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SUPREME COURT OF FLORIDA

AHMAD R. MILTON,	CASE NO.: SC11-1338
Petitioner,	LT CASE NO.: 3D09-122, F06-11820
v.	
STATE OF FLORIDA,	
Respondent.	

_____________________________/

REPLY BRIEF

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ARGUMENT

I. THE THIRD DISTRICT'S OPINION IN *MILTON* EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *COICOU*

The State responds to Milton's first point on appeal by describing the express and direct conflict between the Third District's *Milton* decision and this Court's *Coicou* decision as a "scrivener's error."[1] (Ans. Br. at 16). The State provides no authority – nor could it – to treat a *misstatement of the law* in a published opinion as a mere "scrivener's error" that would not support conflict jurisdiction even where, as here, the opinion on its face expressly and directly conflicts with an opinion of this Court.

And, in fact, "errors that are the result of judicial determination or error" are ***not*** "scrivener's errors." *See Ashley v. State*, 850 So. 2d 1265, 1268 (Fla. 2003). This Court has defined scrivener's error as "clerical or ministerial errors . . . but **not** those errors that are the result of a judicial determination or error." *Id*. at 1268 (emphasis supplied).

[1] Tellingly, the State's response to Milton's first point on appeal mainly avoids any discussion of the express and direct conflict identified by Milton in Point I of the Initial Brief. It is not until page 16 of its Answer Brief and the sixth page (out of seven) of its response to Point I that the State finally responds to Milton's argument by brushing the conflict off as a "scrivener's error."

Despite attempting to minimize its impact, the State has now acknowledged that the *Milton* decision is legally flawed. The decision should be quashed.

II. THE TRIAL COURT FUNDAMENTALLY ERRED BY GIVING JURY INSTRUCTIONS THAT (i) DID NOT COMPORT WITH THE STATE'S DETERMINATION OF ATTEMPTED SECOND-DEGREE MURDER AS THE PREDICATE FELONY FOR THE THREE ATTEMPTED FELONY MURDER CHARGES; and (ii) FAILED TO TRACK THE LANGUAGE OF THE STANDARD JURY INSTRUCTION ON ATTEMPTED FELONY MURDER OR THE ATTEMPTED FELONY MURDER STATUTE

The State first argues that the Court should decline to address Point II in Milton's Initial Brief, pointing to cases where the Court declined to address issues not raised in the lower court. (Ans. Br. at 18). However, none of the cases relied on by the State involve fundamental error.

In defining the scope of the fundamental error doctrine, this Court has explained that a fundamental error is one that "goes to the foundation of the case or goes to the merits of the cause of action." *Jaimes v. State*, 51 So. 3d 445, 448 (Fla. 2010). "To justify not imposing the contemporaneous objection rule, 'the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" *Id*. "In other words, the doctrine of fundamental error applies when an error has affected the proceedings to such

an extent it equates to a violation of the defendant's right to due process of law." *Id.*

"It is a fundamental principle of due process that a defendant may not be convicted of a crime that has not been charged by the state." *Id.* (citing *Thornhill v. Alabama,* 310 U.S. 88, 96, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) ("Conviction upon a charge not made would be sheer denial of due process.")). "There is a denial of due process when there is a conviction on a charge not made in the information or indictment." *Id.* (citation omitted). "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Jaimes*, 51 So. 3d 445, 449 (citing *Cole v. Arkansas,* 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948)). "Therefore, an error that directly results in such a conviction is by definition fundamental." *Id.*

As detailed in Point II of the Initial Brief, the jury instructions on Counts II-IV: (i) are confusing and contradictory; (ii) do not comport with the State's ultimate determination of attempted second-degree murder as the predicate felony for the three attempted felony murder charges; and (iii) fail to track the language of the felony murder statute or the Standard Jury

Instruction on Attempted Felony Murder. The jury instructions therefore constitute by definition fundamental error. *See id.*

The State next argues that the jury instructions for the three attempted felony murder charges identified attempted second-degree murder as the predicate felony and properly tracked the applicable statutory language. (Ans. Br. at 19-20). As the State acknowledges, however, the attempted felony murder instructions actually identify "second degree murder **or** attempted second degree murder" as the predicate felony. (Ans. Br. at 21) (emphasis supplied). In other words, the jury instructions for attempted felony murder incorrectly include *both* second degree murder *and* attempted second-degree murder as *alternative* predicate felonies.

The State then obfuscates by maintaining that "the instructions on count 2-4 *were then followed by* instructions for second degree murder." (Ans. Br. at 21) (emphasis supplied). Actually, each of the three attempted felony murder charges incorrectly include the definition of second degree murder (**not** *attempted* second-degree murder) *within* the definition of attempted felony murder. This inclusion of "second degree murder" *as an alternative* to "attempted second degree murder" as the predicate felony to the attempted felony murder charges is incorrect and confusing, resulting in a fundamentally flawed instruction.

Finally, the State disputes that the attempted felony murder instructions should have tracked the language of section 782.051(2), the attempted felony murder statute for non-enumerated felonies. The State maintains that Milton was "at all times charged with and convicted of attempted felony murder pursuant to section 782.05(1)," and not section 782.05, subsection (2). (Ans. Br. at 22).

Section 782.05(1) is applicable to felonies enumerated in section 782.04(3). The State argues that the applicable felony is the "murder of another human being" designated as "(o) on the list of enumerated felonies." (Ans. Br. at 23).

Once again, the State is confusing an improper alternative predicate felony of *murder* with the appropriate predicate felony of "*attempted* second-degree murder." Although Milton was charged in Count I (and cleared) with the second-degree murder of the only dead victim, Marcus Thomas – *the second-degree murder of Marcus Thomas was* ***not*** *identified as the predicate felony in any of the three attempted felony murder charges*. Since the predicate felony for the attempted felony murder charges was *attempted* second-degree murder, the attempted felony murder instructions should have tracked the language of section 782.051(2), the attempted felony murder statute for non-enumerated felonies.

III. <u>THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MILTON'S MOTION TO DISMISS THE ATTEMPTED FELONY MURDER COUNTS FOR FAILURE TO REQUIRE AN INDEPENDENT ESSENTIAL ELEMENT AS MANDATED BY THE ATTEMPTED FELONY MURDER STATUTE</u>

The State responds to Point III by arguing that

> the numerous shots which followed subsequent to the first shot were intentional acts that were not essential for the attempted second degree murder of any of the listed victims of attempted second degree murder in counts II - IV. This applies to Count IV as well, even though it indicates that Jamie Chaney was the sole victim of the attempted felony murder and also the only victim of the predicate felony of attempted second degree murder.

(Ans. at 28-29).

However, these shots did not constitute "offenses [which arose] from separate incidents occurring at separate times and places." *See Wilson v. State*, 467 So. 2d 996, 997 (Fla. 1985). The State has offered no support for the argument that *shots fired during a single continuous episode at a single individual* (or group of individuals) could support separate multiple charges of second-degree murder and/or a separate count for felony murder.

The State argues that the discharge of multiple gunshots distinguishes the instant case from *Tucker v. State*, 857 So. 2d 978 (Fla. 4th DCA 2003). (Ans. Br. at 30). The State is incorrect. The facts set forth in *Tucker* make clear that multiple gunshots were involved in each of the charges:

> On the night of the incident that led to these charges, Wilfredo and Martin Martinez were fishing at Rivergate Park in Port St. Lucie. While fishing, they noticed appellant, a stranger to them, in the area. The Martinezes became apprehensive because appellant looked angry. They decided to leave. As they gathered their equipment, appellant walked past them. <u>When appellant walked behind Martin, he started shooting. He shot Martin in the back, paralyzing both of his legs. Martin heard another pop and felt a strong sting on his upper right shoulder. Appellant held the gun on Martin and tried to reload it. After putting another round in the chamber, he shot at Martin again, this time aiming for his face. Martin turned away, and the bullet hit his arm and ricocheted down to his leg</u>.
>
> Wilfredo looked back and saw the shooting. He grabbed a bucket to protect his head. <u>Appellant then started shooting at Wilfredo. He tried to get around the bucket, aiming for Wilfredo's head. He also attempted to shoot Wilfredo in the side. As he continued to fire the gun, appellant shot Wilfredo in the arm, hand, and stomach</u>.

857 So. 2d at 979 (emphasis supplied). The *Tucker* defendant was convicted on four (4) counts: two counts of attempted first degree murder of Wilfredo and Martin; and two count of attempted felony murder of Wilfredo and Martin. *Id*.

Under the State's argument, the initial shots could have supported the two convictions for attempted first-degree murder, with the subsequent shots supporting the two convictions for attempted felony murder. On appeal, however, the Fourth District reversed the "dual convictions for attempted premeditated murder and attempted felony murder because they constitute double jeopardy violations." *Id*. The court explained:

> In this case, the attempted premeditated first degree murder charges serve as the sole underlying felonies for the attempted felony murder charges. No act distinguishes the attempted premeditated murder from the attempted felony murder; the attempted murder is the predicate felony and the same act on the same victim. In other words, there is no intentional act that is not an essential element of the attempted premeditated murder as is required by section 782.051(1). Hence, appellant's dual convictions for attempted premeditated murder and attempted felony murder constitute double jeopardy. *See Gordon v. State,* 780 So.2d 17, 25 (Fla.2001) (recognizing the principle that dual convictions for attempted premeditated murder and attempted felony murder are impermissible) and *Mitchell v. State,* 830 So.2d 944 (Fla. 5th DCA 2002) (holding that double jeopardy barred dual convictions for attempted second degree murder and attempted felony murder arising from the same criminal act; both crimes fell within core offense of homicide and addressed punishment for acts that could inflict death).

Id. at 979-80. Accordingly, the court affirmed the defendant's convictions and sentences for the crimes of attempted first degree murder, but vacated the convictions and sentences for attempted felony murder. *Id*. at 980.

The State's reliance on *Dallas v. State*, 898 So.2d 163 (Fla. 4th DCA 2005), is misplaced as the facts of that case are inapposite. In *Dallas:*

> Here, the acts of shooting and wounding the victim occurred after the wallet was put on the car seat and the victim started running. <u>At that point in time, the attempted robbery was completed</u>. The victim had given up his property in response to the display of the weapon, the blow to the face, and the forceful demands made on the victim. <u>The subsequent weapon discharge constituted a wholly separate act</u>.

Id. at 165 (Fla. 4th DCA 2005) (emphasis supplied).

The State also argues in response to Point III that "the jury was not precluded from considering any of the many other victims as the potential

victim of the underlying felony in Count IV." (Ans. Br. at 29). The State's argument that the jury was not precluded from essentially *ignoring the jury instructions* is mind-boggling, but perhaps reflects its recognition of the inherent confusion in the jury instructions, which instructed the Jury as to Count IV as follows:

ATTEMPTED FELONY MURDER

To prove the crime of attempted felony murder by Ahmad Milton, as charged in Count 4 of the Information, the State must prove the following four elements beyond a reasonable doubt:

1. Ahmad Milton committed or attempted to commit a second degree murder of Jaime Chaney.

2. . . . .

3. This intentional act of shooting a firearm could have but did not cause the death of Jaime Chaney.

4. The act would have resulted in the death of Jaime Chaney except that someone prevented Ahmad Milton from killing Jaime Chaney or he failed to do so.

* * *

<u>I will now instruct you on the elements of second degree murder</u>.

<u>SECOND DEGREE MURDER</u>

To prove the crime of second degree murder, the State must prove the following three elements beyond a reasonable doubt:

1. Jaime Chaney is dead.

2. The death was caused by the criminal act of Ahmad Milton.

3. There was an unlawful killing of Jaime Chaney by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life.

* * *

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MILTON'S MOTION TO DISMISS WHERE THE FINAL AMENDED INFORMATION DID NOT ALLEGE THE ESSENTIAL FACTS CONSTITUTING THE OFFENSES CHARGED

The State argues that the handwritten notations on Counts III and IV which incorrectly referred to the names of alleged victims who, according to the jury instructions, were pertinent solely to Count II was "nothing more than harmless surplusage." (Ans. Br. at 38). However, this argument flies in the face of Florida Rule of Criminal Procedure 3.140(b), which provides that an "indictment or information upon which the defendant is to be tried shall be a plain, concise and definite written statement of the *essential facts constituting the offense charged*." (Emphasis supplied).

V. THE CONVICTION FOR SHOOTING AT A DWELLING IN ADDITION TO THE ATTEMPTED FELONY MURDER CONVICTIONS CONSTITUTED DOUBLE JEOPARDY

The State argues that the Court should decline to address Point V on the grounds that it purportedly "was not the basis for this Court's granting of jurisdiction." (Ans. Br. at 41). However, Milton's pro se Amended Jurisdictional Brief, p.4, does raise double jeopardy concerns in this context:

> [T]he defendant's act of shooting at the six victims was an essential element of the predicate felony and could not also support the Attempted Felony Murder convictions of the same six victims without violating double jeopardy principles.

Moreover, "a conviction that violates the prohibition against double jeopardy constitutes fundamental error, e.g., *State v. Johnson*, 483 So.2d 420 (Fla.1986); and a claim of fundamental error may be raised for the first time on appeal." *Kilmartin v. State*, 848 So. 2d 1222, 1224 (Fla. 1st DCA 2003).

As discussed in Point III above, the facts of the instant case are closer to those of *Tucker* than the cases relied on by the State. The charges against Milton for shooting at a dwelling stemmed from the same single criminal act of shooting as did the charges for attempted felony murder with the predicate felony of attempted second-degree murder. Accordingly, the dual convictions on violated principles of double jeopardy. *See Tucker*, 857 So. 2d at 978.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that *Milton* be overturned and the convictions against him be vacated.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via e-mail to: Linda S. Katz, Esq., Linda.Katz@myfloridalegal.com and Richard Polin, Esq., richard.polin@myfloridalegal.com, Attorney General's Office, 444 Brickell Ave., Ste. 650, Miami, FL 33131-2406, on this 25th day of November 2013.

By: /s/ Donna Greenspan Solomon
DONNA GREENSPAN SOLOMON

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By: /s/Donna Greenspan Solomon
DONNA GREENSPAN SOLOMON