067

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,092

THE STATE OF FLORIDA,

Petitioner,

-vs-

ALPHONSO LEE,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Respondent, ALPHONSO LEE, was the defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. The symbol "R." designates the original record on appeal, and the symbol "T." designates the transcript of the trial court proceedings.

STATEMENT OF THE CASE AND FACTS

Alphonso Lee was charged by information, and ultimately by indictment with first degree murder with a firearm, attempted first degree murder with a firearm, attempted armed robbery, unlawful possession of a firearm while engaged in a criminal offense, escape, and unlawful possession of a firearm by a convicted felon. (R. 1-15). Count 2, the charge of attempted murder as to victim Louis Alvarez, alleged that the defendant "did unlawfully and feloniously attempt to kill a human being, to wit: LOUIS ALVAREZ, while engaged in the perpetration of, or in an attempt to perpetrate any robbery, by shooting LOUIS ALVAREZ, with a firearm...." (R. 12).

On November 20, 1990, Luis Alvarez, Paul Sarate, Porferio Nazario and Abrahm Mesa stopped at Conch Town USA on Northwest 17th Avenue to pick up food for Mesa's wife. They stayed in Nazario's Bronco while Mesa went inside the restaurant. (T. 633-636, 666). While they waited, Alvarez saw a black male, female and children enter the restaurant and exit within fifteen minutes with no food. (T. 636). Ten or fifteen minutes later, Mesa came out with his food and, as

he was getting into the car, Alvarez and Sarate heard someone say "Hey Fat Boy" and saw a young man stick a rifle into Mesa's stomach and say "give me the money." (T. 637-638, 669-670). Mesa turned toward the man and Alvarez, in the rear seat, heard the gun go off. Alvarez felt as that he had been burned, and say that he had been shot in the left upper leg. Mesa then fell forward, on top of the shooter who ran northwards towards 37th Street. (T. 638-640). Mesa died as a result of a single gunshot wound which entered the left abdomen and exited at the right hip. (T. 726-728). That bullet then struck Alvarez, sitting behind Mesa, in the left leg. (T. 640). Alvarez could not identify the defendant as the shooter, but he testified that the shooter was the same man he had seen enter and exit the restaurant several minutes earlier. (T. 638, 643). Sarate identified the defendant as the shooter. (T. 673).

Barbara Bennett, the defendant's former girlfriend, and her brother, Derek Roberts, testified that they had gone to Conch Town on December 20, 1990, with the defendant and Barbara's small children, but they did not eat there because the defendant told them they had to leave. (T. 681-683, 692-693). Outside the restaurant the defendant told Bennett he was going to "get" a Cuban he saw in the restaurant with lots of money. (T. 683, 693). The defendant took something long that was wrapped from the trunk of the car and ran towards Conch Town. A few minutes later, Bennett and Roberts heard a boom and yelling. Soon after that, the defendant ran back to the car, put the long, wrapped thing in the trunk and drove off. (T. 683-685, 694). The defendant told Bennett that the Cuban "pulled" at him, causing the gun to go off. (T. 685, 694). Bennett continued to live with the defendant after the shooting for several weeks but left him after he threatened her. She went to

police and gave them a statement. As a result, a warrant was issued for the defendant's arrest. (T. 687-688, 790).

On January 7, 1991, Detective James Smith of the Opa-Locka Police Department got an anonymous tip that the defendant was at 1355 Sharazade Blvd. Knowing that there was a warrant for the defendant's arrest in this case, Smith took the defendant into custody and contacted the City of Miami Police Department. (T. 741-744). The defendant was asleep at the time Smith arrived and, once awakened, seemed sober. (T. 744-745). When Detective Jorge Gil of the Miami Police Department went to get the defendant, and when he interviewed the defendant, he found him to be alert and sober. (T. 795). Detective Gil gave the defendant his Miranda warnings and thereafter the defendant signed a rights waiver and told Detective Gil that he saw Mesa with money, went to get his rifle, confronted Mesa and asked for money. The defendant said Mesa grabbed the barrel of his rifle and the gun went off so he fled and later got rid of the gun. (T. 806-807).

After the State rested, the defendant's motion for judgment of acquittal was denied as to all counts except the escape charge, for which the court entered a judgment of acquittal. (T. 818-828, 831). The defendant rested his case without presenting evidence. (T. 839). The State's case, on the attempted murder charge, went to the jury solely on the theory of attempted felony murder and not on attempted premeditated murder. (T. 820, 909-910; R. 489). As possible lesser included offenses, the jury was instructed on attempted second degree murder, attempted third degree murder, which was a lesser degree of attempted felony murder based on an unenumerated underlying felony

other than the charged robbery, attempted manslaughter, and aggravated battery. (T. 919-922; R. 489-492).

The defendant was convicted of the charges of first degree murder, attempted first degree murder with a firearm, attempted armed robbery, and unlawful possession of a firearm while engaged in a criminal offense. (R. 504-505). Following a penalty phase the jury recommended a sentence of life imprisonment, and the defendant was sentenced to a term of life in state prison with a twenty-five year minimum mandatory provision as to count 1, with a concurrent term of forty years in state prison with a three-year minimum mandatory provision as to count 2, and a concurrent fifteen years in state prison as to counts 3 & 4, with a three-year minimum mandatory provision as to count 3. (R. 546-552). The defendant subsequently entered a nolo contendere plea to the charge of unlawful possession of a firearm by a convicted felon, which had been severed from the other counts before trial. (R. 562-563). The defendant was sentenced as an habitual violent felony offender as to count 6 to a term of fifteen years in state prison with a fifteen year minimum mandatory provision. (R. 564-567).

On appeal, the Third District Court of Appeal found no merit to the defendant's challenges to his convictions and sentences for first degree murder, attempted armed robbery, and unlawful possession of a firearm while engaged in a criminal offense and affirmed the same. However, the Third District reversed the defendant's conviction and sentence for attempted felony murder based on State v. Gray, 654 So. 2d 552 (Fla. 1995). The Court disagreed with the State's argument 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 recognized that this issue will recur in virtually all cases governed by Gray, and therefore again certified the following question of great public importance, which was first formulated in Wilson v. State, 660 So. 2d 1067 (Fla. 3d DCA 1995):

> 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?

(R. 580-581).

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 THE 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 thigh - 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,[1] 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, 446 So. 2d 267 (Fla. 2d DCA 1984) (permitting retrial on forgery charge after conviction for

[1] 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 re-prosecution 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.

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 a wide variety of lesser included offenses: attempted second degree murder, attempted third degree murder, attempted manslaughter and aggravated battery. 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, re-prosecution 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 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[2] 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.[3] 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

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

[3] 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.

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 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 a 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 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, specifically attempted second degree murder; or, in the alternative, a retrial on lesser included offenses. Although the charge of attempted second degree murder was not presented to the jury, 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.

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." Wilson v. State, 660 So. 2d

1067, 1069 (Fla 3d DCA 1995). Not only would the same concern have existed in Hieke, Achin, Jordan, and Davis, 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. 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 offenses of attempted felony murder is really a misguided question. The only legitimate question should be whether attempted second degree murder, attempted third degree murder, attempted manslaughter and aggravated battery, the lesser offenses for which the jury was instructed, were lesser included offenses based on the charging document. In that regard, it is significant that the charging document charged referred to the shooting of the victim. (R. 12). It therefore follows that regardless of whether attempted second degree murder (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. 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]

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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 third degree murder, attempted

This Court, in concluding that the Gray decision should be applied to all convictions which were not yet final, granted Gray, Lee 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 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, during the course of a felony, fired a gun at the victim. (R. 12).

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,

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manslaughter, or aggravated battery, based on an intentional shooting of the victim.

attempted third 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 second degree murder. An intentional shooting of a victim is clearly consistent with attempted second degree murder. When the case was presented to the jury, the jury was instructed on attempted second degree murder as a lesser included offense, and the jury returned a verdict for what it believed to be a greater offense than attempted second degree murder. Under such circumstances, it is reasonable to conclude that the jury necessarily believed the defendant to be guilty of attempted second degree murder. Moreover, as of the time of the trial herein, this Court had expressly held that attempted second degree murder was a necessarily lesser included offense of attempted first degree felony murder. Scurry v. State, 521 So. 2d 1077 (Fla. 1988); Linehan v. State, 476 So. 2d 1262 (Fla 1985); Florida Standard Jury Instructions in Criminal Cases, Schedule of Lesser Included Offenses. As attempted second degree murder was a necessarily lesser included offense at the time of the trial, it is reasonable to conclude that the jury necessarily believed the defendant to be guilty of attempted second degree murder. If for any reason, this Court does not believe that it is proper to reduce the attempted felony murder conviction in that manner, it would then be proper to remand the case to the trial court for retrial on the lesser offenses.

CONCLUSION

Based on the foregoing, the certified question should be answered in the affirmative and 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 retrial for 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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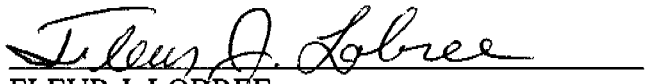

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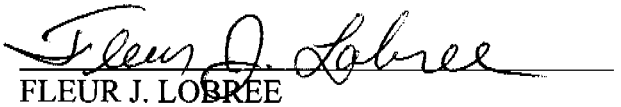
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was mailed to JANE D. FISHMAN, ESQ., Special Assistant Public Defender, 100 S. Pine Island Road, Suite 112, Plantation, Florida 33324, on this this 23rd day of January, 1996



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Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87, 092

THE STATE OF FLORIDA,

Petitioner,

-vs-

ALPHONSO LEE,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

APPENDIX TO
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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1995

95-130198-F

ALPHONSO LEE, **

Appellant, **

vs. ** CASE NO. 95-263

THE STATE OF FLORIDA, **

Appellee. ** #91-500

Opinion filed December 13, 1995.

An appeal from the Circuit Court for Dade County, Jeffrey Rosinek, Judge.

Bennett H. Brummer, Public Defender and Jane D. Fishman, Special Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Fleur J. Lobree, Assistant Attorney General, for appellee.

Before BARKDULL, LEVY and GREEN, JJ.

PER CURIAM.

We find no merit to appellant's challenges of his convictions and sentences for first degree murder, attempted armed robbery and

unlawful possession of a firearm while engaged in a criminal offense and affirm the same.

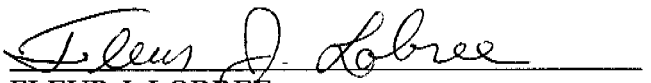
The appellant's conviction and sentence for attempted felony murder, however, must be reversed based on State v. Gray, 654 So. 2d 552 (Fla. 1995). We interpret Gray to require on remand a complete discharge of the appellant on this count rather than a reduction to a lesser included offense or a new trial on lesser included offenses. Alfonso v. State, 661 So. 2d 308 (Fla. 3d DCA 1995); Wilson v. State, 660 So. 2d 1067 (Fla. 3d DCA 1995), rehearing denied and question certified, 20 Fla. L. Weekly D2248, 2249 (Fla. 3d DCA Oct. 5, 1995). We recognize, however, that this issue will recur in virtually all cases governed by Gray. Thus, we again certify the following question of great public importance:

> 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?

Affirmed in part and reversed and remanded in part with instructions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPENDIX TO BRIEF OF PETITIONER ON THE MERITS was mailed to JANE D. FISHMAN, ESQ., Special Assistant Public Defender, 100 S. Pine Island Road, Suite 112, Plantation, Florida 33324, on this 23rd day of January, 1996.



FLEUR J. LOBREE
Assistant Attorney General