IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,739

DCA NO. 94-1732

THE STATE OF FLORIDA,

Petitioner,

-vs-

GILBERTO ALFONSO,

Respondent.

ON APPLICATION FOR DISCRETIONARY JURISDICTION

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The respondent/defendant accepts the petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The decision of the Third District Court of Appeal correctly concluded there can be no lesser included offenses for a nonexistent crime. None of the cases cited by the state support the state's position that it is permissible to reduce the conviction for a nonexistent crime to a lesser included offense or remand for a retrial on lessers of the nonexistent crime. This Court, in State v. Gray, 654 So.2d 552 (Fla. 1995), expressly held there is no such crime as attempted first degree felony murder and reversed the defendant's conviction. Consequently, this Court should decline to accept jurisdiction of this case or in the alternative, should affirm the decision of the Third District reversing the defendant's conviction for the nonexistent crime of attempted first degree felony murder under Gray and discharging the defendant from conviction on that count.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL CORRECTLY CONCLUDED THERE CAN BE NO LESSER INCLUDED OFFENSES FOR A NONEXISTENT CRIME AND CONSEQUENTLY, THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION OR SHOULD AFFIRM THE DECISION OF THE THIRD DISTRICT REVERSING THE DEFENDANT'S CONVICTION FOR THE NONEXISTENT CRIME OF ATTEMPTED FIRST DEGREE FELONY MURDER UNDER STATE v. GRAY, 654 So.2d 552 (FLA. 1995), AND DISCHARGING THE DEFENDANT ON THAT COUNT.

The respondent/defendant was charged by information in count 2 with the attempted first degree murder with a firearm of Jim Fernandez in violation of §782.041(1), 777.04 and §775.089, Florida Statutes (1993). (R: 2) The defendant was charged as a principal for this offense actually committed by the codefendant Roberto Sotolongo, who was tried separately. (T: 1, 123) The evidence at trial established the defendant and the codefendant got out of a truck and walked over to the three victims as they were getting out of their car to buy drugs from a drug house. (T: 141-148, 193-198, 215) The evidence showed that the defendant walked up to Jessie Rodriguez, who was standing on the sidewalk with a television in his arms to trade for drugs, put his hand on Jessie's back without saying a word, described as a "don't move situation," and stayed there momentarily while the codefendant robbed the other two victims still in the car. (T: 147-149, 151-153, 192-193, 218) It is undisputed that the codefendant took Dario Hoyas's wallet and shot Jim Fernandez in the car, and that the defendant remained on the sidewalk and did not participate in the shooting. (T: 151-153, 192-193, 218-219) It is undisputed that as soon as the codefendant's shots rang out, the defendant ran for the truck without stopping. (T: 151-153, 191-195)

Although the defendant was charged in count 2 with attempted first degree murder by premeditation and/or by felony murder in the commission of the robbery, the state announced during trial that it was proceeding only on the felony murder

theory and not by premeditated design. (R: 2; T: 334-335) The defendant moved to dismiss the attempted felony murder in that attempted felony murder was not a crime. (T: 334-335, 412-414, 489) The judge denied the motion on the basis of Amlotte v. State, 456 So.2d 448 (Fla. 1984). (T: 334-335) The judge instructed the jury on attempted first degree felony murder; no instruction was given on premeditated first degree murder. (T: 473-479) The judge also instructed the jury as requested on the lesser offenses of attempted third degree murder and attempted manslaughter. (T: 473-479, 493-499) The jury returned a verdict of guilty as charged to the attempted first degree felony murder of Jim Fernandez in count 2 and the judge adjudicated the defendant guilty and sentenced him to 15 years in prison. (R: 30-38; T: 515, 533)[1]

On direct appeal, the defendant challenged his conviction of attempted first degree felony murder on the grounds it was not a crime in the State of Florida. On July 19, 1995, the Third District Court of Appeal entered its decision reversing the defendant's conviction for attempted first degree felony murder pursuant to this Court's decision in State v. Gray, 654 So.2d 552 (Fla. 1995), which reversed a defendant's conviction for attempted first degree felony murder and held there was no such crime in the State of Florida.

The state filed a petition for rehearing with the Third District and argued the appellate court should have remanded the case to the trial court with directions to adjudicate the 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

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[1]The defendant was also charged with the attempted first degree murder of Jessie Rodriguez (count 1), who was standing on the sidewalk with the television, and the jury acquitted him of that count. (R: 1, 29; T: 516) The defendant was also charged with and found guilty of the attempted robbery of Jim Fernandez (count 3), the armed robbery of Dario Hoyas (count 4), and the shooting into an occupied vehicle (count 5). (R: 1-5; 30-33; T: 515-516) The judge imposed a 15 year prison sentence on all counts to run concurrently. (R: 34-38; T: 533)

trial on one of the lesser included offenses. The Third District rejected the state's argument and stated as follows:

> 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 lesser included offense or a new trial on lesser included offenses. Moreover, we see no principled basis for such reduction or new trial because, as a matter of law, there can be no lesser included offenses under a non-existent offense such as attempted first degree felony murder. . . . (emphasis supplied)

The Third District then certified the question to this Court as follows:

> 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?

In its brief on the merits in this Court, the state argues the Third District erred when it concluded there can be no lesser included offenses for a nonexistent crime. In support of its position, the state relies on a number of cases, Hieke v. State, 605 So.2d 983 (Fla. 4th DCA 1992), Achin v. State, 436 So.2d 30 (Fla. 1983), Jordan v. State, 438 So.2d 825 (Fla. 1983), State v. Sykes, 434 So.2d 325 (Fla. 1983), Ward v. State, 446 So.2d 267 (Fla. 2d DCA 1984), Cox v. State, 443 So.2d 1013 (Fla. 5th DCA 1984), and Brown v. State, 550 So.2d 142 (Fla. 1st DCA 1989), which it claims permit a retrial on lesser included offenses when the appellate court reverses a conviction for a nonexistent offense. A review of these cases, however, shows they do not support the state's position.

In Achin v. State, 436 So.2d 30 (Fla. 1982), the defendant was charged with extortion, a valid existing crime. Pursuant to the defendant's request, the jury was instructed on the asserted "lesser included offense" of attempted extortion. The jury then convicted the defendant of this attempted extortion. The defendant challenged

his conviction for attempted extortion and this Court held that attempted extortion was a nonexistent offense because it was already included in the main offense of extortion. This Court further held that "no one may be convicted of a non-existent crime" and reversed the defendant's conviction. Id., at 31. The state then claimed it could retry the defendant for the main offense of extortion. The defendant argued that because the jury found him guilty of what they thought was a proper lesser included offense, he was acquitted of the main offense and that double jeopardy barred his retrial for the main offense. This Court rejected the argument, stating that under the circumstances, since the main offense of extortion included by its statutory language the offense of attempted extortion, "extortion" is in itself an attempt and "attempted extortion" is "extortion." Id., at 32. Thus, the elements for both offenses were identical and the guilty verdict on the asserted lesser offense could not imply an acquittal of the greater. This Court went on to hold:

> In Green, the Supreme Court said conviction of a lesser included offense acquitted defendant of the main offense. We find in the present case that because defendant was convicted of a crime which, although technically nonexistent, 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. Id., at 32.

Similarly, in Jordan v. State, 438 So.2d 825 (Fla. 1983), the defendant was charged with resisting arrest with violence, a valid existing crime. The jury was charged with attempted resisting arrest with violence as a lesser included offense and returned a guilty verdict of that lesser. This Court held that in fact, the resisting arrest with violence statute itself "makes the attempt a part of the crime. Thus, the crime for which petitioner was convicted does not exist." Id., at 826. As in Achin, the elements of the original valid offense included the elements of the attempt; the elements were the same. Consequently, this Court once again held that, as in Achin, when a defendant is convicted of an asserted "lesser included offense" which

is a nonexistent offense, double jeopardy does not prevent retrial on the original valid charge if the nonexistent lesser offense included all the elements of the valid offense originally charged.

Likewise, in State v. Sykes, 434 So.2d 325 (Fla. 1983), the defendant was charged with the original valid offense of grand theft and the defendant was convicted of the purported "lesser offense" of attempted grand theft. In fact, attempted grand theft is included in the statutory definition of grand theft; grand theft in itself includes an "attempt" to commit grand theft and the elements are the same. This Court again ruled the defendant was convicted of a nonexistent offense, his conviction had to be reversed, but because the original valid crime included the attempted grand theft, the defendant could be retried on the original theft under Achin. See also Ward v. State, 446 So.2d 267 (Fla. 2d DCA 1984) (defendant charged with uttering a forged instrument and convicted of attempted uttering; this Court held that uttering includes the offense of attempted uttering and that attempted uttering was therefore a nonexistent crime but defendant could be retried on original charge of uttering); Cox v. State, 443 So.2d 1013 (Fla. 5th DCA 1983) (defendant charged with insurance fraud and convicted of attempted insurance fraud; held that since insurance fraud statute included in its definition the attempt to commit insurance fraud, the defendant was convicted of a nonexistent crime but could be retried on original valid offense); Brown v. State, 550 So.2d 142 (Fla. 1st DCA 1989) (defendant charged with solicitation to introduce contraband into correctional institution and convicted of its attempt; held that since solicitation statute implicitly included its attempt, the defendant was convicted of a nonexistent crime but could be retried on original valid offense).

Thus, the foregoing cases relied upon by the state do not stand for the state's proposition there can be valid lesser included offenses for an original nonexistent crime. The state's cases are readily distinguishable and only hold that double

jeopardy does not bar retrial on an original valid offense when the defendant is convicted of a nonexistent lesser offense whose elements are already contained within and identical to the original valid offense charged.

The last case relied upon by the state, Hieke v. State, 605 So.2d 983 (Fla. 4th DCA 1992), is also very similar to its other cases and equally distinguishable from the present case. In Hieke, the defendant was charged with solicitation to commit first degree murder, a valid existing crime. The jury was instructed on three lesser included offenses: aggravated battery, battery and the asserted lesser of solicitation to commit third degree murder. The jury convicted the defendant of solicitation to commit third degree murder. The appellate court held there was no such offense as solicitation to commit third degree murder and reversed the defendant's conviction. The appellate court then remanded the case for a retrial on the valid lesser offenses of aggravated battery and battery, which were valid lessers of the original valid charge of solicitation to commit first degree murder.

Thus, Hieke does not hold there can be lesser included offenses for a nonexistent crime. Hieke did not remand for a retrial on lesser offenses of a nonexistent offense. Hieke remanded for a retrial on valid lesser offenses of the original valid offense charged in the information.[2] In contrast, in the present case, the state seeks a retrial on purported lesser offenses of an invalid nonexistent offense charged in the information. There is no authority for such action.

In summary, the key distinction between the state's cases and this case is that in the state's cases, the defendants were all charged with a valid offense that had valid lesser included offenses but the defendants were convicted of another "lesser

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[2]The defendant could not be retried on that original valid offense charged, solicitation to commit first degree murder, because by convicting him of a lesser offense, the jury impliedly acquitted him of the greater charge. Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); Achin v. State, 436 So.2d 30, 32 (Fla. 1982).

included offense" that the appellate court subsequently held was a nonexistent crime. In the present case, however, the defendant was charged with the nonexistent crime itself and convicted as charged of the nonexistent crime. In the state's cases, it was the asserted "lesser offense" that was declared nonexistent and the appellate court permitted a retrial on the original valid charge or on valid lessers of the original valid charge. In this case, however, it is the original charge itself that was declared invalid and nonexistent. In the state's cases, the information charged a valid offense for which there could be valid lessers. Here, the information did not charge a valid offense and there can be no valid lessers of an invalid offense.[3]

The reason there can be no valid lessers of an invalid offense is because in order to determine valid lesser offenses, the court must compare the elements of the charged crime with the potential lesser offense. When the charged crime is nonexistent, there are no elements to consider. Florida law is well settled there are two categories of lesser included offenses which the trial court is authorized to instruct the jury under the charged offense: (1) a necessarily included offense, see 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], see Fla.R.Crim.P. 3.510 and 3.490. Each of these two categories 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 is by definition "an essential aspect of the major offense," Fla.R.Crim.P. 3.510(b), one in which "the burden of proof of the major crime cannot be discharged, without proving the lesser

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[3]As previously noted, although the information charged the defendant with attempted first degree murder by both premeditation and by felony murder, the state announced during trial that it was proceeding only on the felony murder theory and not by premeditated design. (T: 334-335)

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 trial." Brown v. State, 206 So.2d 377, 382 (Fla. 1968).

Thus, 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 nonexistent crime, there can be no elements of this crime. If the charging document charges a nonexistent crime that has no elements, it is impossible for a court to determine lesser included offenses. And logically and practically speaking, it is simply an oxymoron, a self-contradiction, to have a valid lesser included offense of a nonexistent crime. The Third District correctly concluded there was "no principled basis" for reduction to a lesser offense 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."[4]

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[4]The Third District's conclusion is supported by a decision from the Oregon Court of Appeal in State v. Woodley, 746 P.2d 227 (Ore. App. 1987), rev. other grounds,

In this case, the state took the case to the jury on an information that alleged the nonexistent crime of attempted first degree felony murder. The state expressly proceeded forward solely on the attempted first degree felony murder theory. The Third District correctly concluded there can be no lesser included offenses to this nonexistent crime. Since there are no lesser included offenses to a nonexistent crime the court also correctly concluded that it was legally impossible to grant the state's request to have the court reduce the defendant's conviction to attempted manslaughter or in the alternative, remand the case for a new trial on lesser included offenses.[5] Therefore, this Court should decline to accept jurisdiction of this case or,

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State v. Woodley, 760 P.2d 884 (Ore. 1988). In Woodley, the defendant was charged with sexual abuse in the second degree. The jury found the defendant guilty of attempted sexual abuse in the second degree. On appeal, the defendant argued the indictment failed to allege a valid crime and the court of appeal agreed. 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 court rejected the state's argument and concluded that "[i]f 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." Thus, the court recognized there can be no lesser included offense if the indictment failed to allege a valid crime.

[5]The state has not requested a reduction to attempted third degree felony murder since that is another attempted felony murder. The state has also not requested a reduction to attempted second degree murder since the jury was not instructed on that offense.

And although the state suggested in its brief that on retrial, the state should be permitted to prosecute the defendant for attempted first degree premeditated murder, basic principles of double jeopardy prohibit this. Both attempted first degree premeditated murder and attempted first degree felony murder are violations of the same statute, section 782.04(1). When the state charges a defendant with a violation of section 782.04(1) under both theories and the jury is instructed on both theories, only one conviction may be entered for the murder or attempted murder, even if there is evidence to support both theories. And if the state charges the murder or attempted murder on only one theory, either premediated murder or felony murder but not both, and the defendant is acquitted or the appellate court reverses the conviction for insufficient evidence, double jeopardy prohibits the state from bringing a new charge against the defendant on the other theory.

Thus, first degree murder or attempted first degree murder is one offense and when the state abandons one of the theories mid-trial and the defendant's conviction based on the state's other theory is subsequently reversed by the appellate court as a nonexistent crime, double jeopardy prohibits the state from reviving the discarded

in the alternative, should affirm the Third District's decision and hold there can be no lesser included offenses for a nonexistent crime.

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theory or recharging the defendant on it.

CONCLUSION

For the foregoing reasons, the respondent requests that this Court decline to accept jurisdiction of this case or, in the alternative, affirm the Third District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, P.O. Box 013241, Miami, Florida 33101, this 18th day of December, 1995.

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