IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,680

THE STATE OF FLORIDA,

Petitioner,

vs.

EDUARDS WILSON,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, N921
P.O. Box 013241
Miami, Florida 33101
(305) 377-5441

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STATEMENT OF THE CASE AND FACTS

The State relies on the Statement of the Case and Facts as set forth in its Initial Brief of Petitioner.

ARGUMENT

LESSER INCLUDED OFFENSES REMAIN VIABLE FOR A NEW TRIAL OR REDUCTION OF THE OFFENSE WHEN A CONVICTION FOR ATTEMPTED FIRST DEGREE FELONY MURDER IS VACATED PURSUANT TO STATE V. GRAY, 654 So. 2d 552 (Fla. 1995).

The State, in its Initial Brief of Petitioner herein, relied upon several cases which stood for the proposition that after a conviction for a nonexistent offense, it is proper to remand the case for retrial on lesser included offenses. See, e.g., Achin v. State, 436 So. 2d 30 (Fla 1982); Hieke v. State, 605 So. 2d 983 (Fla. 4th DCA 1992). The essence of the Respondent's reply to such cases is that they are inapplicable, because, in those cases, where the defendants were convicted of nonexistent offenses, those invalid convictions had been for charges which had been deemed, by the trial courts and convicting juries, to be lesser included offenses of the principal charge of the charging document. Furthermore, the Respondent asserts, that in those cases the principal charge in the charging document was not a charge for a nonexistent offense. Thus, the Respondent contends that in those cases, there could still be lesser included offenses of the principal charge from the charging document, as that was not a nonexistent offense. In the Respondent's own language: "In none of the cases cited by the state was the defendant charged with a non-existent crime. Therefore, none of the cases 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 judgment of guilt on a lesser included offense or remand the case for a retrial on a lessor [sic] included offense." See, Brief of Respondent, p. 5.

While the State disagrees with the tenuous distinction asserted by the Respondent, and will embellish upon that argument subsequently, the State would first argue that even if the Respondent's tenuous distinction is accepted as a credible one, the Respondent, on the terms of his own argument, has effectively admitted that this case should be either remanded for retrial or reduced to a proper lesser included offense. The reason for this inevitable conclusion is that the charging document, in the instant case, did not charge a nonexistent offense. The charging document clearly charged the perfectly valid offense of attempted first degree murder. The charging document asserted that:

> . . . EDUARDS WILSON, on or about JUNE 12, 1993, . . . did unlawfully and feloniously attempt to kill a human being, to wit: ELAN LOUIS, while engaged in the perpetration of, or in an attempt to perpetrate any robbery, by DISCHARGING A FIREARM AT ELAN LOUIS, CAUSING A PROJECTILE TO STRIKE AND/OR ENTER THE BODY OF ELAN LOUIS, with a firearm, in violation of s. 782.04(1) and s. 777.04 and s. 775.087, Fla. Stats. . . .

(R. 3). In charging attempted first degree murder, while citing sections 782.04(1) and 777.04, Florida Statutes, the State had simply charged attempted first degree murder. Section 782.04(1), Florida Statutes, is consistent with both attempted first degree premeditated murder and with attempted first degree felony murder. The charging document did not specify the sub-subsection, 782.04(1)(a)(2), which might have limited the charge to attempted first degree felony murder, to the exclusion of attempted first degree premeditated murder.

Consistent with the foregoing contention, that the charging document charged a valid offense, it should further be noted that the defendant never argued, in either the trial court or the District Court of Appeal, that the charging document was somehow defective in charging attempted

murder. The failure to raise any such attack in the trial court precludes the defendant from attacking the sufficiency of the information in any appellate proceedings. See, e.g., DuBoise v. State, 520 So. 2d 260, 265 (Fla. 1988). This is especially true where, as here, the charging document specifically references the appropriate statute which constitutes the charged offense. Id. Thus, in the absence of any motion to dismiss the information on the grounds of any alleged deficiency, it must be concluded that the defendant herein fully accepted the validity of the charging document both as to the charged offense of attempted first degree murder and any lesser included offenses thereof. It must similarly be noted that the defendant, in the trial court proceedings, never asserted, during the charge conference, that it was improper to submit lesser included offenses to the jury on the basis of any alleged defect in the charging document.

Furthermore, as this Court has repeatedly noted, a charging document which charges first degree murder is deemed sufficient, in and of itself, to permit alternative theories of premeditated murder and felony murder to go to the jury, even without specifying those alternatives in the charging document. See, e.g., Armstrong v. State, 642 So. 2d 730, 737 (Fla. 1994); Lovette v. State, 636 So. 2d 1304 (Fla. 1994); Young v. State, 579 So. 2d 721 (Fla. 1991); O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983). Likewise, a charging document which simply charges attempted first degree felony murder would have sufficed to permit alternative theories to go to the jury, during such time period as Amlotte v. State remained the law of this State.[1] In view of the foregoing, the

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[1] Although cases such as Armstrong and Lovette involved charges of premeditated murder supporting the alternative theory of felony murder, there is no reason why the reverse should not hold true as well. The underlying reasoning of those cases appears to be that felony murder is, in effect, a form

only possible conclusion is that the charging document, by charging attempted first degree murder, was consistent with alternative theories of attempted first degree murder, and therefore charged a perfectly valid, existent offense: attempted first degree murder. Even though one of the alternative theories is no longer valid, the charging document, in and of itself, was still fully consistent with the valid, existent alternative.

Thus, when the Respondent attempts to argue that the cases relied upon by the State are applicable only in the context of a charging document which charged a valid, existent offense, notwithstanding a conviction for a nonexistent offense, the Respondent has unwittingly, albeit effectively, fully admitted that the instant case can properly be remanded for retrial for any lesser included offenses of the originally charged existent offense of attempted first degree murder.

However, as previously noted, the State does not accept the premise of the Respondent's argument - i.e., that the cited cases are applicable only when the charging document charged an existent offense which had resulted in a conviction for a lesser, nonexistent offense. Even if the charging document were viewed as charging only attempted felony murder, at the time of the trial that was a valid, existing offense, for which the remaining lesser offenses which went to the jury were properly treated as lesser included offenses. While this Court may conclude, as it did

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of premeditated murder, since the intent to commit the underlying felony provides the basis for presuming the existence of premeditation. See, Knight v. State, 338 So. 2d 201, 204 (Fla. 1976); Wharton's Criminal Law, Volume 2, s. 147 (15th ed. 1994) ("The malice which plays a part in the commission of the felony is transferred by the law to the homicide. As a result of the fictional transfer, the homicide is deemed committed with malice. . . .").

in State v. Gray, 654 So. 2d 552 (Fla. 1995), that attempted felony murder is no longer an offense in Florida, it cannot conclude that attempted felony murder was not an offense at the time of the trial herein; it cannot conclude that the various lesser offenses were not proper lesser included offenses of attempted felony murder at the time of the trial herein.

The ultimate question, however, and one which the Respondent has ignored, is the question of why a defendant, such as Wilson, who intentionally shot another person during the course of a robbery attempt, should receive a free ride as to all possible attempted homicide/aggravated battery charges simply because this Court has changed its mind as to the existence of the offense of attempted felony murder. There is no dispute as to whether the jury found that this defendant shot the victim of the robbery.[2] At the time that the charging document was filed, the State, to the extent that it relied on attempted felony murder was following the law as it existed at the time. The State did not have any reason, at that time, to draft the charging document in any contrary manner, for the purpose of ensuring that lesser offenses such as attempted second degree murder or attempted voluntary manslaughter could go to the jury, either at the time of the trial herein, or in the event of any possible retrial after an appeal. Under circumstances where the State has not engaged in any impropriety, either in charging the defendant or in prosecuting the trial, the justice which the defendant has received, in the form of the vacating of a conviction for a now-decreed nonexistent offense, should not be converted into an injustice for the remainder of our

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[2] The sole defense advanced at trial was that the witnesses misidentified the perpetrator. As the jury obviously rejected that theory, the jury obviously concluded that this defendant shot the victim.

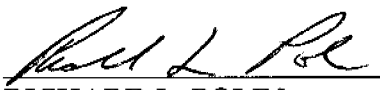
society, in the form of an unwarranted discharge of the defendant from any and all forms of attempted homicide arising out of the charged incident. That would constitute the ultimate absurdity: penalizing the State for following the law, as it existed, by not merely overturning the conviction for a nonexistent offense, but extending that windfall to all other lesser offenses which were proper lesser included offenses at the time of the trial herein. If common sense has any legitimate role in the jurisprudence of this State, it compels the conclusion that the Respondent herein, as a result of the lower Court's opinion, has obtained a truly unwarranted windfall.

CONCLUSION

Based on the foregoing, the decision of the District Court of Appeal should be quashed, in part, with directions to either reduce the overturned conviction for attempted felony murder to a conviction for attempted second degree murder, or, alternatively, to remand the case to the trial court for all offenses which, at the time of the trial herein, were lesser included offenses of attempted felony murder.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



RICHARD L. POLIN
Florida Bar No. 0230987
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, N921
P.O. Box 013241
Miami, Florida 33101
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner on the Merits was mailed this 27th day of December, 1995, to ROBERT KALTER, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN