IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
v.	:	**CASE NO. 88,144**
JOSEPH WILEY,	:	
Respondent.	:	
_____/		

RESPONDENT'S ANSWER BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID P. GAULDIN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 261580
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT

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PRELIMINARY STATEMENT

References to the record proper shall be referred to by the letter "R" followed by the appropriate page number. References to all of the transcripts other than the sentencing transcript shall be by the letter "T" followed by the appropriate page number. References to the sentencing transcript shall be by the letter "S" followed by the appropriate page number. References to the state's brief shall be by the letters "SB" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The state conveniently omits from the statement of the case and facts the following:

By indictment dated January 13, 1994, Joseph Wiley and co-defendant Frederick Wayne McLaughlin were indicted for the first-degree murder of 18-month old Demetrius Ewing, the

attempted first-degree murder with a firearm of Jeffrey Brown, and the shooting of a firearm from a vehicle. (R-2-3). These crimes were alleged to have occurred on or about December 12, 1993. (R-2-3).

Wiley proceeded to jury trial and on January 31, 1995, he was found guilty of the second-degree murder of Demetrius Ewing, guilty of the attempted third-degree murder of Jeffrey Brown, and not guilty of shooting a firearm from a vehicle. The verdict specified that Wiley or his principle carried, displayed, used, threatened to use or attempted to use a firearm during the commission of the crimes for which he was convicted. However, the verdict specifically indicated that Wiley did not personally possess a firearm during the commission of the crimes. (R-509-511).

SUMMARY OF THE ARGUMENT

This Court has recently ruled that when a defendant is convicted of attempted first-degree felony murder, a defendant may be retried on all lesser included offenses which were instructed.

However, respondent was convicted of the non-existent crime of attempted third-degree felony murder although he was charged with attempted first-degree felony murder. The only other available options on which the jury was instructed were either of a higher degree, the same degree of crime as attempted felony murder, or not a lesser included offense at all. As such, respondent should not be retried on Count II at all.

ARGUMENT

ISSUE

WHEN A DEFENDANT IS CHARGED WITH [ATTEMPTED] FIRST-DEGREE MURDER AND IS CONVICTED BY A JURY OF THE PERMISSIVE LESSER OFFENSE OF ATTEMPTED THIRD-DEGREE MURDER, A NON-EXISTENT 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 ATTEMPTED MANSLAUGHTER, A NECESSARY LESSER INCLUDED OFFENSE OF THE CRIME CHARGED?

The answer is, of course, no, notwithstanding this Court's recent decision in State v. Wilson, 21 Fla. L. Weekly ____, Opinion No. 86,680 (Fla. July 3, 1996).

In Wilson, the following question was certified:

> **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?**

The answer to this question was that this Court held that "...the proper remedy is remand to the trial court for retrial on any of the other offenses instructed on at trial." Of course, as made clear later in the opinion, what this court meant was retrial on any lesser offenses.

There are some significant differences between this case and Wilson's case. First, Wilson was convicted of the highest charged

crime. Here, respondent was not convicted of the highest charged crime.

Second, there was a specific finding by the jury that respondent did not carry a firearm.

Third, respondent was specifically acquitted of the charge of shooting a firearm from a vehicle. (R-511).

Fourth, the underlying felony in respondent's conviction of the non-existent crime of attempted third-degree felony murder was the commission of shooting a firearm from a vehicle. (R-267).

The pertinent portion of the verdict form reads:

> **COUNT II - ATTEMPTED FIRST-DEGREE MURDER WITH A FIREARM OF JEFFREY BROWN**
>
> **A. ____ GUILTY OF ATTEMPTED FIRST-DEGREE MURDER**
>
> **____ GUILTY OF ATTEMPTED SECOND-DEGREE MURDER**
>
> **____ GUILTY OF ATTEMPTED THIRD-DEGREE MURDER**
>
> **____ GUILTY OF ATTEMPTED MANSLAUGHTER**
>
> **____ GUILTY OF AGGRAVATED BATTERY**
>
> **____ GUILTY OF AGGRAVATED ASSAULT**
>
> **____ GUILTY OF BATTERY**
>
> **____ GUILTY OF ASSAULT**
>
> **____ NOT GUILTY [R-510].**

Aggravated battery is a second-degree felony and hence cannot be a lesser included offense of attempted third-degree

murder. Similarly, aggravated assault and attempted manslaughter are third-degree felonies and are of the same degree as attempted third-degree murder and as such cannot be lesser included offenses of attempted third-degree murder. Lesser included offenses are by definition lesser in penalty. Florida Rule of Criminal Procedure 3.490. See Nurse v. State, 658 So.2d 1074 (Fla. 3d DCA 1995), and cases cited therein. It should further be noted that aggravated assault and attempted manslaughter contain intent elements missing from attempted third-degree murder.

Of course, it almost goes without saying that respondent could not be retried on the higher degreed offenses of attempted first-degree murder and attempted second-degree murder.

Finally, respondent should not be retried on the misdemeanors of battery and assault. The jury specifically found that respondent did not personally fire a firearm. Moreover, it should be reemphasized that the underlying felony for the attempted felony third-degree murder was shooting a firearm from a vehicle, a crime for which respondent was acquitted, and for which assault and battery were not listed as lesser included offenses.

Under the circumstances of this case the only conclusion that can be reached consistent with this Court's opinion in Wilson is that respondent should be discharged (without retrial) of any of the crimes listed in the verdict form under Count II.

CONCLUSION

Based on the foregoing arguments and authorities, respondent should be acquitted of all crimes listed under Count II.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to the Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 8th day of ~~June~~ July, 1996.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
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DAVID P. GAULDIN
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FLORIDA BAR NO. 261580
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COUNSEL FOR RESPONDENT