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IN THE SUPREME COURT OF FLORIDA.

JIMMY DELL BOWEN,

Petitioner,

vs.

CASE NO.: 88,748 consolidated with 88,219

STATE OF FLORIDA,

Respondent.

______________________________/

DISCRETIONARY REVIEW OF A DECISION OF
THE DISTRICT COURT OF APPEAL SECOND DISTRICT
STATE OF FLORIDA

PETITIONER'S BRIEF ON MERITS

JIMMY DELL BOWEN #856243(H-2102-L)
SUMTER CORRECTIONAL INSTITUTION
P.O. BOX 667
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PRO SE PETITIONER

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PRELIMINARY STATEMENT

In this brief Jimmy Dell Bowen will be referred to as petitioner or Bowen. The State will be referred to as respondent or State.

Citations to the original record on appeal will be designated by the letter "R" followed by the appropriate page number.

Citations to the original five volumes of trial transcripts will be designated by the letter "T" followed by the appropriate page number.

Citations to two supplemental volumes will be designated by the letters "S.T." followed by appropriate page number.

Citations to Bowens amended initial brief to Second District Court of Appeals shall be designated by the letters "I.B." followed by appropriate page number.

Citations to State's answer brief to Bowen's initial brief shall be designated by the letters "S.B." followed by appropriate page number. Bowen's reply to State's answer brief shall be designated by the letters "R.B." followed by appropriate page number. Bowen's Motion for Rehearing shall be designated by the letters "R.H." followed by appropriate page number.

STATEMENT OF FACTS

The facts to the incident which gave rise to this case are

relatively simple. After working all day on February 6, 1993, Bowen and a friend, Horace Brady, stopped at Leo's Bar to have a drink. (T.536). Bowen had two drinks and was leaving to pick up flowers for his girlfriend for her birthday and go home. (T.528). Upon walking by alleged victims **Mickey J. Lemons** and **Floyd Hall,** Lemons started a conversation with Bowen. Bowen exited the side door of the bar and was followed outside by Hall and Lemons. Hall told Lemons to go back inside the bar, which he did. Hall demanded money Bowen allegedly owed Lemons from several years ago on an alleged cock fight (T.537). Hall then turned to Bowen and knocked him down with the back of his hand, almost knocking him out. (T.541-42).

It must be noted that Hall, who had a reputation for violence (T.608), was 6'2" tall and weighed 232 lbs. (T.444), was extremely drunk with an alcohol level of .20 (T.515-17). Lemons, who owns and fights game chickens (T.230), also had a reputation of violence (T.544; 612), is 5'10" tall and weighed 210 lbs., was extremely drunk as well, .234 (T.512-22).

Lemons stated under oath that he only had six beers the entire afternoon (T.242-43) and the witnesses for State, Francis Hall, Donna Guscott, and Mary Ragsdale stated under oath that Hall drank only 3-5 beers all day (T.632-33; 174; 213).

David Garczynski, Medical Lab Technician Tampa General

Hospital stated, however, that Lemons blood alcohol level was .234 (T.516-22) and Dr. Lee Miller, Corner Hillsborough County Medical Examiners Office, stated that Hall would have had to drink 12-15 one and one-half ounces of whiskey within an hour and a half of death to have a .20 reading (T.456; 516-17).

After Hall knocked down Bowen, he went back inside the bar. When Bowen regained his senses, he was in the process of picking up his truck keys when Lemons looked out the small glass in the bar door and stated, "there's that little bastard again, I'll whip his butt" (T.295-96; 543). In his eagerness to attacked Bowen, Lemons pushed Hall out the door and followed (T.33; 543). Hall told Bowen, "this time I'll beat you to death, you old gray haired bastard" (T.544). Bowen backed up to the wall of the bar begging Hall and Lemons to leave him alone. Hall kept advancing (T.544). Bowen drew his pistol and fired one shot into the ground (asphalt parking lot) (T.540-47), which was later found on the door stoope 3-4 foot away (T.383-389). Hall continued to advance on Bowen, who could not retreat any further, because of parked cars, and wall of building (T.260-61; 544), with his right arm drawn back to again strike Bowen. Bowen, again fired one time, hitting Hall in the outside of his right forearm, said bullet exiting inside of his arm and entering into his lower chest thereby severing the aorta, from which Hall bled to death

(T.449-53). **Mickey J. Lemons** had gotten a pistol from a truck and was running back toward Bowen threatening to kill Bowen when he was shot one time in his lower stomach, said bullet exiting his left buttock (T.545).

Francis Hall, live in girlfriend of **Floyd Hall**, and states alleged eye witness, stated under oath that Bowen fired the first shot up in the air and then stuck the gun to Hall's chest and shot him (T.208-12). This prejured testimony is belied by physical and scientific evidence. Common sense tells you that if you shoot a pistol up in the air, the bullet will not come down within two feet of where you were standing. It was found on door stoope only 2-3 ft. away from where it was allegedly fired in the air (T.383-89). Moreover, said bullet would not be severely damaged (smashed almost flat) from a free fall.

Police officer Kunde testified said bullet had to strike a very hard object (T.382-89). Dr. Lee Miller testified that no bones were broken in Hall's body and that it could not have been a point blank wound (T.457-65), and that one bullet produced all three wounds (T.463) and said doctor indicated that the position of Hall's arm was consistent with striking Bowen.

State's witness, Donna Guscott, testified to the same basic lie as her "good friend" Francis Hall (T.365-69).

The facts are that Bowen, who is five feet, two inches tall,

weighs 150 lbs., 61 years old, suffers from arthritis of arm and legs, spinal stenosis, and emphyzema, was acting in self defense when these two alleged victims, who are described to be much larger, stronger, and who were extremely drunk, tried to extort and/or physically take and/or attempted to rob Bowen of $100.

This is further supported by the fact that the alleged victim **Floyd Hall** and **Mickey J. Lemons** had only one dollar and seventeen cents between the two of them. (T.382-89; R.48; defendant's exhibit list; ex.22; photograph of concrete slab outside door, where smashed bullet (fired into ground), (1). one dollar bill, one dime, 1 nickle, and 2 pennies were found, contents of Hall's pockets).

STATEMENT OF CASE

Bowen was arrested on 2-8-93 on a warrant originating from criminal report affidavit alleging first degree murder of **Floyd Hall**, and aggravated battery on **Mickey J. Lemons**, DOB: 11-3-45, 13401 Henderson Road, Tampa, Florida, and for carrying a concealed firearm (R.9-12).

Public Defender, Manuel Lopez, was subsequently appointed to represent Bowen. On February 24, 1993, Bowen was indicted by grand jury for count one: first degree murder of **Floyd Hall**; count two: attempted first degree murder of **Mickey J. Lemons**; and count three: carrying a concealed firearm (R.13-15).

Bowen invoked the defense of self defense (T.105; 107; 144) in this case, which arises from a bar room altercation of February 6, 1993, at Leo's Bar, 1948 E. Hilsborough Ave., Tampa, Fla. . Said bar is co-owned by Attorney William Garcia, and Lino Rodriquez. Long time good friends of Bowen's State appointed counsel, Manuel Lopez (T.696). Said bar is operated as part of the Santo Jose Trafficanti crime family and is known for sports gambling, loan sharking and racketeering. (R.52).

On June 3, 1993, Mr. Lopez deposed numerous people, including the alleged victim **Mickey J. Lemons**, who stated under oath that his name was **Mickey Gerald Lemons**, DOB: 11-3-45 and lived at 13401 Henderson Road, Tampa, Fla., which is a variance in the name alleged in the indictment. (S.T.760).

Also, on June 3, 1993, Bowen filed a pro se motion for withdrawal or termination of counsel (R.18; 118).

In denying said motion on 6-9-93, Judge Sexton impermissibly forced Bowen to chose between poor counsel and self representation (S.R. 741-42), failed to conduct a sufficient "Nelson" inquiry (S.R.740), denied Bowen's constitutional right to self representation after three unequivocal request for self representation (S.R.741-42; 752-55).

Bowen was forced to accept and continue with Manuel Lopez who himself points out a conflict of interest (S.T.753-54).

Bowen was subsequently tried before Judge Susan Bucklew who was substituting for Judge Susan Sexton. Bowen was found guilty by jury on September 30,1993, on count one: second degree murder w/firearm; count two guilty of "attempted first degree murder w/firearm as charged in indictment" (R.98-100) verdict form). Again, Bowen respectfully directs the court's attention to name of victim in count two, **Mickey J. Lemons**.

On October 12, 1993, Bowen was sentenced to a term of 40 years on count one; 40 years on count two; and 5 years on count three, with two 3 year mandatory sentences running concurrent. (R.121-30).

On October 5, 1993, Bowen filed a pro se Motion for New Trial pursuant to Fla. R. Crim. P., Rule 3.600(a)(2), (b)(8) and 3,140(o), alleging four fundamental errors (R.103-19). At oral argument of said motion on October 12, 1993, Bowen made the trial court aware that there was a material variance in the name stated in count two of the indictment and that proven at trial, and that said indictment exposed him to a new prosecution for the same offense (R.105; T.702-03) motion was denied.

It should be noted that the State and defense counsel stood mute on this double jeopardy issue.

On October 12, 1993, Bowen was granted leave to file pro se notice of appeal, which was filed on November 1, 1993 (R.138).

On or about July 23, 1994, Bowen filed an initial brief without record on appeal due to clerk's failure to provide said record. On January 24, 1995, Bowen recieved partial record from clerk of court.

Bowen then filed with Second District "Motion to Supplement Record" which was granted April 19, 1995. Supplemental record was furnished to Bowen on May 5, 1995.

On May 15, 1995, Bowen filed with Second District Court of Appeal his amended initial brief (Case#93-03918). On August 23, 1995, Bowen filed in the Second District "Notice of Supplemental Authority" **Jacob v. State, 651 So.2d. 147 (2 DCA 1995).** On July 10, 1995, State filed answer brief in case #93-03918. On July 28, 1995, Bowen filed with Second District "Reply Brief of Appellant". The State did not file cross reply.

On May 29, 1996, the Second District reversed and remanded for new trial Case #93-03918 & #94-01076 (consolidated), because trial court denied Bowen's constitutional right to self representation at trial, issue three of Bowen's direct appeal, certified question to this court (21 FLW. D-1311).

In said ruling the Second District failed to rule on issue one "Fatal defect in indictment, and double jeopardy violation", did not declare issue one without merit, or render issue one moot. Therefore, Bowen timely filed for rehearing in Second

District on June 5, 1996. On June 3, 1996, State prematurely filed "Notice to invoke discretionary review" in an attempt to foreclose issue one. On June 6, 1996, Bowen filed with this court "Motion to do dismiss and/or hold in abeyance State's motion to invoke discretionary review", which this court granted June 12, 1996.

The Second District Court of Appeal denied rehearing in case #93-03918 & #94-01076 on July 31, 1996. On August 6, 1996, Bowen filed with this court "Notice to invoke discretionary review". On August 15, 1996, Bowen filed with this court "Jurisdiction Brief". On August 19, 1996, Bowen filed with this court motion to consolidate issue one with certified qustion (issue 3) of Second District opinion of May 29, 1996. This court consolidated sua sponte and graciously allowed Bowen to file a brief on the merits of issue one within a 20 day period of State filing brief on cerified question. On September 11, 1996, State filed brief on merits of certified question case #88,219. Bowen now files this brief on merits, case #88,748 consolidated with case #88,219.

SUMMARY OF ARGUMENT

The issues before this Honorable Court is as follows:

Bowen adopts Second District's ruling on May 29, 1996, with the following question of law.

1. WHETHER, THE SECOND DISTRICT COURT OF APPEAL'S REFUSAL TO RULE, RENDER MOOT, OR DECLARE WITHOUT MERIT, ISSUE ONE OF BOWEN'S AMENDED INITIAL BRIEF, REPLY BRIEF, AND MOTION FOR REHEARING IN CONSOLIDATED CASE #93-03918 AND #94-01076, ERROR ?

2. WHETHER, SAID COURT'S RULING ON MAY 29, 1996, WHEREIN SAID COURT REVERSED AND REMANDED FOR NEW TRIAL ON ISSUE THREE, "VIOLATION OF CONSTITUTONAL RIGHT TO SELF REPRESENTATION", CERTIFIED QUESTION TO THIS COURT, VIOLATED DOUBLE JEOPARDY GUARNTEES OF THE FLORIDA CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES,BY STANDING MUTE ON ISSUE ONE, FATAL DEFECT IN INDICTMENT, THEREBY RECEEDING FROM THIS COURTS OPINIONS ON FATAL DEFECTS IN INDICTMENTS AND DOUBLE JEOPARDY VIOLATIONS ?

3. BY LAW THIS IS AN APPEAL OF MATTERS THAT WERE NOT LITIGATED TO FINALITY AS BOWEN HAS SHOWN IN JURISDICTION BRIEF. IT IS NOT UNREASONABLE TO BELIEVE THAT THE FAILURE OF THE SECOND DISTRICT COURT OF APPEAL TO RULE ON ISSUE ONE OF BOWEN'S INITIAL APPEAL BRIEF WAS BASED ON AN UNREASONALBLE DETERMINATION ON THE FACT'S, IN LIGHT OF THE EVIDENCE PRESENTED, WHICH WAS NOT LITIGATED TO FINALITY AS SAID DOUBLE JEOPARDY ISSUE WAS NOT RULED ON.

Therefore, it is Bowen's contention that for the Second District Court to reverse and remand for new trial, without ruling on this valid double jeopardy issue forces Bowen to run the gauntlet again, is fundamentally unfair, as said issue remains unresolved, and Bowen properly presents it to this court for redress and resolution.

Wherefore, these reasons stated and others cited within this

brief, foregoing initial brief, reply to State's response, and Motion for Rehearing, Bowen does under the ambit of law, have in full force an appeal to this court and would respectfully ask this court to equally consider the merits of this brief on issue one, initial brief, reply brief and Motion for Rehearing, determine questions of law and facts of case, fully in the interest and furtherance of justice.

Bowen respectfully submits that the Second District Court's ruling of May 29, 1996, is a long overdue opinion concerning the State trial court's unconstitutional infringement upon a defendant's constitutional right to self representation at trial, and agrees one hundred percent with said court. This most important right as mandated upon state courts by **Faretta v. California**, has been subtley, but effectively erroded until the true meaning was lost. However, as important as this right is, Bowen submits that is superceeded by the constitutional protections (at least in instant case) against double jeopardy. This country's founding fathers concern for this right was so great that it is mentioned twice in the bill of rights.

Bowen would further submit that a decision affirming the facts of fatal defects in indictment and double jeopardy violations could, possibly, negate the necessity of an answer to the certified question, which would no doubt open a "Pandora's

Box" of pro se litigation on right to self representation at trial. Prehaps this question could be left for another day and case.

ARGUMENT OF ISSUE ONE

WHETHER, DUE TO FATALLY DEFECTIVE INDICTMENT, TRIAL COURT ERRED IN DENYING MOTION FOR NEW TRIAL, ISSUE FOUR, DISMISS COUNT TWO OF INDICTMENT DUE TO DOUBLE JEOPARDY VIOLATION. WHETHER, THE SECOND DISTRICT COURT OF APPEAL, IN REFUSING TO RULE ON SAID ISSUE ON DIRECT APPEAL, RECEEDS FROM IT'S OWN RULING, RULING OF THE THIRD DISTRICT COURT OF APPEAL, FIFTH DISTRICT COURT OF APPEAL, RECEEDS FROM AND/OR EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS HONORABLE COURTS OPINIONS ON FATAL DEFECTS IN INDICTMENTS, AND DOUBLE JEOPARDY VIOLATIONS.

Bowen unoquivocally states that there is, in fact, a material variance in the named alleged in the indictment (**Mickey J. Lemons**), and that proven at trial (**Mickey Charles Lemons**). That such material variance is a fatal defect which mandates said indictment be dismissed, judgement and conviction thereon vacated, Bowen discharged from all charges therein, as said indictment fails to protect Bowen from another prosecution for the same offense. Which is evidenced by Second District Court of Appeal ruling of May 29, 1996.

At approximately 8:30 pm., Feburary 6, 1993, Tampa Police Dept. Detective Richard T. Stanton responded to a call to investigate a shooting at Leo's Bar, 1948 E. Hillsborough, Tampa, Fla. . He subsequently briefly interviewed a man named **Mickey**

Lemons who had been shot (T.377). After conducting interview of **Mickey Lemons**, he later reduced handwritten notes to a police report (T.380; R.12), showing **Mickey J. Lemons**, white male, DOB: 11-3-45, who lived at 13401 Henderson Road, Tampa, Fla., to be a victim (R.12).

Tampa Police Dept. Officer Amy Anderson who interviewed State's witnesses Francis Hall, testified Hall knew **Mickey Lemons** and that **Mickey Lemons** refused to talk to her (T.504-06). She later reduced what was said and occurred to a police report (T.508). Again, criminal report affidavit state's **Mickey J. Lemons** 13401 Henderson Road, Tpa., Fla., to be the victim (R.12).

Bowen was subsequently arrested and charged by indictment of attempted first degree murder on **Mickey J. Lemons.** (R.13).

The alleged victim testified, after taking an oath on 6-3-93, that his name was **Mickey Gerald Lemons** during the deposition hearing (S.T.760; p.3 depo.), which is a variance in the name alleged in the indictment.

The alleged victim subsequently testified, after taking an oath, that his name was **Mickey Charles Lemons** at trial (T.224), which is yet another variance in the name alleged in indictment.

The records show that the State called **Mickey Lemons** (T.224) who is listed on State's witness list (R.48).

(T.224):

THE COURT: Mr. Bedell, you may call your next witness.
MR. BEDELL: Mickey Lemons.
THE COURT: Mr. Lemons, if you would come forward, sir, to be sworn, the clerk will swear you in. If you will come forward in front of the clerk. (The witness was sworn by clerk.)
THE COURT: Would you have a seat over here sir, in the witness chair.

MICKEY CHARLES LEMONS

was called as witness by the State, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BEDELL:

Q. Please tell us your name.
A. Mickey Charles Lemons.
Q. Where do you live ?
A. 13401 Henderson Road, Tampa.

It should be noted that Bowen did not hear the name given, due to a deliberate distraction by defense counsel Manuel Lopez, who was forced on Bowen.

However, the State was aware of this material variance, but elected to continue to elicit testimony from this person, **Mickey Charles Lemons**, throughout trial, even though said person was not named in the criminal report affidavit (R.11-12), was not named in indictment (R.13), and was not on State's witness list (R.48).

During entire trial, the State never ascertained any testimony or introduced any other evidence to prove that **Mickey**

J. Lemons was a victim as alleged in the indictment, or that **Mickey J. Lemons** and **Mickey Gerald Lemons** and **Mickey Charles Lemons** were, in reality, the same person.

Despite the material variance in the name alleged in the indictment (**Mickey J. Lemons**) and that proven at trial (**Mickey Charles Lemons**), Bowen was found guilty of committing the offense of attempted first degree murder of **Mickey J. Lemons** (T.728).

Bowen respectfully directs this Honorable Court's attention to Jacobs v. State, 46 Fla. 157, 35 So. 65 (1903) where this court held:

> "The name of the person assaulted, as alleged in the indictment, is an essential element in the legal description of the offense, and the failure to prove it as laid is fatal to a conviction had"
>
> "The error assigned is the denial of defendant's motion for a new trial. The fifth ground of this motion is as follows; because of a fatal variance between the allegation and the proof in said cause, is this; that the indictment charges the offense to have been committed on one Rosa Lee Nelson, and the testimony and practically the only evidence as to the name of the person assualted and abused was from the person herself, as follows:
>
> Q. What is your name ?
> A. Rosa Lee.
> Q. Rosalle Nelson ?
> A. Rosa Lee Ann."

Thus, pursuant to Jacobs (supra), this is a fatal defect. see: State v. Dudley, 7 Wis. 644; State v. English, 67 Mo. 136;

Lutrell v. State, 65 Tex. Cr. R. 102, 143 S.W. 628; **Lewis v. State**, 90 Ga. 95, 15 S.E. 697; **Irwin v. State**, 117 Ga. 722, 45 S.E. 59; **People v. Hughes**, 41 Cal. 234.

Pursuant to **Lattimore v. State**, 202 So.2d. 3 (3 DCA 1967), it was held that:

> **"The conviction on count one must be reversed upon the authority of Jacobs v. State, 46 Fla. 157, 35 So. 65. There is no evidence in the record to identify Willie Applegate as the person alleged to have been assualted. The state failed to prove that Willie Applegate and Willie Gay were, in reality, the same person. Therefore, it cannot be said that the records protects the accused against another prosecution for the same offense"**

The case at bar is indistinguishable from **Jacobs** and **Lattimore** (supra).

Bowen submitted a written motion for new trial (R.103-06), which was heard in open court (T.701-03) and Bowen, in proper person, orally argued (T.702-03) that:

> **MR. BOWEN:** I'm going to request that count 2 of the indictment be dismissed because it exposes me to a new prosecution for the same offense.
>
> **THE COURT:** Now, count 2 was the attempted first degree murder, a different victim, correct ?
>
> **MR. BOWEN:** Of Mickey Lemons.
>
> **THE COURT:** Why is it that you think that --- that count --- count 1 has to do with the murder of Floyd and count 2 has to do with the attempted murder --- or attempted first

degree murder of Mickey Lemons ?

MR. BOWEN: Because that's what the indictment says.

THE COURT: Well, that's true, but why do you think it exposes you to prosecution for the same offense ?

MR. BOWEN: Count 2 ?

THE COURT: Yeah.

MR. BOWEN: Well, the indictment says that I shot a **Mickey J. Lemons.**

THE COURT: Right.

MR. BOWEN: The man who took the stand said his name was **Mickey Gerald Lemons. Mickey J. Lemons** is currently on probation for a burglary charge in Pasco County. This is not the same two people.

THE COURT: Okay. I'll deny the motion as to that argument.

Bowen directs this court's attention to the fact that the trial court judge argued in depth as to the reasons for denying all other issues present in the motion for new trial, except this issue, which was summarily denied (T.703).

Since the proof at trial failed to sustain the charge as "laid" in the indictment, the material variance was fatal to conviction and, thus, the trial court abused it's discretion in denying Bowen's motion for new trial thereby exposing Bowen to a new prosecution for the same offense.

It should be noted that the State's counsel and counsel for

Bowen stood mute because they realized that Bowen was aware of a variance in names, but failed to hear the alleged victim state **Mickey Charles Lemons.** The trial judge denied motion without even questioning either attorney. This abuse of discretion leaves Bowen in jeopardy for any crimes against **Mickey Gerald Lemons** and/or **Mickey Charles Lemons.** This is evidenced by the Second District's ruling of May 29, 1996.

There is nothing in the record to indicate that **Mickey J. Lemons** was also known to any State's witnesses as **Mickey Charles Lemons** (R.48). Therefore, pursuant to **Raulerson v. State, 358 So.2d. 826 (Fla. 1978)** this is a fatal defect. The consequences of said defect is that the indictment fails to protect Bowen from another prosecution for the same offense. Which is of course, a violation of double jeopardy principles, which is evidenced by the Second District's ruling of May 29, 1996. Pursuant to said ruling, the State can, and will, simply change the name on indictment and retry Bowen on the same charge with a different victim, as Bowen remains in jeopardy for any crimes against **Mickey Gerald** and/or **Charles Lemons.**

The State conveniently refers to **Mickey Lemons** as the alleged victim, not **Mickey J. Lemons** as named in indictment, and suggest that the omissions of the middle initial **"J"** is not a material variance (S.B.7-9). The facts are that the name, **Mickey**

J. Lemons appear no where in the records, other than as follows: (R.13) Indictment; (T.19) Judge reads indictment to jury; (T.656, 658,661-62) Judge gives jury instructions; (R.98-100) Verdict form, "We the jury find as follows to count 2 of the indictment, (a). the defendant is guilty of attempted first degree murder with a firearm, as **charged in the indictment**. [EMPHASIS ADDED].

Thus, **Mickey J. Lemons,** the victim as alleged in the indictment, **did not appear, and did not testify**. **Detective Stanton testified that he conducted a brief interview with Mickey Lemons. Which he later reduced to a police report. (T.377-80) see: criminal report affidavit signed under oath by Detective R.T. Stanton showing the name Mickey J. Lemons (R.13)**. Thus, all police officers on State's witness list (R.48) who talked to the victim on Feburary 6, 1993, later testified that they talked to the victim **Mickey J. Lemons**, **not Mickey Charles Lemons.** Therefore, the person who testified at trial as the victim witness, **Mickey Charles Lemons, was unknown to said officers and witnesses.**

State's witness Francis Hall testified that she knew **Mickey Lemons,** and/or Mr. Lemons (T.156-185), the person who was shot, the person who identified himself to police as **Mickey J. Lemons, not Mickey Charles Lemons.** Thus, **Mickey Charles Lemons was unknown to all State's witnesses.**

In <u>**Jacob v. State**</u>, 651 So.2d.147 (2 DCA 1995) the Second District Court of Appeals held:

> "Evidence did not conform to allegations in information and convictions for robbery and battery were invalid where **victim did not testify and was unknown to State's witnesses, officer testified that he had interviewed Joseph Neely, arrest affidavit listed complainant as Joseph L. Neely,** but information charged defendant with crimes against **James Neely.** Variance in victim's name between information and evidence at trial was fundamental error, requiring reversal even though no objection was made at trial"

The Court, reversed and remanded with instructions to discharge the defendant Jacob on the charges of robbery and battery of James Neely, Because, Jacob remains at jeopardy for any crimes against Joseph L. Neely. If we affirmed these convictions and the victim's name was, in fact, Joseph, then Jacob could be convicted twice for the same offense.

<u>The instant case is indistinguishable from Jacob supra</u>, and Bowen, remains at jeopardy for any crimes against **Mickey Charles and/or Mickey Gerald Lemons**, due to Second District's opinion on May 29, 1996, which reversed and remanded for new trial on issue three of Bowen's initial brief, right to represent himself at trial.

The record shows beyond any doubt, that Bowen was charged

with committing a crime against one person (**Mickey J. Lemons**), but trial testimony show a different victim (**Mickey Charles Lemons**). Pursuant to **Lattimore v. State**, 202 So.2d. 3 (3 DCA 1967) **it was held that:**

> "The conviction on count one must be reversed upon the authority of Jacobs v. State, 46 Fla. 153, 35 So. 65. There is no evidence in the record to identify Willie Applegate as the person alleged to have been assaulted. The State failed to prove that Willie Applegate and Willie Gay were, in reality, the same person. Therefore, it cannot be said that the record protects the accused against another prosecution for the same offense."

Again, the instant case is indistinguishable from **Lattimore** (supra).

An Attempted first degree murder of **Mickey J. Lemons** is a distinctly different factual event and crime from an attempted first degree murder of **Mickey Charles Lemons** or any other person. This is illustrated by the case of the thirteen robbed mourners in **Palmer v. State**, 416 So.2d. 878 (4 DCA 1982), that in a criminal case each crime against a different victim is a seperate and distinctly different criminal offense. accord:**Hillman v. State**, 410 So.2d.180 (2 DCA 1982); **O'Neal v. State**, 323 So.2d. 685 (2 DCA 1975); and **Harris v. State**, 286 So.2d. 32 (2 DCA 1973).

It is a basic tenet of common law pleading that the allegata and probata must correspond and agree. **Delk v. Dept. of Pro-**

Regulation, 595 So.2d. 966 (5 DCA 1992), quoting from **Rose v. State**, 507 So.2d. 630 (5 DCA 1987).

In **Rose**, supra, as in the case at bar, Bowen was charged with committing a crime against one person, but trial testimony proved that said crime was actually committed against another person. The trial court allowed the jury to convict Bowen of the crime charged in the indictment, of attempted first degree murder of **Mickey J. Le mons** (R.13; T.728), but trial testimony proved the victim was **Mickey Charles Lemons** (T.224).

It is elementary that the conviction of a crime not charged violates constitutional due process as well as the constituional right of the accused in all criminal cases to be informed of the nature and cause of the accusation against him. The citations on this are legion, is prohibited by the United States Constitution, Amendment 5, 6, & 14, Florida Constitution, Article I, Section 16, and this Court's decision in **State v. Gray**, 435 So.2d. 816 (Fla. 1983) wherein this court held:

> "However, a conviction on a charge not made by the indictment or information is a denial of due process." **Gray**, at 818.

Since 1813, the United States Supreme Court in **Schooner Hoppet and Cargo v. U.S.**, 11 U.S. 389, 7 Cranch 389, 3 L.Ed. 380 (1813) has held that:

> "The rule that a man shall not be charged with one crime and convicted of another, may

> sometimes cover real guilt, but it's observation is essential to the preservation of innocense."

Jeopardy is the risk or chance of being convicted of a certain crime in a certain trial. Certainly, when the jury was sworn in this case, jeopardy attached as to the crime of attempted first degree murder of **Mickey J. Lemons.** In the instant case the State alleged a crime and, at trial, failed to prove it but proved another completely different crime.

This constitutes not only a fatal variance in indictment, but also a fatal variance in proof. Thus, the trial court erred in denying motion for judgment of acquittal (T.613), and motion for new trial pursuant to Fla. R. Crim. P., Rule 3.600(a)(2)(T.702-03; R.105). The trial court further erred in denying Bowen's pro se motion for new trial and to dismiss count two due to material variance, in violation of Fla. R. Crim. P., Rule 3.140(o), thereby exposing him to a new prosecution for the same offense, as he feared and so stated in said motion. see also: (I.B.13; R.B.1-2; R.H.2).

Jeopardy attached as to count two of indictment (**Mickey J. Lemons**), when the jury was sworn. Trial testimony shows (**Mickey Charles Lemons**) to be the victim, a completely different crime than charged in indictment.

Thus, for purpose of Fla. R. Crim. P., Rule 3.151(c) Bowen

was tried on one charge of two or more related offenses in indictment and therefore all remaining related charges must be dismissed on his motion. The trial court was aware of this, hence, summarily denial of motion to dismiss count two of indictment. This is error that cannot be cured by the Second District Court ordering a new trial, contrary to it's belief's. Thus, Bowen respectfully submits that not only is he entitled to discharge pursuant fatal defect and double jeopardy but also Rule 3.151 (c). accord: **Rose**, supra at 631; also see: I.B.13; R.H.2 .

Pursuant to the foregoing facts and records, there can be no doubt that the State failed to prove the name as alleged in indictment, at trial which is fatal to conviction. This has held since 1787 in **U.S. v. Howard, 26 Fed. Cas. 388 No. 151033 .**

Pursuant to the "Federal Court" (1787-1801), the forerunner to the United States Supreme Court, the court in **Howard** held basically as follows:

> "The name the person assaulted, as alleged in the indictment, is an essential element in the legal description of the offense, and the failure to prove it as laid is fatal to a conviction had."

This was, and still is the controlling authority on fatal Defects in indictments. **accord**: **Jacobs** supra and **Raulerson** supra.

Pursuant to **Lattimore** supra, the State failed to prove that the person named in indictment and the person who testified at trial were, in reality, the same person, which violates double jeopardy principes. Therefore, Bowen is entitled to discharge because he remains in jeopardy for any crimes against **Mickey Charles Lemons.**

Pursuant to **Jacob** supra, Bowen is entitled to discharge, ther is no evidence in the record linking or explaining the variance between the names **Mickey J. Lemons** and **Mickey Charles Lemons.** Again, Bowen remains in jeopardy for any crimes against **Mickey Charles** or **Mickey Gerald Lemons.** Thus, the Second District Court of Appeal, by refusing to rule on this issue, receeds from their own opinion in **Jacob v. State, 651 So.2d. 147 .** Expressly and directly conflicts with the Fifth DCA in **Rose** supra; the Third DCA in **Lattimore** supra.

Said failure to rule also expressly and directly conflicts with this Honorable Court's decisions in **Jacobs** supra, **Raulerson**, supra, and **Gray** supra .

Bowen submits that the case at bar is indistinguishable from **Smith** v. State, 86 So. 640,(1920), where this Court held;

> "Evidence of killing "little girl" will not support conviction of killing named person; identity cannot be inferred on appeal"

> "The deceased is referred to in the evidence as a "little girl", and while it is probable that the "little girl" referred to as having been killed was the person alleged in the information to have been killed, an appellate court cannot, in the absence of any proof at all to that effect, infer that such was the case."

Smith supra;...

> **[1,2].** "But there is nothing in the evidence to even suggest that the "little girl" whom plaintiff in error is shown to have killed was the person alleged in the information to have been killed by him. The name of the "little girl" is not mentioned by a single witness, and there is a total failure to identify by evidence the person actually killed with the person alleged to have been killed."

In the instant case as **Smith** supra, the name of the victim as alleged in indictment **Mickey J. Lemons** is not mentioned by a single witness, and there is a total failure to identify by evidence the person actually shot with the person alleged to have been shot.

Perhaps the Second District Court of Appeal's opinion as to what constitutes fatal defect and double jeopardy is predicated upon the offense severity level (Jacob; robbery and assault; Bowen attempted first degree murder), or perhaps said court inferred identity. Either one is error and expressly and directly conflicts with this court's decisions.

Given the facts of this case, that the State and defense counsel was aware of this material variance prior to, and during trial, yet continued to perpetrate a fraud upon the court, jury, and Bowen, it is not unreasonable to believe that the State will indeed retry Bowen under a new charging document with **Mickey Charles** or **Mickey Gerald Lemons** named as the victim.

In **Grady v. Corbin**, 110 S.Ct. 2084, 109 L.Ed. 548 (1990), the Supreme Court stated:

> "The double jeopardy clause of the Fifth amendment of the United States Constitution provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. this clause protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense."
>
> **HELD:**
>
> "The double jeopardy clause bars a subsequent prosecution if, to establish an essential element of a offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. at 2090-2095. Thus, Bowen cannot be retried without violating double jeopardy."

CONCLUSION

Based upon the foregoing facts, arguments and controlling authorities Bowen respectfully prays that this Honorable Court will dismiss indictment, vacate judgment and sentence thereon, forever discharge Bowen on said charges, and discharge Bowen from unlawful confinement.

Respectfully Submitted,

Jimmy Dell Bowen
JIMMY DELL BOWEN/PETITIONER PRO SE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief on merit's in Florida Supreme Court Case No. 88,748; consolidated with Case No. 88,219, has been furnished by U.S. Mail Postage Prepaid to, Ms. Angela D. McCravy, Office of the Attorney General, Criminal Division, Westwood Center, 7th Floor, 2002 N. Lois Ave., Tampa, Florida 33607, on this 24th day of September 1996.

Respectfully Submitted,

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