007

IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v.

RONALD RIGGINS,

Respondent.

CASE NO. 87,949

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS[1]

Ronald Riggins was charged with attempted second-degree murder of Gainesville Police Officer Mason Byrd. The information alleged that Riggins, with knowledge that he was infected with the HIV Virus, bit Officer Byrd during the performance of his lawful duties. (R. 7)

Officer Bryant was dispatched to a residence in Gainesville in response to a domestic disturbance. Riggins interfered with the investigation by not allowing Bryant to talk to another occupant of the house. Other officers, including Corporal Byrd, were called as backup, and Riggins eventually was arrested. Riggins kicked, punched, and threatened to kill the officers. (T. 176-200, 207-222, 345-349, 392-400, 407-408, 414-415) He bit Corporal Byrd's pinkie finger, causing excruciating pain and ripping the skin open. (T. 160-162, 216-217, 411-412) Riggins was HIV positive and so informed Byrd after biting him. (T. 175, 217-218, 292-294, 320-322, 333, 412, 444-454, 460-461) The HIV virus can be transmitted by a human bite. (T. 486-487) Byrd

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[1]The record on appeal, consisting of two volumes of pleadings, etc. and nine volumes of trial transcript, will be referred to by the symbols "R" and "T" respectively, followed by the appropriate page numbers. Petitioner will be referred to as "State" and respondent by his last name.

subsequently was tested for the virus, with negative results so far. (T. 194-195)

Counsel for Riggins expressly requested that the jury be instructed on attempted third-degree murder, as a lesser included offense of attempted second-degree murder of a law enforcement officer. (T. 545-550) The underlying felony was resisting arrest with violence. (T. 547)

The jury was instructed on the charged offense--attempted second-degree murder of a law enforcement officer--and three lesser included offenses--attempted third-degree felony murder, resisting an officer with violence, and resisting an officer without violence. (T. 622-628) The jury instruction on attempted third-degree murder provided, in pertinent part:

> Before you can find the defendant guilty of attempted third-degree felony murder, the State must prove the following elements beyond a reasonable doubt:
>
> 1. Ronald Riggins did some overt act which could have caused the death of Mason Byrd but did not; and
>
> 2. The act was committed as a consequence of and while Ronald Riggins was engaged in the commission of the crime of resisting arrest with violence. (T. 626) (e.s.)

The verdict form provided, in pertinent part:

> _____1. The defendant is guilty of Attempted Second Degree Murder of a Law Enforcement Officer, as charged in Count I of the Information.

_____2. The defendant is guilty of Attempted Felony Murder - Third Degree, a lesser included offense of Count I of the Information.

_____3. The defendant is guilty of Resisting an Officer with Violence, a lesser included offense of Count I of the Information.

_____4. The defendant is guilty of Resisting an Officer Without Violence, a lesser included offense of Count I of the Information.

_____5. The defendant is not guilty.

The jury selected the second option. (T. 649; R. 89)

Riggins appealed his judgment of conviction to the First District. On authority of State v. Gray, 654 So. 2d 552 (Fla. 1995), the conviction was reversed with a certified question as to the appropriate remedy on remand (reduction in conviction, retrial, or discharge). Riggins v. State, 21 Fla. L. Weekly D855 (Fla. 1st DCA April 9, 1996).

## SUMMARY OF ARGUMENT

The answer to the certified question is "yes." Riggins' conviction should be reduced to resisting arrest with violence. The evidence supports this offense, and the jury necessarily found that Riggins committed it as the underlying felony for the now nonexistent crime of attempted felony murder.

Alternatively, Riggins should be granted a new trial, not discharge. The error occurred in the jury instructions (instruction on nonexistent crime as a lesser offense), and since the jury relied on the erroneous instruction, the error was harmful. The remedy for this type of error, as this Court has held on many occasions, is retrial, not discharge. The United States Supreme Court is in agreement.

## ARGUMENT

### CERTIFIED QUESTION

> ONCE A DEFENDANT IS CHARGED WITH ATTEMPTED SECOND-DEGREE (DEPRAVED MIND) MURDER OF A LAW ENFORCEMENT OFFICER AND IS CONVICTED BY A JURY OF THE LESSER OFFENSE OF ATTEMPTED THIRD-DEGREE FELONY MURDER, A NONEXISTENT CRIME, DOES *STATE V. GRAY*, 654 SO.2D 552 (FLA. 1995) PERMIT THE TRIAL COURT, UPON REVERSAL OF THE CONVICTION AND REMAND, TO ENTER JUDGMENT FOR THE OFFENSE OF RESISTING ARREST WITH VIOLENCE, A LESSER INCLUDED 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 answer to the first part of the certified question is "yes." During the process of being arrested, Riggins, who was HIV positive, bit Corporal Byrd's finger. (T. 160-162, 216-217, 411-412) Riggins was charged with attempted second-degree murder and convicted of attempted third-degree murder. The jury necessarily found that he committed the underlying felony (resisting arrest with violence). Some four months after completion of his trial, this Court held in State v. Gray, 654 So. 2d 552, 554 (Fla. 1995) that attempted felony murder was no longer a crime in Florida.

Reducing Riggins' conviction to the felony underlying the attempted felony murder offense is clearly authorized by section 924.34, Florida Statutes, which provides:

> When 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.

This statute has been applied in similar situations. Paige v. State, 641 So. 2d 179 (Fla. 5th DCA 1994) (conviction under void statute), collecting cases; Harris v. State, 649 So. 2d 923 (Fla. 1st DCA 1995) (same); Ellison v. State, 547 So. 2d 1003, 1006 (Fla. 1st DCA 1989) (second-degree murder conviction reduced to manslaughter), quashed on other grounds, State v. Ellison, 561 So. 2d 576 (Fla. 1990). But see Jordan v. State, 416 So. 2d 1161, 1162 (Fla. 2d DCA 1982), approved, Jordan v. State, 438 So. 2d 825 (Fla. 1983).

The answer to the second part of the certified question likewise is "yes." The error in the case at bar was an erroneous jury instruction, specifically requested by Riggins. The trial court instructed the jury that it had the option of convicting Riggins of attempted third-degree murder, a nonexistent crime, as

a lesser offense of attempted second-degree murder. (T. 362, 365-367, 374) The error was harmful because, as it turned out, this was the option chosen by the jury. (R. 99; T. 377)

This Court has repeatedly held that when a defendant has been convicted in a trial in which the judge instructed on a nonexistent crime as a lesser included offense, the proper remedy was retrial, not discharge. See State v. Sykes, 434 So. 2d 325 (Fla. 1983) (defendant convicted of nonexistent crime as lesser offense of grand theft); State v. Ervin, 435 So. 2d 815 (Fla. 1983) (defendant convicted of nonexistent crime as lesser offense of dealing in stolen property); Achin v. State, 436 So. 2d 30 (Fla. 1982) (defendant convicted of nonexistent crime as lesser offense of extortion); Jordan v. State, supra, (defendant convicted of nonexistent crime as lesser offense of resisting arrest with violence).

This Court's decisions are in accord with federal law. "The 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." United States v. Scott, 437 U.S. 82, 90-91 (1978).

Montana v. Hall, 481 U.S. 400 (1987) is analogous to the instant case. The defendant there was accused of molesting his

12-year-old stepdaughter. The State originally charged the defendant with sexual assault, but at the defendant's behest, he was tried instead for incest. The jury convicted him of incest. On appeal, the parties discovered that incest was not a crime at the time of the defendant's assault. The State, therefore, sought to retry the defendant for sexual assault. The Montana Supreme Court concluded that retrial was barred by the Double Jeopardy Clause on two grounds. First, sexual assault and incest were the same offense; and second, the defendant had been convicted of a nonexistent crime. The United States Supreme Court held that the defendant could be retried for sexual assault:

> Although Montana's *ex post facto* law clause prevents Montana from convicting respondent of incest, we see no reason why the State should not be allowed to put respondent to a trial on the related charge of sexual assault. There is no suggestion that the evidence introduced at trial was insufficient to convict respondent. Montana originally sought to try respondent for sexual assault. At Respondent's behest, Montana tried him instead for incest. In these circumstances, trial of respondent for sexual assault, after reversal of respondent's incest conviction on grounds unrelated to guilt or innocence, does not offend the Double Jeopardy Clause.
>
> *** [T]he *Brown [v. Ohio*, 432 U.S. 161 (1977)] analysis is not apposite in this case. In *Brown*, the defendant did not overturn the first conviction; indeed, he served the prison sentence assessed as punishment for that crime. Thus, when the State sought to try him for

> auto theft, it actually was seeking a second conviction for the same offense. By contrast, respondent in this case sought, and secured, invalidation of his first conviction. This case falls squarely within the rule that retrial is permissible after a conviction is reversed on appeal.
>
> The Montana court also suggested that the Double Jeopardy Clause would forbid retrial because respondent was convicted of an offense that did not exist when respondent had committed the acts in question. But, under the Montana court's reading of the Montana sexual assault statute, respondent's conduct apparently was criminal at the time he engaged in it. If that is so, the State simply relied on the wrong statute in its second information. It is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument. [citations omitted]

Id., at 403-404. Here, the defect happened to be in the jury instructions on lesser offenses instead of in the charging document. See, also, United States v. Davis, 873 F. 2d 900 (6th Cir. 1989).

## CONCLUSION

Based on the foregoing discussion, the State respectfully requests that the certified question be answered in the affirmative and the decision of the First District quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to Paula S. Saunders, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 27th day of June, 1996.

Carolyn J. Mosley
Assistant Attorney General

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