IN THE SUPREME COURT OF FLORIDA

WILLIE LEE MURRAY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,414

PETITIONER'S BRIEF ON JURISDICTION

RICHARD L. JORANDBY
Public Defender

LOUIS G. CARRES
Assistant Public Defender
15th Judicial Circuit
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

Counsel for Petitioner.

TABLE OF CONTENTS

	PAGE
Table of Contents	i
Authorities Cited	ii
Preliminary Statement	1
Statement of the Case	2
Statement of the Facts	3
Summary of Argument	4
Argument --	
I	5
WHETHER THE DECISION CONFLICTS WITH OTHER DISTRICT COURT OF APPEAL DECISIONS ON WHETHER THE THREE YEAR MANDATORY MINIMUM FOR USE OF A FIREARM APPLIES TO ATTEMPTED MANSLAUGHTER?	
II	6-9
WHETHER A VERDICT FOR ATTEMPTED MANSLAUGHTER IS LAWFUL WHEN THE JURY IS INCORRECTLY INSTRUCTED ON THE CRIME BECAUSE VOLUNTARY AND INVOLUNTARY MANSLAUGHTER WERE MELDED IN THE INSTRUCTION AND WHETHER THE RESULTING CONVICTION IS FOR A NON-EXISTENT CRIME THUS REQUIRING A NEW TRIAL?	
Conclusion	9-10
Certificate of Service	10

AUTHORITIES CITED

CASES	PAGE
Achin v. State, 436 So.2d 30 (Fla. 1982)	7,8
Bashans v. State, 388 So.2d 1303 (Fla. 1st DCA 1980)	8
Jones v. State, 356 So.2d 4 (Fla. 4th DCA 1977)	5
McGahagin v. State, 17 Fla. 665 (1880)	8
Rozier v. State, 353 So.2d 193 (Fla. 3d DCA 1977)	5
Strahorn v. State, 436 So.2d 447 (Fla. 2d DCA 1983)	5
Taylor v. State, 444 So.2d 931 (Fla. 1973)	2,6
Tillman v. State, 10 F.L.W. 305 (Fla. January 6, 1985)	6

OTHER AUTHORITIES

Florida Statutes

§ 775.087(2) (1983)	2,5

PRELIMINARY STATEMENT

The petitioner, WILLIE LEE MURRAY, was the defendant in the trial court, and he was the appellant in the district court of appeal. He will be referred to by name and as petitioner in this brief.

This brief is accompanied by an appendix containing conformed copies of those portions of the record necessary to show jurisdiction in this Court.

STATEMENT OF THE CASE

The petitioner was convicted at a jury trial in Broward County, Florida, of kidnapping, two counts of sexual battery with a firearm, robbery with a firearm and attempted manslaughter with a firearm (See Appendix A - Opinion of District Court of Appeal, Fourth District, July 5, 1984). The district court of appeal, on direct appeal, reversed the conviction for attempted manslaughter based upon this Court's decision in Taylor v. State, 444 So.2d 931 (Fla. 1973), because the trial court combined voluntary and involuntary manslaughter in the instruction and therefore gave an "incorrect instruction" (See Appendix A-2-3).

On the motion for rehearing granted the district court of appeal issued a further opinion on June 26, 1985, in which it modified its earlier decision (See Appendix B). In the opinion on rehearing the district court of appeal affirmed the conviction for attempted manslaughter and remanded for imposition of a consecutive and separate three year minimum mandatory sentence under Section 775.087(2), Florida Statutes.

The petitioner timely filed a notice of review in this Court from the rendition of the district court decision below.

STATEMENT OF THE FACTS

The district court of appeal set forth the pertinent facts in its decision issued July 5, 1984, as follows:

> Approaching a woman at a car wash, appellant and another male forced her at gunpoint to leave with them in her car. Appellant drove, while his codefendant pointed the gun, threatened their victim, and went through her purse for money. Appellant parked, and the two men each committed sexual battery upon their victim. They also took a necklace that she was wearing. The two men then drove to a wooded area a short distance away, where appellant and the victim exited the car. The victim was permitted to walk away, and appellant shot her in the head, destroying the sight in one eye and impairing her vision in the other. The two then drove away in her car.
>
> The victim was able to summon help, and appellant was arrested and charged with kidnapping, two counts of sexual battery, armed robbery, and attempted first degree murder. He was given a trial by jury, which resulted in convictions on five counts: one for kidnapping without a firearm, two for sexual battery with a firearm, and one each for robbery with a firearm and attempted manslaughter with a firearm.

SUMMARY OF ARGUMENT

The petitioner will show jurisdiction on the two separate issues discussed in this brief. This Court should grant discretionary review of the decision below which incorrectly imposes a three year mandatory minimum sentence upon the petitioner where the statute does not provide for it.

On the second issue this Court has jurisdiction because the trial court melded an instruction of attempted manslaughter which combined the existent form with the non-existent form of attempted manslaughter, and the decision affirming the conviction expressly and directly conflicts with decisions of this Court and the First District Court of Appeal. This Court should grant review because the resulting affirmance of the attempted manslaughter conviction runs afoul of important rules of law which prohibit a conviction of a non-existent crime and which mandate reversal when it cannot be determined which offense the jury convicted the accused of committing.

ARGUMENT

ISSUE I

WHETHER THE DECISION CONFLICTS WITH OTHER DISTRICT COURT OF APPEAL DECISIONS ON WHETHER THE THREE YEAR MANDATORY MINIMUM FOR USE OF A FIREARM APPLIES TO ATTEMPTED MANSLAUGHTER?

In the present case the district court of appeal on June 26, 1985, held that the three year minimum sentencing provision of Section 775.087(2), Florida Statutes, applies to a conviction for attempted manslaughter. The district court of appeal, based upon its holding, affirmed the imposition of said sentence on appellant. However, the express provisions of Section 775.087(2), Florida Statutes (1983), do not provide for imposition of the three year mandatory minimum sentence to cases of manslaughter or attempted manslaughter.

The decision expressly and directly conflicts with the decision of the court in Strahorn v. State, 436 So.2d 447 (Fla. 2d DCA 1983), which held that there is no three year mandatory minimum sentence for attempted manslaughter because manslaughter is not included within the offenses enumerated in Section 775.087(2), Florida Statutes. To the same effect is Rozier v. State, 353 So.2d 193 (Fla. 3d DCA 1977), and the decision of the Fourth District Court of Appeal itself in Jones v. State, 356 So.2d 4 (Fla. 4th DCA 1977).

Therefore, based upon the decisions in Strahorn and Rozier, this Court has jurisdiction in this case due to conflict of decisions.

ISSUE II

WHETHER A VERDICT FOR ATTEMPTED MANSLAUGHTER IS LAWFUL WHEN THE JURY IS INCORRECTLY INSTRUCTED ON THE CRIME BECAUSE VOLUNTARY AND INVOLUNTARY MANSLAUGHTER WERE MELDED IN THE INSTRUCTION AND WHETHER THE RESULTING CONVICTION IS FOR A NON-EXISTENT CRIME THUS REQUIRING A NEW TRIAL?

The District Court of Appeal, Fourth District, in the present case first reversed for a new trial, then affirmed on rehearing, the appellant's conviction for attempted manslaughter. In the initial decision the district court of appeal reversed upon this Court's holding in Taylor v. State, 444 So.2d 931 (Fla. 1983), which held that attempted manslaughter exists when the manslaughter is voluntary but does not include manslaughter committed solely through culpable negligence. In the present case the District Court of Appeal, Fourth District, found in its initial decision that the trial court melded voluntary and involuntary manslaughter into a single instruction, resulting in an incorrect instruction, and based upon the argument made by appellant in closing argument to the jury the harm was prejudicial.

On rehearing the district court of appeal affirmed on this Court's decision in Tillman v. State, 10 F.L.W. 305 (Fla. January 6, 1985).

Since the district court of appeal in the present case found that the trial court did not give a clear instruction on attempted manslaughter which comported with the law, but instead melded the instruction into an incorrect instruction, and since the

appellant was arguing to the jury solely that his offense was the negligent firing of the pistol, and entirely unintended, the district court of appeal found the error to be harmful thus requiring a new trial. In the present case the appellant had been charged with attempted murder, and the state was arguing that the appellant intended to kill the victim, while the appellant was arguing solely that the act was accidental although negligent. Thus, the district court of appeal referred expressly in its decision of July 5, 1984, to the argument made by appellant as requiring a new trial because the jury was given an incorrect instruction and it was impossible to determine the precise offense of which the jury had found the appellant guilty. Since the jury was incorrectly instructed on attempted manslaughter, and since a portion of the instruction was incorrect in that there is no such crime as involuntary attempted manslaughter, the court found the error to be prejudicial.

The decision of the district court of appeal on rehearing filed June 26, 1985, expressly and directly conflicts with the holding of this Court in Achin v. State, 436 So.2d 30 (Fla. 1982), which held that one "may never be convicted of a non-existent crime" and that when the defense counsel in some way invites the error, a new trial is required. In the present case the trial court melded the instruction on voluntary and involuntary manslaughter into a single instruction which resulted, when the arguments of counsel were considered, the appellant was convicted of a non-existent crime because the jury clearly

rejected the state's argument that appellant intended to fire at the victim and accepted the defense argument that the shooting was accidental, in finding the defendant guilty of attempted manslaughter instead of attempted murder. Thus the decision in Achin is directly applicable inasmuch as in Achin the jury was also incorrectly instructed on the difference between extortion and attempted extortion when this Court found that the latter offense was non-existent since it was incorporated within the former.

The decision below also directly and expressly conflicts with this Court's decision in McGahagin v. State, 17 Fla. 665 (1880). In that case this Court held that when a verdict is returned which joins two or more distinct offenses into one so that it was impossible to determine whether the jury verdict intended to find the defendant guilty of one crime or the other, the verdict was fundamentally defective and no judgment could be entered thereon. This decision was followed by the court in Bashans v. State, 388 So.2d 1303 (Fla. 1st DCA 1980), in which there was sufficient evidence to support a guilty verdict on one of two alternate ways in which the single crime could have been committed, but the judgment could not stand as it could not be determined which of the offenses the jury found him guilty of having committed.

In the present case the finding by the district court of appeal that the instruction was incorrect since it melded one form of manslaughter which is non-existent with one form of

manslaughter which, according to the argument of the parties would not be applicable, it was impossible for the district court of appeal, as it expressly stated in the opinion below, to determine whether the jury convicted the petitioner of the existent or non-existent offense.

Based on the above, the decision of the district court below expressly and directly conflicts with the decision cited above, and this Court has jurisdiction.

CONCLUSION

Wherefore, the petitioner having shown jurisdiction on the two separate issues discussed in this brief, this Court should grant discretionary review of the decision below which incorrectly imposes a three year mandatory minimum sentence upon the petitioner where the statute does not provide for it.

On the second issue this Court has jurisdiction because the trial court melded an instruction of attempted manslaughter which combined the existent form with the non-existent form of attempted manslaughter, and the decision affirming the conviction expressly and directly conflicts with decisions of this Court and the First District Court of Appeal as shown above. This Court should grant review because the resulting affirmance of the

attempted manslaughter conviction runs afoul of important rules of law which prohibit a conviction of a non-existent crime and which mandate reversal when it cannot be determined which offense the jury convicted the accused of committing.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

LOUIS G. CARRES
Assistant Public Defender
15th Judicial Circuit
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

Counsel for Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to PENNY H. BRILL, Assistant Attorney General, Counsel for Respondent, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 7th day of August, 1985.

LOUIS G. CARRES
Assistant Public Defender