IN THE SUPREME COURT OF FLORIDA

BRIAN DAVID LEE,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

CASE NO. 87,715

ON DISCRETIONARY REVIEW
From the First District Court of Appeal

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, Brian David Lee, was the defendant in the trial court and appellant in the lower court; this brief will refer to him as the defendant. The State of Florida, the prosecution below, will be referred to as the State.

The symbol "R" will refer to the record on appeal and the symbol "T" will refer to the transcript of trial court proceedings. "IB" will designate Petitioner's Initial Brief. Each symbol is followed by the appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

JURISDICTIONAL STATEMENT

Article V, Section 3(b)(4) of the Florida Constitution provides, in pertinent part, that the Supreme Court

> [m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance...

Similarly, Fla. R. App. P. 9.030(a)(2)(v) provides that the discretionary jurisdiction of this Court may be sought to review decisions of a district court of appeal which "pass upon a question certified to be of great public importance."

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's statement of the case and facts as being essentially accurate, but would add the following matters omitted from the defendant's version thereof.

The record establishes that the defendant at no time objected to his absence from the bench during the exercise of peremptory challenges. (S. 22). The defendant was present in the courtroom during jury selection and did discuss matters relating to jury selection with his counsel. (S. 14).

SUMMARY OF ARGUMENT

ISSUE I.

The question certified by the district court has already been answered and does not rise to the level of a question of great public importance. Thus, discretionary review should be denied. The Court should also decline review because the petitioner is not a member of the pipeline class who could benefit from an affirmative answer to the certified question, as he did not raise the issue at trial.

Finally, the state urges that if this Court answers the question, that it answer the question in the negative. The question should be answered in the negative because the issue has been decided, because this Court has the authority to make its decisions prospective, and because modifications of rules of procedure are appropriately prospective only.

ISSUE II.

The Court should answer the certified question in the affirmative and hold that reversal of a conviction pursuant to State v. Gray permits the trial court, upon reversal of the conviction, to reduce the conviction and enter judgment for attempted manslaughter, a category one necessarily included

lesser offense of the crime charged. In the alternative, such reversal does not preclude retrial for any valid offense. Case law holds that original jeopardy continues while a conviction is on appeal, that reversal of a conviction on appeal, where the evidence is sufficient to uphold the conviction, does not interrupt jeopardy, and that an appellant/defendant who successfully obtains a reversal of a conviction may be retried. There is not double jeopardy bar to such reprosecution. These rules of law are particularly apropos where convicted criminals, as in this case, receive a beneficent change in appellate law which overturns settled law of long duration.

ISSUE III.

This Court should decline to consider the issue presented which is not one of the questions certified by the lower tribunal and which was deemed to be of no merit by that court. The comments complained of were fair response to the defendant's suggestion that the State had offered a victim/witness a secret deal in return for favorable testimony. If the comments complained of were, in fact, improper, they were not objected to in a timely fashion and were merely harmless in view of the overwhelming evidence of the defendant's guilt.

ARGUMENT

ISSUE I

DOES THE DECISION IN CONEY APPLY TO "PIPELINE CASES," THAT IS, THOSE OF SIMILARLY SITUATED DEFENDANTS WHOSE CASES WERE PENDING ON DIRECT REVIEW OR NOT YET FINAL DURING THE TIME CONEY WAS UNDER CONSIDERATION BUT PRIOR TO THE ISSUANCE OF THE OPINION?

The defendant seeks to have this Court recede from its clear statement in Coney v. State, 653 So. 2d 1009 (Fla. 1995) that its creation of a new rule was to have prospective application only. The lower court in this case specifically found that the defendant's claim was without merit holding that the decision in Coney was to have only prospective application.

Pursuant to Article V § 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." The District Court of Appeal of Florida, First District has certified the above stated question, therefore, this Court has jurisdiction.

While this Court has jurisdiction to answer this question certified by the lower tribunal, it also has the discretion to decline to do so. State v. Burgess, 326 So.2d 441 (Fla. 1976),

Stein v. Darby, 134 So.2d 232 (Fla. 1961) The State respectfully urges this Court to exercise its discretion and decline to review this case. Coffin v. State, 374 So.2d 504, 508 (Fla. 1979).

The certified question posed by the lower court improperly asks this Court to conduct a rehearing of its decision in Coney v. State, 653 So.2d 1009, 1013 (Fla. 1995). In Coney, this Court interpreted rule 3.180(a) Fla. R. Crim. P. stating that:

> Our ruling today clarifying this issue is prospective only.

Id. at 1013

In certifying its question, the District Court acknowledged that it understood the meaning of the language used by this Court in Coney, prospective means the decision does not apply to cases tried prior to the decision, by denying relief on this issue. On rehearing, which sought certification, the court cited to its prior decision in Lett v. State, 21 Fla. L. Weekly D580 (Fla. 1st DCA March 25, 1996), a case in which the court questioned how the Coney decision can be reconciled with Smith v. State, 598 So.2d 1063 (Fla. 1992). In order to resolve what it perceived as an unanswered issue, the District Court once again certified the question.

The District Court's perception that an issue remains to be resolved is erroneous. Subsequent to the Smith decision, this Court has answered the question of how decisions of this Court are to be applied by the courts of this state. The issue was specifically addressed in Wuornos v. State, 644 So.2d 1000 (Fla. 1994), where this Court addressed the proper reading of Smith and held that Smith means that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise. Subsequently, in Domberg v. State, 661 So.2d 285 (Fla. 1995), a case dealing with retroactivity, this Court referred to Smith in the following way:

> Smith v. State, 598 So.2d 1063 (Fla. 1992), limited by Wuornos v. State, 644 So.2d 1000, 1008 n.4 (Fla. 1994)(Smith read to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise), cert. denied ___ U.S. ___, 115 S. Ct. 1705, 131 L. Ed.2d 566 (1995), State v. Jones, 485 So.2d 1283 (Fla. 1986)

Domberg at 287.

Thus, the issue of how Smith is to be read has been decided.

Since the issue presented by the certified question has been put to rest by recent decisions of this Court, it cannot be said that the certified question is one of any public importance. Therefore, this Court should decline to exercise its jurisdiction

to answer the already decided question presented by this case. See Stein.

A second reason why this Court should decline to exercise its jurisdiction in this case involves a misapplication, by the District Court, of the concept of pipeline cases. The Lett decision, relied upon by the Court below, misapplies the definition of a pipeline case entitled to obtain the benefit from a new decision. A pipeline case is one in which the issue is properly preserved in an appeal which is not final at the time the change in law occurs. In order to be a pipeline case, an appellant must establish that he is similarly situated and his issue is properly preserved. This was made clear by this Court's holding in Gibson v. State, 661 So.2d 288 (Fla. 1995), in which this Court held that issues relating to a defendant's presence during jury voir dire (like other jury voir dire issues) must be preserved in the trial court by contemporaneous objection. The Gibson case presented this Court with the following issue:

> Gibson claims error in two respects. First, he argues that the trial court violated his right to be present with counsel during the challenging of jurors by conducting the challenges in a bench conference. Second, he argues that the trial court violated his right to the assistance of counsel by denying defense counsel's request to consult with Gibson before exercising peremptory challenges.

This Court specifically held that:

> In Steinhorst v. State, 412 So.2d 332 (Fla. 1982), we said that, "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." In this case, we find that Gibson's lawyer did not raise the issue that is now being asserted on appeal. If counsel wanted to consult with his client over which jurors to exclude and to admit, he did not convey this to the trial court. On the record, he asked for an afternoon recess for the general purpose of meeting with his client. Further, there is no indication in this record that Gibson was prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges. On this record, no objection to the court's procedure was ever made. In short, Gibson has demonstrated neither error nor prejudice on the record before this Court. Cf. Coney v. State, 653 So.2d 1009, 1013 (Fla. 1995)

Gibson at 290-291

Thus, Gibson's attempt to raise for the first time on appeal a Coney issue was rejected because it was not properly preserved. This rule of law operates independently of Coney and applies even to cases where the trial takes place after Coney issued. Likewise, the defendant in this case did not object in the trial court and his case is indistinguishable from Gibson.

This Court should discourage the promiscuous certification of irrelevant questions by declining to exercise its discretionary jurisdiction and by instructing the district courts that unpreserved claims cannot be the basis for "an issue of great

public importance." Misapplication of the designation "this is an issue of great public importance" when the issue certified could not provide the defendant with relief is all too common. In fact, this "Coney" issue has been repeatedly certified by the lower tribunal in cases which do not contain any objection to the trial court procedure. See Branch v. State, No 87,717, Bell v. State, No. 87,716, Gainer v. State, No. 87,720, Lett No. 87,541, Horn No. 87,789 Continuation of this practice should be discouraged. This Court, if it exercises discretionary review, should answer the certified question in the negative.

This Court specifically answered the question of how its decisions are to be applied in, Wuornos v. State, supra, where this Court addressed the proper reading of Smith and held that Smith means that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise. The Court noted that it had repeatedly held that it had the authority to make new rules prospective and cited a series of cases in which it had dictated that a new rule announced therein was to be prospective only in application.

The Court, as previously stated, in Domberg v. State, supra, recognized that Smith, as limited by Wuornos, meant that new

points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise.

Petitioner's arguments are based on a fundamental misunderstanding of the nature and scope of this Court's authority. Unlike the United States Supreme Court, this Court has the authority to promulgate procedural rules and modify them when necessary. For obvious reasons, changes to procedural rules are almost always prospective. Tucker v. State, 357 So.2d 719 (Fla. 1978) Thus, in numerous circumstances, rulings of this Court will only apply prospectively. Adopting a rule akin to the United States Supreme Court rule in Griffin v. Kentucky, 479 U.S. 314 (1987) would be inappropriate given this Court's rule making authority and would also unduly restrict the Court's ability to modify the rules.

This approach is also appropriate given the subject of this litigation. As in R.J.A v. Foster, 603 So.2d 1167 (Fla. 1992) where the Court found the procedural rule superseded the statutory juvenile speedy trial provision, Rule 3.180 superseded the provisions of § 914.01 Fla. Statutes. See: Thomas v. State, 65 So.2d 866, 868(Fla. 1953) Thus, the rule is a procedural mechanism designed to implement a substantive right.

It must also be recognized that the rights provided in the rule and the rights mandated by the constitution are not synonymous. In Shriner v. State, 452 So.2d 929 (Fla. 1984) this Court held that it was not fundamental error when a defendant was absent from bench conferences because he was present in the courtroom. Likewise, in Jones v. State, 569 So.2d 1234, (Fla. 1990), this Court found **no error** when Jones was not at the sidebar during selection of the jury even though the record did not reflect an affirmative waiver.

Thus, the Coney interpretation of the term "present" is not constitutionally mandated, but is a modification of a rule of procedure setting out the manner in which the constitutional right should be implemented. See: R.J.A.

Reading the rule in this fashion is in accord with federal practice. The United States law regarding this issue was summarized in United States v. McCoy, 8 F.3d 495, 496 (7th Cir. 1993) in which the Court stated that:

> [a] defendant's right to be present at trial derives from several sources. First, the defendant has a sixth amendment right to confront witnesses or evidence against him. See *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 1484, 84 L. Ed.2d 486 (1985) (per curiam); *Verdin v. O'Leary*, 972 F.2d 1467, 1481 (7th Cir.1992); *United States v. Shukitis*, 877 F.2d 1322, 1329 (7th Cir.1989). That right is not implicated here, because no witness or evidence against

McCoy was presented at any of the conferences. See *Verdin*, 972 F.2d at 1481-82.

The defendant also has a due process right to be present "'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" *Gagnon*, 470 U.S. at 526, 105 S. Ct. at 1484 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934). But "'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" *Id.* (quoting *Snyder*, 291 U.S. at 107-08, 54 S. Ct. at 333); see also *Verdin*, 972 F.2d at 1481-82; *United States v. Moore*, 936 F.2d 1508, 1523 (7th Cir.), cert. denied, --- U.S. ----, 112 S. Ct. 607, 116 L. Ed. 2d 630 (1991); *Shukitis*, 877 F.2d at 1329-30. That determination is made in light of the record as a whole. *Gagnon*, 470 U.S. at 526-27, 105 S. Ct. at 1484.

In *Gagnon*, the Supreme Court found that defendants' due process rights were not violated when they were excluded from an in camera conference between the judge, defense counsel and a juror regarding the juror's possible bias. The Court based its holding on the fact that the defendants "could have done nothing had they been at the conference, nor would they have gained anything by attending." *Id.* at 527, 105 S. Ct. at 1485. In *Shukitis*, we similarly held that a defendant's due process rights were not implicated when he was excluded from an in camera conference that addressed a separation of witnesses order. We reasoned that the absence did not affect the court's ability to decide the issue or otherwise diminish Shukitis' ability to defend against the charges, and that Shukitis' interests were adequately protected by his counsel's presence at the conference. 877 F.2d at 1330. See also *Moore*, 936 F.2d at 1523.

As in *Gagnon* and *Shukitis*, McCoy's absence from the conferences did not detract from his defense or in any other way affect the fundamental fairness of his trial.

> Indeed, McCoy seems to have conceded this point, having offered no argument to the contrary. Like Shukitis, McCoy's interests were sufficiently protected by his counsel's presence at the conferences. McCoy therefore had no due process right to attend.
>
> Finally, Fed. R. Crim. P. 43 entitles defendants to be present "at every stage of the trial including the impaneling of the jury...." This right is broader than the constitutional right (*Shukitis*, 877 F.2d at 1330), but is waived if the defendant does not assert it. Reversing the Ninth Circuit in *Gagnon*, the Supreme Court explained:
>
> We disagree with the Court of Appeals that failure to object is irrelevant to whether a defendant had voluntarily absented himself under Rule 43 from an in camera conference of which he is aware. The district court need not get an express "on the record" waiver from the defendant for every trial conference which a defendant may have a right to attend.... A defendant knowing of such a discussion must assert whatever right he may have under Rule 43 to be present.
>
> 470 U.S. at 528, 105 S. Ct. at 1485; Cf. Taylor v. United States, 414 U.S. 17, 18-20, 94 S. Ct. 194, 195-96, 38 L. Ed. 2d 174 (1973) (per curiam). A defendant may not assert a Rule 43 right for the first time on appeal. *Gagnon*, 470 U.S. at 529, 105 S. Ct. at 1485; *Shukitis*, 877 F.2d at 1330. Because McCoy did not invoke Rule 43 either during trial or in a post-trial motion, he has waived any right under that rule.

Because of the availability of consultation between a lawyer and his client present for trial, there is no due process violation when a defendant is not present at the bench during a sidebar for peremptory challenges. See, McCoy; United States v.

Gayles, 1 F.3d 735 (8th Cir. 1993); United States v. Moore, 936 F.2d 1508, 1523 (7th Cir. 1991); United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984). Therefore, the only legitimate conclusion is that the Coney decision was not one of constitutional magnitude.

In United States v. Gagnon, 470 U.S. 522, 526-530 (1985) the Supreme Court indicated that the right of the defendant to be present under Rule 43 of the Federal Rules of Criminal Procedure (similar to our rule) is broader than the constitutionally based right to be present. In Gagnon, the Court held that such claims must be preserved at trial and that waiver of the benefits of the Rule 43 right to be present may be inferred by a defendant's failure to assert the right at trial. Thus, the United States Supreme Court recognizes that rule created right must be asserted at trial by the defendant; our rule should adopt this approach.

Finally, to state the problem and set forth its analysis in a slightly different form, the District Court and the defendant fail to distinguish between the Coney decision and the prospective rule announced in that decision. While Coney is applicable to all pipeline cases, that decision, by its own terms, plainly announces that the new procedural rule established therein is only applicable to trials which occur after the

announcement of the new rule. By its terms, it does not provide relief to any appellant/petitioner whose trial occurred before the Coney decision became final[1]. Not only is it uncontroverted that the issue was not preserved by the defendant below, it is also uncontroverted that the trial occurred before the issuance of Coney. The district court is simply misapprehending the plain language of Coney in perceiving a conflict with Smith. None exists.

The question certified by the district court has already been answered and does not rise to the level of a question of great public importance. Thus, discretionary review should be denied. The Court should also decline review because the petitioner is not a member of the pipeline class who could benefit from an affirmative answer to the certified question, as he did not raise the issue at trial. Gibson

Finally, the state urges that if this Court answers the question, that it answer the question in the negative. The question should be answered in the negative because the issue has been decided, because this Court has the authority to make its

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[1] The defendant's trial took place from September 21-23, 1994.

decisions prospective, and because modifications of rules of procedure are appropriately prospective only.

ISSUE II

WHEN A DEFENDANT IS CHARGED WITH ATTEMPTED SECOND-DEGREE MURDER AND IS CONVICTED BY A JURY OF THE CATEGORY 2 LESSER-INCLUDED OFFENSE OF ATTEMPTED THIRD DEGREE (FELONY) MURDER, SO STATE V. GRAY, 654 So. 2d 552 (FLA.. 1995), AND SECTION 924.34, FLORIDA STATUTES (1991), REQUIRE OR PERMIT THE TRIAL COURT, UPON REVERSAL OF THE CONVICTION TO ENTER JUDGMENT FOR ATTEMPTED VOLUNTARY MANSLAUGHTER, A CATEGORY 1 NECESSARILY INCLUDED LESSER OFFENSE OF THE CRIME CHARGED? IF THE ANSWER IS NO, THEN DO LESSER-INCLUDED OFFENSES OF THE CHARGED OFFENSE REMAIN VIABLE FOR A NEW TRIAL?

The defendant contends that the answer to the above question, certified as one of great public importance, must be no and that he should be discharged forever from all liability for his criminal conduct. This contention is, however, without merit.

In Amlotte v. State, 456 So. 2d 448 (Fla. 1984) this Court interpreted section 777.04(1), Florida Statutes (1981) as creating a criminal offense of "attempted first degree murder done in the felony murder mode." Amlotte at 449. Eleven years later, although the legislature had not acted to correct this Court's interpretation of the statute and the statute remained as it was at the time of Amlotte, this Court reinterpreted the statute in Gray and determined that it did not create an offense of attempted first degree felony murder. This partly retrospective, partly prospective, judicial repeal of the

statutory criminal offense was made applicable to all cases on direct appeal or not yet final. The abrupt 180 degree turn in the law has created confusion in the law. The district courts have not only applied the actual holding of Gray to overturn jury verdicts of attempted first degree felony murder, they have gone further and held that the decision precludes conviction or prosecution for alternative offenses to attempted first degree felony murder. Although Gray violated at least three basic principles of statutory interpretation[2], the State will not now attempt to persuade the Court that it should reverse the decision in Gray and return the law to that enacted by the legislature as interpreted by Amlotte and relied on by all concerned,

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[2] These three principles, so well-settled as to require no citation, are (1) a court interpreting a statute or rule close in time to its enactment is presumed to be more familiar with legislative purpose and intent than a subsequent court interpreting the statute or rule after a lengthy lapse of time, (2) a decision of the legislature not to overturn a judicial interpretation of a statutes indicates that the judicial interpretation is correct and should not be overturned, and (3) **stare decisis** is critical to the stability and integrity of the law. For an example of the continuing mischief which occurs when these principles are violated, see the ongoing saga of Batilla v. Allis Chalmers Manufacturing, 392 So. 2d 874 (Fla. 1981); Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985); Firestone Tire & Rubber Co. V. Acosta, 612 So. 2d 1361 (Fla. 1992); and Mosher v. Speedstar Div. Of AMCA INT. Inc, 52 F. 3d 913 (11th U.S.C.A 1995).

particularly prosecutors, for some eleven years.[3] Instead, the State will simply argue that the good faith prosecution and conviction for the then extant criminal offense of attempted second degree murder does not bar prosecution and conviction for other alternative offenses. The certified question should be answered yes.

The district court in this case reversed and remanded the defendant's conviction for attempted third degree felony murder. Because of its uncertainty on the full import of Gray, and its reluctance to prohibit retrial on other alternative offenses, the district court certified the same question as that certified by the Third District Court of Appeal in Alfonso v. State, 661 So. 2d 308 (Fla. 3d DCA 1995), cause dismissed, ___ So. 2d ___ (Fla. 1995) and Wilson v. State, 660 So. 2d 1067 (Fla. 3d DCA 1995).

In Alfonso and Wilson, the court reversed and remanded the defendants' convictions for attempted first degree felony murder and discharged them from all criminal liability based on the irrelevant truism that "there can be no lesser-included offenses

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[3] The Florida Legislature has already moved to correct the gap in the law created by Gray by enacting three new felony offenses relating to bodily injuries to persons resulting from the commission of a felony. See, House Bill 2712 of the 1996 legislative session.

under a non-existent offense such as attempted first degree felony murder." 660 So. 2d at 1069. The State asserts that the reversal of a conviction for an offense, whether existent or nonexistent, does not preclude conviction or retrial for other existent offenses. The trial courts did not err in instructing on lesser included offenses, they would have erred had they not done so. The fact that this Court changed its view on whether there is an offense of attempted felony murder does not taint the other offenses. The reversal of a conviction for the offense the defendant was convicted of does not preclude either retrial on other offenses or affirmation of convictions for lesser included offenses already obtained.

Attempted first degree murder and first degree murder may be charged as general offenses and the jury alternatively instructed under both premeditated and felony theories. Would Gray mandate reversal of a conviction for attempted first degree murder if the evidence supported a verdict of attempted premeditated first degree murder during the commission of a felony? Not at all. This conclusion is fully consistent with decisions of this Court on cases involving an indictment of first degree murder where the case is submitted to the jury for its determination upon alternative theories of premeditated and first degree murder and

the jury returns a general verdict of guilty as charged. Where the evidence adduced at trial supports a verdict of guilt on one of the two theories of the case, courts have refused to substitute their opinion of the evidence for that of the jury. Atwater v. State, 626 So. 2d 1325, 1327-1328, n. 1, (Fla. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994). Similarly, in cases in which a verdict of guilty of attempted first degree murder has been entered, if the evidence supports a verdict on premeditated attempted first, then no court should replace the fact finding authority of the jury and determine that the conviction was based upon an underlying felony which necessitates reversal. Certainly, they should not reverse and prohibit retrial.

An analogy is found in Cooper v. State, 547 So. 2d 1239 (Fla. 4th DCA 1989), in which Cooper was convicted of the nonexistent offense of attempted manslaughter by culpable negligence. In that case, the District Court agreed

> with the appellant that the trial court erred in instructing the jury on attempted manslaughter by culpable negligence, a non-existent crime in Florida. *Taylor v. State*, 444 So. 2d 931 (Fla. 1983). Although the trial court also instructed the jury on attempted manslaughter by act, a crime that is recognized by Florida law, the trial court went astray when it informed the jury that the case at hand was one involving culpable negligence.

547 So. 2d at 1239.

Thus the key to the result in Cooper was the trial court's act of informing the jury that the case involved attempted manslaughter by culpable negligence, which, in essence, limited the jury's consideration to the non-existent crime as a basis for its verdict. The necessary implication of the decision in that case is that had the court not so instructed the jury, reversible error would not have occurred.

Other cases in which courts have applied Gray to convictions of attempted felony first degree murder present one of two types of situations. The first occurs where a defendant is charged with and convicted of attempted first degree felony murder. The second situation occurs where the defendant is charged with attempted felony first degree murder, but is convicted of some lesser degree crime. A variation of the second situation, as in this case, occurs when a defendant is charged with a valid offense such as attempted second degree murder, but is convicted of a lesser included offense such as attempted third degree (felony) murder. There is no bar in either situation to conviction or retrial on other existent offenses.

> Courts of this State have applied the provisions of F.S. 924.34 "to cases in which convictions had to be set aside because they were based on statutes later

> determined to be unconstitutional." Harris v. State, 649 So. 2d 923 (Fla. 1st DCA 1995); Paige v. State, 641 So. 2d 179, 181 (Fla. 5th DCA 1994); Golden v. State, 578 So. 2d 480 (Fla. 2d DCA 1991). F.S. 924.34 provides that: "[w]hen the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish his guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense."

See: e.g., Harris v. State, supra., (where the defendant was convicted of a crime, the authority for which was a void statute, the remedy on appeal was to reduce the conviction to a lesser-included offense); Ellison v. State, 547 So. 2d 1003, 1006 (Fla. 1st DCA 1989) (defendant's conviction for second-degree murder reduced to manslaughter), quashed on other grounds, 561 So. 2d 576 (Fla. 1990).

The situation presented in the instant case, is on point with that in Harris. The defendant was convicted of a crime, the statutory authority for which, was recognized as valid by the courts of this State both at the time of its commission and at the time conviction was entered. Subsequently, the crime was deemed no longer valid. The argument that lesser included offenses do not exist for nonexistent offenses, as asserted by the First District Court in Pratt v. State, 668 So. 2d 1007 (Fla.

1st DCA 1996), flies in the face of its prior decision in Harris. It also ignores the distinction between an offense which never constituted a valid offense and one which was previously recognized as valid, but which, for some other reason, is not longer accepted as such. Thus, as in Harris, viable lesser included offense remain thus permitting the reduction of conviction.

The appropriate conviction which should be entered in this case is for a conviction of attempted manslaughter, a valid criminal offense, Taylor v. State, 444 So. 2d 931, 934 (Fla. 1983), which is a category one lesser included offense of attempted second degree murder. Holland v. State, 634 So. 2d 813, 816 (Fla. 1st DCA 1994). Here, the evidence presented at trial amply supports a conviction for attempted manslaughter, as the record establishes that the defendant intentionally shot into an occupied vehicle.

The defendant in the instant case was charged with attempted second degree, depraved mind murder, and was convicted of the attempted felony third degree murder of his victim. Some courts faced with similar procedural circumstances at issue here have taken the position, either expressly or by implication, that discharge is required. Harris v. State, 658 So. 2d 1226 (Fla.

4th DCA 1995). This approach is erroneous and conflicts with other appellate decisions of this and other Florida courts which have dealt with the ramifications of convictions for nonexistent offenses and typically found that remand for retrial is the appropriate action.

In State v. Sykes, 434 So. 2d 325 (Fla. 1983), for example, this Court reversed Sykes' conviction for attempted second degree grand theft because the act was a nonexistent crime. The Court, however, held that reprosecution was not barred under principles of double jeopardy so that discharge was not mandated. Similarly, in Achin v. State, 436 So. 2d 30 (Fla. 1983), Achin was convicted of the nonexistent offense of attempted extortion. After reversing the conviction, this Court approved retrial of Achin on the original charge of extortion, a higher level offense than the charge for which he was convicted. See also: Sponheim v. State, 416 So. 2d 54 (Fla. 2d DCA 1982). Jordan v. State, 438 So. 2d 825 (Fla. 1983) presented a similar situation in which Jordan was charged with resisting arrest with violence, but was convicted of the lesser nonexistent offense of attempted resisting arrest with violence. This Court reversed the conviction for the nonexistent offense, but remanded for retrial

on the original offense. See also: Pickett v. State, 573 So. 2d 177 (Fla. 2d DCA 1991)

Another case, Hieke v. State, 605 So. 2d 983 (Fla. 4th DCA 1992), presented a situation in which a defendant was found guilty of solicitation to commit third degree murder. After concluding that the conviction was for a nonexistent crime, the Fourth District Court of Appeal remanded for retrial 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.

Other decisions which have reached similar results and permitted retrial on the original substantive offense after reversal for conviction of a nonexistent crime include Brown v. State, 550 So. 2d 142 (Fla. 1st DCA 1989) and Arline v. State, 550 So. 2d 1180 (Fla. 1st DCA 1989) in which convictions for attempted solicitation to introduce contraband into a correctional institution were reversed and the causes were remanded for retrial on the substantive offenses originally charged. In Cox v. State, 443 So. 2d 1013 (Fla. 5th DCA 1983), the District Court reversed Cox's conviction for the nonexistent offense of attempting to make a false insurance claim and permitted retrial on the substantive offense of making a false

insurance claim. The Second District Court of Appeal, in Stephens v. State, 444 So. 2d 498 (Fla. 2d DCA 1986), held that following reversal of the defendant's conviction of the nonexistent crime of the temporary unauthorized use of a motor vehicle, the defendant's retrial was not barred under this Court's decision in Achin, recognizing that conviction of a technically nonexistent crime did not bar retrial where all of the elements of the crime are equal to the elements of the main offense since the jury did not acquit the defendant of the substantive offense.

All of these decisions, with the exception of Hieke, permitted retrial for the original substantive offense which was of a higher degree than the crime for which the appellants were actually convicted. The facts of the instant case are more compelling than those of Hieke for permitting retrial. While Hieke involved an offense which had never been recognized as a valid offense in the State of Florida, this case involves the crime of attempted felony murder, a crime which has been recognized and treated as a valid offense since this Court's decision in Amlotte, over eleven years ago. Unlike Hieke, the criminal offense at issue here was considered to constitute a valid offense at the time it occurred, the time the defendant was

charged, the time the defendant was brought to trial, and the time he was convicted. It would be absurd for appellate courts to prohibit reprosecution where the reversed offense existed at the time of trial while permitting retrials where the offense had never been recognized as a valid offense.

, The double jeopardy clause furnishes protection against retrial in three distinct situations, none of which apply under the circumstances of this case. It protects against: 1) a second prosecution for the same offense after acquittal, 2) a second prosecution for the same offense after conviction therefore, and 3) multiple punishment for the same offense. Ohio v. Johnson, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984). Reprosecution after conviction, however, refers to subsequent prosecutions which attempt to obtain multiple convictions for the same offense. It has no bearing on the more common situation involving reversal of a conviction, for reasons other than insufficient evidence, following an appeal initiated by the defendant, where jeopardy is continuous, which ultimately results in a retrial upon remand by the appellate court. See e.g., Montana v. Hall, 481 U.S. 400, 107 S. Ct. 1825, 95 L. Ed. 2d 354 (1987) (a defendant who was convicted under an inapplicable

statute, following 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. Double jeopardy cannot bar retrial where, as here, the information charged a nonexistent offense and both the conviction and sentence were for a nonexistent offense. See Jenkins v. State, 238 P.2d 922 (Md. App. 1968).

Double jeopardy does not bar reprosecution on any lesser included offense of the crime charged which remain valid following Gray, should the facts of the case be consistent with that charge.

This Court, in concluding that its decision in Gray should apply to all convictions which were not yet final, granted Gray and all other similarly situated defendants a benefit not compelled by law. Article X, Section 9, of the Florida Constitution provides that when a criminal statute is repealed, that repeal "shall not affect prosecution or punishment for any crime previously committed." As previously pointed out, the effect of this Court's decision in Gray, by receding from Amlotte

which recognized attempted felony murder as a constitutionally valid crime, was analogous to legislative repeal of a statute. Given the fact that such legislative repeal cannot retroactively excuse convictions for previously committed offenses, this Court could well have concluded that Gray did not affect previously committed offenses. This would have been consistent with the policy grounds on which Gray was based. Having decided to confer on all pipeline defendants the unearned benefits of Gray, such decision should not permit the discharge of defendants from all criminal liability. This is particularly true where, as here, the crime for which the defendant was convicted was a valid offense through the entire prosecution and conviction and for years prior to the commission of the offense.

ISSUE III

WHETHER THE DEFENDANT MAY OBTAIN REVERSAL ON PETITION FOR DISCRETIONARY REVIEW GRANTED FOR REVIEW OF OTHER UNRELATED CERTIFIED QUESTIONS WITH REGARD TO ALLEGED IMPROPER COMMENTS BY THE PROSECUTOR IN CLOSING ARGUMENT WHICH WERE INVITED BY THE DEFENSE? (Restated)

The defendant contends that he is entitled to reversal of his conviction and sentence on the basis of alleged improper comments by the prosecutor during closing argument.

The defendant fails to acknowledge that this same issue was presented to the District Court for its consideration, but that Court, in its opinion, summarily dismissed the issue stating: "we find no merit as to issue one, and affirm without further discussion." 21 Fla. L. Weekly D581. The Court did not incorporate this issue into its certified questions presented for the review of this Court. Although this Court certainly has the authority to consider the issue should it chose to do so, it may exercise its jurisdiction to refuse to consider it. State v. Burgess, 326 So.2d 441 (Fla. 1976), Stein v. Darby, 134 So.2d 232 (Fla. 1961) The State respectfully urges this Court to exercise its discretion and decline to review this case. Coffin v. State, 374 So.2d 504, 508 (Fla. 1979). The State would respectfully urge this Court to exercise that discretion and refuse to

consider this issue given the increasing tendency of defendants to seek review of issues which have been found to be without merit by tacking them onto questions certified by a district court. This tendency, which adversely impacts upon the workload of this Court and the State of Florida, should be curbed.

The defendant does not set forth the standard of review appropriate to the issue presented. It is undisputed that the control of counsel's comments to the jury is a matter which is within the sound discretion of the trial court. Absent a clear showing of abuse, this Court may not interfere with the trial court's exercise of that discretion. Breedlove v. State, 413 So. 2d 1 (Fla. 1982); Gallon v. State, 455 So. 2d 473 (Fla. 5th DCA 1984).

As a general rule, a considerable degree of latitude is allowed to prosecutors in their closing remarks to the jury and they may appropriately draw all reasonable inferences from evidence adduced at trial. Frierson v. State, 339 So. 2d 312 (Fla. 3d DCA 1976); State v. Thomas, 326 So. 2d 413 (Fla. 1975).

Each instance in which a defendant contends that a prosecutor engaged in an abusive or inflammatory remark must be considered on its own merits and must be judged within the context and circumstances existing at the time the comment was made. Darden

v. State, 329 So. 2d 287 (Fla. 1976). Thus, a prosecutor is entitled to make fair reply to the closing remarks of the defense. The defendant may not make comments in closing argument which reasonably invite a response from the prosecutor, and then complain when the prosecutor does, in fact, reply to his remark. Pitts v. State, 307 So. 2d 473 (Fla. 1st DCA 1075), cert. denied, 423 U.S. 918, 96 S. Ct. 302, 46 L. Ed. 2d 273 (1975); Hoffman v. State, 474 So. 2d 1178 (Fla. 1985). A prosecutor is afforded particularly wide latitude with regard to retaliatory remarks made in closing which are invited fair response to defendant counsel's own comments. Schwark v. State, 568 So. 2d 1326 (Fla. 3d DCA 1990).

To constitute cognizable reversible error, the defendant must first object to the allegedly improper remark and then request that the trial court give a curative instruction to the jury to remove any taint from the remark. Then, and only then, if the defendant feels that the curative instruction was insufficient to cure the harm, should he move for mistrial. Clark v. State, 363 So. 2d 311 (Fla. 1978); State v. Cumbie, 380 So. 2d 1031 (Fla. 1980). The failure to comply with this procedure bars consideration of the issue on appeal. Cabrera v. State, 490 So.

2d 200 (Fla. 3d DCA 1986); Clark v. State, supra; State v. Cumbie, supra.

Only in those rare instances in which the remark rises to the level of fundamental error is a defendant's failure to follow the appropriate procedure excused. Fundamental error, of course, is that error which goes to the foundation of the case or merits of the cause of action. The rare case in which fundamental error had been found as the result of prosecutorial misconduct has been described as:

> [w]hen the prosecutorial argument taken as a whole is of such a character that neither rebuke nor retraction may entirely destroy their sinister influence... Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th DCA 1984).

Only in those instance in which it is reasonably evident that the statements complained of were so inflammatory and abusive as to have influenced the jury to return a more severe verdict than it ordinarily would have, thus depriving the defendant of a fundamentally fair trial, is reversal warranted. James v. State, 334 So. 2d 84 (Fla. 3d DCA 1976). In other words, to rise to this level of fundamental error, the remark must be so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So. 2d 230 (Fla. 1979).

The defendant does not dispute that the comments complained of were not contemporaneously objected to. (IB. 40, 41; T. 1212, 1244, 1249, 1302, 1303). The defendant finally placed the court on notice of his dissatisfaction with closing argument of the prosecutor, but conceded that the objection was not timely, by stating that he 'let it go on longer than he should have.' (T. 1306.

The defendant ignores the fact that the prosecutor was entitled to fair response to the closing arguments of the defendants. During his own closing remarks, the defendant improperly accused the State of having given a victim/witness a deal, stating:

> Let me tell you something else. You read the papers in the next few days, next few weeks, next few months. You're going to find out that he's testifying against the guy who shot the baby, too. You're going to see that he gets a deal in that case, too. (T. 1295).

After defense counsel completed his remarks, the prosecutor made his rebuttal beginning as follows:

> Mr. Harrison told you that he wasn't going to get too far out there in left field. He got way out there. He got outside the courtroom. He said complete untruths for lack of a better word.
>
> That's the kind of thing, I guess -- he said he's scared. When y'all heard the statement his defendant made, I can see why, when he confesses to a crime. At no time has Frederick Wayne McLaughlin ever been offered any type of deal at all to testify in a murder

trial against his co-defendant in the case in which he is charged, at no time.

And, in fact, just recently I was given the ultimatum by his defense counsel, the public defender's office. They had a conflict in the case and they had to write to the Florida Bar to see if they could still represent him. They told me the only way they would be able to handle the case, the only way he would be able to testify was if I offered him some type of reduced charge from first degree murder.

SO, when Mr. Harrison comes in and tells you to look at the newspapers in a few weeks and he's going to get some kind of reduced charge and all this, no. That is a complete untruth and I think you know what that means.

Again they're making up evidence. They're making up stuff that's outside the courtroom that hasn't even been presented and they're trying to put that in your mind to poison your mind. Like I said, don't let them rob you of your common sense.

There's more. There's more. This thing about immunity, by law in the State of Florida when I subpoena a witness to court they get immunity. I can't make them testify or compel them to testify on one hand and then try to use what they say against them. That's the law. That's not some deal.

That just means I can't use whatever he says in this trial against him in this trial unless he says something different. It can be used to impeach as a prior inconsistent statement, not as substantive evidence. They're really reaching way out there for things that aren't even in evidence. (T. 1302-1304).

After responding to the defendant's improper statements that the State had offered the victim/witness a deal, the prosecutor continued:

Some other things, just briefly. He said Jeff Brown had a .22 out there that night. The .22 that Jeff Brown had, that was the night of the fight. That was a totally different night. I realize that they want to

put guns in everybody's hand, and that's fine. It doesn't matter one bit if five different people shot and these three defendants joined with them. Like I said, if we get a case against any of them, we'll prosecute them.

Keith Shanklin, just another name they're coming up with. I'm pretty sure he wasn't even there. He had a .357 at the party, like that had something to do with it. The best was Tracy McLaughlin. Mr. Harrison knows he wasn't even up there that night.

This came out. It was a very small part of the trial, but it came out why Freddy in the beginning of his statement said Tracy McLaughlin and Chico Mooore, who I think was in jail at the time that this event happened, and Doug Hutchinson and these other names, these were people that Freddy Wayne had helped convict when he brought drugs through the Crestview Police Department.

In his mind he thought they had something to do with this. So he starts where he thinks the beginning is. Well, I just got back from California, all these people hate me, maybe they had something to do with it. He thought Jeffrey Brown had something to do with it.

These people weren't even up there and there are names everywhere. They're still doing the name game. The only names you have to worry about are the names of the these folks that are on trial here. That's the ones you're going to have to deal with what they did as either comparative, if you think anybody did anything else, but mainly what they did. What did they do? They don't want to talk about what they did or what they said in their statements. No.

You will have the opportunity to hear that over and over again. It's hard to argue lack of evidence, although again they're trying, even by bringing evidence that's not in the trial. Its real hard, the things that aren't even true, to poison your mind. That's all I can call that. (T. 1304-1306).

Only then, as previously stated, did the defendant object. As the above quoted sections illustrate, however, the prosecutor's

remarks constitute nothing more than fair rebuttal to the defendant's improper charge that the State had offered the victim/witness a secret deal. The remarks also indicate the prosecutor's disagreement with the defendant's interpretation of the evidence. The jury was repeatedly told, throughout the trial, that they would have to rely on their own recollections of the evidence, that they would have to resolve any differences between the defendant's and the State's version of the evidence, and that argument of counsel did not constitute evidence.

Even if one were to assume the above comments were found to be improper, the comments were harmless as they did not affect the jury's finding of guilt. "[A] defendant is entitled to a fair trial, but not a perfect one, for there are no perfect trials." Brown v. United States, 411 U.S. 223, 231-232 (1973); State v. Anderson, 537 So. 2d 1373 (Fla. 1989); Brunelle v. State, 456 So. 2d 1324 (Fla. 4th DCA 1984). A prosecutor's conduct must be considered, not in isolation, but within the context of the entire trial, with the focus on the fairness of that trial, not the culpability of the prosecutor. Smith v. Phillips, 455 U.S. 209, 219 (1982); State v. Murray, 443 So. 2d 955, 956 (Fla. 1984). The prosecutor is not expected to perform perfectly during closing argument, for "in the ardor of advocacy and in the

excitement of trial, even the most experienced counsel are occasionally carried away" by the temptation to make a remark which is unsupported by the evidence. Dunlop v. United States, 165 U.S. 486, 498 (1987). The law is well established that "[d]efense counsel may not make statements during summation which reasonably invite a response and then complain when his opponent's response is such as would be reasonably expected to be elicited by defense counsel's own prior remarks." Pitts v. State, 307 So. 2d 473, 482 (Fla. 1st DCA 1975). In United States v. Simmons, 923 F. 2d 934 (2d Cir. 1991), the court stated:

> Peter Monsanto joins his brother in challenging the Government's summation. Initially, he claims that the Government improperly chastised the defense for its conduct during summations. For example, he claims that the Government unjustifiably asserted that the defense had not focused on the facts, had intentionally attempted to confuse the issues, and had stated personal opinions during its own summations. These claims must be viewed in the context of the banter between parties. During summations, defense counsel had, in fact, interjected their own personal beliefs about the evidence. In addition, the defense had alleged that the Government had improperly coaxed witnesses into favorable responses and had concealed exculpatory information. Under the circumstances, we will not reprimand the Government's tactics. As we have stated, "when the defense counsel have attacked the prosecutor's credibility ... the prosecutor is entitled to reply with 'rebutting language suitable to the occasion.'" 923 F. 2d at 954-955 (Citations omitted).

Based upon the circumstances in which the prosecutor's comments were made and based upon the evidence presented to the jury, the record shows that those comments, if error, had no effect on the jury's ultimate conclusion that the defendant was guilty of the crimes at issue. State v. DiGuilio, 491 So. 2d 1229 (Fla. 1986).

During a trial, a court is guided by the principle that a defendant is entitled to a fair trial, but not a perfect trial.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court answer the certified questions as indicated and decline to address the remaining issue presented by the defendant in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to John C. Harrison, Esq., John C. Harrison, P.A., P.O. Box 876, 12 Old Ferry Road, Shalimar, Florida, 32579, this 24th day of May, 1996.

Giselle Lyden Rivera
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