IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,739

THE STATE OF FLORIDA,

Petitioner,

vs.

GILBERTO ALFONSO,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS..... ii

STATEMENT OF THE CASE AND FACTS..... 1

ARGUMENT..... 2-10

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).

CONCLUSION..... 11

CERTIFICATE OF SERVICE..... 12

TABLE OF CITATIONS

Cases	Page
Achin v. State, 436 So. 2d 30 (Fla. 1982)	2
Amlotte v. State, 456 So. 2d 448 (Fla. 1984)	5
DuBoise v. State, 520 So. 2d 260 (Fla. 1988)	4
Fleming v. State, 374 So. 2d 954 (Fla. 1979)	5
Hieke v. State, 605 So. 2d 983 (Fla. 4th DCA 1992)	2
McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed. 2d 292 (1987)	5
Montana v. Hall, 481 U.S. 400, 107 S.Ct. 1825, 95 L.Ed. 2d 354 (1987)	4
Saylor v. Cornelius, 845 F. 2d 1401 (6th Cir. 1988)	6
State v. Gray, 654 So. 2d 552 (Fla. 1995)	2,5
State v. Woodley, 746 P. 2d 227 (Or. App. 1987), reversed on other grounds, 760 P. 2d 884 (Or. 1988)	10
United States v. Davis, 873 F. 2d 900 (6th Cir. 1989)	5-8
United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed. 2d 65 (1978)	4

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 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." See, Brief of Respondent, p. 8.

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:

> . . . GILBERTO ALFONSO and ROBERTO SOTOLONGO, on or about AUGUST 14, 1993, in the County and State aforesaid, did unlawfully and feloniously attempt to kill a human being, to wit: JESUS RODRIGUEZ, 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 at JESUS RODRIGUEZ, with a firearm, in violation of 782.04(1) and 777.04 and 775.087 and 777.011, Florida Statutes . . . .

(R. 6). Thus, the amended information clearly charged the defendant, in the alternative, with both forms of attempted first degree murder: attempted premeditated murder and attempted felony murder.

The Respondent resorts to arguing that the charging document is somehow invalid, or somehow fails to charge an existent offense, because the prosecution, at trial, proceeded solely on the charge of attempted felony murder, and various lesser offenses of attempted first degree murder. That argument fails for several reasons. First, it can clearly be seen that the charging document charged a valid, existent offense: attempted first degree murder. At the time that the information was filed, and, at the time of the trial herein, both forms of attempted murder, as charged in the alternative, were equally valid. The State had no reason for drafting the charging document

in any contrary manner. Thus, it is noteworthy that when the State chose not to proceed on a theory of attempted premeditated murder, the defense never argued in the trial court that the charging document was somehow insufficient for purposes of having the jury consider various lesser offenses of attempted first degree murder. The failure to raise any such attack in the trial court precludes a 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.

The Respondent attempts to argue, albeit without the support of any case law to support the Respondent's proposition, that a retrial of the defendant herein would somehow violate double jeopardy principles. See, Brief of Respondent, pp. 10-11, n. 5. As noted in the State's initial brief herein, a retrial is prohibited only if a defendant has been acquitted due to insufficient evidence, which is not the case herein. See, Montana v. Hall, 481 U.S. 400, 107 S.Ct. 1825, 95 L.Ed. 2d 354 (1987); 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 only reason that the defendant's conviction was vacated herein was because of this Court's decision in State v. Gray, 654 So. 2d 552 (Fla. 1995), holding that attempted felony murder, which had been recognized as a valid offense for many years - at least since the decision if Amlotte v. State, 456 So. 2d 448 (Fla. 1984), if not since the earlier decision in Fleming v. State, 374 So. 2d 954 (Fla. 1979) - was no longer going to be recognized as an offense in Florida.

The United States Court of Appeals for the Sixth Circuit, in United States v. Davis, 873 F. 2d 900 (6th Cir. 1989), dealt with a highly analogous situation and rejected a defendant's double jeopardy claim. Davis had been charged with mail fraud, based on an "intangible rights" theory. 873 F. 2d at 901. Shortly after the defendant was convicted under that charge, the Supreme Court of the United States disavowed the "intangible rights" theory of mail fraud[1] and the defendant's conviction was overturned on appeal. Subsequent to the reversal of that conviction, the prosecution filed a superseding indictment, alleging an alternative theory of mail fraud.[2] That alternative theory had neither been charged in the original charging document nor presented to the original jury. The Sixth Circuit Court of Appeals found that the new prosecution, on the alternative mail fraud theory, could proceed, without violating double jeopardy principles. The emphasis of the decision was that the prosecution, at the time of the filing of the indictment and trial had been acting in accordance with existing law, and had not done anything improper: the prosecution had no reason

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[1] See, McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed. 2d 292 (1987).

[2] By contrast, the instant case entails lesser included offenses which were actually presented to the jury in the lower court proceedings, as opposed to a "new" theory alleged for the first time in a superseding charging document.

to anticipate the Supreme Court's disavowal of a mail fraud theory which the federal courts had routinely deemed proper. 873 F. 2d at 905-906.

The Sixth Circuit contrasted the situation in Davis with that of an earlier decision from the same Court, Saylor v. Cornelius, 845 F. 2d 1401 (6th Cir. 1988). In Saylor, a defendant had been indicted for murder, with the indictment encompassing murder as a principal and as an accomplice, and murder by conspiracy. The judge charged the jury solely on a conspiracy theory and not on an accomplice theory, even though the evidence supported the accomplice theory. The conspiracy theory was ultimately overturned based on insufficient evidence, and the State then sought to retry the defendant on the basis of the accomplice theory, which had not been presented to the jury. The Sixth Circuit Court of Appeals, in federal habeas corpus proceedings, concluded that such a retrial would, in fact, result in a double jeopardy violation. As the same Court explained in the subsequent Davis decision, the result in Saylor ensued, in large part, because the prosecution had been negligent, in the trial court proceedings, in not seeking a jury instruction on the basis of the accomplice theory of murder. 873 F. 2d at 905. By contrast, in the Davis-type situation, where the prosecution has no reason to anticipate a subsequent disavowal of a theory of an offense which had previously been expressly recognized by the courts, the prosecution was not negligent in any manner for the way it chose to charge or prosecute the case. Id.

With the background of both Davis and Saylor in mind, the Sixth Circuit's analysis in Davis is worthy of careful consideration:

> . . . We were concerned in Saylor about setting a precedent that would

allow a prosecutor to "indict on several counts or theories, present evidence on each of them, and then go to the jury only on selected ones, in effect holding the others in reserve for a subsequent or improved effort" if the jury should fail to convict on the theory or theories actually submitted to it. 845 F.2d at 1408. Perhaps we ought to be equally concerned about setting a precedent that would allow a prosecutor to obtain an indictment on one theory (defrauding the electorate of an intangible right to honest government, e.g.) And let the case go to a jury on that theory, while holding in reserve a second theory (defrauding an identifiable individual of money or property) in order to get a subsequent bite at the apple if the jury failed to convict the first time.

. . .

Judge Kinneary [the trial judge in Davis] emphasized another distinction between this case and Saylor: the Saylor prosecutor was asleep at the switch (or so we assumed) when he failed to request that the jury be charged on the conspiracy theory, but no comparable fault could be attributed to the Davis prosecutor in deciding to base the indictment of Mr. Davis on an "intangible rights" theory alone. That decision was perfectly legitimate when made, the intangible rights theory having been endorsed by this court only weeks before in the very case that was ultimately to produce the McNally decision. . . . This court has been wrong before, of course, but the prosecutor is not to be faulted for assuming we were right.

The prosecutor gained no unfair advantage by limiting the indictment of Mr. Davis to an intangible rights theory. Had the prosecutor been given the prescience to realize that Gray would be reversed in McNally, the indictment of Mr. Davis would unquestionably have been drawn differently. . . .

The defect in the charging instrument at issue in United States v. Ball, supra, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (a failure to specify the time and place of a murder victim's death), like the defect in the charging instrument in Montana v. Hall, supra ("the State simply relied on the wrong statute," 481 U.S. at 404, 107 S.Ct. at 1827), obviously reflected more poorly on the prosecutor than did the defect (as it proved to be) in the instrument with which Mr. Davis was charged. If, as Saylor seems to suggest, prosecutorial culpability may have some relevance in determining when jeopardy has been terminated, it would be more than a little anomalous to conclude that

> although a retrial was not barred in Ball or in Hall, Saylor requires us to block a retrial of Mr. Davis.

873 F. 2d at 905-906.

The same reasoning is applicable herein; indeed, the instant case presents even stronger arguments against the defendant's reliance upon a double jeopardy claim. As in Davis, the prosecution acted properly at the time of the filing of the information and at the time of trial. The abandonment of the attempted premeditated murder charge is little more than a red herring. The State herein is not seeking retrial on an attempted premeditated murder charge; the State is seeking either a reduction of the attempted murder conviction to one of the lesser included offenses that the jury was instructed on in this case; or, in the alternative, a retrial on lesser included offenses. The State has also sought, either a reduction of the vacated conviction (or retrial) on the lesser offense of attempted second degree murder. Although that charge was not presented to the jury, as indicated in the initial brief herein, at the time of the trial, it was a necessarily lesser included offense of attempted first degree felony murder, and, as such, it would have to be concluded, without any retrial, that the jury which found the defendant guilty of the greater offense would inevitably have had to find the defendant guilty of the necessarily included lesser offense. As such a reduction does not involve any retrial, it could not pose any double jeopardy question. Thus, for the foregoing reasons, the Respondent's double jeopardy argument is lacking in merit.

As previously noted, the State does not accept the premise of the Respondent's argument - i.e., that the cases cited in the State's initial brief herein 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 in Gray, 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 Alfonso, who was a principal to the intentional shooting of another person during the course of a robbery attempt, should receive a free ride as to all possible attempted homicide 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 was a principal to that shooting.[3] 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

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[3] The sole defense advanced at trial was that Sotolongo, who actually shot the victim, had forced Alfonso, under duress, into the vehicle fleeing from the scene, while Alfonso had previously been an innocent bystander.

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 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 clearly 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.[4]

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[4] The principal case upon which the Respondent relies, State v. Woodley, 746 P. 2d 227 (Or. App. 1987), rev. on other grounds, 760 P. 2d 884 (Or. 1988), does not support the Respondent's argument. While Woodley involved a conviction for a nonexistent offense, and a subsequent attempt to reduce the vacated conviction to a lesser degree offense, the offense charged in Woodley, sexual abuse in the second degree, unlike the offense of attempted felony murder in Florida, was not an offense which the state's highest court had previously decreed to be a valid offense. The prosecution, in Woodley, had acted negligently, in drafting a charging document which alleged, not merely a nonexistent offense, sexual abuse in the second degree, but an offense which the state's highest court had never decreed to be a valid offense. By contrast, the prosecution, in the instant case, was clearly following valid precedent from this Court - Amlotte and Fleming - at all times. Thus, consistent with the reasoning in Davis, supra, the prosecution in Woodley could be deemed responsible for the outcome by virtue of its negligence in drafting the charging document, whereas the prosecution in the instant case, by following precedents from this Court and all of Florida's District Courts of Appeal, which were valid at the time of the filing of the information and trial, acted in a proper manner at all times; no negligence or fault can be attributed to the prosecution such as to impute to a double jeopardy bar to retrial. Furthermore, Woodley applies only to the effort to reduct the vacated conviction to a lesser degree; not to any effort to retry the defendant on an amended charging document.

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 a proper lesser included offense, or, alternatively, to remand the case to the trial court for retrial on all offenses which, at the time of the trial herein, were lesser included offenses of attempted felony murder.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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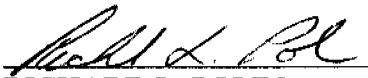

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner on the Merits was mailed this 31st day of December, 1995, to MARTI ROTHENBERG, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN