IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,473

THE STATE OF FLORIDA,

Petitioner,

vs.

MAURICE HARRIS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Maurice Harris was charged by indictment with one count of attempted first degree murder and one count of armed robbery. (R. 1). The attempted murder count alleged that Harris and a codefendant, John Mickens, "did unlawfully and feloniously attempt to kill a human being, to wit: ALEXIS SALVAT, while engaged in the perpetration of, or in an attempt to perpetrate any Robbery, by shooting ALEXIS SALVAT, with a firearm, in violation of s. 782.04(1), s. 775.04 and s. 775.087 . . . ." (R. 1).

Alex Salbat, the victim, testified at trial, explaining how, after he and his girlfriend had parked their car in Coconut Grove, en route to the Coconut Grove Art Festival, Salbat was accosted. On February 20, 1994, after parking the car, Salbat and his girlfriend started to walk towards the festival. While walking, they passed a group of about 10 or 15 people, including one big male on a bicycle. (T. 214). Shortly afterwards, Salbat looked back, towards his girlfriend's car, and saw that same group of people surrounding her car. (T. 215-16). Salbat and his girlfriend kept walking, but looked back again, and saw that everyone had left the vicinity of the girlfriend's car, except for the one person on

the bicycle and a second person standing near him. (T. 216). The man who was standing then got on the handlebars of the bicycle. (T. 217). Salbat continued walking and then realized that the bicycle was approaching him. (T. 217-18). As the bicycle pulled alongside him, Salbat felt a gun on his head. (T. 220). Salbat saw the man who was holding the gun and that person told Salbat to give him his chain. (T. 222). The person with the gun was the one who had been on the handlebars of the bicycle. (T. 222). Salbat asked what the gunman wanted and told him to leave him alone. (T. 222). Salbat saw an opportunity to run and proceeded to do so. (T. 222-23). The gunman pursued Salbat, and Salbat subsequently felt someone at his right hand side, pulling at his chain; Salbat felt a gun and was then shot, after the chain had been taken. (T. 224-25). The gunman dropped the gun and chain, but the gunman apparently picked up the gun again and shot Salbat a second time. (T. 225-26).

During the first part of the confrontation, before Salbat ran, Salbat had an opportunity to observe the gunman. (T. 222). During the second confrontation, when he was actually shot, Salbat did not see the gunman's face. (T. 226). Salbat identified the defendant, in court, as the gunman. (T. 226-27).

Salbat's girlfriend, Nirvka Garcia, testified as to the same events as Salbat (T. 246-50). She, too, identified the defendant as the gunman. (T. 249). Although she heard the shots, she did not see them being fired because a tree had blocked her vision after Salbat ran and the defendant caught up to him. (T. 251).

Anthony Singletary resided on the block where this incident occurred. (T. 257). He heard the victim yelling for help and saw a young black "kid" with a gun chasing the victim. (T. 258-59). This young black "kid" was identified by Singletary as the defendant. (T. 260). The defendant, pursuing the victim, caught the victim, snatched the gold chain from the victim's neck, and tried to snatch one from the victim's wrist. (T. 259-60). Mary Bryant similarly heard the victim's calls for help and observed a black man with a gun in pursuit of the victim. (T. 272-73). While she identified the defendant as the gunman, based upon changes in the defendant's appearance since the time of the incident, her in-court identification expressed some uncertainty. (T. 273-74). Several witnesses had also identified the defendant, as the perpetrator, on the basis of a photographic lineup prepared and presented by Detective Quesada. (T. 288-94).

Detective Quesada obtained a statement from the defendant, in which he said that he saw a man get out of a car, "and the man who was pulling me around on the bike said, let's get him."[1] (T. 307). The defendant continued:

> So I jumped, I put a gun to him and he had ran. I had ran behind him and I tried to grab the chain and he knocked my hand out of the way and I went for the wallet and he slapped my hand where the gun was in and the gun went off.
>
> I dropped the gun when I heard the ambulance was coming and I picked the gun back up and then I ran.

(T. 307). The defendant's accomplice on the bicycle had handed him the gun. (T. 308). The defendant thought that the gun went off once or twice. (T. 310).

During the charge conference, the judge indicated that he intended to instruct the jury on both attempted first degree premeditated murder and attempted first degree felony murder. (ST. 92-93).[2] Defense counsel did not object to the court's decision to

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[1] The defendant later observed that "let's get him" meant "let's rob him." (T. 315).

[2] The charge conference is included in the supplemental record which the Respondent herein furnished to the Third District Court of Appeal as an attachment to a Motion to Supplement Record on Appeal.

instruct the jury on the two alternative types of attempted first degree murder:

> THE COURT: Now, I have prepared attempted first degree murder, premeditated and attempted first degree murder, felony murder and although the State has only pled attempted felony murder, the case law is clear that they are entitled to the instruction even if they didn't plead it. I didn't know if you wanted it so it is really up to you, Mr. Chitty [prosecutor]?
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> MR. CHITTY: I'll take it.
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> THE COURT: Well, it is complete. Let me just get my secretary out of here. Apparently she cut off a word. Attempted felony murder, other than the fact that the attempted premeditated murder is short, it is obviously missing a couple of words at the end. Any other objections?
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> MR. CHITTY: No, Your Honor.
>
> MR. FALLON [defense counsel]: No.
>
> THE COURT: Okay, and attempted felony murder, first degree.
>
> MR. FALLON: No objection.

The Third District Court of Appeal granted the motion to supplement and accepted the documents appended to the motion to supplement as the supplemental record. The initial page of this supplemental transcript bears the title Supplemental Transcript, and further bears the date of October 31, 1994. The State's citations to that supplemental record appear, in this brief, in the alternative as the page number of the supplemental transcript, and as the page number of the supplemental record. Since the supplemental record included other matters as well, those two numbers vary.

(Supplemental Transcript Oct. 31, 1994, pp. 4-5; SR. 91-92).

During closing arguments, the prosecutor referred to both attempted premeditated murder and attempted felony murder. (T. 370).[3] In accordance with the judge's prior pronouncement, the judge did instruct the jury on both attempted first degree premeditated murder (T. 394-96) and attempted first degree felony murder. (T. 396-97). The judge also instructed the jury on the following lesser included offenses: attempted second degree murder, attempted third degree murder, attempted voluntary manslaughter, and aggravated battery. (T. 396-407). At the conclusion of the reading of the jury instructions, the court inquired whether there were any objections to the instructions as read, and defense counsel did not have any objections. (T. 420).

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[3] With respect to attempted premeditated murder, the prosecutor presented the following argument to the jury: "Now, attempted first degree murder comes in two forms, one is the defendant's premeditated act. He at some point in time formulated in his mind I am going to kill X, I am going to kill Mr. X. And he sets out and he kills Mr. X. That is first degree premeditated murder. It'll be read to you and you may find that it is applicable in this case, attempted first degree murder because the judge, the jury instruction will also tell you that that constitutes and [sic] intent to carry out the death of another human being, can be done in a moment in the human mind and that will be read to you." (T. 370).

The jury verdict found the defendant guilty of "attempted first degree murder as charged in count I of the Indictment." (R. 26). The verdict form which was used did not present separate options for attempted premeditated or attempted felony murder; the only attempted first degree murder verdict available to the jury was the one which the jury selected. The jury also found the defendant guilty of armed robbery. (R. 27, T. 424).

The Third District Court of Appeal, on direct appeal, reversed "Harris's conviction and sentence for attempted felony murder and remand with instructions that he be discharged as to this count." Pet. App. p. 4. The Court based that conclusion on its interpretation of State v. Gray, 654 So. 2d 552 (Fla. 1995). In so holding, the Court, as it had done in several prior cases, certified to this Court the following question:

> 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?

Id.

Additionally, the Court rejected the State's argument that the case should be remanded for retrial on attempted murder since the

jury had been instructed on both attempted felony murder and attempted premeditated murder, and it could not be determined which theory applied:

> Notwithstanding the fact that Harris's conviction and sentence for attempted felony murder must be vacated pursuant to Gray, the state makes the argument that since this case was presented to the jury on the alternative theories of attempted felony murder and attempted first degree murder and it is not clear which theory the jury relied upon to support its guilty verdict, this case should be remanded for a retrial on the attempted first degree murder charge based upon this court's decision of Meeks v. State, 667 So. 2d 1002 (Fla. 3d DCA 1996) and Thompson v. State, 667 So. 2d 470 (Fla. 3d DCA 1996). We disagree and find the state's reliance upon these cases to be misplaced.
>
> Unlike Thompson and Meeks, Harris was never charged with the crime of attempted first degree premeditated murder and it is most assuredly not a lesser included offense of either of the two charged offenses. Although the evidence adduced by the state may very well have been sufficient to support an attempted first degree murder charge, we conclude, as did the First District in Ables v. State, 338 So. 2d 1095 (Fla. 1st DCA 1976), cert. denied, 346 So. 2d 1247 (Fla. 1977), that it was error for the trial court to charge the jury under count I on attempted first degree premeditated murder where the indictment charged only attempted felony murder:
>
> > The court's charge [for attempted first degree premeditated murder] thus potentially exposed appellant

> to a jury determination of his guilt on a charge not made by the indictment. That was error, for an accused in entitled to have the charge proved substantially as laid; he cannot be charged with one offense and convicted of another, even though the offenses are of the same character and carry the same penalty. (Citations omitted)
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> 338 So. 2d at 1096. But compare Knight v. State, 338 So. 2d 201 (Fla. 1976) (holding that conversely, it is proper for the trial court to charge the jury on the alternative theory of felony murder if supported by the evidence where the indictment charges only premeditated first degree murder), denial of habeas corpus affirmed in relevant part, 863 F. 2d 705, 707 (11th Cir. 1988).. The fact that Harris interposed no objection to the court's sua sponte jury instruction on attempted first degree premeditated murder is of no moment because we deem this instruction to constitute fundamental error. Thus, on remand, we conclude that Harris is entitled to a complete discharge from his conviction and life sentence for attempted felony murder as charged in count I of the indictment.

Pet. App. at pp. 4-6. The State filed a timely motion for rehearing which was denied, and the State then sought discretionary review in this Court, pursuant to the certified question.[4]

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[4] As of the date of service of this Brief, the lower Court has not prepared the Index to the Record on Appeal, and record citations to pleadings filed with the District Court of Appeal are therefore incomplete.

SUMMARY OF ARGUMENT

Pursuant to this Court's recent decision in State v. Wilson, 21 Fla. L. Weekly S292 (Fla. July 3, 1996), the lower Court's treatment of the attempted felony murder conviction must be quashed as the State is entitled to proceed, on remand, to retry any lesser included offenses which the jury was instructed on during the first trial. Additionally, it is submitted that the same principles should permit the State to retry to the defendant on the charge of attempted first degree premeditated murder. The jury was instructed on that parallel offense as well, and retrial on that charge is not precluded by double jeopardy principles.

ARGUMENT

THE VACATED CONVICTION FOR ATTEMPTED FELONY MURDER IS SUBJECT TO RETRIAL FOR OTHER DEGREES OF ATTEMPTED MURDER.

The lower court, in concluding that a vacated conviction for attempted felony murder cannot be retried for other degrees of attempted murder, has issued an opinion which is contrary to the recent holding of this Court in State v. Wilson, 21 Fla. L. Weekly S292 (Fla. July 3, 1996). This Court, in Wilson, held "that the proper remedy [for cases reversed pursuant to State v. Gray, 654 So. 2d 552 (Fla. 1995)] is remand for retrial on any of the other offenses instructed on at trial." 21 Fla. L. Weekly at 292. While this Court's opinion in Wilson refers to retrial on any "other offenses instructed on at trial," it does not distinguish between lesser offenses and parallel offenses, such as attempted first degre premediated murder. This Court's subsequent opinions clarify this, and refer to retrial for lesser included offenses on which the jury was instructed. See, e.g., State v. Alfonso, 21 Fla. L. Weekly S332 (Fla. July 18, 1996); State v. Lee, 21 Fla. L. Weekly S332 (Fla. July 18, 1996). None of the foregoing cases involved situations where the jury was instructed on attempted premeditted murder in addition to attempted felony murder.

At an absolute minimum, the instant case, controlled by Wilson, must be remanded for retrial for any lesser included offenses that were instructed upon at trial. The jury, in the instant case, was instructed on the following lesser included offenses: attempted second degree murder, attempted voluntary manslaughter, and aggravated battery. (T. 396-407).[5]

However, in the instant case, the jury was also instructed on attempted premeditated first degree murder. The Third District refused to permit any retrial on that offense, even though it had been instructed upon in the alternative. The Third District had previously recognized that cases which went to the jury in the alternative - attempted premeditated murder and attempted felony murder - could go back for retrial on attempted premeditated murder. Thompson v. State, 21 Fla. L. Weekly D286 (Fla. 3d DCA Jan. 31, 1996); Meeks v. State, 21 Fla. L. Weekly D400 (Fla. 3d DCA Feb. 15, 1996). See also, Humphries v. State, 20 Fla. L. Weekly D2634 (Fla. 5th DCA Dec. 1, 1995). The holding in such cases was based on the notion that it could not be determined whether a conviction

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[5] The jury was also instructed on attempted third degree murder. As that is another form of attempted felony murder, retrial on that offense would obviously be prohibited under Gray.

was for attempted felony murder or attempted premeditated murder when the jury is instructed on attempted first degree murder in the alternative. Meeks, 21 Fla. L. Weekly at D400. The lower court, however, refused to apply that principle in the instant case, concluding that the jury was erroneously instructed on attempted premeditated murder, since the charging document did not allege attempted premeditated murder. Even though defense counsel did not object to the instructions on attempted premeditated murder, the lower Court concluded that any such instruction was fundamental error.

While the instruction on attempted premeditated murder was erroneous, insofar as the charging document did not allege premeditation, see, Garcia v. State, 492 So. 2d 360, 368-69 (Fla. 1986), the error in instructing on attempted premeditated murder in the first trial does not control whether such an instruction may be given on retrial.[6] To whatever extent the charging document, alleging attempted felony murder, failed to allege premeditation, the real question is whether the State may amend the charging

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[6] The State further believes that Garcia refutes the lower Court's conclusion that the instruction on attempted premeditated murder was "fundamental" error, 492 So. 2d at 368-69.

document, upon remand to the trial court and prior to any retrial. Such an amendment, alleging premeditation, would remove any defect in the charging document and would remove any bar to instructing the jury, on retrial, with attempted premeditated murder.

The Third District's opinion effectively precludes the State from seeking such an amendment of the charging document on remand. Just as in Wilson, double jeopardy principles do not preclude a retrial on any degree of attempted murder. The defendant was convicted of the highest charge in the trial court; there was no acquittal as to any offense. Indeed, the charge of attempted premeditated murder did go to the jury, and it may be that that was what the jury believed it was convicting the defendant of. The lower Court, in its opinion, notes that both theories of attempted murder were argued to the jury and that "[n]either party disputes the fact that the evidence adduced by the state could have supported either theory." App. at p. 2, n. 2.

In the absence of any double jeopardy bar to retrying the defendant for attempted premeditated murder, a charge which one jury already considered, the only legitimate question is whether the State could properly amend the charging document upon remand to

the trial court, so as to add an appropriate reference to the premeditation element. Such an amendment would be fully consistent with the principles governing the amendment of charging documents. As a general rule, the State is free to amend a charging document, prior to trial, without leave of court. See generally, Hoffman v. State, 397 So. 2d 288 (Fla. 1981); Lackos v. State, 339 So. 2d 217 (Fla. 1976); State v. Anderson, 537 So. 2d 1373, 1375 (Fla. 1989); Rosser v. State, 658 So. 2d 175, 176 (Fla. 3d DCA 1995); State v. Conte, 516 So. 2d 1115 (Fla. 2d DCA 1987). The principal exception to the rule applies when dilatory amendments will prejudice the defendant's ability to prepare for trial. Anderson, 537 So. 2d at 1375 ("*Lackos* stands for the proposition that the state may substantively amend an information during trial, even over the objection of the defendant, unless there is a showing of prejudice to the substantial rights of the defendant. This proposition is even more relevant when, as here, the amendment occurs prior to trial."); Conte, 516 So. 2d at 1116 ("The prejudice . . . is directed to prejudice in the preparation of a defense.").

In the instant case, the defendant's ability to prepare for retrial would not be prejudiced by any amendment to the charging document for the purpose of adding the element of premeditation to

the accusatory pleading. The original charging document cited section 782.04(1), Florida Statutes, without distinguishing between attempted premeditated murder and attempted felony murder. That charging document further alleged that the defendant shot the victim with a firearm. The defendant has already gone to one trial where the jury was permitted to consider attempted premeditated murder and the prosecutor argued both theories before that jury. By virtue of both pretrial discovery and the first trial, the defendant is fully aware of the evidence which the State possesses which may be used to demonstrate premeditation. Under such circumstances, the defendant's ability to prepare for retrial would not be prejudiced by any amendment of the charging document to specify the elements of attempted premeditated murder.

Insofar as there is no double jeopardy bar to either retrial on the various lesser offenses or the parallel offense of attempted premeditated murder, the latter charge should be within the permissible scope of any retrial as well.[7] The instant case is

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[7] It should be noted that this issue did not arise in Wilson, because, as noted by this Court's opinion in Wilson, the jury which convicted the defendant of attempted felony murder "had not been instructed on attempted first-degree premeditated murder. . . ." 21 Fla. L. Weekly at S292.

similar to the situation found in United States v. Davis, 873 F. 2d 900 (6th Cir. 1989). Davis had been charged with mail fraud, based on an "intangible rights" theory. 873 F. 2d at 901. Shortly after the defendant was convicted under that charge, the Supreme Court of the United States disavowed the "intangible rights" theory of mail fraud and the defendant's conviction was overturned on appeal. Subsequent to the reversal of that conviction, the prosecution proceeded to retry the defendant on an alternative theory of mail fraud, which had neither been charged in the original charging document nor presented to the original jury. The Sixth Circuit Court of Appeals concluded that the overturning of the original conviction, as a result of the United States Supreme Court's decision regarding the mail fraud statute, did not preclude the government from retrying the defendant on other theories of mail fraud derived from the same underlying facts. By contrast, the instant case is even more compelling, as the attempted premeditated murder theory was, in fact, presented to the original jury.

In view of the foregoing, the decision of the lower Court, with respect to the attempted felony murder conviction, should be quashed, in part, and this Court, pursuant to Wilson, should direct that a retrial be permitted on lesser offenses for which the

defendant was originally tried, and, additionally, that the retrial should permit the prosecution to amend the charging document so that the retrial may further proceed on the parallel charge of attempted premeditated murder, a charge which was also considered by the original jury.

CONCLUSION

Based on the foregoing, the decision of the lower Court, with respect to attempted felony murder, should be quashed in part, and remanded for retrial on both lesser included offenses of attempted felony murder, for which the jury had been instructed herein, and for retrial on the additional charge of attempted first degree premeditated murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on the Merits was mailed this 12th day of August, 1996 to ROSA FIGAROLA, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN