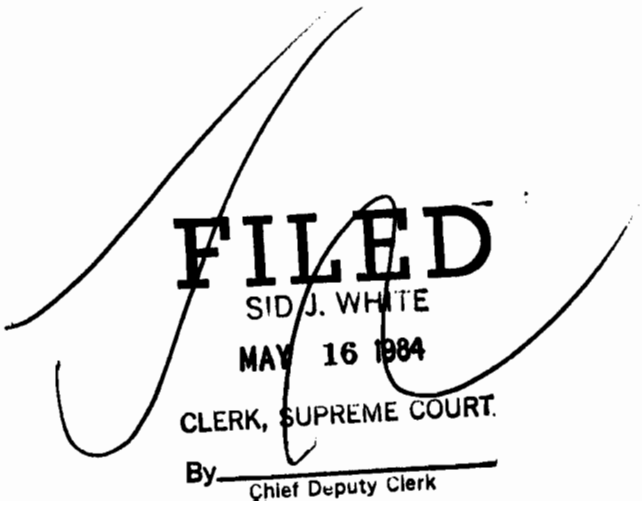
IN THE SUPREME COURT OF FLORIDA

MORRIS LEE MILLER,	)	
Petitioner,	)	
vs.	)	CASE NO. 64,505
STATE OF FLORIDA,	)	
Respondent.	)	

PETITIONER'S BRIEF ON THE MERITS



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AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida, in and for Broward County, and the Appellant in the District Court of Appeal, Fourth District. The Respondent was the Prosecution and Appellee in the lower courts. In the brief the parties will be referred to by name.

The symbol "R" will denote the Record on Appeal.

STATEMENT OF THE CASE

Morris Miller was informed against for second degree murder with a handgun (R 256). On May 7, 1982, he was tried by jury which the same day returned a verdict of guilty as to the lesser included offense of attempted second degree murder (R 269). Mr. Miller was immediately adjudged guilty of the offense (R 270) and sentenced to a term of thirty years in prison with a mandatory three (3) year minimum and credit for time served (R 272), based on the State's argument that the offense was re-classified to a first degree felony because of the use of a firearm (R 251).

Mr. Miller's appeal to the Fourth District Court of Appeal was denied in a written opinion filed September 7, 1983. This Court accepted jurisdiction of Mr. Miller's case in an order dated April 24, 1984.

This brief on the merits follows.

STATEMENT OF THE FACTS

On October 19, John "Nature Boy" Benefield got into an argument with another black male at a pool hall (R 130, 159).

According to the only eyewitness to the actual shooting, called by the defense, there was a brief scuffle, which ended when Nature Boy turned and drew his gun, firing it at the other man and his friend, Mr. Miller, who was standing nearby (R 160-161). At that point, Nature Boy himself was shot at twice by each of the other men (R 68-69, 161). Mr. Miller admitted firing at Nature Boy, but only hit him in the back of the leg (R 131, 135). This wound was not the fatal one (R 104). Nature Boy was killed by another shot, which hit him in the lower back (R 103-104).

ARGUMENT

WHERE A DEFENDANT IS CONVICTED OF A LESSER INCLUDED OFFENSE RATHER THAN THE "OFFENSE CHARGED," FLORIDA STATUTES, §775.087(1) DOES NOT APPLY TO AUTHORIZE RE-CLASSIFICATION OF THE OFFENSE WHERE A FIREARM HAS BEEN USED.

Mr. Miller was convicted of attempted second degree murder pursuant to the jury's verdict finding him guilty of that offense. Normally, attempted second degree murder is a second degree felony which, if a firearm is used, may be re-classified as a first degree felony punishable by a maximum of thirty (30) years in prison. Dion v. State, 409 So.2d 1216 (Fla. 3d DCA 1982). However, in the present case, Mr. Miller was charged with the completed offense, second degree murder, and the jury's verdict was for a lesser included offense. Fla. Stat. §775.087(1) provides for re-classification under the following circumstances:

> "Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:
> (a) In the case of a felony of the first degree, to a life felony.
> (b) In the case of a felony of the second degree, to a felony of the first degree.
> (c) In the case of a felony of the third degree, to a felony of the second degree.

Therefore, the question presented in the instant case is whether re-classification of the offense for which a defendant is convicted is proper where that offense is not the offense originally charged in the information but a lesser included offense thereof.

Since resolution of this question involves interpretation of the statutory language employed by the legislature, certain fundamental principles of statutory construction must be adhered to in determining the issue. Certainly one such principle, as noted by the Fourth District Court of Appeal, is that the legislative intent is a guiding light by which the statute under examination is to be construed. However, Mr. Miller submits that the best evidence of the legislative intent is the specific language employed in the statute itself. In the present case, it is difficult to imagine any words which could more clearly manifest an intent to limit operation of the statute here under consideration only to those offenses actually alleged in the charging document than the phrase "offense charged," which is used in the re-classification statute. On the other hand, had the legislature expressly intended for the statute to apply to lesser included offenses as well, it would have been a simple matter to state that re-classification would occur for "the felony for which the person is charged and for any offenses included therein" or simply for "the felony for which the person is convicted."

The legislature did not employ the latter phraseology, and speculation that it would have done so is out of place in the construction of a penal statute. In Palmer v. State, 438 So.2d 1

(Fla. 1983), this Court recently construed Fla. Stat §775.087(2), which provides that any person who has a firearm in his possession during commission of a felony must be sentenced to a mandatory minimum three (3) year term. Applying what it called the "fundamental rule of statutory construction" that criminal statutes should be construed strictly in favor of the person against whom the penalty operates, this Court held that where multiple convictions are returned as a result of acts occurring during the course of a single criminal episode, the mandatory minimum penalties may not be stacked, that is, a defendant may receive no more than a single mandatory minimum penalty rather than being required to serve several such terms imposed consecutively. This ruling was based on this Court's failure to find, in any portion of Fla. Stat. §775.087, express authority for the imposition of more than one mandatory minimum term as the result of a single criminal episode.

By its decision in Palmer, then, this Court has mandated that Fla. Stat. §775.087 be strictly construed. Despite its recognition of the harm the legislature sought to prevent by the promulgation of the statute, the requirement of narrow construction in criminal cases necessitates an express legislative statement of the offenses to which the statute was to apply, rather than allowing any expansion of those offenses based on a speculative assessment of the legislature's intentions in promulgating the law.

Nor may the State avoid application of the rule requiring strict construction of a penal statute by an argument that the defendant is on trial for the lesser included offenses as well as

for the offense actually alleged, since verdicts may properly be returned for lesser offenses on an information charging only the main offense. A specific procedural authorization exists for this result. Fla.R.Cr.P. 3.510 expressly provides:

> "Upon an indictment or information upon which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> * * *
>
> (b) any offense which as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information... (emphasis added)

Obviously, no such legislative definition has been included to expand the commonly understood definition of "offense charged" as used in Fla. Stat. §775.087(1). Therefore, the offense for which a verdict may be returned cannot be automatically construed as the same as the "offense charged."

This position is supported by this Court's own opinion in Lewis v. State, 419 So.2d 337 (Fla. 1982), holding that a jury need not be instructed on the maximum and minimum penalties for offenses included within the main offense charged. This conclusion was reached despite the fact that Fla.R.Cr.P. 3.390(1) provides:

> "...the judge shall include in said charge [to the jury] the maximum and minimum sentences which may be imposed (including probation) for the offense for which the accused is then on trial." (Emphasis added).

Certainly, the "offense for which the accused is then on trial" is an even broader designation than the term "offense charged" utilized in the statute at issue sub judice. Thus, Lewis makes clear that whether or not an offense is included within the

offense alleged so that conviction may be returned, even though the charging document makes no specific reference to it, does not end the inquiry as to what is meant by "offense charged" for sentencing, procedural, and purposes other than the question of what is an appropriate verdict.

In Fla. Stat §775.087(1), the legislature employed a term, "offense charged", which has a recognized legal meaning limited to the offense alleged in the charging document. Nothing in that statute expressly states--or even implies--its applicability to lesser offenses which are included within the "offense charged." Because a penal statute must be construed strictly in favor of the party against whom it operates, inclusion of such an express provision is necessary before the statute may be given an interpretation more expansive than that suggested by the plain meaning of its words. Assessed against this standard, it is clear that the only meaning which can attach to the statute's express words of implementation is one which limits its operation to the offense with which the defendant was originally charged and no other. Consequently, Mr. Miller, convicted of a lesser offense, rather than for the offense charged, was illegally sentenced to a term in excess of the legal maximum, and his sentence must be appropriately corrected.

CONCLUSION

Based upon the foregoing Argument and the authorities cited therein, Petitioner respectfully requests this Honorable Court to reverse the decision of the District Court of Appeal, Fourth District and remand this cause with such directives as may be deemed appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SHARON LEE STEDMAN, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 14th day of MAY, 1984.

Of Counsel