

Citations to the record are abbreviated as follows:

(R) - Clerk's Record on Appeal

(T) - Trial Transcript

(SR I) - Sentencing Transcript

(SR II)- Transcript of Petitioner's Taped Statement

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts as found in his Initial Brief on the Merits.

POINT I

**PETITIONER'S DUAL CONVICTIONS FOR CARJACKING  
AND ROBBERY VIOLATE DOUBLE JEOPARDY**

Respondent does not address petitioner's argument that one continuous application of force, as occurred here, should result in only one robbery conviction (or carjacking, a specific form of robbery). Respondent engages in no analysis of this proposition, and instead relies on the "analysis" contained in two cases: Simboli v. State, 728 So.2d 792 (Fla. 5th DCA 1999), and Smart v. State, 652 So.2d 448 (Fla. 3d DCA), rev. denied, 660 So.2d 714 (Fla. 1995). But these decisions do no more than state the facts of the case and then conclude that two convictions are appropriate. No reasoning is given, and respondent makes no attempt to remedy this deficiency.

Next, respondent argues that petitioner's claim should be denied as unpreserved. Respondent acknowledges that there are cases holding that double jeopardy claims are fundamental error, but respondent does not cite or discuss them. See e.g. State v. Johnson, 483 So.2d 420, 422 (Fla. 1986); Novaton v. State, 634 So.2d 607 (Fla. 1994); Lippman v. State, 633 So.2d 1061 (Fla. 1994); Greene v. State, 702 So.2d 510 (Fla. 3d DCA 1997)(en banc); Austin v. State, 699 So.2d 314 (Fla. 1st DCA 1997)(en banc). The bedrock of these decisions is the United States Supreme Court decision in Benton v. Maryland, 395 U.S. 784, 794-96, 89 S.Ct. 2056, 2062-64, 23 L.Ed.2d 707 (1969), which held "that the right

not to be twice placed in jeopardy is 'fundamental.'" See State v. Johnson, supra, 483 So.2d at 421; Austin, supra, 699 So.2d at 315.

Respondent argues that double jeopardy claims should not be considered fundamental error because they are analogous to motions for judgment of acquittal. But even judgment of acquittal issues can be fundamental error. For example, a conviction is fundamentally erroneous when the facts affirmatively proven by the state do not constitute the charged offense as a matter of law. See Troedel v. State, 462 So.2d 392, 399 (Fla.1984); K.A.N. v. State, 582 So.2d 57, 59 (Fla. 1st DCA 1991); Harris v. State, 647 So.2d 206, 208 (Fla. 1st DCA 1994); Johnson v. State, 737 So.2d 555, 556 (Fla. 1st DCA 1999). In the instant case, the state's evidence affirmatively proves one continuous application of force. Hence, only one conviction should stand. This court should reverse.

## POINT II

### **PETITIONER'S CRIME FELL WITHIN THE "WINDOW" PERIOD DURING WHICH THE 1995 GUIDELINES WERE IN VIOLATION OF THE "SINGLE SUBJECT" RULE OF THE FLORIDA CONSTITUTION**

Respondent argues that this court should decline to address this issue because it is not the issue upon which jurisdiction is



based, even though this court has the power and authority to do so. Fla. R. App. P. 9.040(a). See e.g., Doctor v. State, 596 So.2d 442 (Fla. 1992). Respondent argues that the claim was not properly raised in the trial court or district court, even though the error is deemed fundamental. See Heggs v. State, 759 So.2d 620 (Fla.2000)(held chapter 95-184, Laws of Florida, violates single subject rule of the Florida Constitution, and any sentence illegally imposed thereunder constitutes fundamental error). Respondent states that it disagrees with petitioner's calculations, but does not state wherein the disagreement lies. Finally, respondent concedes that if this court chooses to address the issue, the case should be remanded to the trial court to calculate a new scoresheet. Confident in his scoresheet calculations, petitioner will accept this concession.

CONCLUSION

Petitioner respectfully requests this Court to set aside petitioner's conviction for robbery and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to James Carney, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, Florida 33401 by courier this 14<sup>th</sup> day of August, 2000.

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Attorney for Michael Consiglio