

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

JUN 1 1998

OSCAR TRAYLOR,  
Petitioner,

CLERK, SUPREME COURT

By JWS  
Chief Deputy Clerk

v.s.

Case No. 93062

THE STATE OF FLORIDA,  
Respondent.

---

PETITIONER'S BRIEF ON JURISDICTION

OSCAR TRAYLOR, PRO SE  
DC#183205  
EVERGLADES CORRECTIVAL INST.  
P.O. Box 659001  
MIAMI, FL 33265-9001

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENTS	iii
STATEMENT OF THE CASE AND FACTS	1,2,3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
THE DECISION OF THE THIRD DISTRICT CONFLICTS WITH THIS COURT'S DECISION IN <u>GONZALEZ V. STATE, 585 So.2d 932 (Fla. 1991)</u>	5
CONCLUSION	7
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

CASES

PAGE

Gonzalez v. State,

585 So.2d 932 (Fla. 1991) \_\_\_\_\_ 5

Jenkins v. State,

385 So.2d 1356 (Fla. 1980) \_\_\_\_\_ 5

OTHER AUTHORITIES

FLORIDA CONSTITUTION

Article V, § 3 (b) (3) \_\_\_\_\_ 5

FLORIDA RULES OF APPELLATE PROCEDURE

RULE 9.030 (a) (2) (A) (iv) \_\_\_\_\_ 5

## PRELIMINARY STATEMENT

Petitioner was the defendant at trial and the appellant in the Third District Court of Appeal. Respondent was the prosecution and the appellee.

In the brief, the parties will be referred to as they appear before this Honorable Court.

## STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with one count of attempted first degree murder with a deadly weapon under alternative theories to wit: attempted Felony murder or attempted premeditated murder. The Petitioner was also charged with one count of attempted sexual battery with a deadly weapon, and burglary of a dwelling. After a trial by jury in the Eleventh Judicial Circuit, in and for Dade County Florida. The Petitioner was convicted of attempted armed sexual battery, guilty of attempted first degree murder with a deadly weapon as charged, and guilty of armed trespass of a dwelling as a lesser included offense of the burglary charge. During sentencing, following section 775.087 (1), the trial court reclassified the Petitioner's conviction of attempted first degree murder to a life felony and sentenced the Petitioner to life imprisonment.

Subsequently, the Petitioner filed a Rule 3.800 (4) motion in which he challenged his sentences for attempted first-degree murder with a deadly weapon ~~and~~ attempted sexual battery with a deadly weapon. The Petitioner argued that the reclassification of these crimes pursuant to section 775.087, Florida Statute (1995), was improper and that the resultant enhanced sentence awarded were illegal, in that

USE OF a WEAPON WAS, UNDER THE FACTS OF HIS CASE, AN ESSENTIAL ELEMENT OF THE CRIMES CHARGED. THE LOWER COURT ISSUED AN ORDER SUMMARILY DENYING PETITIONER'S RULE 3.800 MOTION. PETITIONER APPEALED TO THE THIRD DISTRICT COURT OF APPEAL.

THE DISTRICT COURT AFFIRMED THE PETITIONER'S SENTENCE FOR ATTEMPTED FIRST-DEGREE MURDER, AND REVERSED AND REMANDED PETITIONER'S SENTENCE FOR ATTEMPTED SEXUAL BATTERY WITH A WRITTEN OPINION ON JANUARY 14, 1998. THE OPINION STATED THE FACTS AS THEY PERTAIN TO PETITIONER'S ATTEMPTED FIRST-DEGREE MURDER CONVICTION AS FOLLOWS:

... HERE, TRAYLOR WAS CHARGED WITH AND CONVICTED OF ATTEMPTED FIRST-DEGREE MURDER, A VIOLATION OF SECTION 782.04(1), FLORIDA STATUTES (1995). SECTION 782.04(1) COMPRISES BOTH PREMEDITATED MURDER, § 782.04(1)(a)(1), AND FELONY MURDER, § 782.04(1)(a)(2). ATTEMPTED OF SUCH A CRIME IS A FIRST-DEGREE FELONY IF THE CRIME IS CHARGED AS A CAPITAL FELONY AS HERE. SEE § 777.04(1), FLORIDA STATUTES (1995). AS THERE IS NO CRIME IN FLORIDA OF "ATTEMPTED FELONY MURDER," TRAYLOR'S CONVICTION WAS FOR ATTEMPTED PREMEDITATED MURDER.

PETITIONER MOVED FOR REHEARING OF DECISION ARGUING THAT THE THIRD DCA'S OPINION IN THIS CASE, TRAYLOR V. STATE, 23 FLA. 2. WEEKLY D213 (FLA. 3D DCA JAN. 14, 1998), ERRONEOUSLY RELIED ON STATE V. GRAY, 654 SO.2D 552

(Fla. 1995). The District Court denied Petitioner's Motion For Rehearing but granted his Motion For Clarification. The District Court also withdrew its previous opinion in this case and substituted the following in its place. The opinion stated the facts as they pertain to Petitioner's attempted first-degree murder conviction as follows:

Traylor was charged with and convicted of attempted first-degree murder, a violation of Section 782.04(1), Florida Statutes (1995). Section 782.04(1) comprises both premeditated murder, § 782.04(1)(a)2, and felony murder, § 782.04(1)(a)2. Neither premeditated murder nor felony murder (where the underlying felony was burglary or sexual battery, as here) included use of a weapon as an essential element. See § 782.04(1)(a), Fla. Stat. (1995). Attempted first-degree murder (of either variety) is a first degree felony if the crime is charged as a capital felony, as here. See § 777.04(1), Fla. Stat. (1995). Neither attempted premeditated murder nor attempted felony murder included use of a weapon as an essential element, so it matters not which variety of attempted murder Traylor was convicted of.

Notice of intent to invoke this Court's discretionary jurisdiction was filed on May 12, 1998

## SUMMARY OF ARGUMENT

The decision of the Third District here conflicts with this Court's previous holding that whenever it is necessary to prove an underlying felony involving the use of a weapon in order to establish a felony murder conviction the enhancement statute is inapplicable to such convictions because when charged the use of a weapon is an essential element of the crime. The District Court improperly concluded that "neither premeditated murder nor Felony Murder (where the underlying felony was burglary or sexual battery, as here) included use of a weapon as an essential element."



## ARGUMENT

THE DECISION OF THE THIRD DISTRICT CONFLICTS WITH THIS COURT'S DECISION IN GONZALEZ V. STATE, 585 So.2d 932 (Fla. 1991).

The decision of the District Court in the instant case conflicts with this Court's previous decision in Gonzalez v. State, 585 So.2d 932 (Fla. 1991). The conflict is expressed and direct and appears on the face of District Court's opinion. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv); see Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

In the instant case the District Court found that in the instant case, use of a deadly weapon was an "essential element" of the attempted sexual battery as charged and under the specific statutory section with which Taylor was charged. However, the District Court found that the felony murder (where the underlying felony was burglary or sexual battery, as here) did not include use of a weapon as an essential element.

In reaching this conclusion, the District Court improperly relied upon an underlying felony involving the use of a weapon in order to establish a felony

MURDER CONVICTION, IN DIRECT CONTRAVENTION OF GONZALEZ.

IN GONZALEZ, THIS COURT STATED, "WHENEVER IT IS NECESSARY TO PROVE AN UNDERLYING FELONY INVOLVING THE USE OF A WEAPON IN ORDER TO ESTABLISH A FELONY MURDER CONVICTION, THE ENHANCEMENT STATUTE IS INAPPLICABLE TO SUCH CONVICTIONS BECAUSE WHEN CHARGED THE USE OF A WEAPON IS AN ESSENTIAL ELEMENT OF THE CRIME."

THE DISTRICT COURT FOUND THAT THE USE OF A DEADLY WEAPON WAS AN ESSENTIAL ELEMENT OF THE ATTEMPTED SEXUAL BATTERY AS CHARGED. THIS SAME UNDERLYING FELONY WAS ESSENTIAL IN ORDER TO ESTABLISH THE FELONY MURDER CONVICTION IN THIS CASE. THEREFORE, THIS COURT'S ACTIONS BROUGHT THE COURT INTO DIRECT CONFLICT WITH THIS COURT. THIS COURT MUST GRANT REVIEW IN ORDER TO RESOLVE THE CONFLICT.

## CONCLUSION

Based on the foregoing arguments and authorities cited therein, Appellant respectfully request this Honorable Court to grant review.

Respectfully Submitted,

Oscar Taylor

Oscar Taylor, DC#183205  
Everglades Correctional Inst.  
P.O. Box 659001  
Miami, FL 33265-9001

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been hand delivered to the Institutional Mailroom to be forwarded by regular U.S. Mail to:  
The Office of the Attorney General, 401 Northwest Second Avenue, Suite 921, Miami, Florida 33128, on this  
19 day of May, 1998.

Oscar Taylor

Oscar Taylor, DC#183205

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPENDIX has been hand delivered to the Institutional Mailroom to be forwarded by regular U.S. Mail to: The Office of the Attorney General, 401 Northwest Second Avenue, Suite 921, Miami, Florida 33128, on this ~~18~~ 19 day of May, 1998.

RESPECTFULLY Submitted,

Oscar Traylor

OSCAR TRAYLOR, DC#183205  
Everglades Correctional Inst.  
P.O. Box 659001  
Miami, FL 33265-9001