ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,631

THE STATE OF FLORIDA,

Petitioner,

-vs-

PATSY JONES,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION 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, PATRICIA JONES, 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 symbols "ST." and "T." designate the supplemental transcript and transcript of the trial court proceedings.

STATEMENT OF THE CASE AND FACTS

Patsy Lakesia Jones, was charged by Information in Case No. 93-30742 along with codefendants Recondall ("Reco") L. Wiggins and Alvan ("Al") Charles Hudson, with attempted first degree premeditated murder, armed burglary of an occupied conveyance, armed robbery, carjacking and dealing in stolen property, offenses arising out of the midnight hijacking of visiting businessman Thomas Walsh as he left a car rental agency near the airport on the night of September 7, 1993. (R. 1-5).

The evidence adduced at trial established that shortly before midnight the Defendant and the codefendants -- Defendant's boyfriend Reco and Al -- gathered at Reco's house and prepared to go out and rob. (ST. 921). They traveled in a fifteen-foot yellow Ryder truck and shortly after midnight on September 7, 1993, they began following the victim from the area around the airport car rental companies up onto State Road 112 heading eastbound toward the beach. (ST. 922-923). Observing that there was no traffic on the expressway, Reco maneuvered the Ryder truck in front of the victim's rental car forcing him to stop. (ST. 924). The victim attempted to back down the ramp away from the truck, but Al and the Defendant jumped out of the truck and the Defendant fired one or two shots from about thirty feet away. (ST. 270-271). The Defendant was carrying a sawed off shotgun, and testified in her statement that she fired a warning shot into the air. (ST. 925-927). Thomas Walsh testified that the Defendant jumped out of a truck about thirty feet from is rental car and aimed a shotgun directly at him, firing one or two shots. (ST. 270-273). Al ran to the victim's car on the passenger side, pointing a .25 caliber pistol at him and told him to get out. (ST. 927). The Defendant and Al robbed the victim, leaving him with his wedding ring. (ST. 273-276). The Defendant and Al drove away in the rental car with

the victim's belongings which they later split up and pawned. (ST. 927-930). The Defendant, after a waiver of her rights, gave statements to the police admitting her involvement. (ST. 550-557, 589-602, 634-637, 688, 692, 696-698, 919-938).

During the charge of the jury, instructions as to the lesser included offenses of the charge of attempted first degree murder (ST. 809-814) included attempted second degree murder (ST 814), attempted third degree murder (the underlying felonies being grand theft and/or armed trespass) (ST. 815-816), attempted voluntary manslaughter (ST. 816-818) and aggravated assault (ST. 818). On November 17, 1994, the jury returned a verdict of guilty of attempted third degree murder with a firearm, a lesser included offense of Count One of the Information -- a second degree felony, (R. 161) guilty of armed burglary of an occupied conveyance with a firearm -- a first degree felony, (R. 162) guilty of robbery with a firearm -- a first degree felony, (R. 163) guilty of carjacking with a firearm -- a first degree felony, (R. 164) and guilty of dealing in stolen property -- a second degree felony. (R. 165). The Defendant was adjudicated guilty on all five counts in accord with the verdicts and sentencing was set over until December 29, 1994. (R. 166). The Defendant's sentencing guidelines scoresheet

totaled 156 points indicating a recommended range of seven to twelve years state prison and a permitted range of three to seventeen years state prison. (T. 176).

On December 29, 1994, the trial court sentenced the Defendant on Count I to five years in state prison, on Counts II and III each for a term of natural life with three year minimum mandatory terms for the use of a firearm, on Count IV to a term of thirty years with a three year minimum mandatory term for the use of a firearm, and on Count V to a term of fifteen years, all sentences and mandatory minimum terms to be served concurrently. (R. 170-175; ST. 905). The trial court entered a written order departing upwards from the sentencing guidelines, stating as grounds therefor:

> The victim's status as a tourist made him particularly vulnerable to defendant's crimes since his lack of familiarity with the area made his escape highly unlikely. Moreover, because he was a tourist it was a great hardship for him to return to Miami to appear for deposition and trial. The defendant and her codefendants specifically selected the victim in this case because they hoped that his vulnerability as a tourist would make the crime easier to commit and less likely to be successfully prosecuted.

(R. 176, 178-179; ST. 899, 908).

On appeal, the Third District Court of Appeal found no merit to the Defendant's challenges to her convictions and sentences for armed burglary, armed robbery, carjacking with a firearm and dealing in stolen property, affirming the same. However, the Third District reversed the defendant's conviction and sentence for attempted third degree felony murder based on State v. Gray, 654 So. 2d 552 (Fla. 1995). The Court further disagreed with and rejected the State's argument that the reversed conviction for attempted third degree felony murder should be reduced to a lesser included offense. 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?

(App. A:2; Jones v. State, No. 95-389 (Fla. 3d DCA March 13, 1996)).

Additionally, the Third District rejected the trial court's upward departure sentence based on the victim's "particular vulnerability" because of his status as a tourist, reversing and remanding for resentencing within the sentencing guidelines. (App. A:3-7). The Third District recognized that this issue presented a question of great public importance, certifying the following question:

> WHETHER THE PARTICULAR VULNERABILITY OF A PERSON IN THE VICTIM'S POSITION JUSTIFIES A DEPARTURE FROM THE GUIDELINES?

QUESTION PRESENTED

I

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).

II

WHETHER THE PARTICULAR VULNERABILITY OF A PERSON IN THE VICTIM'S POSITION JUSTIFIES A DEPARTURE FROM THE GUIDELINES?

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 of the charge of attempted first degree murder -- and, as here, the conviction for attempted third degree murder -- as attempted voluntary manslaughter or aggravated assault. The Third District Court of Appeal, construing Gray, has effectively held that the only proper action is to reverse the attempted third degree 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 firing of the sawed off shotgun at 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 at the victim - is fully consistent with various lesser degrees of attempted homicide and aggravated assault. 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 and assault related charges. That result does not ensue from anything which this Court stated in Gray.

The victim's status as a tourist/visitor placed him in a particularly vulnerable position because the Defendant and her codefendants specifically targeted and hunted late arrivals at Miami International Airport car rental agencies for victimization. The trial court was justified in imposing sentence constituting an upward departure from the sentencing guidelines based on this heightened vulnerability, where the Legislature of Florida has recognized this heightened vulnerability status of tourist/visitors by enactment of measures to prevent easy identification of rental cars in order to protect tourist/visitors from such victimization.

ARGUMENT I

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 first degree murder, or for reducing the conviction for attempted third degree 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. Most recently, in Thompson v. State, 667 So. 2d 470 (Fla. 3d DCA 1996), the Third

District has found that upon reversal of the attempted first-degree murder conviction on grounds that one of the crimes that went to the jury, attempted felony murder, did not exist, there was no impediment to a new trial on the charge of attempted premeditated murder where the facts could support a guilty verdict on that charge. The district court specifically noted that the opinion in Thompson differed from its opinions in Lee v. State, 664 So. 2d 330 (Fla. 3d DCA 1995) *question certified*, Alfonso v. State, 661 So. 2d 308 (Fla. 3d DCA 1995) *question certified*, and Wilson v. State, 660 So. 2d 1067 (Fla. 3d DCA 1995) *question certified*. In those cases the court refused to reduce the convictions for attempted felony murder to a lesser included offense or remand for a new trial on a lesser included offense because it found that there could be no lesser included offense to the now non-existent crime of attempted felony murder. Thompson v. State, 667 So. 2d at 471.

In other cases, the courts 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

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[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 seven months 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

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 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

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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.

for nonexistent offense of attempted solicitation was overturned).

Thus, in this case the conclusion that retrial on lesser included offenses is prohibited by Gray would be clearly erroneous. As in Hieke, the jury in the instant case was instructed on a wide variety of lesser included offenses of attempted first degree murder: attempted second degree murder, attempted third degree murder, attempted manslaughter and aggravated assault. (T. 808). Furthermore, it is clear that there is no double jeopardy bar to retrial on the various lesser included offenses. The verdict which the jury returned in this case was a conviction for the lesser included offense of attempted third degree felony murder, which was the second lesser included offense that the jury had been instructed to consider. There was no acquittal of the Defendant for that offense (attempted third degree felony murder) or for either of the next lesser included offenses -- the parallel offense of attempted manslaughter (also a second degree felony) or aggravated assault -- 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, Davis, 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 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

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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.

routinely deemed proper. Davis, 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. Davis, 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.
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> . . .
>
> 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 Davis 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.

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 first degree murder charge; the State is seeking either a reduction of the attempted third degree felony murder conviction to one of the lesser included offenses that the jury was instructed on in this case, specifically the parallel lesser included offense of attempted manslaughter or aggravated assault; or, in the alternative, a retrial on the lesser included offenses. Both attempted manslaughter and aggravated assault were presented to the jury during the charge to the jury as lesser included offenses of attempted first degree felony murder. As such, it would have to be concluded, without any retrial, that the jury did not reject attempted manslaughter or aggravated assault when it returned a verdict on attempted third degree felony murder. The jury would inevitably have had to find the defendant guilty of the next lesser included offense, either attempted manslaughter (like attempted third degree murder, it is also a second degree felony) or aggravated assault. As such, where 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 reversing the attempted third degree 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 first degree 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 assault, 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 referred to the shooting of the victim. (R. 1). It therefore follows that regardless of whether any form of attempted homicide is a lesser included offense of attempted first degree 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 aggravated assault could have proceeded to the jury even if attempted third degree felony murder could not.[4]

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

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

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 first degree 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 shotgun at the victim. (R. 1).

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 voluntary manslaughter, and aggravated assault, 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 aggravated assault. An intentional shooting of a victim is clearly consistent with aggravated assault. When the case was presented to the jury, the jury was instructed on the lesser included offenses of attempted first degree murder which included aggravated assault, and the jury returned a verdict for what it believed to be a greater offense than either attempted manslaughter or aggravated assault. Under such circumstances, it is reasonable to conclude that the jury necessarily believed the defendant to be guilty of either attempted manslaughter or aggravated assault. If for any reason, this Court does not believe that it is proper to reduce the attempted third degree 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.

ARGUMENT II

THE PARTICULAR VULNERABILITY OF A PERSON IN THE VICTIM'S POSITION JUSTIFIES A DEPARTURE FROM THE GUIDELINES.

A departure sentence shall be based upon circumstances or factors which reasonably justify the aggravation of the sentence. §921.001(5), Fla. Stat. (Supp. 1993). It is settled in Florida that the particular vulnerability of a victim is a valid reason for departing from the sentencing guidelines. Carter v. State, 550 So. 2d 1130, 1131 (Fla. 3d DCA 1989)(where the injury inflicted upon a victim initially rendered her particularly vulnerable to the following series of vicious attacks); Orange v. State, 535 So. 2d 691 (Fla. 3d DCA 1988)(where the victim was particularly vulnerable in that she was substantially smaller than her assailant); Berry v. State, 511 So. 2d 1075, 1077 (Fla. 1st DCA 1987)(where pregnancy of the victim placed her in an unusually vulnerable position, vulnerability was a valid reason for departure, but reversed and remanded where it was not clear that the absence of the invalid reasons would not have affected the sentence.) This Court has held that where the protection of police officers is a valid societal objective which justifies legislation making police officers a special class of crime victims, a trial court may validly pronounce

as a reason for departing from the sentencing guidelines that a defendant who chooses to make a police officer acting in the line of duty the victim of his crime is to be treated differently than a defendant who commits the same crime upon an ordinary citizen. State v. Baker, 483 So. 2d 423, 424 (Fla. 1986).

In the instant case, the trial court specifically departed upwards from the sentencing guidelines stating that the evidence established that the Defendant and her codefendants specifically targeted out-of-town tourists for their vulnerability. The Defendant's statement described a plan to rob by driving to the automobile rental companies closest to the expressway bordering Miami International Airport where they were most likely to encounter out-of-town tourists who would be traveling with baggage and cash. Such planned criminal activity which involves the knowing and deliberate exercise of one's will to an antisocial end has been recognized as deserving of additional punishment. Steiner v. State, 469 So. 2d 179, 183 (Fla. 3d DCA 1985)(where the fact that a motel burglary planned for three years by a former employee who had made a copy of the master key to the motel rooms, represented a breach of trust and concentrated protracted planning which violated reasonable and common societal concerns and

justified an upward departure from the sentencing guidelines.).

While it is true that a departure cannot be based on factors common to nearly all victims of similar crimes, the similarity between most victims of robbery, armed burglary and carjacking ends where, as here, the victim is singled out for selection and targeted based upon their being easily identifiable as new arrivals who would be generally unfamiliar with their surroundings and would be expected to be carrying extra baggage and cash. Wemett v. State, 567 So. 2d 882, 887 (Fla. 1990)(vulnerability of an elderly victim, without more, was not a clear and convincing reason to depart from the guidelines when the victim's helplessness is common to nearly all similar crimes.). In this case, there was more. The tourist/visitor in the rental car was being hunted, he was the target preselected by the predators for his inherent lack of orientation and potentially bountiful plunder. The tourist, like the injured zebra who cannot run from the lion, has the added disadvantage of not knowing where to run or even when to run. The tourist/visitor carries with him extra baggage, cash and credit cards, increasing his attraction as a target. His lack of familiarity with the expressways, his rental car, the late hour of his arrival at the international airport all place him in the bulls

eye. These factors facilitate the robbery and carjacking. The hardship and difficulty of bringing the tourist/visitor back to Miami to appear for depositions and for trial, make successful prosecution of such cases less likely and become an additional benefit to the predators when targeting their prey. This particular status which places a specific target in harms way is not a vulnerability which is common to all victims of robbery or carjacking. It is a heightened, specific vulnerability rendering them more susceptible to crimes against their person for no other reason than that they choose to arrive from out-of-town to enjoy the beauty of working or playing in the Magic City. Carter v. State, 550 So. 2d at 1131.

Moreover, there is a valid societal objective which justifies making tourist/visitors a special class of victims. State v. Baker, 483 So. 2d at 424. In a city which depends on its tourist industry for a healthy economy, the targeting of tourist/visitors as prey based on their vulnerable status constitutes extraordinary circumstances which reasonably justify aggravating the sentence. Rule 3.701(d)(11), Fla.R.Crim.P. The Legislature has recently recognized the heightened vulnerability of tourist/visitors to Dade County by enacting legislation which requires rental car

companies to remove any indication or signs which identify the vehicle as a rental car, and have also required a change in license plates which were common to all rentals so as to make vehicles for hire indistinguishable from other vehicles thus diminishing the tourist/visitor's vulnerability. §320.0601, Fla. Stat. (1993). While this acknowledgment of the heightened vulnerability of the tourist/visitor has come subsequent to the Defendant's offense, it is a direct result of and response to the Defendant's particular carjacking and armed robbery along with a number of other similar crimes in which the victim was targeted and more vulnerable by virtue of their easy identification as a person unfamiliar with their surroundings, generally carrying plenty of "loot," and less likely to return from abroad or afar to assist in the prosecution of the crime.

Therefore, the trial court was correct in recognizing the heightened vulnerability of the tourist/visitor as a valid reason for upward departure from the sentencing guidelines, in spite of the fact that the court failed to base the departures on the **status** of the victim as a visitor. A review of the trial court's reasoning indicates that while it did not use the "magic words" in characterizing the tourist/visitor as a special class of victim or

as having a specially protected "status", the trial court did carefully describe the position of particular vulnerability which adhered to the victim from being a tourist/visitor. In effect, the trial court was saying that tourist/visitors were is a special category because of the heightened vulnerability of their position. State v. Baker, 483 So. 2d at 424. Tourist vulnerability was not scored under the guidelines or based on factors for which convictions had not been obtained. Moreover, where the departure is not based on factors common to nearly all victims of similar crimes, having the specific distinguishable characteristics of being a preselected easily identifiable rich "mark" inherently disoriented and unlikely to assist in the prosecution of the crime against their person, such vulnerability supports enhancement of the sentence. Carter v. State, 550 So. 2d at 1131; Orange v. State, 535 So. 2d at 692. The trial court's determination to override sentencing guidelines was within its sound discretion and should be affirmed, particularly where the Defendant's conduct violated common societal concerns for the safety of tourist/visitors as a class of more vulnerable victims of planned criminal activity. State v. Baker, 483 So. 2d at 424; Steiner v. State, 469 So. 2d at 183.

CONCLUSION

WHEREFORE, based upon the foregoing, the certified question should be answered in the affirmative as to the upward departure from the sentencing guidelines, and the decision of the District Court of Appeal should be quashed, in part, with directions to either reduce the overturned conviction for attempted third degree felony murder to a conviction for attempted manslaughter or aggravated assault, 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 third degree felony murder.

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Attorney General
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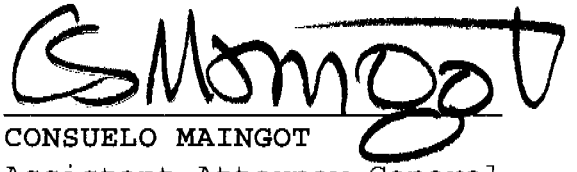

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to **BRUCE A. ROSENTHAL,** Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit, 1320 N.W. 14th Street, Miami, Florida 33125 on this 28 day of May 1996.

CONSUELO MAINGOT
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,631

THE STATE OF FLORIDA,

Petitioner,

-vs-

PATRICIA JONES,

Respondent.

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

APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

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INDEX TO APPENDIX

APPENDIX	DESCRIPTION
App. A	Slip Opinion, Case 95-389 March 13, 1996

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CONSUELO MAINGOT
Assistant Attorney General

95-13-255-W

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1996

PATSY JONES, **

Appellant, **

vs. ** CASE NO. 95-389

THE STATE OF FLORIDA, ** LOWER TRIBUNAL NO. 93-30742

Appellee. **

Opinion filed March 13, 1996.

An Appeal from the Circuit Court for Dade County, Richard V. Margolius, Judge.

Bennett H. Brummer, Public Defender and Bruce A. Rosenthal, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Consuelo Maingot, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and JORGENSON and GREEN, JJ.

SCHWARTZ, Chief Judge.

The appellant Jones and two co-perpetrators followed an Illinois businessman named Thomas Walsh, who had just arrived at Miami International Airport on his way to a meeting in Broward County, from a rental car agency at the airport onto an expressway where they stopped his car at gunpoint, shot at him and robbed him of money and jewelry. She was convicted of attempted third degree

felony murder, as a lesser offense of attempted first degree murder, and of armed burglary, armed robbery, carjacking with a firearm, and dealing in stolen property. On this appeal, she challenges only the first conviction and an upward departure sentence which was based on the victim's heightened vulnerability.[1] We find merit in both positions.

I.

The attempted third degree felony murder conviction must be reversed under State v. Gray, 654 So. 2d 552 (Fla. 1995). Moreover, as in Wilson v. State, 660 So. 2d 1067 (Fla. 3d DCA 1995), review granted (Fla. Case no. 86,680, January 31, 1996), and several similar cases,[2] we reject the state's claim that this conviction may properly be reduced to a lesser included offense. We again certify to the Supreme Court the question of great public importance stated in Wilson. 660 So. 2d at 1069.

II.

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[1] The maximum permitted under the guidelines was seventeen years imprisonment. The court departed to impose concurrent sentences of life for armed burglary and for armed robbery, thirty years for carjacking with a firearm--all with a concurrent three-year firearm mandatory minimum--five years for attempted third degree murder, and fifteen years for dealing in stolen property.

[2] See Gibson v. State, ___ So. 2d ___ (Fla. 1st DCA Case no. 94-3311, opinion filed, February 6, 1996)[21 FLW D358]; Pratt v. State, ___ So. 2d ___ (Fla. 1st DCA Case no. 94-1432, opinion filed, January 31, 1996)[21 FLW D311]; Lee v, State, 664 So. 2d 330 (Fla. 3d DCA 1995); Alfonso v. State, 661 So. 2d 308 (Fla. 3d DCA 1995), cause dismissed, 665 So. 2d 220 (Fla. 1995), review granted (Fla. Case no. 86,739, January 30, 1996).

The trial court departed upward from the sentencing guidelines on the following basis:

> 2. The Court's sentence departs from the guidelines because the evidence clearly establishes that the defendants chose the victim in this case because they correctly surmised that he was a tourist. The defendant's confession establishes that when she and the codefendants decided to commit a robbery they drove a considerable distance to the area of Miami International Airport. Specifically, they drove to the expressway on the south side of the airport, which was closest to the rental companies where an out-of-town tourist would most likely go to rent an automobile. They forcibly stopped the victim's rental car on the expressway and committed the crimes for which the defendant was convicted.
>
> 3. The victim's status as a tourist made him particularly vulnerable to defendant's crimes since his lack of familiarity with the area made his escape highly unlikely. Moreover, because he was a tourist it was a great hardship for him to return to Miami to appear for deposition and trial. The defendant and her codefendant specifically selected the victim in this case because they hoped that his vulnerability as a tourist would make the crime easier to commit and less likely to be successfully prosecuted.
>
> 4. The particular vulnerability of a victim can be a valid reason for departing from the sentencing guidelines. Carter v. State, 550 So. 2d 1130 (Fla. 3d DCA 1989); Orange v. State, 535 So. 2d 691 (Fla. 3d DCA 1988); Berry v. State, 511 So. 2d 1075 (Fla. 1st DCA 1987). Particularly, when as in this case, the victim's vulnerability is the actual reason why he was selected as a victim, a departure from the guidelines is warranted.

Whatever our own view may be, the guidelines departure imposed because of Walsh's "particular vulnerability" in these circumstances does not pass muster under controlling decisions of the supreme court. E.g., Wemett v. State, 567 So. 2d 882 (Fla. 1990); Mathis v. State, 515 So. 2d 214 (Fla. 1987); Lerma v. State, 497 So. 2d 736 (Fla. 1986). This is essentially because Walsh's

situation as an out-of-towner driving a rental car at night on a Miami expressway was simply not significantly more (indeed, was probably less) dangerous than that of any other victim of an armed robbery, or, even more obviously, any other victim of a carjacking. As the Supreme Court said in Wemett:

> [A] departure cannot be based on factors common to nearly all victims of similar crimes. Otherwise, the exception would swallow the rule. Previous decisions rendered by this Court, in a context similar to that presented here, support this position.
>
> For example, in Williams, the defendant was convicted of aggravated battery with a deadly weapon. We rejected as a ground for departure the fact that the "the defendant stabbed the victim while she was sleeping and therefore more vulnerable," holding that vulnerability of the victim "alone is not a clear and convincing reason to depart." 492 So.2d at 1309. We resolved analogous situations in similar fashion in Mathis v. State, 515 So.2d 214 (Fla. 1987), and Lerma v. State, 497 So.2d 736 (Fla. 1986), receded from on other grounds, State v. Rousseau, 509 So.2d 281, 284 (Fla. 1987). In Mathis, we rejected a departure predicated on the fact that the victims of an armed robbery were female and working alone at night. We reasoned that "victims' defenselessness is common to nearly any armed robbery," and "gender of the victim, in and of itself, [is not] an appropriate reason for departure." Mathis, 515 So.2d at 216. Likewise, in Lerma, the trial court departed from the guidelines in a sexual battery case on the grounds that "[t]he victim was an especially susceptible female," being a "slight female, weighing approximately 108 lbs., while the defendant is a stocky, muscular male." Lerma, 497 So.2d at 738. We rejected that as a reason for departure, holding that helplessness of a sexual battery victim cannot be a valid reason to depart because "unfortunately, the vast majority of victims of sexual battery are virtually helpless." Id. at 739.
>
> Some of the same concerns we had in Williams, Lerma, and Mathis also are present here. Just as almost any female armed-robbery victim could be considered defenseless to a bigger, stronger male, or almost every female sexual-battery victim can be considered helpless

> when attacked, almost every elderly person could be considered helpless and vulnerable to a younger, stronger assailant such as Wemett. Vulnerability is not a clear and convincing reason to depart from the guidelines when the victim's helplessness is common to nearly all similar crimes. Were we to allow the departure here based solely on age-related vulnerability, virtually every defendant who assaults an elderly person or a child would qualify for a departure sentence regardless of the nature or severity of the offense. These crimes are reprehensible, but such a rule would defeat the purpose and spirit of the guidelines.

Wemett, 567 So. 2d at 886-87.

The trial judge's entirely correct conclusion that the victim was targeted because of the belief that an attack upon him would be especially easy to commit and to get away with similarly does not justify a departure. Presumably all robbers, burglars, and carjackers--indeed all criminals--choose their victims on the basis of whether their crimes are more, rather than less, likely to be successful. Thus, one walking alone on a dark street or working alone at a convenience store after midnight is obviously more likely to be singled out than a member of a crowd at the Orange Bowl. But our courts have consistently held that these considerations are not enough to support a departure. E.g., Mathis, 515 So. 2d at 214 (females working alone at night not "particularly vulnerable"). The facts of Williams v. State, 531 So. 2d 212 (Fla. 1st DCA 1988) are particularly close to ours. There the court rejected a vulnerability departure based on the fact that the victim was the sole employee of an all-night store. The court stated:

> However, victim vulnerability is not a valid reason to depart when the victim's helplessness is based on factors common to nearly all victims of armed robbery. Mathis v. State, 515 So.2d 214, 215 (Fla. 1987); Burney v. State, 523 So.2d 795, 795 (Fla. 1st DCA 1988). In this case, as in Burney and Mathis, the victim's vulnerability was due to the circumstances of his employment. We conclude that the victim's vulnerability in this regard was a factor common to nearly all armed robbery victims employed by business establishments that remain open all night, and therefore does not constitute a valid departure reason in this case.

Williams, 531 So. 2d at 218-19.

Surely neither the present victim nor those in his general class was or are more vulnerable than the sleeping victim in Williams v. State, 492 So. 2d 1308 (Fla. 1986), the elderly, alcohol-impaired victim in Johnson v. State, 517 So. 2d 792 (Fla. 3d DCA 1988), the elderly, disabled lady in Grant v. State, 586 So. 2d 438 (Fla. 1st DCA 1991), who was at home late at night in bed when the defendant shot into her house, or the 86 year-old frail, blind victim in Byrd v. State, 516 So. 2d 107, 108 (Fla. 4th DCA 1987). In all of these cases, however, departures based on victim vulnerability[3] were reversed. We must do the same. We certify that this case also involves a question of great public importance as to whether the particular vulnerability of a person in the

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[3] Because the trial judge did not base the departures on the status of the victim as a visitor, but rather because of his purported "vulnerability" under the circumstances, we do not directly consider whether a departure could be sustained on that ground. See generally State v. Baker, 483 So. 2d 423 (Fla. 1986); Steiner v. State, 469 So. 2d 179, 182 n.10 (Fla. 3d DCA 1985), review denied, 479 So. 2d 118 (Fla. 1985).

victim's position justifies a departure from the guidelines.

III.

The appellant's convictions for armed robbery, armed burglary, carjacking with a firearm, and dealing in stolen property are affirmed, the attempted third degree felony murder conviction is vacated, and the cause is remanded for resentencing within the guidelines.

Affirmed in part, reversed in part, questions certified.