IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-637

DCA NO. 3D03-271

BLEKLEY COICOU,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONER'S REPLY BRIEF ON THE MERITS/ ANSWER BRIEF OF CROSS-RESPONDENT

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INTRODUCTION

This case is being reviewed on the Petitioner/defendant's invocation and on the Respondent/state's cross-invocation. This is the Petitioner's reply to the state's answer brief and the answer to the state's cross-petitioner initial brief.

CERTIFICATE OF FONT AND TYPE SIZE

Undersigned counsel for petitioner certifies that this brief was typed using 14-point proportionately spaced Times New Roman.

STATEMENT OF THE CASE AND FACTS

The Petitioner/defendant relies on the more-detailed rendition of the facts contained in the Statement of the Case and Facts in our initial brief on the merits, but in response to the state's answer/cross-petitioner brief on the merits, directs this Court to the portion of the trial testimony, as cited in the district court decision below, which explains that the robbery occurred when

> the defendant in an unbroken stream reached below the seat of his car,
>
> removed a firearm, pointed it at the victim, shot him and ordered him out of the car,
>
> after which, the defendant drove away with the money the victim had given to him. (T. 304); *see also Coicou v. State*, 867 So. 2d 409, 410 (Fla. 3d DCA 2003).

The defendant was convicted of attempted first-degree felony murder with robbery as the underlying felony. On appeal, the district court reversed, finding that "the use of force, the shooting, was itself an essential element of the underlying robbery and was not an independent act as required by section 782.051(1)," 867 So. 2d at 412, and directed the trial court to enter a conviction for attempted second-degree murder, pursuant to Fla. Stat. 924.34.

Both the defendant and the state moved for rehearing (on the same grounds as

raised here). The district court denied rehearing, but certified to this Court the question of whether attempted second-degree murder is a lesser-included offense of attempted first-degree felony murder.

The defendant sought review in this Court on the certified question and on whether the application of section 924.34 is both unconstitutional (given the specific facts of this case) and in conflict with case law from this Court and other district courts of appeal. The state has cross-petitioned on whether the evidence supports the attempted felony murder conviction.

Review was stayed pending decisions in *Battle v. State*, 837 So. 2d 1063 (Fla. 2d DCA 2003),[1] and *Sigler v. State*, 881 So. 2d 14 (Fla. 4th DCA 2004).[2] Both cases

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[1] In *Battle*, this Court addressed the question of whether the failure to instruct the jury on an essential element of the charged offense constitutes error. In 2005, the Court held that where the element is not in dispute, the failure to instruct does not rise to the level of fundamental error. 911 So. 2d 85 (Fla. 2005), *cert. denied*, 546 U.S. 1111 (2006).

[2] As discussed later in this brief, the Court in *Sigler* addressed whether Fla. Stat. 924.34 allows a district court to direct the entry of a conviction for a lesser-included offense where the offense contains elements not included in the

have now been resolved.

On November 24, 2007, the parties to show cause why the Court should not accept jurisdiction and summarily quash the decision below in light of *Sigler*.

Responses were filed and on June 24, 2007, the Court accepted jurisdiction and established a briefing schedule.

QUESTION PRESENTED

WHETHER THE DECISION ENTERED BY THE THIRD DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS FROM THIS COURT (APPLYING UNITED STATES SUPREME COURT PRECEDENT) AND OTHER DISTRICT COURTS OF APPEAL ON THE AUTHORITY OF FLORIDA STATUTE 924.34 TO DIRECT THE ENTRY OF A CONVICTION FOR A "LESSER OFFENSE" THAT REQUIRES JURY FACTUAL FINDINGS THAT HAVE NEVER BEEN MADE?

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main offense and where the jury is not instructed on all of the elements of the lesser offense. In October of 2007, the Court held that to do so violates the right to jury trial. 967 So. 2d 835 (Fla. 2007).

SUMMARY OF THE ARGUMENT

The defendant has taken the position throughout that the district court improperly directed the entry of a conviction for attempted second-degree murder in this case. First, it is not an authorized lesser-included offense of attempted first-degree felony murder. And second, because attempted second-degree murder requires that certain factual findings be made by a jury, the application of Fla. Stat. 924.34 in this circumstance both conflicts with case law from this Court and other district courts of appeal and is unconstitutional under the Florida and federal constitutions.

In response, the state argues that because robbery can be accomplished by the threat of force/violence or the actual display of force/violence, the exercise of either one – without the other – serves as an independent basis for the felony murder charge. This argument is not borne out by the law or the facts of this case.

The state then argues that the jury implicitly found the facts necessary for attempted second-degree murder. Again, there were no such factual findings made.

Finally, the state argues that if this Court overlays the old felony murder statute atop the new one, and lumps all of the lessers together, it will see that attempted second-degree murder is still a lesser-included offense of attempted felony murder. This is not the proper manner for interpreting statutes that are plain on their face.

This case falls under the umbrella of *Sigler* and the federal cases cited below.

ARGUMENT

THE DECISION ENTERED BY THE THIRD DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS FROM THIS COURT (APPLYING UNITED STATES SUPREME COURT PRECEDENT) AND OTHER DISTRICT COURTS OF APPEAL ON THE AUTHORITY OF FLORIDA STATUTE 924.34 TO DIRECT THE ENTRY OF A CONVICTION FOR A "LESSER OFFENSE" THAT REQUIRES JURY FACTUAL FINDINGS THAT HAVE NEVER BEEN MADE.

In our initial brief, we argued that the district court decision was incorrect on two separate grounds: 1) the court reversed and remanded for the entry of what it erroneously believed was a necessary lesser offense and 2) even if it were a lesser-included offense, because the jury (in this non-bench trial) hadn't made the requisite factual findings for that lesser, the statute authorizing appellate reduction of conviction, as applied in this case, is unconstitutional.

The state answered by arguing 1) if this Court puts the old attempted felony murder statute (the one that existed before it was overturned) and the new felony-causing-bodily-injury statute together, and combine the lessers of the old statute (which included attempted second-degree murder) with the lessers of the new statute (which does not include attempted second-degree murder), the district court's holding below is proper and 2) because attempted second-degree (depraved mind) murder is a necessary

lesser of attempted felony murder, this Court's holdings in *State v. Sigler*, 967 So. 2d 835 (Fla. 2007) and *I.T. v. State*, 694 So. 2d 720 (Fla. 1997) do not apply here and by finding the defendant guilty of attempted first-degree felony murder, the jury implicitly found him guilty of attempted second-degree murder.

In its cross-petition brief on the merits, the state argues that since robbery can be proven in two ways (forceful or violent act and threat of forceful or violent act), neither way is an essential element and, therefore, the felony murder statute's requirement that the defendant commit an act that is *not* an essential element of the underlying offense is satisfied.

None of the state's arguments is supported by the record or by Florida law.

A. Essential Element Argument

The defendant was convicted of attempted felony murder (shooting the victim during the commission of a robbery). In accordance with the charge and the proof adduced at trial, the district court held that the same act – shooting the victim – was both an essential element of the robbery and the intentional act upon which the attempted felony murder charge was based. 867 So. 2d 409, 412 (Fla. 3d DCA 2003).

The state argues in its initial brief on the merits that shooting the victim is not an essential element of robbery because the statute provides that robbery may be accomplished either through the threat of force or violence or the actual display of

force or violence. This is the position the state took at the district court.

While it is true, in a general sense, that Fla. Stat. 812.13 provides for alternative theories for establishing robbery, in this case, according to the charge and the evidence presented at trial, there is only one way robbery was established here: shooting.

Indeed, the testimony at trial showed that the defendant pulled out a firearm and, in an unbroken stream, fired it at the victim. Unlike in *Dallas v. State*, 898 So. 2d 163 (Fla. 4th DCA 2005) and *Atkins v. State*, 838 So. 2d 637 (Fla. 5th DCA 2003) (both cases cited by the state), where the display of a weapon and the demand for money were the operative events behind the robbery (the firing of a gun came afterwards), in this case, the shooting was the operative event.[3] The evidence shows no semblance of

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[3] In *Dallas*, the defendant the co-defendant stole money from the victim. The co-defendant pulled out a pistol, struck the victim in the face, and demanded money. At that point, Dallas pulled out two pistols and screamed to the victim "where's the money, where's the money." After the victim gave them everything and tried to run away, Dallas shot him and drove away as the victim lay on the ground. 898 So. 2d at 164.

In *Atkins*, the defendant walked up the counter in a convenience store, demanded money from the store clerk and when she explained that she didn't have any, he placed a firearm on the counter, pointed it at the clerk and told

a threat and the offense at conviction shows that the jury based its verdict on the shooting, not on any other grounds.

Therefore, according to the facts of this case, shooting the firearm was the essential element of the robbery and, as the district court properly concluded, it may not also serve as the intentional act upon which the felony murder charge is based.[4]

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her to give him all the money. 838 So. 2d at 638. The district court held that the "victim's testimony that she thought the weapon was a sawed off shotgun, coupled with Atkins's nonverbal implication that he would use it against the victim, sufficed to support a finding that Atkins possessed a firearm during the robbery.

The threat component of each of these cases distinguishes them from this case.

[4]

With all due respect to the state, the decision below does not "eviscerate[] [the attempted felony murder statute] in nearly every robbery." It is simply a correct application of a plain statute.

Indeed, it is quite a stretch to suggest that the district court's decision paves the way for robbers to try to kill their victims since they now can only be charged with robbery. *See* Answer Brief of Respondent at 8. Would the state prefer to charge every robber with attempted/completed felony murder and

B. Non-existent lesser

The district court certified to this Court the question of whether attempted second-degree murder is a lesser-included offense of attempted felony murder. The court cited case law from 1990 and 1996 for the proposition that it is.

In our brief on the merits, we carefully traced the history of the attempted felony murder statute to the present, as well as the lesser-included offenses for the old and the new statutes.

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robbery because he threatened to harm the victim or otherwise discharged his weapon – a situation vulnerable to double dipping?

Both of these suggestions are as far beyond legislative intent as would be the argument that when the legislators drafted a law specifically providing that "the intentional act must not be an essential element of the underlying felony," Fla. Stat. 782.051 (1), they really didn't mean it.

Whether it was by oversight or legislative intent, attempted second-degree murder is no longer a lesser-included offense of this crime. It was a lesser at the time the two cases cited below were decided,[5] but it no longer is.

The state argues that if we put the old and the new statutes together, and lump all of their lesser offenses together, attempted second-degree murder is still an authorized lesser offense. Unfortunately, that isn't the way to interpret statutes. In fact, principles of statutory construction direct us to do the opposite: if something that was in a statute is omitted in a later version of the statute, it must be presumed the Legislature intended it to be that way. *See, e..g., Carlisle v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364-65 (Fla. 1977) ("The omission of a word in an amendment of a statute will be assumed to have been intentional."); *see also Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1049 (Fla. 2008).

That being the case, the district court erred by imposing a conviction for this offense.

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[5] *Mingo v. State*, 680 So. 2d 1079 (Fla. 3d DCA 1996) and *Hayes v. State*, 564 So. 2d 161 (Fla. 2d DCA 1990). 867 So. 2d at 412.

C. Unconstitutional application of statute

As explained more fully in our initial brief on the merits, applying Fla. Stat. 924.34 in these circumstances violates the constitutional right to trial by jury. That is, both the United States Supreme Court and this Court have held that imposing a conviction which implicitly circumvents the jury's role as fact-finder (in a jury trial) violates the defendant's rights under the Sixth Amendment to the United States Constitution.[6]

In this case, the defendant was charged with, and convicted of, attempted first-degree felony murder. The district court reversed and remanded for the entry of conviction for attempted second-degree murder – a crime which requires factual findings different from the findings necessary for the felony murder offense.

The state seeks to get around the reasoning of *Franks v. Alford*, 820 F.2d 345 (10th Cir. 1987) by arguing that when the jury found the defendant guilty of attempted first-degree felony murder, it implicitly found him guilty of attempted second-degree murder. *See* Answer Brief of Respondent on the Merits at 17. This argument is premised on the latter being a necessary lesser of the former – which it is not.

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[6] The same argument applies under Art. 1, sect. 16 of the Florida Constitution.

Even if it were, though, it wouldn't change the analysis. Where the lesser crime contains essential elements that should have been, but weren't, factually found by the jury, it is improper for an appellate court to make them for the jury. *See Seaboard Coast Line RR Co. v. McKelvey*, 259 So. 2d 777, 781 (Fla. 3d DCA), *approved*, 270 So. 2d 705 (Fla. 1972) (neither an appellate court nor a trial court should sit as a seventh juror).

In *Sigler*, this Court held – in almost the identical circumstances – that where the jury has the responsibility to make factual findings *viz*. an essential element of the underlying crime, it is improper for the appellate court to use Fla. Stat. 924.34 to make those findings for the jury.

> Thus, the issue before this Court is whether application of section 924.34, Florida Statutes, to the facts of this case is a violation of Sigler's right to a trial by jury. We hold that to the extent that section 924.34 can be interpreted to allow entry of a conviction by an appellate court for a crime where the jury has not determined all of the elements of that crime beyond a reasonable doubt, section 924.34 is a violation of the Sixth Amendment right to a trial by jury.

967 So. 2d at 841.

While we certainly can appreciate an appellate court's desire to direct an outcome it feels just, there are constitutional limits to the authority of that court. One of those limits is that the statute authorizing the direction of conviction must not be applied to overstep the defendant's right to trial by jury. This includes the right to have a jury make the necessary factual findings with respect to the essential elements of the (arguably) lesser-included offenses.

To do otherwise, conflicts with established law from this Court, other Florida district courts of appeal and from the United States Supreme Court.

CONCLUSION

For the foregoing reasons, the Petitioner requests that the district court's order be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Richard L. Polin and Timothy R.M. Thomas, Assistant Attorneys General, Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida 33131-2406, this __ day of October, 2008.

_____

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