IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,680

THE STATE OF FLORIDA,

Petitioner,

vs.

EDUARDS WILSON,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF CASE AND FACTS

Respondent accepts the Petitioner's Statement of the Case and Facts as being accurate.

QUESTION PRESENTED

WHEN A CONVICTION FOR ATTEMPTED FIRST DEGREE FELONY MURDER MUST BE VACATED ON AUTHORITY OF *STATE V GRAY*, 654 So. 2d 552 (FLA. 1995), DO LESSER INCLUDED OFFENSES REMAIN VIABLE FOR A NEW TRIAL OR REDUCTION OF THE OFFENSE.

SUMMARY OF ARGUMENT

The Third District Court of Appeal correctly concluded that there can be no lesser included offenses for a non-existent crime. None of the cases cited by the State of Florida support the position that the Third District Court of Appeal was incorrect in concluding that there can be no lesser included offenses for a non-existent crime. Therefore, this Court should affirm the decision of the Third District Court of Appeal.

ARGUMENT

WHEN A CONVICTION FOR ATTEMPTED FIRST DEGREE FELONY MURDER MUST BE VACATED ON AUTHORITY OF *STATE V GRAY*, 654 So. 2d 552 (FLA. 1995), DO LESSER INCLUDED OFFENSES REMAIN VIABLE FOR A NEW TRIAL OR REDUCTION OF THE OFFENSE.

The information charged defendant with attempted first degree felony murder and robbery.[1] The jury convicted defendant of attempted first degree felony murder and robbery. On direct appeal defendant appealed his conviction of attempted first degree felony murder since attempted first degree felony murder was not a crime in State of Florida. On July 19, 1995 the Third District Court of Appeal entered its decision vacating defendant's conviction of attempted first degree felony murder pursuant to this Court's decision in *State v Gray*, 654 So. 2d 552 (Fla. 1995) wherein this Court vacated defendant's conviction for attempted first degree felony murder since there is no such crime as attempted first degree felony murder in the State of Florida.

The State of Florida filed a petition for rehearing with the Third District Court of Appeal wherein the state argued that the court should have remanded the case to the trial court with instructions to adjudicate defendant guilty of one of the lesser included offenses charged in the information or in the alternative remand the case back to the trial court for a new trial on one of the lesser included offenses. The Third District Court of Appeals rejected the state's argument and held the following:

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[1]The information did not allege attempted first degree premeditated murder and the jury was never instructed on attempted first degree felony murder.

> The state moves for rehearing or certification, arguing that on remand there should either be a new trial on lesser included offenses or that the defendant's conviction for attempted first degree felony murder should be reduced to a lesser included offense. We cannot agree. We interpret the Florida Supreme Court's decision in *State v Gray*, 654 So. 2d 552 (Fla. 1995) to require an outright reversal rather than a reduction to a lessor included offense or a new trial on lesser included offenses. Moreover, we see no principled basis for such a reduction because, as a matter of law, there can be no lesser included offense under a non-existent offense such as attempted first degree felony murder. . .

The State of Florida argues in its brief that the Third District Court of Appeal erred when it concluded that there can be no lesser included offenses for a non-existent crime. To support its argument the state relies on cases that do not stand for the proposition that there can be lesser included offenses for a non-existent crime. A review of all the cases cited by the state will reveal that the defendants were all charged with a valid offense that had valid lesser included offenses, and that the defendants were convicted of a lesser included offense that the court subsequently held was a non-existent crime. In none of the cases cited by the state was the defendant charged with a non-existent crime. Therefore, none of the case cited by the state stand for the proposition that when a defendant is charged with a non-existent crime an appellate court has the authority to enter a judgement of guilt on a lesser included offense or remand the case for a retrial on a lessor included offense.

In *Achin v. State,* 436 So. 2d 30 (Fla. 1982) the defendant was charged with extortion. Pursuant to defense counsel's request the jury was instructed on the lesser included offense of attempted extortion. After deliberations the jury convicted

defendant of attempted extortion. This court held that since attempted extortion was a non-existent crime, defendant's conviction for attempted extortion must be vacated. The court went on to hold:

> We find in the present case that because defendant was convicted of a crime which although technically non-existent, was in all elements equal to the main offense, the double jeopardy provision of the fifth amendment does not bar defendant's reprosecution. We conclude that defendant is not entitled to discharge.

Therefore, in *Achin, supra,* this court merely held that when a defendant is convicted of a non-existent lesser included offense the double jeopardy clause does not prohibit a retrial on the original charge if the non-existent lesser included offense had all of the elements of the original valid charge.

Similarly, in *Jordan v. State*, 438 So. 2d 825 (Fla. 1983) the defendant was charged with resisting arrest with violence, a valid existing crime and was convicted for the non-existing crime of attempted resisting arrest with violence. This court once again ruled that when a defendant is convicted of a lesser included offense which is a non-existing crime a retrial on the original charge is not barred by double jeopardy if the non-existing crime has all of the same elements as the original valid charge.

There is nothing in this Court's holdings in *Jordan v. State, supra* or *Achin v. State, supra*, which stands for the proposition that there can be lesser included offenses for a non-existent crime. In *Jordan* and *Achin*, unlike this case, the information charged defendants with valid crimes and this court merely held that the lesser included offense that defendant was convicted of was not a valid crime and

double jeopardy did not prohibit retrying defendant on the valid crime.

The case the state claims is identical to the facts in this case is *Hieke v. State*, 605 So. 2d 983 (Fla. 4th DCA 1992). A review of the facts and holding in *Hieke, supra,* will once again reveal that this case does not stand for the absurd proposition that there can be lesser included offenses for a non-existent crime. In *Hieke, supra*, the defendant was charged with solicitation to commit first degree murder, a valid existing crime in the State of Florida. The jury was given the opportunity to convict defendant of the following lesser included offenses of solicitation to commit first degree murder: (1) solicitation to commit third degree murder; (2) aggravated battery and (3) battery. After deliberations the jury convicted defendant of solicitation to commit third degree murder. The court of appeals vacated the defendant's conviction for solicitation to commit third degree murder since this was a non-existent crime. The court remanded the case for a new trial on aggravated battery and simple battery since these two charges were valid lesser included offenses of solicitation to commit first degree murder which was the crime charged in the information.

It is clear that the court in *Hieke, supra*, did not hold that there can be lesser included offenses for a non-existent crime. In *Hieke, supra*, unlike this case, the information charged a valid crime and the court remanded the case for a new trial on the lesser included offenses of this valid charge.[2] Therefore, the state has cited no

[2]The remaining cases cited by the state to support its argument that there can be lesser included offenses for a non-existent crime are all cases similar to *Achin, supra* and *Jordan, supra* wherein the defendant was charged with a valid offense and the jury convicted defendant of a non-existent lesser included offense and the appellate court held that double jeopardy did not prevent retrial on the

cases that hold that there can be lesser included offenses for a non-existent crime.

A review of the law concerning lesser included offenses along with when an appellate court can reduce a charge to a lesser included offense will clearly establish why the Third District Court of Appeal was correct in their conclusion that there can be no lesser included offenses for a non-existent crime.

The law in Florida is well settled that in a criminal case there are two categories of lesser included offenses upon which a trial court is authorized to instruct the jury under the charged offense in an indictment or information: (1) a necessarily included offense, Fla.R.Crim.P. 3.510(b), and (2) a permissive included offense [including any attempt to commit the charged offense and some lesser degree offenses], Fla.R.Crim.P. 3.510, 3.490.

Each of these two categories of lesser included offenses have certain requirements which, under existing case law, must be met before being considered proper lesser offenses. As to the first category, a necessarily included offense, Fla.R.Crim.P. 3.510(b), is by definition "an essential aspect of the major offense," one in which "the burden of proof of the major crime cannot be discharged, without

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original valid charge. Once again none of these cases hold that there can be lesser included offenses for a non-existent crime. See *State v. Sykes*, 434 So. 2d 325 (Fla. 1983)(permitting retrial on theft charges after conviction of non-existent lesser charge of attempt grand theft overturned); *Ward v. State,* 446 So. 2d 267 (Fla. 2d DCA 1984)(permitting retrial on forgery charge after conviction for non-existent lesser offense of attempted uttering a forged instrument was overturned); *Cox v. State*, 443 So. 2d 1013 (Fla. 5th DCA 1984)(permitting retrial on insurance fraud charge after conviction for non-existent lesser offense of attempted insurance fraud was overturned); *Brown v. State,* 550 So. 2d 142 (Fla. 1st DCA 1989)(permitting retrial on solicitation charge after conviction for non-existent lesser offense of attempted solicitation was overturned.

proving the lesser crime as an essential link in the chain of evidence," *Brown v. State*, 206 So. 2d 377, 382 (Fla.1968); this means that the statutory elements of a necessarily included offense must be subsumed within the statutory elements of the charged offense. A trial judge has no discretion on whether to instruct the jury on a necessarily included offense; upon request of either party, the judge must so charge the jury once it is determined that the offense is a necessarily included offense, even if the evidence shows that this lesser offense could not have been committed without also committing the charged offense. State v. Wimberly, 498 So. 2d 929 (Fla.1986).

As to the second category, a permissive lesser included offense is, in its purest form, the same as a necessarily included offense except that it contains one or more statutory elements which the charged offense does not contain. Consequently, such an offense "may or may not be included in the offense charged, depending upon, (a) the accusatory pleading, and (b) the evidence at the trial." *Brown v. State*, 206 So. 2d at 377, 383 (emphasis in original).

In determining whether a crime is either a category one or two lesser included offense the court must compare the elements of the charged crime with the potential lesser included offense. Since attempted first degree felony murder is a non-existent crime there can be no elements of this crime. If the charging document charges a non-existent crime that has no elements it is impossible for a court to determine lesser included offenses. Therefore, the Third District Court of Appeal correctly concluded that remanding this case for a trial on lesser included offenses of attempted first degree murder would be improper.

The state in its brief, alternatively, requests this Court to enter a judgment against defendant for attempted second degree murder since this is a lesser offense of attempted first degree felony murder. This Court has consistently recognized that an appellate court can not reduce a charge to a lesser included offense unless the lessor included offense is a category one necessary lesser included offense. See *Taylor v. State*, 608 So. 2d 804 (Fla. 1992)(Section 932.34 only allows an appellate court to reduce a charge if the lesser included offense is a necessary lesser included offense); *Gould v. State*, 577 So. 2d 1302 (Fla. 1991)(Express and unambiguous language of section 924.34 establishes that an appellate court can only reduce a charge to a lesser included offense if the lesser included offense is a necessary lesser included offense).[3]

As previously argued a necessarily included offense, Fla.R.Crim.P. 3.510(b), is by definition "an essential aspect of the major offense," one in which "the burden of proof of the major crime cannot be discharged, without proving the lesser crime as an essential link in the chain of evidence," *Brown v. State*, 206 So. 2d 377, 382 (Fla.1968); this means that the statutory elements of a necessarily included offense

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[3] Section 924.34, Florida Statutes (1985) provides:

> When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish his guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense.

Emphasis added.

must be subsumed within the statutory elements of the charged offense.

Therefore, in order for this court to reduce defendant's conviction from attempted first degree felony murder to attempted second degree murder this court must hold that the statutory elements of attempted second degree murder are subsumed in the statutory elements of attempted first degree felony murder. Since there can be no statutory elements of a non-existent crime there obviously can be no lesser included offenses of that nonexisting crime. Therefore, the Third District Court of Appeal correctly concluded that under Florida law there can be no lesser included offenses for a non-existing crime.

The Third District Court of Appeal's conclusion is also supported by a decision of the Oregon Court of Appeal in the case of *Oregon v. Woodley*, 746 P.2d 227 (Oregon Court of Appeals 1987). In *Woodley, supra*, the defendant was charged with sexual abuse in the second degree. The jury found defendant guilty of attempted sexual abuse in the second degree. On appeal the defendant argued that the indictment failed to allege a valid crime. The state argued that even if the indictment was technically insufficient to charge sexual abuse in the second degree, reversal was not required, because there was sufficient evidence to convict the defendant of the lesser included offense of attempted sexual abuse in the second degree. The Oregon Court of Appeal rejected the state's argument and concluded that "If the indictment was insufficient to charge the offense that it purported to state, then it was insufficient to support a trial, let alone a conviction for an offense supposedly included within a charge that was improperly alleged." Therefore, the court recognized that

there can be no lesser included offense if the information fails to allege a valid crime.

In this case since the information only alleged the non-existent crime of attempted first degree felony murder, the Third District Court of Appeals correctly concluded that there can be no lesser included offenses to this non-existent crime. Since there are no lesser included offenses to a non-existent crime the court also correctly concluded that it was legally impossible to grant the state's request to have the court reduce defendant's conviction to attempted second degree murder or in the alternative remand the case for a new trial on lesser included offenses. Therefore, this Court should affirm the Third District Court of Appeal's decision and hold that there can be no lesser included offenses for a non-existent crime.

CONCLUSION

Based upon the foregoing, this Honorable Court is respectfully requested to affirm the judgment of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to RICHARD L. POLIN, Assistant Attorney General, Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33101 this 5th day of December, 1995.

_____
ROBERT KALTER
Assistant Public Defender