IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,092

DCA NO. 95-263

THE STATE OF FLORIDA,

Petitioner,

-vs-

ALPHONSO LEE,

Respondent.

ON APPLICATION FOR DISCRETIONARY JURISDICTION

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, ALPHONSO LEE, was the Defendant in the trial court and the Appellant in the District Court of Appeal, Third District, which court reversed his conviction for attempted felony murder. Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the District Court of Appeal. The parties will be referred to as they appear in this Court. All references are to the Record on Appeal, designated "R." or the Transcript of Trial Testimony, designated "T."

STATEMENT OF THE CASE AND FACTS

Respondent, ALPHONSO LEE, accepts the Statement of the Case and Facts set forth in Petitioner's Brief, as it is in most respects identical to the State of the Case and Facts set forth in Respondent's Initial Brief in the District Court of Appeal, Third District, with the following exception:

The events that resulted in the filing of these charges occurred on December 20, 1990, not November 20, 1990 as indicated by the Petitioner in its Brief, page 1. T.633-636.

QUESTION PRESENTED

WHETHER LESSER INCLUDED OFFENSES EXIST TO A NON-EXISTENT CRIME, AND, IF SO, WHETHER A NEW TRIAL ON SUCH LESSER INCLUDED OFFENSES OR REDUCTION OF THE OFFENSE IS PROHIBITED BY DUE PROCESS OF LAW OR DOUBLE JEOPARDY?

SUMMARY OF ARGUMENT

No principled basis exists for finding that any lesser included offense exists to the non-existent crime of attempted felony murder, and therefore, retrial is not appropriate. The State charged Respondent with a non-existent crime for which no conviction may be had. Logic dictates that there can be no lesser included offense to an offense for which due process would prevent a conviction.

ARGUMENT

THERE CAN BE NO LESSER INCLUDED OFFENSES TO THE NON-EXISTENT CRIME OF ATTEMPTED FELONY MURDER AND THEREFORE NO PRINCIPLED BASIS EXISTS TO ORDER A NEW TRIAL OR TO REDUCE RESPONDENT'S CONVICTION.

This Court, in State v. Gray, 654 So.2d 522 (Fla. 1995), held that attempted felony murder is a fiction and a non-existent crime for which no conviction may be had. This Court ruled that its decision in Gray must be applied to all cases pending on direct review or not yet final. In accordance with this Court's mandate in Gray, the court below properly reversed Respondent's conviction of Attempted Felony Murder.

Petitioner now seeks to have this Court hold that although attempted felony murder is a non-existent crime, it may nevertheless encompass lesser included offenses for which Respondent ought to be tried. Petitioner is wrong, and the case law Petitioner cites for its position is inapposite.

Petitioner relies on several cases, 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 hold that where a defendant has been convicted of a non-existent lesser crime that includes all the elements of the offense originally charged, then the defendant can be prosecuted again for the original charge, where the original charge was for a real crime. In Achin, for example, the defendant was charged with extortion and the jury convicted him of the so called lesser crime of attempted extortion. However, "attempted extortion" was a non-existent crime because all the elements of "attempted extortion" actually made out the crime of extortion. Since all the elements of the charged crime were included in the non-existent lesser, retrial was permissible on the original charge because a jury effectively convicted defendant of the original charge but called it by the name of a non-existent "lesser" charge.

In the instant case, the situation is completely different. Here the charged offense is the non-existent offense. In the cases relied upon by Petitioner, the defendant was charged with a real

crime and convicted of that actual crime under the guise of a "lesser" offense. However the so-called "lesser" offense was non-existent because it is the greater offense.

In the instant case, retrial is not appropriate because the defendant was never charged with a real offense. The fact that he might have been charged with a real but lesser crime is irrelevant. The State chose to charge him with a non-existent crime, and a non-existent crime, logically, can have no lesser included offenses. See, Alphonso v. State, 661 So.2d 308 (Fla. 3d DCA 1995); Wilson v. State, 660 So.2d 1067 (Fla. 3d DCA 1995).

Nor is Petitioner's reliance on Hieke v. State, 605 So.2d 983 (Fla. 4th DCA 1992), availing. In Hieke, the defendant was charged with the real crime of solicitation to commit first degree murder. The jury was instructed on that crime and instructed that the lesser included offenses were solicitation to commit third degree murder, aggravated battery and battery. The defendant was convicted of the non-existent crime of solicitation to commit third degree murder. The Fourth District Court of Appeal held that the defendant could be retried only on the aggravated battery charge because she had been specifically acquitted of solicitation to commit first degree murder. Thus, Hieke does not stand for the proposition that a defendant who is originally charged with a non-existent crime may be retried on a lesser charge. Again, as the court below has noted, a non-existent crime cannot logically be said to have any lesser included offenses.

There can be no valid lessers of an invalid offense because to determine valid lessers, the court must compare the elements of the charged crime with those of the potential lesser. See Florida Rule of Criminal Procedure 3.510 and Florida Rule of Criminal Procedure 3.490. Since the crime charged here was a non-existent, invalid offense, there are no elements which can be proved beyond a reasonable doubt to support a conviction for that non-existent crime. Thus, an "offense" without elements cannot possibly have lesser offenses, as the court below correctly found.

Nevertheless, Petitioner contends that due process, fundamental fairness and double jeopardy are not violated by retrying Respondent or reducing his conviction to attempted second degree murder.

Indeed, Petitioner in its Brief, page 14, states

> "...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,[1] at the time of 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."

Petitioner is wrong. This Court has consistently held that an appellate court cannot reduce a charge to a lesser included offense

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[1]In fact the jury was instructed on attempted second degree murder. See, R.489,T.903.

unless it is a category one necessary lesser offense. See, Taylor v. State, 608 So.2d 1302 (Fla. 1991); §924.34, Florida Statute (1985). Petitioner claims that the double jeopardy protections are not applicable to Respondent and that the State, having charged, tried and convicted Respondent of a non-existent crime, should now be free to try him again for whatever lesser crime it thinks it might win a conviction on. Petitioner is wrong. Double jeopardy considerations bar Respondent's retrial in this case. In Achin, and the other cases relied on by Petitioner, this Court held that double jeopardy did not bar retrial of a defendant charged with a real crime who had been convicted of a non-existent "lesser" crime that was in fact the original crime charged. Under those circumstances this Court held that the defendant could be retried on the original charge. As noted above, the instant case is different. Here Respondent was charged with and convicted of a non-existent crime. As this Court has held, "...one may never be convicted of a non-existent crime." Achin, 436 So.2d at 30.

What Petitioner asks for here is not the standard retrial after a defense initiated reversal. In fact, what Petitioner seeks here is a whole new bite at the apple - to make a second charging decision as to what new crimes to charge Respondent with and to have a second trial before a second jury on those new charges now that this Court has held that the State's first choice of a non-existent crime could not constitutionally be upheld. Fundamental fairness, due process of law and the guarantee against double jeopardy prohibit letting the State start the charging process all

over again and subjecting Respondent to a second trial merely because the State chose to charge Respondent with a non-existent crime. Petitioner relies on United States v. Davis, 873 F.2d 900 (6th Cir. 1989), to persuade this Court to suspend the double jeopardy protections of the United States and Florida Constitutions. In Davis, the defendant was indicted for and convicted of mail fraud on a theory later held impermissible by the United States Supreme Court. Defendant's conviction was reversed, but the Sixth Circuit held that double jeopardy did not preclude a retrial of the defendant on a permissible theory of mail fraud because there was no prosecutorial abuse. 873 F.2d at 905. The Sixth Circuit's decision in Davis did not limit its earlier decision in Saylor v. Cornelius, 845 F.2d 1401 (6th Cir. 1988), where that court held that double jeopardy would bar a retrial if the prosecutor indicted on several theories, presented evidence on them but presented only one theory to the jury, "...in effect holding the others in reserve for a subsequent or improved effort" if the jury did not convict on the theory it was offered. 845 F.2d at 1408. If anything, the instant case is more like Saylor than it is like Davis. Here the State chose to pursue a *non-existent* crime, and won a conviction for that crime. Now that the conviction has been reversed, the State seeks not to try a new theory of attempted first degree murder, but seeks to obtain a new information charging a new, lesser crime to take to a new jury because the crime originally charged was non-existent. Where, as here, a crime is held to be non-existent, the Third District Court

of Appeal was correct in holding that no principled basis exists for finding that any lesser offenses exist.

CONCLUSION

For the foregoing reason, 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; to the Office of the Public Defender, 1320 Northwest 14th Street, Miami, Florida 33125; and to Alphonso Lee, #392195, Sumter Correctional Institution, Post Office Box 667, Bushnell, Florida 33513, this 20th day of February, 1996.

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