

IN THE SUPREME COURT OF FLORIDA

ANDREW MANOS,)	
)	
Petitioner,)	FSC Case No.
)	
vs.)	Fifth DCA Case No. 5D03-2560
)	
STATE OF FLORIDA,)	
)	
Respondent.))	
_____)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER’S BRIEF ON JURISDICTION

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
THE DECISION IN THIS CASE CITES <i>FRANKLIN V. STATE</i> , 877 SO. 2D 19 (FLA.4 th DCA 2004) WHICH IS CURRENTLY PENDING BEFORE THIS COURT.	
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

PAGE NO.

CASES CITED:

Franklin v. State

877 So.2d 19 (Fla. 4th DCA 2004)

3, 4, 5, 6

Jollie v. State

405 So. 2d 418 (Fla. 1981)

4, 5

Manos v. State

___So.2d ___, 2005 WL 678 660 (Fla. 5th DCA, Case No. 5D03-2560
March 1, 2005)

3

OTHER AUTHORITIES CITED:

Section 782.04(2), Florida Statutes

1

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STATE OF FLORIDA,)	
)	
Appellee.)	
_____)	

STATEMENT OF CASE AND FACTS

The state charged Andrew Manos, the petitioner, with second-degree murder in violation of Section 782.04(2), a first-degree felony. (I 111-112) Specifically, the state charged that the petitioner did “unlawfully both by an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, kill and murder William Flanders, a human being, by stabbing him with a knife.” (I 111)

At the charge conference, defense counsel indicated petitioner’s desire to go “all or nothing.” Specifically, petitioner wanted the jury instructed only on

second-degree murder with no lesser-included offenses. The only other option for the jury would be a choice of “not guilty.” (VII 860-861)

After hearing argument, the trial court overruled petitioner’s objection (VII 862-866, 885-886), and subsequently instructed the jury on two additional offenses, manslaughter with a weapon and manslaughter. (VII 991) The trial court instructed the jury that both of these offenses were lesser included offenses of second-degree murder. (VII 991-999; VIII 1016-1017) The jury verdict also reflects these three choices for the jury. (II 324)

As fate would have it, the jury acquitted petitioner of second-degree murder but convicted him of manslaughter with a weapon. (II 324) Petitioner subsequently filed a motion for a new trial and motion for arrest of judgment contending, *inter alia*, that manslaughter with a weapon (reclassified) constituted the same degree offense (a first degree felony punishable by thirty years) as second degree murder, also a first degree felony. Defense counsel contended that the jury erroneously believed that, by acquitting the petitioner of second-degree murder, they were exercising their pardon power. In reality, because manslaughter with a weapon is the same degree felony as second-degree murder, petitioner was facing and, in fact, received the maximum sentence of thirty years in prison. Defense counsel also pointed out that he had requested that the court instruct the jury as to

the potential penalties on each of the offenses included on the verdict form.¹ The trial court denied petitioner's request. (VI 927-928)

On July 28, 2003, the petitioner filed a timely notice of appeal from the judgment and sentence. (II 375-80) On direct appeal, petitioner raised three separate issues. One issue argued that the trial court erred in giving the jury the option of convicting petitioner of manslaughter with a weapon. Petitioner argued that manslaughter with a weapon is not a lesser included offense of second-degree murder where both are first degree felonies.

On March 1, 2005, the Fifth District Court of Appeal issued a per curiam decision affirming petitioner's judgment and sentence. *Manos v. State*, __So.2d__, 2005 WL 678 660(Fla. 5th DCA, Case No. 5D03-2560, March 1, 2005). In doing so, the court cited, *inter alia*, *Franklin v. State*, 877 So.2d 19 (Fla. 4th DCA 2004). This case is currently pending before this Honorable Court. *State v. Franklin*, Case No. SC04-1523. Petitioner filed his notice of intent to invoke this Court's jurisdiction on March 31, 2005.

¹ Despite the line of cases which hold that a trial court properly refuses to instruct the jury on possible penalties, petitioner relied on Section 918.10(1), Florida Statutes (2003).[trial court must include the penalty for the offense for which the accused is being charged when the court instructs the jury.]

SUMMARY OF ARGUMENT

The decision in this case cited *Franklin v. State*, 877 So.2d 19 (Fla. 4th DCA 2004), a case now pending in this Court. (Case No. SC04-1523) *Franklin* holds that a conviction for aggravated battery involving the discharge of a firearm and serious bodily injury does not carry a lesser penalty than attempted second degree murder. Since the penalties are the same, the former is not a lesser included of the latter. Therefore, the jury should not have been instructed on the former offense. Petitioner raised a similar issue below. The district court affirmed on the authority of *Franklin, supra*.

ARGUMENT

THE DECISION IN THIS CASE CITES *FRANKLIN V. STATE*, 877 SO. 2D 19 (FLA.4th DCA 2004) WHICH IS CURRENTLY PENDING BEFORE THIS COURT.

In *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), this court held that similarly situated litigants should have similar avenues of review in the Florida court system. The authority relied on by the Fifth District Court of Appeal is currently pending before this Court. *Franklin v. State*, 877 So.2d 19 (Fla. 4th DCA 2004), *review granted*, Case No. SC04-1523. *Franklin* holds that a conviction for aggravated battery involving the discharge of a firearm and serious bodily injury does not carry a lesser penalty than attempted second degree murder. Since the penalties are the same, the former is not a lesser included of the latter. Therefore, the jury should not have been instructed on the former offense. Petitioner raised a similar issue below. Specifically, petitioner argued that second degree murder and manslaughter with a weapon are both first degree felonies. Therefore, the latter is not a lesser included offense of the former. The district court affirmed on the authority of *Franklin, supra*.

Pursuant to the procedure outlined in *Jollie*, this Court should take jurisdiction. One of the three issues argued on the merits in the direct appeal of

this case, is also pending review in this court. *Franklin v. State, supra*. Petitioner is entitled to the same avenue of review.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below and should exercise that jurisdiction to consider the merits of Petitioner's argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Charles Crist, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Andrew Manos, DC #V17794, Liberty Correctional Institution, 11064 N.W. Dempsey Barron Rd., Bristol, FL 32321, this 11th day of April, 2005.

CHRISTOPHER S. QUARLES
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