IN THE SUPREME COURT OF FLORIDA

CASE NO. SC

DEWARN ANTONIO BROWN,

Petitioner,

-vs-

THE STATE OF FLORIDA.

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER

INTRODUCTION

Petitioner seeks discretionary review of a Third District decision that conflicts with decisions of this Court and of other District Courts holding that a defendant can not be convicted of felony murder when the jury exonerates the defendant of the underlying felony by convicting only for a necessarily included lesser that is a misdemeanor. The symbol AA.@ refers to the lower court opinion, set forth in the Appendix.

STATEMENT OF THE CASE AND FACTS

The District Court stated the facts as follows (A. 1-2):

> Brown was charged with armed robbery and first degree felony (robbery) murder in the shooting death of a participant in a drug deal whose wallet the defendant and two co-perpetrators were attempting to steal. The jury found the defendant guilty of petit theft as a lesser included offense of the armed robbery charge and guilty of first degree felony murder. This is an appeal by the state from a post-trial order vacating the felony murder conviction as Alegally inconsistent@ with the theft conviction, on the theory that an acquittal of armed robbery, implied by the guilty verdict of the Alower@ offense of theft, precluded the finding that the

defendant had committed that felony, as required for a felony murder. See Redondo v. State, 403 So.2d 954 (Fla.1981); Mahaun v. State, 377 So.2d 1158 (Fla.1979).

The District Court ruled as follows:

For two reasons, we reverse.

First, the defendant is precluded even from claiming a fatal inconsistency between the verdicts on the two counts because he endorsed and supported the trial judge=s charge to the jury, in accordance with the standard jury instruction, that the evidence as to each of the counts must be considered separately and a separate verdict returned as to each. A finding of guilty or not guilty as to one crime must not affect your verdict as to the other crime(s) charged. Fla. Std. Jury Instr. (Crim.) 3.12(a). See Dial v. State, [31 Fla. L. Weekly D501, D502 n. 1](Fla. 4th DCA . . . Feb. 15, 2006); McKee v. State, 450 So. 2d 563 (Fla. 3d DCA 1984); see also Davis v. State, 459 So.2d 1120 (Fla. 3d DCA 1984); cf. State v. Barton, 523 So. 2d 152, 153 n. 2 (Fla. 1988)(declining to decide question); State v. Jimenez, 542 So. 2d 430 (Fla. 3d DCA 1989).

On the merits, there is no true legal inconsistency

because of the rational possibility (which is, in fact, consistent with the evidence in this case) that the guilty verdict as to first degree felony murder was based on a finding that, as the felony statute provides, and as the jury was instructed, the death occurred in the course of an *attempted* robbery, rather than a completed one. *See Pitts v. State*, 425 So. 2d 542 (Fla. 1983); McCray v. State, 397 So. 2d 1229, 1230 n. 3 (Fla. 3d DCA 1981), approved, 425 So.2d 1 (Fla. 1983); *Davis*, 459 So. 2d at 1120; see also Streeter v. State, 416 So. 2d 1203, 1206 n. 3 (Fla. 3d DCA 1982); Damon v. State, 397 So. 2d 1224 (Fla. 3d DCA 1981). Because attempted robbery was not instructed upon as a lesser included offense of the robbery count, and was thus not rejected by the jury, the two verdicts logically can be reconciled, thus requiring reversal. Cf. Castillo v. State, 590 So.2d 458 (Fla. 3d DCA 1991)(unlike *Pitts* and *McCray* and the case at bar, inconsistency exists when jury is instructed on attempted substantive crime); *Wooten v. State*, 404 So. 2d 1072, 1073 n. 3 (Fla. 3d DCA 1981)(same), *review denied*, 412 So.2d 471 (Fla. 1982); *Palacio v. State*, 402 So. 2d 500, 501 n. 2 (Fla. 3d DCA 1981)(same); *McCray*, 397 So. 2d at 1230 n. 3.

Accordingly, the order under review is reversed with directions to enter a judgment on the jury verdict for first degree murder and for appropriate sentencing thereafter.

(A. 2-4, footnote omitted).

SUMMARY OF ARGUMENT

The decision below is in conflict with established authority holding that when a defendant is convicted of a necessarily included lesser offense that is a misdemeanor, the verdict exonerates him of all other lesser offenses of the offense charged that would be felonies and therefore precludes a conviction for felony murder.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT IS IN CONFLICT WITH ESTABLISHED AUTHORITY HOLDING THAT, WHEN A DEFENDANT IS CONVICTED OF A NECESSARILY INCLUDED LESSER OFFENSE THAT IS A MISDEMEANOR, THE VERDICT EXONERATES HIM OF ALL OTHER LESSER OFFENSES OF THE OFFENSE CHARGED THAT WOULD BE FELONIES, AND THUS PRECLUDES A CONVICTION FOR FELONY MURDER

Defendant was charged in a two-count indictment, with

first-degree felony murder, allegedly committed Awhile engaged in the perpetration of, or in an attempt to perpetrate any robbery,@ and with armed robbery, allegedly committed by unlawfully taking,

Aby force, violence, assault or putting in fear,@ more than $300.00, and by discharging a firearm during the offense, causing death or great bodily harm.[1]

The jury convicted the defendant of petit theft as a lesser offense of armed robbery. Petit theft is a necessarily included Category One lesser offence of armed robbery. *See* Florida Standard Jury Instructions (Criminal) ' 15.1.

The jury also returned a guilty verdict on the charge of felony murder. No one told the jury that petit theft was a misdemeanor, not a felony. Indeed, the prosecutor=s closing argument expressly invited the jury to convict for first degree murder if the victim was killed in the course of the commission of any crime.

Accordingly, this case is unlike any of the cases relied upon by the Third District in holding that the jury=s felony murder verdict was not inconsistent with the petty theft

[1] The indictment superceded a previous information charging second-degree murder and armed robbery.

verdict. The claim here is not that the petit theft verdict is factually inconsistent with the felony murder verdict, or that the factual findings implicit in the petty theft verdict negative a factual finding necessary for a felony murder conviction. *See Dial v. State*, 31 Fla. L. Weekly D501, D502 Feb. 15, 2006) (claim of inconsistency waived where jury found defendant guilty of aggravated manslaughter by culpable negligence and not guilty of felony murder by culpable negligence).

Rather, the claim here is that, as a matter of law, the petit theft verdict precludes a second conviction for any other lesser offense of robbery, and thus precludes conviction for attempted robbery, a permissively included Category Two lesser offense of the armed robbery for which defendant has already been convicted of petit theft. *See* Florida Standard Jury Instructions (Criminal) ' 15.1; *see also Nurse v. State*, 658 So. 2d 1074, 1077 (Fla. 3d DCA 1995) (attempts are permissively included lesser offenses), *receded from on other grounds, Jones v. State*, 660 So. 2d 960, 965 n.3 (Fla. 3d DCA 1996). Accordingly, there is no felony upon which a felony murder conviction can be rested.

The legal consequence of the petit theft conviction is that defendant cannot be convicted of any felony offense as a

result of the episode for which armed robbery was charged, and there is, accordingly, no felony offense upon which the felony murder charge can be predicated. It is not material that the jury was not instructed on attempted robbery; the jury convicted the defendant of petit theft, and could not simultaneously or subsequently convict defendant of armed robbery or of another lesser offense of the armed robbery charged. And defendant=s mere failure to object to a jury instruction in accordance with Florida Standard Jury Instructions (Criminal) 3.12(a), that the jury could consider the felony murder and armed robbery charges separately, was not a waiver of defendant=s right not to be convicted of two lesser offenses of the armed robbery charge.[2]

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[2] In addition, defendant=s failure to object to the standard jury instruction that each crime is to be considered separately was not such endorsement and support of the standard instruction as would bar the granting relief on his subsequent motion set aside the verdict. *See State v. Jimenez*, 542 So. 2d 430, 431 (Fla. 3d DCA 1989). Florida Standard Jury Instruction (Criminal) 3.12(a) deals with

factual inconsistency, with the jury=s right to consider the evidence separately as to each count, and does not permit the jury to convict defendant of two lesser offenses of the offense charged.

The Third District here cited the controlling decisions of this Court, but refused to apply them, instead applying a rule applicable where verdicts are claimed to be inconsistent as a matter of fact, rather than the rule applicable where verdicts can be reconciled only by permitting the State to convict the defendant of two lesser offenses of the crime charged.

It is fundamental that the legislature does not intend two convictions as a result of a single criminal episode where the two convictions would be for Alesser offenses the statutory elements of which are subsumed by the greater offense.@ Section 775.021(4)(b)(3); *see State v. Florida*, 894 So. 2d 941, 947 (Fla. 2005) (Asubsection [775.012 (4)(b)(3)] applies only to necessarily lesser included offenses listed in Category 1 of the Schedule of Lesser Included Offenses . . . . When the commission of one offense always results in the commission of another, then the latter is an inherent component of the former. In other words, the *Blockburger* test by its very nature is designed to distinguish between that group of crimes that are ›necessarily lesser included= offenses and that group of crimes that are not@); *State v. Weller*, 590 So. 2d 923, 926 (Fla. 1992) (crimes that are necessarily included lessers cannot give rise to multiple punishments);

McCloud v. State, 577 So. 2d 939, 941 (Fla. 1991) (an offense is a lesser-included offense if the greater offense necessarily includes the lesser); *see Chikitus v. Shands*, 373 So. 2d 904, 905 (Fla. 1979) (prior conviction for lesser bars prosecution); *Perkins v. Williams*, 424 so. 2d 990, 991 (Fla. 5th DCA 1983) (reprosecution barred by double jeopardy).

In *Mahaun v. State*, 377 So. 2d 1158 (Fla. 1979), a husband and wife were charged with felony murder and aggravated child abuse in the death of her child from a prior marriage. The husband was found guilty of both charges, but the jury convicted the wife only of a misdemeanor, negligence by exposing the child to injury, as a lesser of aggravated child abuse. The wife argued that Athe jury failed to find her guilty of the underlying felony of aggravated child abuse or attempted aggravated child abuse, instead finding her guilty of the lesser included misdemeanor of culpable negligence.@ The Court ruled that the wife=s Aconviction for culpable negligence effectively holds her innocent of the aggravated child abuse charge. Because the aggravated child abuse felony was an essential element of the felony murder, we hold that Mrs. Mahaun cannot be guilty of third-degree felony murder.@ *Mahaun*, 377 So. 2d at 1161. The decision below is flatly in conflict with *Mahaun*.

Similarly, in *Redondo v. State*, 403 So. 2d 954 (Fla. 1981), defendant was charged with aggravated battery and possession of a firearm during the commission of a felony. On the aggravated battery charge the jury convicted defendant of simple battery, a lesser offense, but also convicted the defendant of possession of a firearm during the commission of a felony. The Court ruled A[i]n the present case the jury in effect acquitted petitioner of the felonies of aggravated battery **and attempted aggravated battery** when it found him guilty of the lesser included offense of simple battery, a misdemeanor. The existence of a felony or an attempted felony is an essential element of the crime of unlawful possession of a firearm during the commission of a felony. . . . Therefore, petitioner may not be convicted of that crime. A conviction for unlawful possession of a firearm during the commission of a felony must stand or fall in conjunction with the underlying felony.@ *Redondo*, 403 So. 2d at 956 (emphasis added). The decision below is flatly in conflict with *Redondo*.

This Court=s use of words like Ainnocent@ and Aacquitted@ in these opinions has apparently led to the mistaken impression that no true inconsistency between verdicts appears if the jury is not instructed as to a lesser offense, such as an attempt. *See Castillo v. State*, 590 So. 2d 458, 459 (Fla.

3d DCA 1991) (verdicts inconsistent where jury was instructed as to attempt); *Wooten v. State*, 404 So. 2d 1072, 1073 (Fla. 3d DCA 1981) (same). Authority supports that view where the record indicates only an acquittal on the felony charged, and does not indicate that the defendant was exonerated of an attempt or for other lesser offenses, and the jury convicts for an offense for which an underlying felony is Aan essential element@ without convicting for the underlying felony. *See Pitts v. State*, 425 So. 2d 442, 544 (Fla. 1983) (A[h]ere the jury made no such affirmative finding that defendant was guilty of a lesser included offense of the crime of aggravated battery@); *McCray v. State*, 397 So. 2d 1229, 1231 (Fla. 3d DCA 1981), *approved*, 425 So. 2d 1 (Fla. 1983) (A(r)eversible inconsistency will not ordinarily be held to result from contrary verdicts . . . if the offenses of which defendant was acquitted required proof of elements different from or in addition to those of the offense for which he was convicted@); *but see Wainwright v. State*, 528 So. 2d 1329, 1331 (Fla. 5th DCA 1988) (no evidence of attempt); *Ashley v. State*, 493 So. 2d 1079 (Fla. 3d DCA) (no attempt instruction because no evidence of attempt).

But where there is a **conviction** for a necessarily included lesser offense that is a misdemeanor, not a felony,

and that involves the same elements, double jeopardy exonerates the defendant as a matter of law of any attempt or other lesser offense, and precludes a conviction of an offense for which an underlying felony is an essential element. As the Court said in *State v. Powell*, 674 So. 2d 731, 733 (Fla. 1996), such cases involve legally interlocking charges because an act can be done during the course of a felony only if there was a felony, and a misdemeanor verdict on a necessarily included lesser offense negates any felony, and thus negates a necessary element for conviction on another count charging an act during a felony.

In *McCray*, 397 So. 2d at n.4, the Third District suggested that the defendant=s argument was that the jury gave him the appetizer and main course, and that he was therefore also entitled to dessert and coffee. Here, as in *Mahaun* and *Redondo*, the facts are different: the jury exonerated defendant of any felony, and a felony murder conviction is barred. Nothing is more basic than that a felony murder conviction cannot stand without a conviction for an underlying felony. *See Fayson v. State*, 698 So. 2d 825, 826-27 (Fla. 1997); *Eaton v. State*, 438 So. 2d 822, 823 (Fla. 1983); *State v. Cappalo*, 31 Fla. L. Weekly D453, D454 (Fla. 2d DCA Feb. 10, 2006); *Cuevas v. State*, 741 So. 2d 1234, 1236 (Fla. 5th DCA

1999); *see also State v. Wheeler*, 468 So. 2d 978, 982 (Fla. 1995); *DeBiasi v. State*, 681 So. 2d 890, 891 (Fla. 4th DCA 1996); *Wainwright v. State*, 528 So. 2d 1331.

CONCLUSION

The Court should grant discretionary review.

Respectfully submitted

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By:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Valentina M. Tejera, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 650, Miami, Florida 33131 on March 29, 2006.

_____

Assistant Public Defender

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point, except that the headings are in 14 point proportionately spaced Times New Roman.

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ROY A. HEIMLICH
Assistant Public Defender

APPENDIX