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 BRIEF ON THE MERITS

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INTRODUCTION

This is the Petitioner's brief on the merits from an order directing the entry of a "lesser included crime" entered by the district court of appeal.

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

Pursuant to a jury verdict, the Petitioner BLEKLEY COICOU was convicted of attempted first-degree felony murder (shooting the victim during the commission of a robbery).[1] He was sentenced to life imprisonment.

The facts of the case were summarized in the district court of appeal decision. *Coicou v. State*, 867 So. 2d 409 (Fla. 3d DCA 2003). The events grew out of a failed drug sale.[2] Everything occurred inside of the defendant's car.

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[1] He was also charged with aggravated battery, possession of a firearm by a convicted felon and use of a weapon during the commission of a felony. All of these charges – save for the attempted felony murder – were *nol prossed*.

The state did not charged the defendant with the robbery as a separate crime.

[2] The offense occurred in 2002.

According to the testimony, the buyer (victim) got into the car and gave the defendant money in exchange for a bag of drugs. When the buyer questioned the consistency of the contents of the bag, the defendant pulled out a gun, pointed it at the buyer and ordered him to leave the car. The defendant shot the buyer in the chest (propelling him out of the car) and drove away with the money.

The buyer testified at trial that the shooting occurred simultaneously with the defendant's order to leave his car – there was no gap in time between the exhibition of the gun, the shooting, and the order to leave the car. (*See also* T. 309).

On direct appeal, the defendant challenged the legal sufficiency of the evidence, i.e., the state failed to offer evidence of, or otherwise prove, that the defendant committed an intentional act that was *not* an element of the robbery, as required by Florida Statute 782.015. In accordance with the charge, the evidence and the

argument at trial, the act of shooting the buyer was an element of the robbery and of the attempted felony murder.

The Third District Court of Appeal agreed, reversed the attempted felony murder conviction and sentence and remanded for the entry of a conviction for attempted second-degree murder (lesser), pursuant to Florida Statute 924.34 (2001).

The defendant moved for rehearing and for certification to this Court on the grounds that attempted second-degree murder is not a lesser-included offense of attempted first-degree felony murder and that by directing the entry of a conviction for a lesser offense that, itself, requires factual findings not made by the jury, the court applied section 924.34 in a way that violates the defendant's state and federal constitutional right to a jury trial.[3]/[4]

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[3] The defendant cited to, among other cases, *Apprendi v. New Jersey*, 530 U.S. 466 (2001); *Franks v. Alford*, 820 F.2d 345 (10th Cir. 1987); *Pratt v. State*, 668 So. 2d 1007 (Fla. 1st DCA), *approved*, 682 So. 2d 1096 (Fla. 1996); and *Wilson v. State*, 660 So. 2d 1067 (Fla. 3d DCA 1995), *remanded*, 680 So. 2d 411 (Fla. 1996).

[4] The state also moved for rehearing – arguing that the evidence presented supported a conviction for attempted felony murder. The denial of the state's motion for rehearing is the subject of the cross-petition to this Court.

The district court denied the defendant's motion for rehearing, but certified to this Court the following question:

> WHETHER ATTEMPTED SECOND-DEGREE MURDER IS A LESSER-INCLUDED OFFENSE OF ATTEMPTED FELONY MURDER?

Review of this case was stayed pending decisions in *Battle v. State*, 837 So. 2d 1063 (Fla. 2d DCA 2003),[5] and *Sigler v. State*, 881 So. 2d 14 (Fla. 4th DCA 2004).[6] Both cases have now been decided.

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[5] 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, this Court concluded 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).

[6] 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 main offense and where the jury is not instructed on all of the elements of the lesser offense. In October of 2007, this Court held that to do so violates the

right to jury trial. 967 So. 2d 835 (Fla. 2007).

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?

SUMMARY OF THE ARGUMENT

Jurisdiction was sought on 3 different bases: 1) the district court certified a question of great public importance – is attempted second-degree murder a lesser-included offense of attempted first-degree felony murder; 2) whether the district court's application of Fla. Stat. 924.34 to direct the entry of a lesser conviction directly and expressly conflict with prior decisions from this Court and other district courts of appeal; and 3) because the direction circumvented the need for jury factual findings with respect to the directed lesser, did the application of the above statute violate the defendant's federal and state rights to a jury trial. This Court's acceptance of the case did not delineate the basis for review.

Attempted second-degree murder used to be a lesser of attempted first-degree felony murder, but it no longer is. Therefore, section 924.34 does not apply here.

Second, case law from this Court and from other Florida district courts of appeal hold that it is improper to direct a conviction for a lesser offense (assuming that this is a recognized lesser) where the elements of the lesser offense require the jury to have made factual findings which, as in this case, it did not do. The instant decision conflicts with this law.

Finally, directing a conviction for a lesser offense in the absence of required jury findings violates state and federal constitutional protections.

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 .....

The defendant was charged with, and convicted of, attempted felony murder (with robbery as the underlying felony). The district court held that the evidence was legally insufficient to support an attempted felony murder conviction but, relying on section 924.34, it directed the trial court to enter a conviction for attempted second-degree murder (which, it held, was a lesser-included offense).

This is problematic for two separate reasons: 1) attempted second-degree murder is not a lesser (necessary or permissive) of attempted first-degree felony murder and 2) directing a conviction for an offense that requires factual findings which were never made by the jury violates the defendant's state and federal rights to a jury trial.

Directed entry of a non-existent lesser offense

Florida Statute 924.34 provides that where appropriate, an appellate court may

direct the entry of a lesser offense of the one charged:

> When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense.

This authority has been extended to include both necessary and permissive lesser-included offenses. *See I.T. v. State*, 694 So. 2d 720 (Fla. 1997).

In this case, the district court found that the evidence did not satisfy the elements of the charged attempted first-degree felony murder offense and then directed the trial court to enter judgment for attempted second-degree murder.

> The evidence contained in the record supports a finding that Coicou acted in a manner which was imminently dangerous to the victim. This supports a conviction of the lesser included offense of attempted second-degree murder. Mingo v. State, 680 So. 2d 1079 (Fla. 3d DCA 1996); Hayes v. State, 564 So. 2d 161, 163 (Fla. 2d DCA 1990).
>
> Accordingly, we remand to the trial court with directions to enter a judgment of conviction for the offense of attempted second-degree murder.

867 So. 2d 409, 412 (Fla. 3d DCA 2003).

In the motion for rehearing, the defendant argued that attempted second-degree murder is not a lesser-included offense (necessary or permissive) of attempted first-degree felony murder and that neither *Mingo* nor *Hayes* stood for the proposition.

According to the Schedule of Lesser Included Offenses, Standard Jury Instructions in Criminal Cases, the charge of felony causing bodily injury, Fla. Stat. 782.051, carries no category 1 (necessary) lessers and only two category 2 (permissive) lessers – both of which are different levels of the same offense (felony causing bodily injury). Second-degree murder is not a lesser of the offense.

That being so, attempted second-degree murder is also not a lesser of an attempted felony causing bodily injury.

The district court relied on the *Mingo* and the *Hayes* cases for the proposition that it is a recognized lesser. With all due respect to the district court, neither case supports the proposition and neither takes into consideration changes to the felony murder statute.

Hayes was decided in 1990. At the time, the offense of attempted first-degree felony murder was recognized in Florida, *see Scurry v. State*, 521 So. 2d 1077 (Fla. 1988)*; Amlotte v. State*, 456 So. 2d 448 (Fla. 1984), and attempted second-degree murder was an enumerated lesser offense. *See Schedule of Lesser Offenses in*

Criminal Cases (1990).[7]

In 1995, the Florida Supreme Court receded from *Amlotte* and held that attempted first-degree felony murder no longer existed in Florida. *See State v. Gray*, 654 So. 2d 552 (Fla. 1995). One year later, the Florida Legislature enacted Fla. Stat. 782.051 (felony causing bodily injury) to circumvent the problems with the attempted felony murder statute that were denounced in *Gray*. So, *Hayes* does not represent the current lesser offenses in the attempted felony murder context.

Mingo concerned cases arising between the time when the attempted felony murder offense was rendered non-existent and when the legislature re-enacted it. In *Mingo*, the defendant was charged alternatively with attempted first-degree premeditated murder and attempted first-degree felony murder. The jury was instructed that attempted second-degree murder was a lesser included offense, and it returned a verdict of that lesser.

On appeal, Mingo cited to the *Gray* decision which rendered the felony murder offense non-existent and argued that since it did not exist, the jury should not have been instructed on a lesser of it.

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[7] Specifically, attempt was listed as a category 2 lesser of first-degree felony murder.

The district court disagreed. Quoting from this Court's decision in *State v. Wilson*, 680 So. 2d 411 (Fla. 1996), the district court ruled that attempted second-degree murder should by tradition be recognized as a lesser to attempted first-degree felony murder.[8]

Therefore, at the time *Hays* and *Mingo* were decided, attempted second-degree murder was a recognized lesser offense of attempted first-degree felony murder. That has not been the case, however, since 1998.

Section 782.051 (felony causing bodily harm) was enacted in 1996 and first appeared in West's *Florida Criminal Laws and Rules* in 1997. There was, however, no separate citation to the statute in the 1997 or 1998 versions of the *Schedule of Lesser Included Offenses in Criminal Cases*. That didn't come about until 1999 and when it did, there were no category 1 lessers at all and the only category 2 lessers enumerated were offenses from 782.051.

According to the applicable *Schedule of Lesser Included Offenses in Criminal*

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[8] As stated, Mingo was charged with attempted premeditated murder *and* attempted felony murder. Attempted second-degree murder is a lawful and recognized lesser of attempted premeditated murder.

Unfortunately, the decision does not make clear which of the two charged crimes formed the basis for the jury's verdict and the district court's holding.

Cases, the only lesser offenses enumerated for attempted first-degree felony murder are second and third-degree felonies causing bodily injury pursuant to Fla. Stat. 782.051 (2) and (3). Attempted second-degree murder is *not* a lesser of attempted first-degree felony murder.

That being the case, neither *I.T.* nor Fla. Stat. 924.34 authorize the entry of a conviction for attempted second-degree murder as a lesser offense to attempted first-degree felony murder.[9]

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[9] To complicate matters, the appellate court directed the entry of a conviction for an offense for which the jury was never instructed.

Again, the defendant was charged and tried for attempted first-degree felony murder. The jury was instructed on attempted first-degree felony murder, attempted second-degree felony murder, and attempted voluntary manslaughter. (T. 564). The jury was never instructed on attempted second-degree murder.

The jury returned a verdict of attempted first-degree felony murder (as charged). When the district court reversed the conviction and remanded the case for the entry of a judgment of conviction for attempted second-degree murder, it directed the conviction for an offense on which the jury was never instructed. This was error. *See Carranza v. State*, 678 So. 2d 6, 6 (Fla. 3d DCA 1996):

> [U]nder the authority of State v. Wilson, 679 So.2d 411 (Fla. 1996), once a charge of attempted felony murder is vacated a defendant may be retried on any lesser included offense of attempted felony murder

Unconstitutional application of statute

Separate and apart from the question of whether attempted second-degree murder is a lesser-included offense of attempted first-degree felony murder (the subject of the certified question), implicit in the court's direction are factual findings that were never made by the jury.

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provided that the jury was instructed on the lesser included offenses at trial.

According to Fla. Stat. 782.04 (2), in order to be guilty of second-degree murder, the killing must be perpetrated by an act that is "imminently dangerous to another and evinc[es] a depraved mind regardless of human life."[10] Neither of these elements was addressed by the jury's verdict.

The question, then, is whether section 924.34 can be applied to authorize an appellate court to direct the imposition of a lesser offense that requires factual findings never made by the jury. That question has been answered in the negative by this Court's decision in *State v. Sigler*, 967 So. 2d 835 (Fla. 2007).

In that case, Sigler was indicted for first-degree felony murder. The jury was instructed on the charged offense, as well as on the lesser offenses of second-degree murder and third-degree felony murder, and returned a verdict of guilty of second-degree murder. 967 So. 2d at 838.

On appeal, the fourth district reversed (insufficient evidence); however, it applied section 924.34 to direct the trial court to enter judgment for third-degree felony murder.

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[10] These elements are not part of the requirements for felony-murder, *see* Fla. Stat. 782.051.

Sigler unsuccessfully moved for discharge, arguing that the jury hadn't found him guilty of an essential element of that charge[11] and the fourth district reversed the conviction on that basis. 967 So. 2d at 839. The state sought review in this Court.

Citing to *Blakey v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and *Jones v. United States*, 526 U.S. 227 (1999) (among other cases), this Court affirmed the reversal and held:

> 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.

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[11] The offense, as charged, began as an escape from prison – Sigler and another inmate escaped and facilitated their getaway in a car owned by Sigler's mother. The following day, the two men engaged in a high-speed chase (the other inmate drove), and ultimately crashed their car into another car, killing its driver.

The jury found Sigler guilty of second-degree felony murder but not, he argued, of harboring an escapee (underlying felony).

The *Sigler* decision is consistent with other cases from this Court and around the state. *See, e.g.,Carrin v. State*, 978 So. 2d 115 (Fla. 2008); *Bummit v. State*, 971 So. 2d 205 (Fla. 4th DCA 2007).

For example, in *Pratt v. State*, 668 So. 2d 1007 (Fla. 1st DCA), *approved*, 682 So. 2d 1096 (Fla. 1996), the defendant was convicted of attempted third-degree felony murder. The killing "unequivocally . . . arose from a violent, dangerous, and potentially deadly incident perpetrated by the defendant." 668 So. 2d at 1007.

On appeal, the first district reversed the conviction because at the time of the commission of the offense, and in accordance with *State v. Gray*, 654 So. 2d 552 (Fla. 1995), the crime of attempted felony murder did not exist in Florida. The district court concluded that while a conviction for the lesser offense of attempted manslaughter may be proper, it could not impose it under Fla. Stat. 924.34 because the jury had not found that the offense was committed with the required intent.

> Were we to adopt the state's position and direct entry of judgment for attempted manslaughter (an intent crime) pursuant to section 924.34, we necessarily would be acting as the fact-finder and would have to assume the presence of the requisite intent. Such a result would encroach impermissibly upon the province of the jury. We conclude that the appellant would be effectively denied his constitutional right to trial by a jury if we, sitting in an appellate capacity, were to presume a finding of intent that the jury itself did not have to make.

668 So. 2d at 1009.

This Court approved the first district's decision, but remanded the case to the trial court for retrial on the lesser offense of attempted manslaughter. In so doing, the Court made it possible for the jury – as contrasted with the appellate court – to make the requisite factual findings.

The process was also employed in *Wilson v. State*, 680 So. 2d 411 (Fla. 1996). There, the defendant was convicted of attempted felony murder and armed robbery (shooting the victim as he tried to walk away from the robbery). On appeal, the third district reversed the conviction based on *Gray* and held that because attempted felony murder did not exist in Florida, it could not impose a lesser conviction pursuant to section 924.34. 660 So. 2d at 1068.

This Court held that while the evidence may support a conviction for a lesser offense, the proper remedy was to remand the case for retrial on the lesser offenses instructed on at trial. 680 So. 2d at 412. In so doing, the Court made it possible for the jury to make the requisite factual findings to support a lesser conviction.

Federal courts have also weighed in on the appellate-direction issue. In *Franks v. Alford*, 820 F.2d 345 (10th Cir. 1987), for example, the court faced a situation

strikingly similar to the one here.[12]

Franks was charged with felony murder (while trying to escape from police investigating a store robbery, Franks stole the officer's gun, fired at him and then negligently drove his getaway car into another car killing an infant passenger). The jury was instructed on the charged offense and on the lesser offenses, including second-degree murder. Franks was convicted of felony murder and sentenced to death.

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[12] The *Franks* case was cited approvingly in this Court's decision in *Sigler*, 967 So. 2d at 843. It was also cited and discussed by the defendant below.

On direct appeal, the state appellate court reversed his first-degree felony murder conviction (insufficiency of evidence) but found that the evidence warranted a reduction of conviction to second-degree murder, a permissive lesser offense.[13]

[13] The Oklahoma second-degree murder statute is similar to Florida's in that it requires the perpetration of an act that is "imminently dangerous to another person and evinc[es] a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual." *See* Okla. Stat. tit. 21, §701.8(1) quoted in *Franks*, 820 F.2d at 346. *Compare* Fla. Stat. 782.04 (2).

The case ultimately wound its way to the federal appellate court which held that where the jury hasn't made the required factual findings (e.g., whether the act was imminently dangerous evincing a depraved mind and a disregard for human life), ordering the reduction of conviction violates the defendant's constitutional right to a trial by jury. It doesn't matter, the court held, that the jury was correctly charged on the permissive lessers or that Franks didn't object to the instructions; the key is that the two offenses (felony murder and second-degree murder) require different elements and different factual findings and it is not for an appellate court to make those findings for the jury.[14] *See also*

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[14] This is different than when the lesser offense at issue is a necessarily-included one, because in that case, the jury would necessarily have found the facts sufficient to justify the lesser as well as the charged offenses and, according to the *Franks* court, no sixth amendment violation occurs. 820 F.2d at 347.

Apprendi v. New Jersey, 530 U.S. 466 (2000) (sentencing enhancement based on factual findings not made by jury impermissible).

In accordance with this Court's holding in *Sigler*, as well as the holdings from the United States Supreme Court, the action below constitutes an impermissible application of Fla. Stat. 924.34. Moreover, since the district court directed the entry of a conviction for an offense that is not a lesser-included offense, and for which the jury did not make the required findings of fact, the court's order must not stand.

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 A. Polin and Marni A. Bryson, Assistant Attorneys General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this ___ day of July. 2008.

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