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Solicitation and Conspiracy: A Florida Practitioner's Guide to Double Jeopardy Defense and Analysis

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SOLICITATION AND CONSPIRACY: A FLORIDA PRACTITIONER'S GUIDE TO DOUBLE JEOPARDY DEFENSE AND ANALYSIS

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I. INTRODUCTION

Under Florida law, an individual may be convicted of solicitation if he "commands, encourages, hires, or requests another person" to commit a

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criminal act.[1] An individual may also be convicted of conspiracy if that person "agrees, conspires, combines, or confederates with another person . . . to commit any offense."[2] The issue that will be examined in this article is whether, according to Florida law, the solicitor can be convicted of both solicitation and conspiracy to commit a single criminal offense, or whether double jeopardy prohibits conviction for these two crimes.

For purposes of this article, a simple hypothetical fact pattern will help illustrate the issue. Zack hires Hunt to murder Ken.[3] On that same day at that same time, Hunt agrees to commit the murder.[4] This article will address the specific question of whether Zack can be convicted of both solicitation and conspiracy. Moreover, if Hunt commits the murder of Ken, can Zack be convicted of solicitation, conspiracy, and the murder? Under previous Florida cases, individuals have been convicted of both solicitation and conspiracy to commit one substantive offense such as murder or theft.[5] The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[6] The Florida Constitution also contains a double jeopardy clause stating, "[n]o person shall . . . be twice put in jeopardy for the same offense."[7] The double jeopardy clause provides "protect[ion] against a second prosecution for the same offense after acquittal, and against a second prosecution for the same offense after conviction,"[8] and "protection against 'multiple punishments for the same offense' imposed in a single proceeding."[9] Accordingly, both the United States Constitution and the Florida Constitution prohibit multiple convictions for the same act committed during a single episode when those offenses contain identical elements.[10] The *Florida Statutes* regarding double jeopardy also contain exceptions which expand double jeop-

1. FLA. STAT. § 777.04(2) (2004).
2. § 777.04(3).
3. This fact pattern is loosely based upon the case of *Zacke v. State*, 418 So. 2d 1118, 1120 (Fla. 5th Dist. Ct. App. 1982).
4. *Id.*
5. *See* Corona v. State, 814 So. 2d 1184, 1185 (Fla. 4th Dist. Ct. App. 2002); Burnside v. State, 656 So. 2d 241, 242 (Fla. 5th Dist. Ct. App. 1995); Atkinson v. State, 457 So. 2d 1063, 1063 (Fla. 2d Dist. Ct. App. 1984); *Zacke*, 418 So. 2d at 1119.
6. U.S. CONST. amend. V.
7. FLA. CONST. art. I, § 9.
8. Jones v. Thomas, 491 U.S. 376, 381 (1989) (citing Ohio v. Johnson, 467 U.S. 493, 498 (1984)).
9. *Id.* (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).
10. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932); State v. Florida, 894 So. 2d 941, 945–46 (Fla. 2005).

ardy prohibitions to grant further protections not provided by the United States Constitution.[11]

Part II of this article will take a look at the *Florida Statutes* and case law regarding the crimes of solicitation and conspiracy. Part III of this article will examine the Florida Statute that codifies the "same-elements test" and the exceptions used to determine whether double jeopardy is an issue so as to prevent multiple convictions for the same offense.[12] Part IV will examine Florida's double jeopardy analysis and its effect on solicitation and conspiracy. Moreover, since this is a prima facie case under Florida jurisprudence, Part V of this article will explore how other jurisdictions have dealt with the question of whether a charge of solicitation and conspiracy should merge for purposes of protecting individuals from multiple convictions against double jeopardy. Part VI will then discuss how the Model Penal Code deals with convictions and sentencing in regards to the inchoate crimes of solicitation and conspiracy. Lastly, Part VII will conclude with a proposal for the Florida legislature to adopt the Model Penal Code's approach to criminal convictions of solicitation and conspiracy.

II. SOLICITATION AND CONSPIRACY

A. *Solicitation*

The basic premise of a solicitation is the "enticement" of another person to commit a criminal offense.[13] Even if the individual who is solicited to commit the crime never agrees to the request, the solicitor has still committed the crime of solicitation.[14] Section 777.04(2) of the *Florida Statutes* provides:

> A person who solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation, ranked for purposes of sentencing as provided in subsection (4).[15]

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11. *See* FLA. STAT. § 775.021(4)(b) (2004).
12. *See generally Blockburger*, 284 U.S. at 304.
13. Lopez v. State, 864 So. 2d 1151, 1153 (Fla. 2d Dist. Ct. App. 2003) (quoting Hutchinson v. State, 315 So. 2d 546, 548 (Fla. 2d Dist. Ct. App. 1975)).
14. *Id.* (citing State v. Waskin, 481 So. 2d 492, 493–94 n.2 (Fla. 3d Dist. Ct. App. 1985)).
15. FLA. STAT. § 777.04(2) (2004).

Florida courts have stated that "[t]he crime of solicitation is completed when the actor with intent to do so has enticed or encouraged another to commit a crime; the crime need not be completed."[16] Furthermore, the crime of solicitation itself need not be violent or even involve a violent crime.[17] Since the solicitation is completed by one party simply asking another to commit a crime, no agreement is necessary by the person solicited.[18] The question that Florida courts have seemed to evade is what happens to the solicitation when the solicitee agrees with the solicitor and a conspiracy has been formed?

B. *Conspiracy*

Florida courts explain that "'[t]he crime of conspiracy is comprised of the mere express or implied agreement of two or more persons to commit a criminal offense; both the agreement and an intention to commit an offense are essential elements.'"[19] Florida statutes codifying the crime of conspiracy state that "[a] person who agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy, ranked for purposes of sentencing as provided in subsection (4)."[20] An individual who combines with a police officer to commit a crime cannot be convicted of conspiracy because the officer lacks the required intent to ultimately commit the substantive offense.[21] However, an individual who requests a police officer to commit a crime may be convicted of solicitation.[22] Furthermore, the object of the conspiracy for purposes of sentencing is already factored into the guidelines providing the appropriate punishment.[23]

Interestingly, a defendant in Florida has argued that a conviction for solicitation should merge with a conviction for conspiracy.[24] The Florida court

16. State v. Johnson, 561 So. 2d 1321, 1322 (Fla. 4th Dist. Ct. App. 1990) (finding that an individual can be convicted of solicitation even when the person he solicits is a police officer); *see also Waskin*, 481 So. 2d at 498.

17. *Lopez*, 864 So. 2d at 1153.

18. *Johnson*, 561 So. 2d at 1323.

19. Corona v. State, 814 So. 2d 1184, 1185 (Fla. 4th Dist. Ct. App. 2002) (quoting Jimenez v. State, 715 So. 2d 1038, 1040 (Fla. 3d Dist. Ct. App. 1998)).

20. § 777.04(3).

21. *Johnson*, 561 So. 2d at 1322–23.

22. *Id.* (rejecting defendant's argument that an individual cannot be convicted of solicitation when the person he solicits is a police officer).

23. Crofton v. State, 491 So. 2d 317, 319–20 (Fla. 1st Dist. Ct. App. 1986); *see also* § 777.04(4).

24. *See* Tarawneh v. State, 562 So. 2d 770, 772 (Fla. 4th Dist. Ct. App. 1990).

dismissed this argument under circumstances where merger would not apply because the conspiracy by the defendant was between himself and his co-defendant, and the solicitation occurred with another individual.[25] However, by the court's acknowledgment of the appellant's merger theory, it is logical to infer that they have recognized the possibility of merger under other circumstances.[26] The inchoate crimes of solicitation and conspiracy, although appearing simple at first glance, can raise complex issues.

III. DOUBLE JEOPARDY

The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[27] The Florida Constitution also contains a double jeopardy clause stating, "[n]o person shall . . . be twice put in jeopardy for the same offense."[28] The Double Jeopardy Clause provides three separate types of protection for criminal defendants.[29] These safeguards include "protect[ion] against a second prosecution for the same offense after acquittal, and against a second prosecution for the same offense after conviction."[30] The third "protection against 'multiple punishments for the same offense' imposed in a single proceeding" is the most important protection for purposes of this analysis.[31] Both the United States Supreme Court and the Supreme Court of Florida prohibit multiple convictions for the same act committed during a single episode when those offenses contain identical elements.[32]

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25. *Id.* In *Tarawneh*, the Fourth District Court of Appeal rejected the argument that conviction for solicitation should merge with the conviction for conspiracy. *Id.* However, in *Tarawneh* the husband's conviction for conspiracy was based on an agreement between the husband and his wife to have a third party murdered. *Id.* The solicitation charge was based upon the husband's attempted procurement of one Petrillo to commit the murder of the third party. *Id.* The court's rejection of the merger theory was premised on the fact that the crimes were committed at a different time with different actors. *Tarawneh*, 562 So. 2d at 772. Therefore, there was no issue as to double jeopardy. *Id.*

26. *See id.*

27. U.S. CONST. amend. V.

28. FLA. CONST. art. I, § 9.

29. Jones v. Thomas, 491 U.S. 376, 380–81 (1989).

30. *Id.* at 381.

31. *Id.* (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

32. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932); State v. Florida, 894 So. 2d 941, 945 (Fla. 2005).

A. Blockburger *and the "Same-Elements" Test*

The United States Supreme Court in *Blockburger v. United States* explored the issue of double jeopardy and whether an individual may be punished more than once for the same offense.[33] In *Blockburger* the defendant was convicted of Count II for sale of morphine, Count III for sale of morphine not in the original stamped package, and Count V for selling morphine without a written order.[34] Counts III and V occurred on the same day with the same person purchasing the morphine.[35] The defendant appealed and argued that his conviction violated his protection against double jeopardy because the morphine was only sold to one person and this constituted a single offense.[36] The Court rejected the petitioner's first argument because his charges for the second and third counts "although made to the same person, were distinct and separate sales made at different times."[37] The Court also reasoned that the legislature had intended to punish "[e]ach of several successive sales [as] a distinct offense."[38]

The Court went on to discuss Counts III and V which included sale of narcotics not in the original stamped package and selling any of such drugs not pursuant to a written order.[39] The question was then raised whether, during the one sale of narcotics, the individual had "committed two offenses or only one."[40] The Court stated that the test to determine whether two offenses had been committed "is whether each provision requires proof of a fact which the other does not."[41] The Court held that a single act may be a violation of two statutes, and the petitioner's consecutive sentences were upheld.[42] The test created by *Blockburger* has been commonly referred to in Florida as the "same-elements" test[43] and has been codified under section 775.021(4) of the *Florida Statutes*.[44]

33. *Blockburger*, 284 U.S. at 301–02.
34. *Id.* at 301.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Blockburger*, 284 U.S. at 302.
39. *Id.* at 303–04.
40. *Id.* at 304.
41. *Id.* (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).
42. *Id.* (citing *Gavieres*, 220 U.S. at 342).
43. Gordon v. State, 780 So. 2d 17, 20 (Fla. 2001).
44. *See* FLA. STAT. § 775.021(4) (2004).

B. *Section 775.021(4) of the* Florida Statutes

Under Florida law, the courts will examine the legislative intent to determine whether multiple convictions for different crimes occurring during a single criminal transaction can be upheld.[45] When the legislative intent is not clear, the courts will apply the "same-elements" test as set forth in *Blockburger*.[46] Florida has codified the *Blockburger* test in section 775.021(4) of the *Florida Statutes*.[47] This statute also provides several exceptions to the "same-elements" test that enhance double jeopardy protections for individuals facing criminal conviction.[48] Section 775.021(4)(a) of the *Florida Statutes* provides:

> 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.[49]

Florida cases apparently have yet to apply this test to the inchoate offenses of solicitation and conspiracy when both occur during one criminal episode.[50] However, section 775.021(4) is consistently applied in cases dealing with double jeopardy issues.[51]

1. Overview of Section 775.021(4) and Exceptions: *State v. Florida*

In a recent case, the Supreme Court of Florida provided a helpful overview of how to apply the provisions of section 775.021(4) of the *Florida*

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45. State v. Florida, 894 So. 2d 941, 945 (Fla. 2005).
46. *Id.*
47. *See* § 775.021(4).
48. *See* § 775.021(4)(b)(1)-(3).
49. § 775.021(4)(a) (emphasis added).
50. *See* Corona v. State, 814 So. 2d 1184, 1185 (Fla. 4th Dist. Ct. App. 2002); Burnside v. State, 656 So. 2d 241, 242 (Fla. 5th Dist. Ct. App. 1995); Atkinson v. State, 457 So. 2d 1063, 1063 (Fla. 2d Dist. Ct. App. 1984); Zacke v.State, 418 So. 2d 1118, 1119 (Fla. 5th Dist. Ct. App. 1982).
51. *See* State v. Florida, 894 So. 2d 941, 944 (Fla. 2005) (finding that the conviction of both aggravated battery on a law enforcement officer and attempted second degree murder arising from one bullet shot by the defendant into the officer's head did not violate double jeopardy).

Statutes.[52] The Supreme Court of Florida in *State v. Florida* was faced with the question of whether an individual can be convicted of aggravated battery on a police officer and attempted second-degree murder with a firearm arising from a single criminal act by the defendant of firing a bullet and hitting a police officer.[53] On its face, the case appeared to be a clear cut violation of the defendant's constitutional rights protected under the double jeopardy clause.[54] However, the court held that the defendant's conviction of attempted second-degree murder and aggravated battery on a law enforcement officer did not violate double jeopardy, and consecutive sentences under section 775.021(4) were proper.[55]

The facts of the case are relatively straightforward. The defendant, during a single criminal episode, shot a police officer in the head with a handgun.[56] The jury came back with a verdict under Count VI as guilty of aggravated battery on a law enforcement officer and guilty on Count VII for attempted second-degree murder with a firearm.[57] During sentencing, "defense counsel moved to vacate the conviction on" double jeopardy grounds alleging that the convictions were for "the same exact conduct."[58] The trial court then withheld sentencing on Count VI but sentenced the defendant to life imprisonment on Count VII.[59] The Fourth District Court of Appeal affirmed per curiam and without an opinion.[60] However, when the defendant asserted post-conviction relief on double jeopardy grounds, the Fourth District reversed and vacated the conviction on Count VI.[61] The Supreme Court of Florida granted de novo review of the case on a motion for post-conviction relief.[62]

The Supreme Court of Florida agreed with the State's contention that attempted second-degree murder and aggravated battery on a law enforcement officer contained elements distinct from one another.[63] The court narrowly applied the "same-elements" test and found that "[v]ictim contact is

52. *Id.* at 944–49.
53. *Id.* at 944.
54. *See* Lovell v. State, 882 So. 2d 1107, 1108 (Fla. 5th Dist. Ct. App. 2004) (stating that dual convictions satisfying the "same-elements" test may still violate double jeopardy protections when the offenses are "degree variants of the same core offense").
55. *Florida*, 894 So. 2d at 949.
56. *Id.* at 944.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Florida*, 894 So. 2d at 944 (citing Florida v. State, 701 So. 2d 881 (Fla. 4th Dist. Ct. App. 1997)).
61. *Id.* (citing Florida v. State, 855 So. 2d 109, 111 (Fla. 4th Dist. Ct. App. 2003)).
62. *Id.* at 944–45.
63. *Id.* at 946.

unnecessary for attempted second-degree murder but essential to aggravated battery, and unlike attempted second-degree murder, an act need not have had the potential to cause death to constitute aggravated battery."[64] The court then examined the exceptions under section 775.021(4)(b) which provides:

> 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.[65]

Applying the exceptions provided under this statute is a complex task.[66] The Supreme Court of Florida quickly dismissed the "identical elements" exception under section 775.021(4)(b)(1), explaining that proof of attempted second-degree murder requires the state to prove the defendant's act could have caused death where as aggravated battery does not require this proof.[67]

The court also went on to analyze the application of section 775.021(4)(b)(2) which bars a dual conviction for "[o]ffenses which are degrees of the same offense as provided by statute."[68] The test under this exception looks to see whether the crimes committed during the single criminal episode are done toward the same "core offense."[69] In determining if both crimes have the same "core offense," the court will look to see what the primary evil is of the crime that has been committed.[70] If the two offenses con-

64. *Id.*

65. FLA. STAT. § 775.021(4)(b) (2004).

66. Gordon v. State, 780 So. 2d 17, 20 (Fla. 2001).

67. *Florida*, 894 So. 2d at 947–48.

68. § 775.021(4)(b)(2).

69. *Florida*, 894 So. 2d at 948. In *Johnson v. State*, the defendant had stolen a purse that contained a firearm and a certain amount of cash. 597 So. 2d 798, 799 (Fla. 1992). He was separately convicted of grand theft of cash and grand theft of a firearm. *Id.* The court of appeals reversed on double jeopardy grounds because both takings occurred during one criminal taking. *Id.*

70. *See* Carawan v. State, 515 So. 2d 161, 173 (Fla. 1987) (Shaw, J. dissenting) ("The primary evil of aggravated battery is that it inflicts physical injury on the victim; [and that] the primary evil of attempted homicide is that it *may* inflict death . . . ."); Lovell v. State, 882 So. 2d 1107, 1109 (Fla. 5th Dist. Ct. App. 2004) (holding that a conviction for first degree felony

tain the same "primary evil," no dual conviction will withstand double jeopardy protection.[71] Because the "primary evil" of aggravated battery is the infliction of bodily harm, and the "primary evil" of attempted murder is the possibility of killing the victim, both crimes are not derived from the same "core offense."[72] In *Florida*, the court followed precedent[73] and held that aggravated battery and attempted murder were "not merely degree variants of the same core offense, and therefore [did] not come within the [statutory] exception."[74]

Next, the court analyzed the last exception to the *Blockburger* test as codified under the *Florida Statutes*. Section 775.021(4)(b)(3) of the *Florida Statutes* bars dual convictions for two separate crimes when one of the offenses is the lesser offense, "the statutory elements of which are subsumed by the greater offense."[75] However, the court in *Florida* made clear that this subsection only applies "to necessarily lesser included offenses listed in Category 1 of the Schedule of Lesser Included Offenses."[76] In other words, "necessarily lesser included offenses are those in which the elements of the lesser offense are always subsumed within the greater, without regard to the charging document or evidence at trial."[77] The court also discussed the difference between necessarily lesser included offenses and permissive included offenses.[78] The permissive lesser included offense is fact specific where both crimes appear different on the face of the statute; but in this particular case, one crime cannot be committed unless the other has been perpetrated.[79] The court, in applying the necessarily lesser included offense exception, found that dual convictions for aggravated battery on a police officer and attempted second-degree murder did not violate double jeopardy protections since aggravated battery is not a necessarily lesser included offense under Category 1 of the Schedule of Lesser Included Offenses.[80] Judging from the court's opinion in this case, the double jeopardy protections under Florida law are

murder and aggravated manslaughter of one person violated double jeopardy because the statutes are designed to punish the same evil of a criminal act leading to death).

71. *See Johnson*, 597 So. 2d at 799.
72. Gordon v. State, 780 So. 2d 17, 23–24 (Fla. 2001).
73. *Florida*, 894 So. 2d at 949 (Fla. 2005) (citing *Gordon*, 780 So. 2d at 23).
74. *Id.*
75. FLA. STAT. § 775.021(4)(b)(3) (2004).
76. *Florida*, 894 So. 2d at 947.
77. *Id.*
78. *Id.*
79. *Id.* (citing State v. Weller, 590 So. 2d 923, 925 n.2 (Fla. 1991)).
80. *Id.*

narrow, and the application of section 775.021(4) of the *Florida Statutes* can be cumbersome.[81]

2. The Single Criminal Episode

Another issue important to double jeopardy analysis under Florida law is the length of one criminal episode. When does a single criminal transaction end and another begin? The court appears to have taken a very narrow view of timing for a single criminal episode, almost insuring multiple punishments.[82] The Supreme Court of Florida in *Hayes v. State*[83] settled conflicting law among the First, Third, and Fifth District Courts of Appeal.[84] The question presented in *Hayes* was "whether a defendant may be separately convicted of both armed robbery and grand theft of a motor vehicle where the defendant steals various items from inside a victim's residence, including the victim's car keys, and then proceeds outside the victim's residence to steal the victim's motor vehicle utilizing those keys."[85] After being "convicted of armed robbery, armed burglary of a structure, and grand theft of a motor vehicle,"[86] Hayes appealed, arguing that because the acts stemmed from one criminal episode, "double jeopardy prohibited [multiple] convictions for both of these offenses because they are degree variants of the core offense of theft."[87]

The court in *Hayes* then discussed the conflict between the First District and the Fifth District.[88] In *Henderson v. State*,[89] the First District upheld multiple convictions for robbery and grand theft of an automobile on substantially similar facts to that of *Hayes*, which states that the "the robbery . . . was sufficiently separated . . . by both time and geography."[90] The Fifth District Court of Appeal, in another case with facts indistinguishable from *Hayes*, concluded that because the robbery and theft of the automobile occurred during one continuous sequence of events and was the "product of the same force and fear," dual convictions had to be reversed.[91] The Supreme Court of Florida rejected the Fifth District's analysis and went on to rule that

81. *See generally Florida*, 894 So. 2d at 941 (Fla. 2005).
82. *See* Hayes v. State, 803 So. 2d 695 (Fla. 2001).
83. *Id.* at 695.
84. *Id.* at 705.
85. *Id.* at 697.
86. *Id.*
87. *Hayes*, 803 So.2d at 698.
88. *Id.*
89. 778 So. 2d 1046 (Fla. 1st Dist. Ct. App. 2001).
90. *Id.* at 1047.
91. Castlebury v. State, 402 So. 2d 1231, 1231–32 (Fla. 5th Dist. Ct. App. 1981).

the defendant may be convicted and consecutively sentenced to robbery and grand theft of an automobile.[92] The court established that in determining double jeopardy issues resulting from stealing one victim's personal belongings,

> courts should look to whether there was a separation of time, place, or circumstances between the initial armed robbery and the subsequent grand theft, as those factors are objective criteria utilized to determine whether there are distinct and independent criminal acts or whether there is one continuous criminal act with a single criminal intent.[93]

The court reasoned that the defendant, Hayes, first entered the home of the victim and robbed him of many personal items.[94] This ended the robbery.[95] Second, the defendant then went on to separately steal the victim's automobile.[96] The court in *Hayes* recognized the criminal acts of the defendant as "sufficiently separated as to time and place so as to constitute distinct and independent criminal acts."[97] Applying the reasoning of the Supreme Court of Florida in both *Florida* and *Hayes*, a valid argument can be made that a conviction for solicitation and conspiracy occurring at the same time, with the same criminal object should be barred under double jeopardy analysis.[98]

IV. APPLYING FLORIDA'S DOUBLE JEOPARDY ANALYSIS TO SOLICITATION AND CONSPIRACY

A. *"Same-Elements" Test*

To determine whether multiple convictions for solicitation and conspiracy arising out of one criminal episode violate a defendant's protection against double jeopardy, the courts will first explore whether the legislature intended separate punishments.[99] Absent clear legislative intent to allow for multiple punishments for two separate crimes, courts will apply the *Block-*

92. *Hayes*, 803 So. 2d at 704–05.
93. *Id.* at 704.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Hayes*, 803 So. 2d at 704.
98. *See* State v. Florida, 894 So. 2d 941, 949 (Fla. 2005); *Hayes*, 803 So. 2d at 704–05.
99. Gordon v. State, 780 So. 2d 17, 19 (Fla. 2001) (citing M.P. v. State, 682 So. 2d 79, 81 (Fla. 1996)).

burger test, which the Florida Legislature later codified in section 775.021(4)(a).[100] According to the *Florida Statutes* codification of the *Blockburger* "same-elements" test, an individual may be convicted of multiple crimes when "in the course of one criminal transaction or episode, [he or she] commits an act or acts which constitute one or more separate criminal offenses."[101] To determine whether an offense is separate for double jeopardy purposes, each offense must contain "an element that the other does not."[102] It is relatively clear that the crimes of solicitation and conspiracy will not pass the "same-elements test" under section 775.021(4)(a) of the *Florida Statutes*.[103] The crime of solicitation under the *Florida Statutes* punishes the individual who "commands, encourages, hires, or requests another person" to commit a crime.[104] The crime of conspiracy punishes "[a] person who agrees, conspires, combines, or confederates with another person . . . to commit [an] offense" prohibited by law.[105] Clearly, the crime of solicitation does not require the element of an "agreement" to commit the crime.[106] Furthermore, the crime of conspiracy does not require the element of one individual encouraging or requesting the other to commit the offense.[107] Since solicitation and conspiracy are two separate crimes under the "same-elements" test, which therefore does not prohibit separate convictions of each, it is necessary to review the exceptions listed under section 775.021(4)(b) of the *Florida Statutes*.[108] Multiple convictions are barred "if the offenses meet the criteria in [any] one of the exceptions."[109]

100. *Id.* at 19–20; *see* FLA. STAT. § 775.021(4)(a) (2004).

101. § 775.021(4)(a).

102. *Id.*

103. *See id.;* FLA. STAT. § 777.04(2)-(3) (2004).

104. § 777.04(2).

105. § 777.04(3).

106. § 777.04(2); Lopez v. State, 864 So. 2d 1151, 1153 (Fla. 2d Dist. Ct. App. 2003) (finding that the crime of solicitation is complete when the solicitor asks another person to commit a crime); *see also* State v. Waskin, 481 So. 2d 492, 493 (Fla. 3d Dist. Ct. App. 1985) (finding that a solicitation is complete when one person encourages another person to commit a crime).

107. § 777.04(3); *see also* Hutchinson v. State, 315 So. 2d 546, 549 (Fla. 2d Dist. Ct. App. 1975) (explaining that "the crime of solicitation need not be included in a conspiracy, which may be brought about by the cooperative planning of participants where no one co-conspirator requested the other to become involved").

108. § 775.021(4)(b).

109. State v. Florida, 894 So. 2d 941, 945 n.2 (Fla. 2005).

B. *Identical Elements of Proof*

The next issue under the analysis requires a review of the illustration provided in the introduction of this article. Zack hires Hunt to kill Ken and at that same time and location, Hunt agrees to commit the murder. The first exception under section 775.021(4)(b)(1) of the *Florida Statutes* bars multiple convictions for offenses occurring during one criminal episode that "require identical elements of proof."[110] Here, the only proof needed to sustain the charge against Zack for conspiracy would be the fact that Hunt agreed.[111] Moreover, the proof needed to find Zack guilty of solicitation would be the fact that he requested or hired Hunt to commit the murder.[112] The identical elements of proof exception is not easy to overcome and is very similar to the "same-elements" test; however, even if the two crimes fail to meet this test, the other exceptions must still be analyzed.[113]

C. *Primary Evil and Degree Variant*

The second provision under section 775.021(4)(b)(2) of the *Florida Statutes* provides an exception for "[o]ffenses which are degrees of the same offense as provided by statute."[114] To fulfill this exception, the defendant must prove that the crimes committed were "'aggravated forms of the same underlying offense distinguished only by degree factors.'"[115] The Supreme Court of Florida in *Gordon v. State* used a two-step analysis to see whether two criminal acts committed during a single criminal episode would fall within exception two of section 775.021(4)(a) of *Florida Statutes*.[116] The first question is whether the two crimes constitute separate offenses under the *Blockburger* "same-elements" test.[117] The next inquiry is "whether the crimes are 'degree variants' or aggravated forms of the same core of-

110. § 775.021(4)(b)(1).

111. *See* § 777.04(3).

112. *See* § 777.04(2).

113. *See* Lovell v. State, 882 So. 2d 1107, 1108–09 (Fla. 5th Dist. Ct. App. 2004). The court applied the identical elements of proof test to conclude that to convict for felony murder the state need only prove that the victim died during the commission of a felony, while aggravated manslaughter needs proof that the death resulted from negligently failing to get the victim medical attention. *Id.* at 1109. The court ultimately found that the two crimes fell within another exception and reversed part of the conviction. *Id.*

114. § 775.021(4)(b)(2).

115. Gordon v. State, 780 So. 2d 17, 21 (Fla. 2001) (quoting Sirmons v. State, 634 So. 2d 153, 154 (Fla. 1994)).

116. *Id.*

117. *Id.*

fense."[118] As previously discussed, there is no doubt that solicitation to commit murder and conspiracy to commit murder, are two separate crimes under the "same-elements" test.[119] For purposes of double jeopardy, the argument must now be made that solicitation to commit murder and conspiracy to commit murder occurred during one criminal episode, and "are merely degree variants of the [same] core offense."[120]

According to *Hayes*, and referring to the illustration of Zack's hiring Hunt to kill Ken, it is clear that the offenses of solicitation and conspiracy committed by Zack both occurred during one criminal episode.[121] As previously mentioned, *Hayes* examined "whether there was a separation of time, place, or circumstances" between the two crimes to determine "whether there are distinct and independent criminal acts or whether there is one continuous criminal act with a single criminal intent."[122] In the case of Zack's hiring Hunt to commit murder, there is no separation of "time, place, or circumstances" between the request by Zack and the subsequent agreement by Hunt to commit the offense.[123] Furthermore, both of these acts occurred during "one continuous criminal act with a single criminal intent."[124] Zack needs only to command, encourage, hire, or request Hunt to commit a crime to have committed solicitation.[125] At that same time, and without any further act or intent on behalf of Zack, Hunt simply needs to agree to the scheme for Zack to have committed not only solicitation, but conspiracy as well.[126] Having established in this illustration that the crimes were committed during one

118. *Id.*

119. *See id.* at 20; *see also* FLA. STAT § 777.04(2)–(3) (2004) (stating solicitation includes a request, or encouragement, where criminal conspiracy only requires an agreement to commit an offense proscribed by the law).

120. *Sirmons*, 634 So. 2d at 154 (reversing conviction of grand theft of an automobile and armed robbery with a weapon because both crimes are merely degree variants of the core offense of theft and both occurred during one criminal transaction); *see also* State v. Florida, 894 So. 2d 941, 948–49 (Fla. 2005) (rejecting argument that aggravated battery is a degree variant of attempted murder); Hayes v. State, 803 So. 2d 695, 700 (Fla. 2001); Mixson v. State, 857 So. 2d 362, 365 (Fla. 1st Dist. Ct. App. 2003) (holding that two counts of grand theft must be struck down because they are part of the same core offense of theft and occurred during one criminal episode).

121. *See Hayes*, 803 So. 2d at 704 (finding that criminal episodes are separated by time, place, and circumstance).

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* FLA. STAT. § 777.04(2) (2004).

126. *See* § 777.04(2)–(3).

criminal episode, the issue remaining to be resolved is whether solicitation and conspiracy are "degree variants" of part of the same core offense.[127]

Florida courts have used the "primary evil test" to determine whether separate crimes are "degree variants" of the same "core offense."[128] According to *State v. Florida*, the court looks at the potential harm that the criminal act will or may cause as a result.[129] Under this test, the "primary evil" of a solicitation is that an individual will request, encourage, or hire another to commit an offense with the *potential* that the other individual will *agree*, although it is not necessary for there to be an agreement.[130] Furthermore, the "primary evil" of conspiracy is the *agreement* between two or more people to commit a criminal offense.[131] Under this analysis, it would appear that the solicitation would be a lesser "degree variant" of the "core offense" of conspiracy to commit murder because both are punishing the potential for an agreement or actual agreement that may result in the solicitation becoming a conspiracy.[132] The argument for double jeopardy protection of an individual convicted of solicitation and conspiracy to commit a crime, arising during one criminal episode, may find its chances under the "degree variant" exception in section 775.021(4)(b)(2) of the *Florida Statutes*.[133]

D. *Lesser Offense Subsumed by the Greater Offense*

The most persuasive double jeopardy argument which would ultimately bar dual convictions for a solicitation to commit murder and conspiracy to commit murder, arising during one criminal transaction, will likely be found in the exception listed under section 775.021(4)(b)(3) of the *Florida Statutes*.[134] The third provision under section 775.021(4)(b) of the *Florida Statutes* grants exception to "[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense."[135] The court in

127. *See* FLA. STAT § 775.021(4)(b)(2) (2004); State v. Florida, 894 So. 2d 941, 948 (Fla. 2005).

128. *See, e.g., Florida*, 894 So. 2d at 948–49.

129. *Id.* at 948–49 (finding that the primary evil of battery is intentional, nonconsensual touching, and the primary evil of attempted second-degree murder is the potential of the defendant's act to cause death).

130. *See* § 777.04(2); State v. Johnson, 561 So. 2d 1321, 1322–23 (Fla. 4th Dist. Ct. App. 1990) (stating that "solicitation is *completed* by one party *asking* another" with no agreement or action required by the second party).

131. *See* § 777.04(3).

132. *See* § 777.04(2)–(3); Sirmons v. State, 634 So. 2d 153, 154 (Fla. 1994).

133. FLA. STAT § 775.021(4)(b)(2) (2004).

134. § 775.021(4)(b)(3).

135. *Id.*

Florida explained that this exception only applies "to necessarily lesser included offenses listed in Category 1 of the Schedule of Lesser Included Offenses."[136] Accordingly, a review of the *Florida Standard Jury Instructions in Criminal Cases* provides that neither solicitation nor conspiracy have any necessarily lesser included offenses listed within their jury instruction.[137]

Moreover, Category 1 of the Schedule of Lesser Included Offenses located in the appendix of the jury instructions also fails to mention either solicitation or conspiracy.[138] An argument to include solicitation as a necessarily lesser included offense of conspiracy is not an easy obstacle to overcome. The Supreme Court of Florida in *Ray v. State*[139] has confirmed that the Category 1 "schedule is presumptively correct and complete, and the Court expects that using the schedule will lessen the confusion surrounding lesser included offenses."[140] To succeed under this exception, the defendant must overcome the presumption that Category One of the Schedule of Lesser Included Offenses is complete and argue that solicitation is a necessarily lesser included offense to conspiracy.

An argument to include solicitation as a lesser included offense to conspiracy is not without merit. Arguments have been made that a solicitation can also be referred to as an attempted conspiracy.[141] In *Hutchinson v. State*, the appellant requested a man by the name of Pledger to kill one Dutch Thomas.[142] Pledger then "reported the incident to the State Attorney's office."[143] The appellant was convicted of attempted conspiracy, and on appeal the question was raised whether attempted conspiracy was recognized as a crime under Florida law.[144] The Second District Court of Appeal reversed the conviction, holding that attempted conspiracy was not a crime and a

136. State v. Florida, 894 So. 2d 941, 947 (Fla. 2005) (finding that aggravated battery is not a necessarily lesser included offense of attempted murder recorded under Category One of the Schedule of Lesser Included Offenses).

137. *See* FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES §§ 5.2, 5.3 (4th ed. 2002).

138. *Id.* at 609.

139. 403 So. 2d 956 (Fla. 1981).

140. *Id.* at 961 n.7.

141. Hutchinson v. State, 315 So. 2d 546, 547–49 (Fla. 2d Dist. Ct. App. 1975); *see also* MODEL PENAL CODE & COMMENTARIES § 5.02 cmt. 1 (Official Draft & Revised Comments 1985) (explaining that "[s]olicitation may . . . be thought of as an attempt to conspire").

142. *Hutchinson*, 315 So. 2d at 547.

143. *Id.*

144. *Id.* It should be noted that at the time the appellant was convicted, the crime of solicitation was not codified but would have to be charged under the crime of common law solicitation under section 775.01 of the 1973 *Florida Statutes*. *Id.* This statute made "common law [crimes] of England in relation to crimes applicable in Florida." *Id.*

charge of solicitation would be proper.[145] However, the court did concede to the proposition that, theoretically, a solicitation is the equivalent to attempted conspiracy.[146] The law is well-established that an individual who succeeds in the commission of a crime may not be convicted of both the criminal attempt and the substantive offense.[147] Theoretically, because a solicitation is tantamount to the non-existent crime of attempted conspiracy, an argument could be made that once the solicitee agrees with the solicitor's proposition then the object of the solicitation has been completed and would therefore merge into the conspiracy.[148] In this case, if a jury were to convict the solicitor of conspiracy, then the lesser offense of solicitation, or theoretically an *attempted conspiracy*, would be "absorbed by the greater offense."[149]

Furthermore, one Florida court has recognized that punishment for solicitation is already factored into the sentencing for a conviction of conspiracy.[150] In *Crofton v. State*,[151] the Second District Court of Appeal held that the trial court departed from the recommended sentencing guidelines and the case was reversed and remanded.[152] Geraldine Crofton, the defendant, arranged for her husband to be murdered by seeking out the help of one Vance Ellison.[153] Crofton actively provided information to plan the murder while Ellison subsequently hired two other individuals to commit the murder.[154] Crofton was later convicted of conspiracy to commit the murder of her husband and sentenced to twenty-five years in prison.[155] On appeal, Crofton argued that her conviction had exceeded the recommended sentencing provided in Florida guidelines.[156] The court reversed the sentence because "the trial judge improperly considered factors inherent in the underlying crime to justify departure."[157] The Second District Court of Appeal further noted that "[t]he [lower] court also saw aggravation in the fact that Geraldine *solicited* Ellison to commit the murder."[158] The court then explained that solicitation

145. *Hutchinson*, 315 So. 2d at 549.
146. *Id.*
147. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 375 (3d ed. 2001).
148. *See id.*
149. *Id.*
150. Crofton v. State, 491 So. 2d 317, 319–20 (Fla. 1st Dist. Ct. App. 1986).
151. *Id.* at 317.
152. *Id.* at 320.
153. *Id.* at 318.
154. *Id.*
155. *Crofton*, 491 So. 2d at 318.
156. *Id.*
157. *Id.* at 319. The trial judge improperly considered the fact that the object of the conspiracy was murder and that this was already factored into the sentencing guidelines. *Id.* at 320.
158. *Id.* (emphasis added).

to commit murder "is in the very nature of the charge of conspiracy to commit murder and is already factored into the sentencing guidelines."[159] The case was sent back to the lower court for resentencing.[160] According to *Crofton*, it would appear that punishment for solicitation to commit murder is already factored into the punishment for conspiracy.[161] Accordingly, solicitation should be a necessarily lesser included offense to conspiracy, thus barring multiple convictions.[162] Other jurisdictions have dealt with the complex case of double jeopardy analysis for solicitation and conspiracy and may be helpful insight as to whether an argument to bar multiple convictions will be successful.[163]

V. JURISDICTION ANALYSIS

A. *Michigan Rejects Double Jeopardy Argument*

In Michigan, the issue of whether double jeopardy prohibits multiple convictions for the crimes of solicitation and conspiracy arising during one criminal transaction has been raised.[164] The case of *People v. Jones* was decided in an unpublished opinion on March 22, 2005.[165] In *Jones*, the defendant was convicted and sentenced to nineteen to thirty years imprisonment for solicitation and second-degree murder, and he also received life imprisonment on a conspiracy count.[166] On appeal, the defendant argued that his convictions violated both federal and state protections against double jeopardy.[167] Similar to the Florida double jeopardy analysis, the Court of Appeals first determined the legislative intent in permitting multiple punishments.[168] However, unlike Florida, the Michigan courts believe "[s]tatutes prohibiting conduct violative of distinct social norms are generally viewed as separate and amenable to permitting multiple punishments."[169] The Court of Appeals then explained that "the purpose of the conspiracy statute is to pro-

159. *Corfton*, 491 So. 2d at 320.
160. *Id.*
161. *See id.*
162. *See id.* at 319–20.
163. *See, e.g.*, People v. Jones, No. 250326, 2005 WL 657578 (Mich. Ct. App. Mar. 22, 2005); State v. Vallejos, 9 P.3d 668 (N.M. Ct. App. 2000); People v. Burgess, 396 N.W.2d 814 (Mich. Ct. App. 1986).
164. *See Jones*, 2005 WL 657578, at *4–5; *Burgess*, 396 N.W.2d at 825.
165. *Jones*, 2005 WL 657578, at *1.
166. *Id.*
167. *Id.* at *4.
168. *Id.* at *5.
169. *Id.* (citing People v. Pena, 569 N.W.2d 871, 875 (Mich. Ct. App. 1997)).

tect society from the increased danger presented by group activity as opposed to individual activity."[170] The court then found that the purpose of the solicitation statute was to punish those people who try to induce others into committing a criminal act.[171] The court held that since the statutes were aimed at two separate and distinct social norms, conviction for each crime "[did] not offend double jeopardy principles."[172] Lastly, the court rejected the defendant's argument that convictions of both solicitation and conspiracy should be barred because each required proof of the same evidence.[173] This test is similar to Florida's double jeopardy statute, which exempts those crimes which require identical elements of proof, thus barring multiple convictions.[174] However, the Supreme Court of Michigan has rejected the adoption of this test, so the Court of Appeals would not apply an analysis.[175]

In *Jones*, the Michigan Court of Appeals, in coming to their conclusion, cited the case of *People v. Burgess*.[176] It should be noted that the court in *Burgess* recognized that under double jeopardy there is "a close question . . . where . . . [a] defendant is convicted of inciting, inducing or exhorting another to commit murder in addition to conspiracy and first-degree murder."[177] This analysis appears misplaced. The *Burgess* court came to the conclusion that the intent of the legislature was to punish the solicitation and conspiracy separately.[178] However, the statute which proscribes solicitation was earlier found to be "a special kind of accomplice statute," [179] which stated "[a]ny person who incites, induces or exhorts any other person to unlawfully . . . murder . . . shall be punished in the same manner as if he had committed the offense."[180] Nonetheless, the court found that the statute was meant to codify common law crime of solicitation and ultimately upheld the defendant's multiple convictions.[181] The conclusion in this analysis relied on the legislature's intent in establishing statutes that were meant to punish individuals for separate crimes.[182] Another jurisdiction analyzed a similar "inciting" statute to

170. *Jones,* 2005 WL 657578, at *4 (citing People v. Sammons, 478 N.W.2d 901, 913 (Mich. Ct. App. 1991); People v. Burgess, 396 N.W.2d 814, 824 (Mich. Ct. App. 1986)).
171. *Id.*
172. *Id.* (citing *Pena*, 569 N.W.2d at 875).
173. *Id.*
174. *See* FLA. STAT. § 775.021(4)(b)(1) (2004).
175. *Jones*, 2005 WL 657578, at *5.
176. *Id.* (citing People v. Burgess, 396 N.W.2d 814, 823 (Mich. Ct. App. 1986)).
177. *Burgess*, 396 N.W.2d at 823.
178. *Id.* at 824.
179. *Id.* at 823 (citing People v. Rehkopf, 370 N.W.2d 296, 298 (Mich. 1985)).
180. *Id.* (citation omitted).
181. *Id.* at 824.
182. *Burgess*, 396 N.W.2d at 824.

the one analyzed in *Burgess* and came to a different conclusion as to whether an individual can be convicted of solicitation, conspiracy, and the substantive offense of murder.[183]

B. *New Mexico: One Last Defense*

In the case of *State v. Vallejos,* the New Mexico Court of Appeals reversed the defendant's convictions for solicitation and conspiracy.[184] In *Vallejos*, the defendant appealed his convictions for conspiracy to commit first-degree murder and solicitation to commit murder, arguing that the multiple punishments violated his protection against double jeopardy.[185] The state secured a conviction on the fact that the defendant had solicited and conspired with his nephew, Chris Sedillo, to shoot and kill Sybil Saiz.[186] The criminal plan was executed; however, the victim, Ms. Saiz, survived.[187] The defendant was formally adjudicated as guilty of both solicitation and conspiracy, but the court imposed concurrent sentences for the dual convictions.[188] The defendant then argued that the merger of the two offenses for sentencing purposes was in contradiction to his right against double jeopardy.[189] As a result, the Court of Appeals analyzed whether the legislature intended multiple convictions for crimes relating to a solicitation.[190]

The court first explained that in a prior case, it determined that the crimes of solicitation and conspiracy merge for purposes of sentencing and the defendant may only receive a concurrent sentence for the two crimes.[191] The court of appeals then stated that "imposition of concurrent sentences did not render multiple convictions for the same offense harmless," and that "besides habitual liability, other potential adverse collateral consequences flow from allowing a separate conviction to stand, including delay in the defendant's eligibility for parole, the use of the second conviction for impeachment purposes, and general social stigma."[192] The court then concluded that the crimes of solicitation and conspiracy to commit murder may be prosecuted and submitted to a jury which can render a verdict on both counts.[193]

183. *See* State v. Vallejos, 9 P.3d 668 (N.M. Ct. App. 2000).
184. *Id.* at 670.
185. *Id.*
186. *See id.*
187. *Id.*
188. *Vallejos*, 9 P.3d at 674.
189. *Id.*
190. *Id.* (citing Swafford v. State, 810 P.2d 1223, 1234 (N.M. 1991)).
191. *Id.* at 675 (citing State v. Shade, 726 P.2d 864, 878 (N.M. Ct. App. 1986)).
192. *Id.* (citing State v. Pierce, 792 P.2d 408, 419 (N.M. 1990)).
193. *Vallejos*, 9 P.3d at 675–76.

However, the court held that the "[d]efendant will not be held 'liable' or 'guilty' of criminal solicitation upon formal adjudication or entry of judgment and sentence by the trial court."[194] Thus, the court vacated the conviction for criminal solicitation.[195] Analyzing the *Florida Statutes* codifying solicitation and conspiracy in light of Florida's accomplice liability statute may prove to be one last defense in barring multiple convictions for the two inchoate offenses.[196]

C. *Applying the New Mexico Approach*

The New Mexico statute construed in *Vallejos* was substantially different from the Florida statute that punishes criminal solicitation.[197] The problems that arose in *Vallejos* were the statutes "incongruous provisions" coupled with the fact that the statute also combined accomplice liability with the inchoate crime of solicitation.[198] The New Mexico Court of Appeals was forced to interpret these provisions strictly and with the principle of lenity due to the nature of the crimes.[199] The principle of lenity "requires [the court] to interpret the statute in favor of the defendant."[200] According to section 775.021(4)(b) of the *Florida Statutes*, "[t]he intent of the Legislature is to convict and sentence for each criminal offense" and "not to allow the principle of lenity."[201] Furthermore, it appears that the legislature intended punishment for accomplice liability and solicitation separately. Section 777.011 of the *Florida Statutes* which describes the "[p]rincipal in first degree," or aider and abettor, is only related to the solicitation statute in that they both are contained under chapter 777 of the *Florida Statutes*.[202] However, an argument can be made regarding the construction of the solicitation statute and accomplice statute which may require prohibition of multiple punishments.

A "[p]rincipal in the first degree" can be convicted and punished for a substantive offense if he or she "aids, abets, counsels, *hires*, or otherwise procures such offense to be committed."[203] The use of the word "hires" in both the accomplice liability statute and the solicitation statute may provide

194. *Id.* at 676 (citing State v. Mondragon, 759 P.2d 1003, 1006 (N.M. Ct. App. 1988)).
195. *Id.*
196. *See, e.g.*, FLA. STAT. § 775.021 (2004); FLA. STAT. § 777.011 (2004).
197. *Compare* FLA. STAT. § 777.04(2) (2004), *with* N.M. Stat. Ann. § 30-28-3(D) (LexisNexis 1978).
198. *Vallejos*, 9 P.3d at 675.
199. *Id.*
200. *Id.* (citing State v. Odgen, 880 P.2d 845, 853 (N.M. 1994)).
201. FLA. STAT § 775.021(4)(b) (2004).
202. *See* FLA. STAT §§ 777.011, 777.04(2) (2004).
203. § 777.011 (emphasis added).

double jeopardy protection when the substantive crime is committed.[204] An argument can be made that Zack can only be convicted of murder in this instance because Zack's guilt of solicitation and the substantive offense of murder would rely on the same proof of him "hiring" Hunt, and, therefore, would fall within the statutory exception barring dual convictions.[205]

It is clear that some bright-line rule regarding these offenses and the convictions thereof should be established and adopted by Florida. Professors and legal scholars of the American Law Institute may have created a solution to double jeopardy issues arising out of multiple convictions for solicitation and conspiracy.[206]

VI. THE MODEL PENAL CODE: SOLICITATION, CONSPIRACY, AND COMPLICITY

The Model Penal Code (MPC) and states that have adopted similar penal statutes have taken a different approach to the inchoate offenses of solicitation and conspiracy.[207] According to section 5.02 of the MPC:

> A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.[208]

The basic language of this statute is very similar to that of section 777.04(2) of the *Florida Statutes*.[209] The MPC also provides that a defendant is still guilty of criminal solicitation even if the actor failed to communicate the solicitation to another person, so long as his behavior was indicative of a command, encouragement or request.[210]

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204. *See* State v. Florida, 894 So. 2d 941, 945 (Fla. 2005) (stating that legislative intent is determinative in double jeopardy cases); § 775.021(4)(b)(1) (barring dual convictions for crimes requiring the same elements of proof).

205. *See* § 775.021(4)(b)(1).

206. *See* MODEL PENAL CODE & COMMENTARIES §§ 5.02(2)–(3), 5.05(3) cmt. 1 (Official Draft & Revised Comments 1985).

207. MODEL PENAL CODE & COMMENTARIES §§ 5.02(1), 5.03(1); *see also* Commonwealth v. Graves, 508 A.2d 1198, 1198 (Pa. 1986) (finding that an individual may not be convicted of solicitation and conspiracy if both inchoate offenses are designed towards the commission of one substantive offense).

208. MODEL PENAL CODE & COMMENTARIES § 5.02(1).

209. *See* FLA. STAT. § 777.04(2) (2004).

210. MODEL PENAL CODE & COMMENTARIES § 5.02(1).

The MPC's statute regarding conspiracy is also very similar to Florida's statute. According to section 5.03(1) of the MPC:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.[211]

Under both the MPC and Florida law, an agreement to commit some criminal act is a necessary element of conspiracy.[212] In addition, unlike Florida law, the MPC requires that at least one of the co-conspirators commit some overt act to prove the alleged conspiracy exists.[213]

However, a difference between Florida law and the MPC that is important for purposes of this article regards multiple convictions. Accordingly, in defining the law of solicitation and conspiracy, the MPC provides that "[a] person may not be convicted of more than one offense defined by this Article for conduct designed to commit or to culminate in the commission of the same crime."[214] Indeed, the MPC reasons that the danger of inchoate crimes is that they may result in the crime being committed, and, therefore, "there is no warrant for cumulating convictions of . . . solicitation and conspiracy to commit the same offense."[215] Applying the provisions of the MPC to the illustration of Zack hiring Hunt to kill Ken, Zack will only be guilty of one inchoate crime, either conspiracy or solicitation, since the inchoate offense is of "conduct designed to commit or to culminate in the commission of the same crime."[216] Furthermore, the MPC provides that a person may not be convicted of both an inchoate crime and the substantive offense which was its object.[217] Thus, under the MPC, if Hunt murders Ken, Zack will be guilty

211. MODEL PENAL CODE & COMMENTARIES § 5.03(1).
212. *See id.*; § 777.04(3).
213. MODEL PENAL CODE & COMMENTARIES § 5.03(5).
214. MODEL PENAL CODE & COMMENTARIES § 5.05(3).
215. MODEL PENAL CODE & COMMENTARIES § 5.05 cmt. 4.
216. MODEL PENAL CODE & COMMENTARIES § 5.05(3).
217. MODEL PENAL CODE § 1.07(1)(b) (Official Draft & Explanatory Notes 1985).

of murder and punished accordingly, but will not be guilty of either solicitation or conspiracy.

VII. CONCLUSION AND PROPOSAL

Florida criminal law providing punishment for the crimes of solicitation and conspiracy not only raises double jeopardy issues, but also poses a danger to the efficiency of the Florida criminal justice system. Currently, a jury can convict an individual of both solicitation and conspiracy that is designed to culminate into one substantive criminal offense.[218] An argument that solicitation is a lesser included offense or a "degree variant" of conspiracy may ultimately bar dual convictions under Florida law. However, it appears that the MPC takes the appropriate view that punishment "should certainly suffice to meet whatever danger is presented by the actor," and the "heaviest and most afflictive sanctions" should be reserved for the substantive crimes.[219]

It is questionable whether imposing numerous punishments on an individual for inchoate crimes which were meant to culminate in the commission of one substantive offense will act as a deterrent.[220] Furthermore, the Florida Legislature must enact law that will efficiently "determine under what circumstances consecutive punishment is to be authorized for the various combinations of offenses that arise from unitary conduct."[221] To clear up any confusion raising double jeopardy issues, over-sentencing problems, and overall efficiency of the Florida criminal law system regarding punishment for inchoate crimes such as solicitation and conspiracy, the Florida Legislature should adopt similar provisions to those provided under the Model Penal Code. However, without such legislation the double jeopardy argument to bar dual convictions for solicitation and conspiracy designed to achieve one criminal offense will await its day in court.

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218. *See* FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES §§ 5.2, 5.3 (2002).

219. MODEL PENAL CODE & COMMENTARIES § 5.05 cmt. 2 (Official Draft & Revised Comments 1985).

220. *See id.*

221. Kevin A. Hicks, Note, *A Proposal for Legislative Effectuation of Double Jeopardy Protection*, 41 HASTINGS L.J. 669, 693 (1990).