IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,739

THE STATE OF FLORIDA,

Petitioner,

vs.

GILBERTO ALFONSO,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

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

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Gilberto Alfonso was charged, by information, with two counts of attempted first degree murder with a firearm, two counts of attempted robbery with a firearm, and one count of shooting into an occupied vehicle. (R. 1-5). A codefendant, Roberto Sotolongo, was similarly charged, but was tried separately. (R. 1; T. 1, 123). Count 2, the charge of attempted murder as to victim Jim Fernandez, alleged that the defendants, Alfonso and Sotolongo, "did unlawfully and feloniously attempt to kill a human being, to wit: JIM FERNANDEZ, from a premeditated design to effect the death of said person or any human being, and/or while engaged in the perpetration of, or in an attempt to perpetrate any robbery, by shooting JIM FERNANDEZ in the BODY and/or HEAD, with a firearm . . . ." (R. 2).

Jesus Rodriguez, Jim Fernandez, and Dario Hoyas had been partying on the night of August 13, 1993, and in the early morning hours of August 14th, they decided to go buy some more drugs, using Jim Fernandez's television to pay for it. (T. 139-41, 211-13). According to Rodriguez, they were going to buy some marijuana; according to Fernandez, they were going to buy some cocaine. Id. After driving to the location where the purchase was to be made, Rodriguez took the television, left the vehicle they had arrived in, and started walking towards the house where the purchase was to be made. (T. 144-45). Fernandez remained in the car at this time. (T. 216). Rodriguez then saw the defendant and another man come up from behind, as the defendant put a

hand on Rodriguez's shoulder and back. (T. 145, 147).[1] The defendant's accomplice pulled out a gun, and the defendant said, "If anybody moves here, they are going to die." (T. 148). The gunman then reiterated this, and Rodriguez heard gunfire, as the gunman was demanding money. (T. 151-52).

According to Rodriguez, three shots had been fired, two of them at Rodriguez, who was not hit. (T. 152-54). According to Fernandez, who had remained in the car, the man with the gun approached him, telling him to empty his pockets. (T. 217). After Fernandez showed that his wallet was empty and responded that he did not have anything, he was shot in the hand. (T. 217, 219). After the codefendant, Sotolongo, fired the shots, the defendant, Alfonso, proceeded to go to the truck which he fled in. (T. 154-55). Sotolongo remained at the scene for approximately an additional 15 seconds, before proceeding to join Alfonso in the truck. (T. 155-56).

After the State rested, the defendant's motion for judgment of acquittal was denied. (T. 331, 337). The defendant then testified on his own behalf, stating that he went to the scene of the shooting to buy some crack, and, after arriving there, he heard some shots. (T. 340-41). The defendant stated that he did not know Sotolongo and that Sotolongo coerced him into driving from the scene by threatening to kill him. (T. 341, 347-48). While the defendant claimed that Sotolongo coerced him into fleeing from the scene of the crime as well as from the pursuing police, the

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[1] According to Detective Deegan, one of the investigating officers, in an initial statement which the defendant gave to the police the defendant "said that he placed his hand on the victim's shoulder and stood there." (T. 312). However, in the subsequent recorded statement, the defendant "couldn't remember if he placed his hand on the victim's shoulder or not." (T. 312).

evidence reflected that after a lengthy pursuit of the defendant's vehicle by the police, the defendant ultimately crashed the vehicle, at a location approximately four or five blocks away from his residence. (T. 259). Furthermore, the defendant, while claiming that he acted under duress from Sotolongo, proceeded to flee from the police after his vehicle crashed and the police caught up to the vehicle. (T. 260-61). The defendant, driving the vehicle used to effect the flight, had led the police on a lengthy chase, accelerating after the police turned on the sirens and flashing lights. (T. 249-50, 279-83). Even as the armed officer approached the defendant, and the defendant stated that he was surrendering, the defendant still proceeded to get past the officer and then proceeded to struggle with the officer who was attempting to effectuate the arrest. (T. 261).

The State's case, on the attempted murder charges, went to the jury solely on the theory of attempted felony murder and not on attempted premeditated murder. (T. 334, 467-80). As possible lesser included offenses, the jury was instructed on attempted third degree murder, which was a lesser degree of attempted felony murder based on an unenumerated underlying felony other than the charged robbery, and attempted manslaughter. (T. 467-80). The jury was not instructed on either attempted first degree premeditated murder or attempted second degree murder.

The defendant was acquitted on the charge of attempted first degree murder of Jessie Rodriguez, but convicted of attempted first degree murder with a firearm as to Jim Fernandez, the victim who had been shot in the hand. (T. 515-16; R. 29-33). The defendant was also found guilty of two counts of armed robbery and shooting into an occupied vehicle. (R. 30-33; T. 515-16). The defendant was sentenced as an habitual offender to 15 years in prison, on all counts, to run

concurrently. (R. 34-38; T. 533).

On appeal to the Third District Court of Appeal, the Court's initial decision, which preceded this Court's decision in Gray v. State, 654 So. 2d 552 (Fla. 1995), rejected the defendant's attack on the attempted felony murder conviction. Immediately after the issuance of the Third District's initial opinion in this case, this Court's decision in Gray, holding that attempted felony murder was no longer an offense in Florida, was issued, and Alfonso accordingly filed a motion for rehearing, based on Gray. On rehearing, the Third District issued an opinion reversing the attempted felony murder conviction. (R. 46-47). The State then filed a motion for rehearing, asserting that the reversed conviction for attempted felony murder should either be reduced to a lesser included offense or remanded for new trial. The Third District disagreed, and issued an opinion, stating:

> 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. We recognize, however, that this issue will arise in most, if not all, cases governed by State v. Gray. Accordingly we certify that we have passed on the following question of great public importance:
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> > 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?

QUESTION PRESENTED

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

SUMMARY OF ARGUMENT

In State v. Gray, 654 So. 2d 552 (Fla. 1995), this Court receded from Amlotte v. State, 456 So. 2d 448 (Fla. 1984), and held that attempted felony murder is no longer an offense in Florida. That decision was to be applied to all cases, such as the instant one, which were currently pending on direct appeal at the time of the issuance of the decision in Gray. Gray did not address how the appellate courts should deal with issues such as the possibility of reducing the conviction for attempted felony murder to an offense which was a lesser included offense of attempted felony murder at the time of the trial. Nor did this Court's opinion in Gray discuss the possibility of remanding such cases to the trial court for retrial on such potential lesser included offenses as attempted second degree murder, attempted voluntary manslaughter or aggravated battery. The Third District Court of Appeal, construing Gray, has effectively held that the only proper action is to reverse the attempted felony murder conviction. Without the possibility of either a reduction of that conviction to a lesser included offense or a retrial on such lesser included offenses, the Third District's decision is effectively discharging the defendant from all acts related to the shooting of the victim, even though there has never been any acquittal of the defendant on any charge, and even though the evidence presented to the jury - the intentional shooting of the victim in the hand - is fully consistent with various lesser degrees of attempted homicide. Based on this Court's policy decision to recede from Amlotte, the defendant has been given an unwarranted free ride as to any and all other homicide related charges. That result does not ensue from anything which this Court stated in Gray.

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).

While this Court, in State v. Gray, 654 So. 2d 552 (Fla. 1995), held that attempted felony murder is no longer an offense in Florida, that decision did not address the propriety of either remanding such cases to the trial court for retrial on lesser included offenses of the original charge of attempted felony murder, or reducing the conviction for attempted felony murder to a potential lesser included offense. Insofar as this Court did not address either of those possibilities in its opinion in Gray, the Third District Court of Appeal's construction of Gray, in the instant case, as mandating outright reversal, without the possibility of either retrial or reduction to a lesser included offense, is clearly erroneous.

Several appellate court decisions in Florida have dealt with the ramifications flowing from judicial decisions that various criminal convictions were for nonexistent offenses. Those cases have typically remanded the case for retrial. For example, in Hieke v. State, 605 So. 2d 983 (Fla. 4th DCA 1992), the defendant was found guilty of solicitation to commit third degree murder. After concluding that the conviction was for a nonexistent crime, the appellate court remanded the case to the trial court for a new trial on the lesser included offenses of aggravated battery or battery, as both of those lesser included offenses had been submitted to the jury which returned the conviction

for the nonexistent offense. This Court dealt with a similar situation in Achin v. State, 436 So. 2d 30 (Fla. 1983), where the defendant, who had been charged with extortion, was convicted of the nonexistent offense of attempted extortion. The remedy for the improper conviction of a nonexistent offense was for a retrial on the original charge of extortion, an obviously higher level offense than the improper conviction for the nonexistent offense of attempted extortion. Likewise, in Jordan v. State, 438 So. 2d 825 (Fla. 1983), where the defendant was charged with resisting arrest with violence and convicted for the nonexistent offense of attempted resisting arrest with violence, the remedy was a retrial on the original charge. While Hieke involved a situation virtually identical to that presented in the instant case,[2] the decisions in Jordan and Achin were both permitting retrials not merely for any offenses which had been lesser included offenses of the conviction for a nonexistent offense, but for the original greater charge under which the defendant had been tried. Since those cases were going back for retrial on the original, greater charge, it necessarily follows, pursuant to this Court's decision, that the trial court would have jurisdiction, on retrial, to permit the jury to consider not just the original, greater charge, but any proper lesser offenses of that charge as well. See also, State v. Sykes, 434 So. 2d 325 (Fla 1983) (permitting retrial on theft charges after conviction for nonexistent offense of attempted second-degree theft was overturned); Ward v. State,

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If anything, the facts of the instant case present a more compelling position for permitting retrial than do the facts of Hieke. While Hieke involved an offense which had never been recognized as an existing offense in Florida, the instant case involved attempted felony murder which, for at least 11 years, from the time of Amlotte v. State, 456 So. 2d 448 (Fla. 1984) until this Court's decision in Gray, eleven years later and one year after the trial in this case, had been recognized as an offense in Florida. Thus, attempted felony murder clearly had been a recognized offense, including at the time of the trial herein. It would be absurd for appellate courts to deal more harshly with efforts at reprosecution under such circumstances than in the case of a conviction for a nonexistent offense where that offense, as in Hieke, had never been explicitly recognized as a viable offense in Florida.

446 So. 2d 267 (Fla. 2d DCA 1984) (permitting retrial on forgery charge after conviction for nonexistent offense of attempted uttering of 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 nonexistent 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 nonexistent offense of attempted solicitation was overturned).

Thus, the Third District's conclusion that retrial on lesser included offenses of attempted felony murder is prohibited by Gray is clearly erroneous. As in Hieke, the jury in the instant case was instructed on another feasible lesser included offense: attempted manslaughter. Furthermore, it is clear that there is no double jeopardy bar to retrial on the various lesser included offenses. The verdict which the jury had returned was a conviction for the highest degree offense which the jury had been instructed to consider. There was no acquittal of the defendant for either that offense (attempted felony murder) or any of the lesser offenses which the jury was instructed to consider. Under such circumstances, a retrial does not present any double jeopardy problems. The double jeopardy clause furnishes protection in three distinct situations, none of which are applicable herein: (1) it protects against second prosecution for the same offense after acquittal; (2) it protects against second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed. 2d 425 (1984). As to the second situation, reprosecution for the same offense after conviction, that refers to subsequent prosecutions which attempt to obtain multiple convictions for the same offense; it has no bearing on the typical situation of a reversal of a conviction, for reasons

other than insufficient evidence, on an appeal initiated by the defendant, which ultimately results in the retrial on remand to the trial court. See, e.g., Montana v. Hall, 481 U.S. 400, 107 S.Ct. 1825, 95 L.Ed. 2d 354 (1987) (defendant convicted under an inapplicable statute, after reversal on appeal, could be tried on the correct charge); United States v. Scott, 437 U.S. 82, 90-91, 98 S.Ct. 2187, 57 L.Ed. 2d 65 (1978) ("[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict . . . poses no bar to further prosecution on the same charge."); Achin, supra.

The lower Court's concerns regarding the viability of lesser included offenses after the reversal of the attempted felony murder conviction, arose from the lower Court's perception that "there can be no lesser included offenses under a non-existent offense." (R. 49). Not only would the same concern have existed in Hieke, Achin and Jordan, but, in the instant case it is clearly a false concern. As noted above, attempted felony murder clearly was a recognized offense in Florida, certainly from the time of Amlotte, in 1984, until Gray receded from Amlotte in 1995.[3] As attempted felony murder was explicitly recognized as an offense under Florida law at the time of the trial in this case, it must therefore be concluded that notwithstanding the ultimate reversal of the attempted felony murder conviction, at the time of the trial herein, all of the lesser included offenses were properly treated as lesser included offenses of the main charge, attempted felony murder. Furthermore, the question of whether offenses such as attempted manslaughter were lesser included

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[3] This Court's pre-Amlotte decision in Fleming v. State, 374 So. 2d 954 (Fla. 1979), had also recognized attempted felony murder as an offense in Florida.

offenses of attempted felony murder is really a misguided question. The only legitimate question should be whether attempted manslaughter, the lesser offense for which the jury was instructed, was a lesser included offense based on the charging document. In that regard, it is significant that the charging document charged attempted murder in the alternative: attempted felony murder or attempted premeditated murder. Additionally, the charging document referred to the intentional shooting of the victim. (R. 2). It therefore follows that regardless of whether attempted manslaughter (or any other form of attempted homicide) is a lesser included offense of attempted felony murder, those lesser offenses must properly be viewed as lesser offenses under the charging document, since the charging document would have included any lesser offenses based on either attempted felony murder or attempted premeditated murder. The defendant herein, has been on adequate notice, at all times since the filing of the information, that potential lesser offenses such as attempted manslaughter or attempted second degree murder could have proceeded to the jury even if attempted felony murder did not.[4]

This Court, in concluding that the Gray decision should be applied to all convictions which were not yet final, granted Gray, Alfonso and other similarly situated defendants, a benefit which was not compelled by law. This Court could have treated Gray as a decision which applied purely prospectively, to offenses committed after the date of that decision. Article X, Section 9 of

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[4] By way of comparison and analogy, if the court had granted a motion for judgment of acquittal as to attempted felony murder, refusing to permit that charge to go to the jury because of insufficient evidence as to the underlying felony, the court would still have had the power to let the jury consider charges of attempted second degree murder, attempted manslaughter, or aggravated battery, based on an intentional shooting of the victim.

the Florida Constitution provides that when a criminal statute is repealed, such repeal "shall not affect prosecution or punishment for any crime previously committed." The decision of this Court, in Gray, to recede from Amlotte's recognition of attempted felony murder, is highly analogous to the situation in which the legislature expressly repeals a criminal statute. Just as the latter situation does not affect convictions for previously committed offenses, so too, this Court could have concluded that Gray would not affect previously committed offenses. Nevertheless, having decided to confer on pipeline defendants the full benefit of Gray, it is absurd to compel, as the Third District did, the further benefit of a complete discharge, not just from attempted felony murder, but from all offenses, which at the time of the trial, were proper lesser included offenses of attempted felony murder. Not only were those lesser offenses proper lesser included offenses of attempted felony murder, but, a review of the charging document further compels the conclusion that all of those lesser offenses are fully consistent with the language in the charging document, which alleged that the defendant or his accomplice, during the course of a felony, fired a gun at the victim. (R. 2).

Thus, as a starting point, and at a minimum, it must be concluded that the Third District erred in concluding that a retrial for such lesser included offenses as attempted second degree murder, attempted voluntary manslaughter, and aggravated battery, is somehow either improper or prohibited by Gray. The State, however, would go further, and state, in the instant case, that not only is a retrial a viable remedy in the aftermath of Gray, but, given the unique facts of the instant case, that potential remedy should not be needed, as it would be proper, in the instant case, to reduce the conviction to attempted manslaughter.. An intentional shooting of a victim is clearly consistent with attempted manslaughter. When the case was presented to the jury, the jury was

instructed on attempted manslaughter as a lesser included offense, and the jury returned a verdict for what it believed to be a greater offense than attempted manslaughter. Under such circumstances, it is reasonable to conclude that the jury necessarily believed the defendant to be guilty of attempted manslaughter. That is all the more so since the only issue presented by the defense in this case was whether the defendant was a willing participant in the various offenses, or whether he was a bystander, unrelated to Sotolongo, and coerced by Sotolongo into driving the vehcile to effect the escape. The jury obviously disregarded that claim, as there would have been no basis to find the defendant guilty of any offenses had the jury accepted that defense. Thus, as the defendant was clearly found to be a principal in the offenses committed by Sotolongo, and as the victim was clearly shot during the robbery effort, there is no reasonable theory upon which the jury could have failed to return a verdict for attempted manslaughter.[5]

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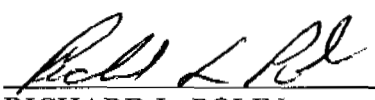
[5] While this Court had previously held that attempted second degree murder was a necessariliy lesser incuded offense of attempted first degree felony murder, see State v. Scurry, 521 So. 2d 1077 (Fla. 1988); Linehan v. State, 476 So. 2d 1262 (Fla. 1985), insofar as the jury was not instructed on attempted second degree murder as a lesser included offense, the State is not asking that the conviction in this case be reduced to attempted second degree murder. Other attempted felony murder cases, involving post-Gray reversals of convictions, will present that possibility, however. Furthermore, in the event that this Court chooses not to reduce the conviction to any form of lesser offense, and chooses, instead, to remand to the trial court for retrial, the State would then suggest that such a remand should include any offenses which are properly viewed as lesser offenses of the main charge set forth in the charging document. Since the primary charge alleged in the charging document was attempted premeditated murder, that would include attempted second degree murder, in addition to attempted manslaughter and any other potential lesser offenses. Indeed, pursuant to Achin, supra, and its progeny, it can further be asserted that in the absence of any double jeopardy problem, a case, such as the instant one, where the charging document covers attempted premeditated murder as well as attempted felony murder, should permit a retrial, if there is to be a retrial as opposed to a reduction of the conviction, on attempted first degree premeditated murder, even though that charge did not go to the jury during the first trial.

CONCLUSION

Based on the foregoing, the lower Court's certified question should be answered in the affirmative and the lower Court's decision should be quashed, in part, and clarified as to the appropriate remedy in the aftermath of a reversal of an attempted felony murder conviction.

Respectfully submitted,

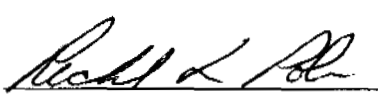
ROBERT A. BUTTERWORTH
Attorney General



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 Brief of Petitioner on the Merits was mailed this 22nd day of November, 1995, to MARTI ROTHENBERG, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.



RICHARD L. POLIN