ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

RONALD RIGGINS,

Respondent.

CASE NO. 87,949

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The State has three responses to Riggins' statement of the case and facts.

1. Riggins improperly injected argument into his summary of the facts, to the extent of actually citing and discussing five cases. (A.B. 2-6) To the extent these cases are relevant, the State will discuss them in the argument portion of its brief.

2. Riggins failed to substantiate his conclusion that the State's summary of the facts were "legally and factually misleading." (A.B. 2) The State's initial summary of the case and facts provided in relevant part:

> 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) (I.B. 2)

There was nothing misleading about the above summary. During the charge conference, the following colloquy, in relevant part, took place:

> MR. TURNER [DEFENSE COUNSEL]: **Frankly, what I'm debating is whether to ask for attempted felony murder straight out, regardless of law-enforcement officer.** ***[1] Because I think that --remembering *Ikavoni* (phonetic), what they said is attempted third-degree

[1]The "asterisk" refers to statements made by other persons.

murder of a law-enforcement officer is unconstitutional. But the facts-- (T. 545) *** Yes, I do [want the court reporter here], I do; and I thank you for stopping me. The *Ikavoni* decision basically ruled that because the penalty enhancement of attempted third-degree murder of a law-enforcement officer was such that it rendered the statute unconstitutional, they sustained the conviction of attempted third-degree murder and took out the enhancer. **So I would ask for that in this case as well. And I have one prepared, and I'd pass it to the court and ask it be made part of the file.** *** And it looks like I've got a grammatical-- *** I think it's "has done"; we left out the word, "has".--Take the boy our of Marianna, Your Honor, but--

MS. POOLEY [PROSECUTOR]: I would change that a bit: "**Ronald Riggins** did some act--"

THE COURT: "... did some overt act," is the way it reads.

MR. TURNER [DEFENSE COUNSEL]: All right; that would be okay with me.

THE COURT: Not done; did.

MR. TURNER [DEFENSE COUNSEL}: "...**did some overt act which could have caused the death of Mason Byrd but did not, and the act was committed as a consequence of and while Ronald Riggins was engaged in the commission the crime of resisting arrest with violence.**"

THE COURT: I think that's an appropriate--

MS. POOLEY: I think so.

THE COURT: In fact, I personally like that better than the attempted manslaughter which I think--

MR. TURNER [DEFENSE COUNSEL]: I think it probably fits the facts--

THE COURT: --is a confusing scenario.

MR. TURNER [DEFENSE COUNSEL]: Well, it is confusing; it is confusing. Let me look at it again. I might want to withdraw it. Why don't we withdraw that; **why don't we just give them attempted felony murder, third-degree.**

THE COURT: It's the same level of--

MR. TURNER [DEFENSE COUNSEL]: It is, and then we don't have-- Because I tell you, it's hard for me to understand the difference between attempted voluntary

manslaughter and attempted second-degree, as I read the thing. So I would withdraw attempted voluntary manslaughter as a request.
THE COURT: Okay. I think that's appropriate.
MR. NILON [PROSECUTOR]: I'm kind of perplexed how you get to attempted felony third-degree murder.
THE COURT: Well, he's attempting the offense of resisting arrest, which is a felony, or he-- He is committing an offense of resisting arrest, which is a felony.
MR. NILON [PROSECUTOR]: I think it would be standard if we started out with felony murder-one and felony murder-two. But we're kind of on just straight-out murder-two. I may be erroneous about--
MR. TURNER [DEFENSE COUNSEL]: There's only one kind of third-degree, and it's felony murder.
MR. NILON [PROSECUTOR]: Okay. All right; I'll withdraw it. If he wants it, that's fine.
THE COURT: In other words, what he was -- what he was doing was in fact resisting arrest. At least that's the allegation. And during that time, suppose he had actually accidentally killed somebody.
MR. TURNER [DEFENSE COUNSEL]: Right.
THE COURT: Then it would be felony murder--
MR. TURNER [DEFENSE COUNSEL]: That's right.
THE COURT: --because even though it was an accident, he was in fact committing a felony.
MR. TURNER [DEFENSE COUNSEL]: Exactly. There's a standard--
THE COURT: Really, it's the same thing as involuntary manslaughter.
MR. TURNER [DEFENSE COUNSEL]: It is. **It's also in the charge as one, by the way.**
MR. NILON [PROSECUTOR]: Okay. (T. 546-548) (e.s.)

It is clear from the above colloquy that defense counsel expressly asked for the jury instruction on attempted third-degree murder, with resisting arrest with violence as the underlying felony; that he was the one who provided the judge

with a copy of the instruction; that he was the one who informed the judge that it was a Category 1 offense; and that he was the one who resisted the prosecutor's concern about giving the instruction. It is also beyond dispute that the defendant is now asking this Court to grant him a new trial because of his conviction for the crime on which he specifically asked for a jury instruction. It is further beyond dispute that the defendant is contending that his conviction cannot be reduced to the predicate felony (resisting arrest with violence) underlying the attempted felony murder conviction.

In accusing the State of providing misleading facts, Riggins quoted from the charge conference that preceded the above-quoted colloquy on which the State relied. (T. 541-544) (A.B. 3-4) With respect to the passages relied on by the State, Riggins quoted only one very small section where defense counsel stated he was debating asking for an instruction on attempted third-degree felony murder. (T. 545-546) (A.B. 4)

3. Riggins failed to identify what he thought needed to be "corrected" in the State's summary of the case facts. (A.B. 2)

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.

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?

Riggins asserts that State v. Wilson, 21 Fla. L. Weekly S292 (Fla. July 3, 1996) entitles him to a new trial, not reduction of the conviction to a lesser offense. The State respectfully disagrees. In Wilson, the defendant was convicted of two crimes: (1) attempted felony murder and (2) armed robbery. Since the State had obtained a conviction for the underlying felony (armed robbery), it obviously wanted a separate conviction for attempted murder. This Court held that the State would have to retry the defendant on the count relating to attempted murder.

The instant case is distinguishable. Riggins was convicted of one crime, attempted felony murder (R. 89), with the underlying felony for that offense being resisting arrest with violence (T.

626). In order to convict Riggins of attempted third-degree felony murder, the jury had to find that he "was engaged in the commission of the crime of resisting arrest with violence," as it was so instructed by the judge. (T. 626) All the State is asking in this case is that Riggins' conviction for attempted third-degree felony murder be reduced to the underlying felony for that offense, which was resisting arrest with violence. Under these circumstances, it would be an unconscionable miscarriage of justice to grant Riggins a new trial on this offense (resisting arrest with violence).

Riggins argues that resisting arrest with violence is not a necessarily lesser offense of the charged offense, attempted second-degree murder. (A.B. 9) The State agrees, but this argument entirely misses the point of the State's argument. The State's argument is directed to the crime of conviction, and as to that crime, we know that the jury found Riggins guilty of resisting arrest with violence, because that crime was the predicate offense for attempted felony murder.

Riggins also asserts that this case does not involve an erroneous jury instruction. The State respectfully disagrees. Either the jury instruction on attempted third-degree felony murder is correct, or it is erroneous. If it is correct, Riggins

has no basis whatsoever for relief on appeal. Absent this jury instruction, there would have been no conviction for attempted felony murder. Due to this Court's holding in State v. Gray, 654 So. 2d 552, 554 (Fla. 1995), which applies retrospectively, the instruction is in error, regardless of whether anyone knew it was in error at the time of trial.

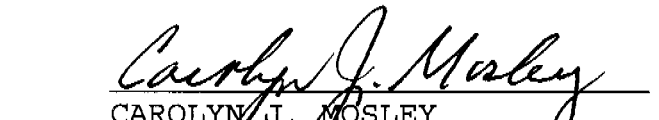
Montana v. Hall, 481 U.S. 400 (1987), which addressed the double jeopardy claim, is analogous. The defendant there was tried for and convicted of a crime that was created after the date of his conduct at issue. According to the Montana Supreme Court, the defendant was convicted of a nonexistent crime. Here, the defendant was convicted of an existing crime that was later found to be retrospectively nonexistent. Thus, in Hall, as in this case, the defendant was convicted of a nonexistent crime. In disposing of the issue, the United States Supreme Court in Hall, after noting that the defendant's conduct was criminal, characterized the error as "a defect in the charging document." Id., at 403-404. Here, the "defect" was in the jury instruction, instead of the charging document. The Hall court held that retrial on an existent crime would not offend the double jeopardy clause.

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,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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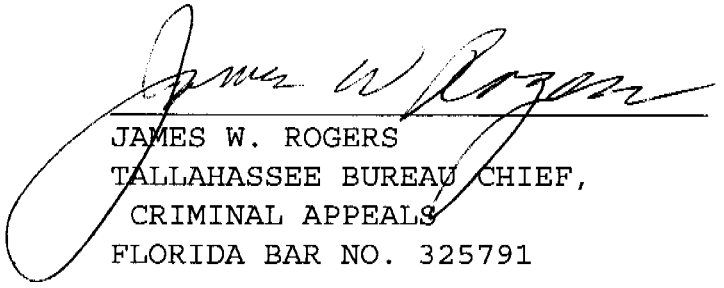

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY 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 7th day of August, 1996.

Carolyn J. Mosley
Assistant Attorney General

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