IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DONOVAN FOREMAN — APPELLANT

VS. — NO. 2009-KA-01785-SCT

STATE OF MISSISSIPPI — RESPONDENT

APPELLANT'S BRIEF

M. ERIC BROWN (MB[redacted]
COXWELL & ASSOCIATES, PLLC
Post Office Box 1337
Jackson, Mississippi 39215-1337
Telephone: (601) 948-1600

ATTORNEY FOR APPELLANT, DONOVAN FOREMAN

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or refusal.

1. Donovan Foreman
   Pattison, MS 39144

2. Alexander C. Martin, Esq.
   Office of the District Attorney
   Claiborne County
   P.O. Drawer 767
   Hazlehurst, MS 39083

3. Myron L. Arrington, Jr., Esq.
   Office of the District Attorney
   Claiborne County
   P.O. Drawer 767
   Hazlehurst, MS 39083

4. Honorable Judge Lamar Pickard
   P.O. Box 310
   Hazlehurst, MS 39083

Respectfully submitted,

DONOVAN FOREMAN

BY: 

OF COUNSEL

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STATEMENT OF FACTS

On August 11th, 2009, Donovan Foreman was indicted in Claiborne County, Mississippi for six (6) felonies: murder, attempted aggravated assault (four counts), and shooting into an automobile. R.E. 3. A written *Motion to Dismiss Indictment* was submitted on September 14th, 2009 and a hearing was provided to Appellant counsel on September 15th, 2009. R.E. 20-24, Tr. 4-10.

The trial of *State of Mississippi v. Donovan Foreman*, Cause No. 2009-23, began and ended on September 30th, 2009. During trial Ashley Jones (Tr. 38), Jessica Earls (Tr. 65), Investigator Carl Ray Fleming (Tr. 74), and Donald Robinson (Tr. 88) testified to the fact that only one (1) shot was fired on the night of May 9th, 2010 in the Big Son's parking lot.

At the conclusion of trial the jury found Donovan Foreman guilty of all six (6) counts included in the indictment: murder, aggravated assault, (four counts), and shooting into an automobile. Tr. 117

Sentencing for Donovan Foreman was held on October 2nd, 2009, and the Honorable Circuit Court Judge Lamar Pickard sentenced Mr. Foreman to serve his natural life in the custody of the Mississippi Department of Corrections as to Count One, Murder; ten (10) years as to Count Two, Aggravated Assault; ten (10) years as to Count Three, Aggravated Assault; ten (10) years as to Count Four, Aggravated Assault; ten (10) years as to Count Five, Aggravated Assault; ten (10) years as to Count Two, Shooting into an Automobile, and that Counts Two, Three, Four, Five, and Six are to be served concurrently, one with the other, and all concurrently with the Sentence in Count One. R.E. 85-86.

ISSUE ONE

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR DISMISSAL AS TO THE COUNTS OF SHOOTING INTO AN AUTOMOBILE AND FOUR COUNTS OF AGGRAVATED ASSAULT

Prior to trial and at the close of the State's case-in-chief, the Defendant requested the Court to dismiss the indictment on the basis of "multiplicity and double jeopardy" (Tr. 5, 95). Defense counsel argued that Foreman could not be tried for murder, aggravated assault, and shooting into a motor vehicle under the same set of facts that had been presented to the jury. All evidence presented by the State supported a finding of only one (1) shot fired on the night in question. Tr. 38, 65, 74, 88. The Defendant argued that Counts 2, 3, 4, and 5 of the indictment should merge with Count 1. The Court overruled Defendant's motion to dismiss. Tr. 95. The Jury found the defendant guilty of all six (6) counts included in the indictment. Tr. 117.

The concept of merger states that one cannot be guilty of two crimes that arise out the same course of events if and when the lesser of the crimes is consumed by the more serious offense. "Similarly, one who does the same thing twice, albeit in rapid succession, may be prosecuted for each criminal act." *Pharr v. State*, 465 So.2d 294, 299-301 (Miss.1984); *Ball v. State*, 437 So.2d 423, 425 (Miss.1983). "But where no further evidence is needed to establish the lesser offense, once the prosecution has proved the greater offense, legal merger occurs." *Faraga v. State*, 514 So.2d 295, 312 (Miss. 1987).

All six (6) felony convictions arose from the same incident, the firing of a gun into the 2005 Chrysler in the parking lot of the "Big Sons" night club on May 10, 2009. Mr. Foreman cannot be convicted of aggravated assault of Ashley Jones, aggravated assault of Shanique Kelly, aggravated assault of Chatonia Minor, aggravated assault of

Jewelisa Kelly, depraved heart murder of Edward Minor, and shooting into a motor vehicle without violating the principles of double jeopardy.

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb...." *U.S. Constitution, Amendment V.* See also, *Miss. Const. Art.* III § 22 (1890). This guarantee, enforceable against the states through the Fourteenth Amendment, assures three separate protections: (1) protection from a second prosecution for the same offense after acquittal, (2) protection from a second prosecution for the same offense after conviction, and (3) protection from multiple punishments for the same offense. *U.S. v. Dixon*, 509 U.S. 688, 695-96 (1993). This case deals with the protection against multiple punishments for the same offense.

Under the facts stated, all six (6) felony charges constitute the "same offense." The objective elements of each offense must be examined. *Blockburger v. U.S.*, 284 U.S. 299 (1932); *Illinois v. Vitale*, 447 U.S. 410, 416 (1980); *Brown v. Ohio*, 432 U.S. 161, 166 (1977). Under *Blockburger*, supra, the test to be applied is whether each provision requires proof of a fact which the other does not.

To determine whether double-jeopardy protections apply, the Court looks to the "same-elements" test prescribed by the United States Supreme Court in *Blockburger*. The *Blockburger* test instructs the Court to "determine whether each offense contains an element not present in the other; if not, they are labeled the same offense for double-jeopardy purposes, and successive prosecutions and/or punishments are constitutionally barred." *Powell v. State*, 806 So.2d 1069, 1074 (Miss.2001).

The defendant in *Blockburger* was tried and convicted on two counts, the sale of a drug not in or from the original packaging and the sale of a drug without a written order,

both charges arising from one specific drug sale. *Blockburger*, 284 U.S. at 301. Rejecting the defendant's claim that the two counts on which he was convicted constituted one offense, the Supreme Court stated:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304 (citations omitted).

This Court dealt with a very similar set of facts to this instant case in *Shook v. State*, 552 So.2d 841 (Miss.1989), wherein Philip Shook was convicted of shooting into a dwelling house and aggravated assault. On appeal, Shook claimed that aggravated assault and shooting into a dwelling house constituted the same offense for double-jeopardy purposes. *Id.* at 848.

In *Shook*, the defendant shot his gun at least eighteen (18) times into a home and was charged with three (3) counts of aggravated assault and shooting into a dwelling house. Because multiple shots were fired, each shot required the trigger of the gun to be pulled back and fired over and over again.

> "Had no shots been fired except those which struck Ms. Thaggard, Shook's position on this point would be arguably correct, in that the very same facts which were required to prove the aggravated assault would also prove the crime of shooting into a dwelling house in this particular situation." (emphasis added), *Shook*, 849.

Nothing in the record of the instant case contradicts the fact that only one shot was fired on the night in question. The single act of shooting a gun one time resulted in a six (6) count felony indictment against Donovan Foreman. Only one shot was fired, and the trigger of the gun was only pulled back one time. This is the exact situation that *Shook* stated would cause the Court to hold that the concept of merger would apply. The

same set of facts needed to prove shooting into a motor vehicle would be the same set of facts needed to prove aggravated assault, which would be the same set of facts needed to prove murder.

The concept of prohibiting multiplicity is rooted in discouraging the practice of charging the commission of a single offense in several counts. This practice is not allowed because single wrongful acts cannot furnish the basis for more than one criminal prosecution. *Towner v. State*, 812 So.2d 1109, 1113 (Miss. 2002) *quoting Black's Law Dictionary* 1016 (6th Ed. 1990).

The Fifth Circuit Court of Appeals held that a defendant could be convicted and sentenced for only one assault where multiple assaults were caused by only one act. *United States v. Theriault*, 531 F.2d 281 (5th Cir. 1976) citing *Ladner v. United States*, 358 U.S. 169 (1958) (Where the assaults of two federal officers arose out of a single act by defendant in hurling himself over the front seat of an automobile into the steering wheel, thereby causing an accident and injuries to two officers, who were riding in front seat, the defendant could be convicted for only one assault). The court stated the test for determining how many offenses were committed is whether the assaults are caused by more than one act, "not whether more than one federal officer is injured by the same act." *Theriault*, 285. Stating that the circumstances demonstrated that the injuries to both officers were caused by a single act, the court directed the District Court to resentence the defendant for a single violation of the statute.

Foreman argues that the trial court committed reversible error by failing to grant his *Motion to Dismiss* as to the aggravated assault charges and to the shooting into an automobile charge based on the doctrine of merger. Foreman argues that it was

impossible to commit the murder without first committing the shooting into an automobile or any of the counts of aggravated assault. On this basis, he alleges that the offenses merged and he could not be charged with all offenses.

ISSUE TWO

DONOVAN FOREMAN WAS SENTENCED TO TEN (10) YEARS FOR COUNT SIX OF THE INDICTMENT, SHOOTING INTO AN AUTOMOBILE. UNDER SECTION 97-25-47 OF THE MISSISSIPPI CODE OF 1972, THE MAXIMUM PENALTY FOR THIS OFFENSE IS FIVE (5) YEARS AND/OR TWO HUNDRED FIFTY DOLLAR ($250.00) FINE.

The Honorable Circuit Court Judge Lamar Pickard sentenced Donovan Foreman to serve his natural life in the custody of the Mississippi Department of Corrections as to Count One, Murder; ten (10) years as to Count Two, Aggravated Assault; ten (10) years as to Count Three, Aggravated Assault; ten (10) years as to Count Four, Aggravated Assault; ten (10) years as to Count Five, Aggravated Assault; ten (10) years as to Count Two, Shooting into an Automobile, and that Counts Two, Three, Four, Five, and Six are to be served concurrently, one with the other, and all concurrently with the Sentence in Count One. R.E. 85-86.

Count Six (6) of the indictment states:

> "...that on or about the 10th day of May, 2009, in Claiborne County, Mississippi, and within the jurisdiction of this court, the said Donovan Foreman did wilfully [sic], unlawfully and feloniously shoot a firearm, to-wit: a pistol, into a motor vehicle, to-wit: that certain 2005 Chrysler, the personal property of Patricia McGriggs, contrary to and in violation of Section 97-25-47 of the Mississippi Code of 1972, and against the peace and dignity of the State of Mississippi." R.E. 5, 6

The statute is quite clear on this issue. Under *Miss. Code Ann.* § 97-25-47 explicitly states:

> "If any person or persons shall wilfully shoot any firearms or hurl any missile at, or into, any train, bus, truck, motor vehicle, depot, station, or

> any other transportation facility, such person shall, upon conviction, be punished by a fine of not less than one hundred dollars ($100.00) nor more than two hundred fifty dollars ($250.00), or be committed to the custody of the department of corrections not less than one (1) year **nor more than five (5) years**, or by both such fine and imprisonment." (emphasis added) *Miss. Code Ann.* § 97-25-47.

Since the maximum penalty for violation of *Miss. Code Ann.* § 97-25-47 cannot exceed five (5) years, the Court's imposition of a sentence of ten (10) years was erroneous and should be remanded for sentencing.

CONCLUSION

Donovan Foreman's six (6) felony charges for one single action are exactly the sort of practice the Mississippi Supreme Court, the Fifth Circuit Court of Appeals and the Constitutions of the United States and state of Mississippi prohibit. Nothing in the record indicates more than one shot was fired on May 10, 2009, and the attempt to have Mr. Foreman punished for multiple felonies arising from the same action is a violation of his constitutional rights.

Donovan Foreman requests the Court enter reverse the trial Court's verdict and remand the case to be tried after dismissal of the multiple charges of aggravated assault and shooting into a motor vehicle, leaving only the depraved heart murder charge in the above referenced cause number. Donovan Foreman further requests the Court to remand this case to the Claiborne County Circuit Court so that sentencing under *Miss. Code Ann.* § 97-25-47 does not exceed the statutorily allowable maximum penalties.

Respectfully submitted,

DONOVAN FOREMAN

By: 

M. ERIC BROWN

M. ERIC BROWN (MB[redacted]
COXWELL & ASSOCIATES, PLLC
Post Office Box 1337
Jackson, Mississippi 39215-1337
Telephone: (601) 948-1600

ATTORNEY FOR APPELLANT, DONOVAN FOREMAN

CERTIFICATE OF SERVICE

I, Eric Brown, attorney for appellant, Donovan Foreman., certify that I have this day filed this Appellant's Brief with the clerk of this Court, and have served a copy of this Appellant's Brief by United States mail with postage prepaid on the following persons at these addresses:

1. Mississippi Attorney General's Office
   Post Office Box 220
   Jackson, MS 39205

2. Alexander C. Martin, Esq.
   Office of the District Attorney
   Claiborne County
   Post Office Drawer 767
   Hazlehurst, MS 39083

3. Myron L. Arrington, Jr., Esq.
   Office of the District Attorney
   Claiborne County
   Post Office Drawer 767
   Hazlehurst, MS 39083

4. Honorable Judge Lamar Pickard
   Post Office Box 310
   Hazlehurst, MS 39083

BY: M. Eric Brown
M. ERIC BROWN