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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.

\_\_\_\_\_ /

**INITIAL BRIEF**

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## PREFACE

The case arises under the Court's conflict jurisdiction. *See* Fla. R. App. P. 9.030(a)(2)(A)(iv). References to the record on appeal are designated R, followed by the appropriate volume and page number. The consecutively paginated transcript of the proceedings is designated T, followed by the appropriate page number. The transcript of the sentencing is designated ST, followed by the appropriate page number.

## STATEMENT OF THE CASE AND FACTS

### *Third DCA Opinion*

On June 1, 2011, the Third District Court of Appeal issued an opinion affirming the conviction of Petitioner, Ahmad R. Milton ("Milton"). *Milton v. State*, 36 Fla. L. Weekly D1165 (Fla. 3d DCA 2011). The Third District summarized the facts as follows:

The State charged Milton with second-degree murder, **attempted felony murder** with a **predicate felony of attempted second-degree murder**, and shooting at a dwelling. Before jury selection, Milton moved to dismiss counts two, three, and four regarding attempted felony murder with a predicate felony of attempted second-degree murder based on the argument that the information did not track the language of the attempted felony murder statute. The trial court denied the motion. After the State's final amendments to the information, Milton renewed the objection, arguing that there was no independent essential element as the attempted felony murder statute requires. The trial court denied the motion.

The jury acquitted Milton of second-degree murder but found him guilty as charged on the remaining counts.

*Id.* (emphasis supplied).

The Third District explained that it was affirming the trial court's conviction for **attempted felony murder** because:

[T]he convictions were in compliance with sections 777.04(1) and 782.04(2), Florida Statutes (2006), which state that ***attempted felony murder*** has two elements: “(1) the defendant intentionally committed an act that would have resulted, but did not result, in the death of someone, and (2) the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life.”

*Id.* (emphasis supplied).

It should be noted, however, that sections 774.04(1) and 782.04(2), as well as the two-element definition referenced above, do **not** pertain to attempted felony murder. Rather, sections 774.04(1) [attempts] and 782.04(2) [second degree murder] together constitute *attempted second-degree murder*. The attempted felony murder statute is actually found in section 782.051.

The June 1, 2011 *Milton* opinion withdrew and replaced an earlier opinion dated September 8, 2010, which had a paragraph identical to that cited above, except that it referred to “attempted second-degree murder” rather than “attempted felony murder”:

[T]he convictions were in compliance with sections 777.04(1) and 782.04(2), Florida Statutes (2006), which state that ***attempted second-degree murder*** has two elements: “(1) the defendant intentionally committed an act that would have resulted, but did not result, in the

death of someone, and (2) the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life.”

On September 10, 2010, Milton filed a Motion for Rehearing, in which he pointed out that he was “*not convicted of attempted second degree murder*; he was convicted of three counts of attempted felony murder.” (Emphasis in original). The Third District denied rehearing but issued the June 1, 2011 opinion, which changed the wording from “attempted second-degree murder” to “attempted felony murder,” but *left the definition – that of second-degree murder -- intact*.

#### *The Information*

The Information was amended several times, with the final amendment occurring on October 29, 2009, the second day of trial testimony. (RV1 21-31), (RV1 135-150), (RV2 228-235). In fact, it was not until that date that the State finally settled on attempted second-degree murder as the predicate felony for the three attempted felony murder charges. (TV5 583), (TV6 667, 670).

The final Information contained five counts against Milton, as follows:

Count I: The second-degree murder of Marcus Thomas. (RV2 229).

Count II: The attempted felony murder of Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and or Randall Campbell and/or Arturo Vargas and/or Bryant Pitts and/or Abdul Hall. (RV2 230).

Count III: The attempted felony murder of Trenard Chaney and/or T.C (a minor) and/or M.T (a minor). (RV2 231).

Count IV: The attempted felony murder of Jamie Chaney. (RV2 232).

Count V: Shooting at a dwelling (occupied or unoccupied). (RV2 233).

It appears that the parties and the Court intended that the Information would be amended to reflect the State's decision to use attempted second-degree murder as the predicate felony for the three attempted felony murder charges. (TV5 583). However, although the final Information contains hand-written notations dated "10/29/08," it does not specify "attempted second-degree murder" as the predicate felony in any of the attempted felony murder charges (Counts II-IV). (RV2 230-233).

Moreover, the handwritten notations on all three counts (Counts II-IV) bear the names of "Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and or Randall Campbell and/or Arturo Vargas and/or Bryant Pitts and/or Abdul Hall" -- which (according to the jury instructions) actually pertain *solely to Count II*, and not to Counts III or IV. (RV2 230-233).

The jury acquitted Milton of the second-degree murder of Marcus Thomas in Count I, but convicted him of three (3) counts of attempted



felony murder in Counts II-IV, and shooting at a dwelling (occupied or unoccupied) in Count V.

*Jury Instructions on Attempted Felony Murder*

The jury instructions on the three attempted felony murder charges (Counts II-IV) inexplicably incorporate an instruction on second-degree murder, rather than *attempted* second-degree murder (which as noted above was designated by the State as the predicate felony for the attempted felony murder charges). Moreover, the combined “attempted felony murder/second-degree murder” instructions bizarrely require a finding that the alleged victims of Counts II-IV were “dead,” when they most certainly were not dead. (Hence the charge of “attempted” felony murder).

Because these jury instructions are critical to Point \_\_\_ of this appeal, the instructions on Counts II-IV are excerpted below.

**COUNT II INSTRUCTION<sup>1</sup>**

**ATTEMPTED FELONY MURDER**

To prove the crime of attempted felony murder by Ahmad Milton, as charged in Count 2 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 Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Aruro Vargas and/or Bryant Pitts and/or Abdul Hall.

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<sup>1</sup> The three attempted felony murder instructions on Counts II-IV are identical except as to the alleged victims. Accordingly, the Count II instruction is the only one excerpted here in full.

2. While engaged in the commission or attempted commission of a second degree murder, the defendant committed, aided or abetted an intentional act that is not an essential element of the second degree murder.
3. This intentional act of shooting a firearm could have but did not cause the death of Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Aruro Vargas and/or Bryant Pitts and/or Abdul Hall.
4. The act would have resulted in the death of Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Aruro Vargas and/or Bryant Pitts and/or Abdul Hall except that someone prevented Ahmad Milton from killing Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Aruro Vargas and/or Bryant Pitts and/or Abdul Hall or he failed to do so.

In order to convict Ahmad Milton of attempted felony murder, it is not necessary for the State to prove that he had a premeditated design or intent to kill.

If you find the defendant guilty of attempted felony murder, you must determine in your verdict if the defendant discharged a firearm or not during the commission of the crime.

A "firearm" is legally defined as any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of such weapon; any firearm muffler or firearm silencer; or any machine gun.

It is not an attempt to commit felony murder if the defendant abandoned the attempt to commit the offense or otherwise prevented its commission under circumstances indicating a complete and voluntary renunciation of his criminal purpose.

I will now instruct you on the elements of second degree murder.

#### SECOND DEGREE MURDER

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

1. Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Aruro Vargas and/or Bryant Pitts and/or Abdul Hall is dead.
2. The death was caused by the criminal act of Ahmad Milton.

3. There was an unlawful killing of Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Arturo Vargas and/or Bryant Pitts and/or Abdul Hall by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life.

An "act" includes a series of related actions arising from and performed pursuant to a single design or purpose.

An act is "imminently dangerous to another and demonstrating a depraved mind" if it is an act or series of acts that:

1. a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and
2. is done from ill will, hatred, spite or an evil intent, and
3. is of such a nature that the act itself indicates an indifference to human life.

(RV3 462) (emphasis supplied).

### **COUNT III INSTRUCTION**

Excerpted below is just that portion of the jury instruction on Count III that differs from the instruction on Count II (i.e., the names of the alleged victims):

#### **ATTEMPTED FELONY MURDER**

To prove the crime of attempted felony murder by Ahmad Milton, as charged in Count 3 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 Trenard Chaney and/or T.C (a minor) and/or M.T (a minor).
2. . . . .
3. This intentional act of shooting a firearm could have but did not cause the death of Trenard Chaney and/or T.C (a minor) and/or M.T (a minor).
4. The act would have resulted in the death of Trenard Chaney and/or T.C (a minor) and/or M.T (a minor) except that someone prevented Ahmad Milton from killing Trenard Chaney and/or T.C (a minor) and/or M.T (a minor) or he

failed to do so.

\* \* \*

I will now instruct you on the elements of second degree murder.

### SECOND DEGREE MURDER

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

1. Trenard Chaney and/or T.C (a minor) and/or M.T (a minor) is dead.
2. The death was caused by the criminal act of Ahmad Milton.
3. There was an unlawful killing of Trenard Chaney and/or T.C (a minor) and/or M.T (a minor) by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life.

\* \* \*

(RV3 464) (emphasis supplied).

As noted above, the jury instruction on Count III does not match to the handwritten notations on Count III of the final Information, (RV2 231), which refers to the names of the alleged victims pertinent solely to Count II. (RV2 230).

### COUNT IV INSTRUCTION

Excerpted below is just that portion of the jury instruction on Count IV that differs from the instruction on Count II (i.e., the names of the alleged victim):

### **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.

\* \* \*

I will now instruct you on the elements of second degree murder.

SECOND DEGREE MURDER

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.

\* \* \*

(RV3 466) (emphasis supplied).

As noted above, the jury instruction on Count IV does not match to the handwritten notations on Count IV of the final Information, (RV2 232), which refers to the names of the alleged victims pertinent solely to Count II. (RV2 230).

This appeal now follows.

## SUMMARY OF ARGUMENT

The Third District's opinion in this case expressly and directly conflicts with this Court's decision in *Coicou v. State*, 39 So. 3d 237 (Fla. 2010), wherein the Court stated: "The crime of attempted felony murder is codified in section 782.051" – **not** section 777.04(1) and 782.04(2), as stated by the *Milton* court.

In addition, 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 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. The alleged "intentional act" of "shooting a firearm" was related to the predicate felony of attempted second-degree murder and thus could not serve as the independent essential element required by statute. The trial court also 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.

Finally, the conviction for shooting at a dwelling in addition to the attempted felony murder convictions constituted double jeopardy as they all stemmed from the same single criminal act of shooting.

### **STANDARD OF REVIEW**

“The standard of review of a trial court's denial of a motion to dismiss is de novo.” *Simpson v. State*, 33 So. 3d 776, 778 (Fla. 4th DCA 2010). Further, the issues in this case are pure questions of law and therefore the standard of review is de novo. *Cromartie v. State*, 70 So. 3d 559, 563 (Fla. 2011).

### **ARGUMENT**

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

The Third District stated in its *Milton* decision that:

[T]he convictions were in compliance with sections 777.04(1) and 782.04(2), Florida Statutes (2006), which state that **attempted felony murder** has two elements: “(1) the defendant intentionally committed an act that would have resulted, but did not result, in the death of someone, and (2) the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life.”

36 Fla. L. Weekly D1165 (emphasis supplied). However, this paragraph incorrectly uses the definition of *attempted second-degree murder* to define *attempted felony murder*.

As noted by this Court in *Coicou v. State*, 39 So. 3d 237, 240-41 (Fla. 2010): “The crime of attempted felony murder is codified in section 782.051” – **not** section 777.04(1) and 782.04(2), as stated by the *Milton* court. Section 782.051 does not define attempted felony murder as the two elements set forth above in *Milton*, but rather where:

Any person who perpetrates or attempts to perpetrate any felony enumerated in s. 782.04(3) and who commits, aids, or abets an intentional act that is not an essential element of the felony and that could, but does not, cause the death of another commits a felony of the first degree . . .

*Coicou*, 39 So. 3d at 241 (citing § 782.051, Fla. Stat.).

*Coicou* then defines attempted second-degree murder using the same two-element definition used above in *Milton* to define attempted felony murder:

The crime of attempted second-degree murder is codified in section 777.04(1), Florida Statutes (2001), defining attempt, and section 782.04(2), Florida Statutes (2001), defining second-degree murder. *See State v. Florida*, 894 So.2d 941, 945 (Fla.2005), *overruled in part by Valdes v. State*, 3 So.3d 1067 (Fla.2009). As we explained in *Florida*, ***attempted second-degree murder has two elements***: “(1) the defendant intentionally committed an act that could have resulted, but did not result, in the death of someone, and (2) the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life.” *Id.* at 945-46 (citing *Brown v. State*, 790 So.2d



389, 390 (Fla.2000); *State v. Brady*, 745 So.2d 954, 957 (Fla.1999)). “Use of a firearm is a third element that increases the penalty for the crime.” *Id.* at 946.

*Id.* (emphasis supplied).

The Third District’s opinion in *Milton* therefore expressly and directly conflicts with this Court’s decision in *Coicou*, as well as the cases cited within. Accordingly, the *Milton* 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**

As discussed above, it was not until the second day of trial testimony that the State finally settled on attempted second-degree murder as the predicate felony for the three attempted felony murder charges. (TV5 583), (TV6 667, 670). However, the Attempted Felony Murder instructions as given by the court *never identify attempted second-degree murder as the predicate felony.*

Instead, the court’s instructions inexplicably incorporate an instruction on second-degree murder, with the bizarre result that the Attempted Felony Murder instructions require two contradictory findings:

- i. The intentional act of shooting a firearm could have but did not cause the death of [victim(s)].
- ii. The victim(s) is/are dead.

It cannot be disputed that the jury did not follow the instructions that were given to them; otherwise, it would not have been logically possible to convict Milton on the Attempted Felony Murder counts. In addition, the only dead victim was Marcus Thomas, and Milton was acquitted of his second-degree murder in Count I.

The trial court's Attempted Felony Murder instructions also fail to comport with the Standard Jury Instruction on Attempted Felony Murder (Standard Jury Instruction 6.3), which states:

To prove the crime of Attempted Felony Murder, the State must prove the following **three elements** beyond a reasonable doubt:

1. (Defendant) [committed] [attempted to commit] a (**crime alleged**).
2. While engaged in the [commission] [attempted commission] [escape from the immediate scene] of (**crime alleged**), the defendant [committed] [aided or abetted] an **intentional act that is not an essential element** of (**crime alleged**).
3. This intentional act could have but did not cause the death of (victim).

(Crime alleged) is defined by Florida law as (define the crime).

In order to convict (defendant) of Attempted Felony Murder, it is not necessary for the State to prove that [he] [she] had a premeditated design or intent to kill.

(Emphasis supplied).

Here, the State had decided to use attempted second-degree murder as the predicate felony – i.e., the above-referenced “crime alleged” – with “shooting a firearm” as the “intentional act that is not an essential element” of the crime alleged. [The “intentional act that is not an essential element” is referred to in the *Milton* decision as the “independent essential element”].

Therefore, an instruction in accordance with Standard Jury Instruction 6.3 that comports with the State’s determination of attempted second degree-murder as the predicate felony would have been essentially as follow:

**ATTEMPTED FELONY MURDER**

To prove the crime of Attempted Felony Murder by Ahmed Milton, the State must prove the following three elements beyond a reasonable doubt:

1. Ahmed Milton committed attempted second-degree murder of [victim(s)].
2. While engaged in the commission of attempted second-degree murder, Ahmed Milton committed, aided or abetted an intentional act that is not an essential element of attempted second-degree murder.
3. This intentional act [of shooting a firearm] could have but did not cause the death of [victim(s)].

Attempted second-degree murder is defined by Florida law as . . .

However, the Attempted Felony Murder instructions as given to the jury did not comport with the State’s determination of attempted second degree-murder as the predicate felony. In addition, while Standard Jury Instruction 6.3 requires the State to prove *three* elements beyond a

reasonable doubt, the Attempted Felony Murder instructions as given to the jury add an additional *fourth* element (“Element No. 4”), with the result being the following instructions in Counts II-IV:

#### **ATTEMPTED FELONY MURDER**

To prove the crime of attempted felony murder by Ahmad Milton, as charged in Count [2, 3, or 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 [victim(s)].
2. While engaged in the commission or attempted commission of a second degree murder, the defendant committed, aided or abetted an intentional act that is not an essential element of the second degree murder.
3. This intentional act of shooting a firearm could have but did not cause the death of [victim(s)].
4. The act would have resulted in the death of [victim(s)] except that someone prevented Ahmad Milton from killing [victim(s)] or he failed to do so.

To add to the confusion, this additional “fourth element” is actually the first of the two elements needed to prove the crime of Attempted Second Degree Murder.<sup>2</sup>

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<sup>2</sup> The Standard Jury Instruction on Attempted Second Degree Murder (Standard Jury Instruction 6.4) states in pertinent part:

To prove the crime of Attempted Second Degree Murder, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) intentionally committed an act which would have resulted in the death of (victim) except that someone prevented (defendant) from killing (victim) or [he] [she] failed to do so.

The Attempted Felony Murder instructions as given to the jury also include the following instruction with regard to the discharge of a firearm:

If you find the defendant guilty of attempted felony murder, you must determine in your verdict if the defendant discharged a firearm or not during the commission of the crime.

A "firearm" is legally defined as any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of such weapon; any firearm muffler or firearm silencer; or any machine gun.

As an initial matter, the instruction is nonsensical since "shooting a firearm" is alleged to be the "intentional act that is not an essential element" of the predicate felony. Therefore, to find the defendant guilty of attempted felony murder, the jury *would have already had to conclude* that a firearm was discharged during the commission of the crime. It therefore makes no sense to ask the jury *after* they have found attempted felony murder to determine whether the defendant discharged a firearm during the commission of the crime.

Moreover, Standard Jury Instruction 6.3 on Attempted Felony Murder does not include any such firearm instruction. Rather, the "[u]se of a firearm is a third element that increases the penalty for the crime" of *attempted second-degree murder*. *Coicou*, 39 So. 3d at 241 (citing § 782.051, Fla.

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2. The act was imminently dangerous to another and demonstrating a depraved mind without regard for human life.

Stat. Here, Milton was *never charged with the crime of attempted second-degree murder*, which was intended to serve solely as the *predicate felony* for the attempted felony murder charges. Thus, the separate instruction as to a firearm was totally inapplicable to the actual charges.

The Attempted Felony Murder instructions given to the jury also fail to track the language of section 782.051(2), the attempted felony murder statute for non-enumerated felonies. Pursuant to section 782.051(2),

Any person who perpetrates or attempts to perpetrate any felony other than a felony enumerated in s. 782.04(3) and who commits, aids, or abets an intentional act that is not an essential element of the felony and that could, but does not, cause the death of another commits a felony of the first degree . . .

In sum, the jury instructions on Counts II-IV are confusing, contradictory, do not comport with the State's determination as to the predicate felony, and fail to track the language of the felony murder statute or the Standard Jury Instruction on Attempted Felony Murder. They are fundamentally flawed, and the *Milton* decision should be quashed. *See Reed v. State*, 837 So. 2d 366, 369-70 (Fla. 2002) (fundamental error occurs when the error "is pertinent or material to what the jury must consider in order to convict" and reaches "down into the validity of the trial itself"); *Neal v. State*, 783 So. 2d 1102, 1104 (Fla. 5th DCA 2001) (charging the jury with

“an incomplete and inaccurate instruction on the law is fundamental error where the error relates to the elements of the criminal offense”).

**III. 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**

As noted by the *Milton* Court:

Before jury selection, Milton moved to dismiss counts two, three, and four regarding attempted felony murder with a predicate felony of attempted second-degree murder based on the argument that the information did not track the language of the attempted felony murder statute. The trial court denied the motion. After the State's final amendments to the information, Milton renewed the objection, arguing that there was no independent essential element as the attempted felony murder statute requires. The trial court denied the motion.

*Milton*, 36 Fla. L. Weekly at D1165. For the reasons that follow, the trial court abused its discretion in denying the motion.

According to the instructions given to the jury, the attempted felony murder instructions in Counts II-IV each identify *the same individual(s)* as **both** the victim of the predicate felony **and** the victim of the “intentional act that is **not** an essential element” of the predicate felony (i.e., the independent essential element).<sup>3</sup> The error is most easily seen when reviewing the

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<sup>3</sup> As noted above, there is a discrepancy between the final version of the Information, which has handwritten notations on all three counts (Counts II-

Attempted Felony Murder instruction for Count IV, the only one of the three attempted felony murder counts that pertain to just one victim.

The Count IV instruction states in relevant part:

**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. While engaged in the commission or attempted commission of a second degree murder, the defendant committed, aided or abetted an intentional act that is not an essential element of the second degree murder.
3. This intentional act of shooting a firearm could have but did not cause the death of Jaime Chaney.

\* \* \*

(Emphasis supplied).

Here, the “intentional act” was alleged to be “shooting a firearm” at Jaime Chaney. However, the intentional act of “shooting a firearm” at Jaime Chaney *also related to the predicate felony of attempted second-degree murder* and thus could **not** serve as the “independent essential element” required by the attempted felony murder statute.

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IV) bearing the names of “Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and or Randall Campbell and/or Arturo Vargas and/or Bryant Pitts and/or Abdul Hall” and the jury instructions, which refers to this list of victims *solely in Count II*, and not in Counts III or IV. (RV2 230-233).



As the Fourth District Court of Appeal said in *Tucker v. State*, 857 So. 2d 978 (Fla. 4th DCA 2003):

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).

*Id.* at 979-80 (emphasis supplied).

Here, too, “no act distinguishes the attempted [second-degree] murder from the attempted felony murder; the attempted [second-degree] 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 [second-degree] murder as required by section 782.051[(2)].” *See id.*; *see also Coicou v. State*, 867 So. 2d 409, 411 (Fla. 3d DCA 2003), *decision quashed on other grounds*, 39 So. 3d 237 (Fla. 2010) (state failed to prove attempted felony murder because the same act that resulted in the victim’s death was an essential element of the predicate felony [robbery]).

In *Milton*, the Third District distinguished its holding in *Coicou* by stating:

In the case before us, we know that there were multiple victims involved. . . . [T]he facts indicated there were multiple victims, and Milton was not shooting specifically at one person.

36 Fla. L. Weekly D1165. This statement is clearly incorrect with respect to Count IV, which named the same single individual as the victim of both the predicate felony and the (allegedly) independent essential act. Moreover, the holdings in *Tucker* and *Coicou* would apply equally to Counts II and III because of the “and/or” manner in which the State designated the alleged victims of those counts.

For example, the Count II instruction states in relevant part:

**ATTEMPTED FELONY MURDER**

To prove the crime of attempted felony murder by Ahmad Milton, as charged in Count 2 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 Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Aruro Vargas and/or Bryant Pitts and/or Abdul Hall.
2. While engaged in the commission or attempted commission of a second degree murder, the defendant committed, aided or abetted an intentional act that is not an essential element of the second degree murder.
3. This intentional act of shooting a firearm could have but did not cause the death of Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Aruro Vargas and/or Bryant Pitts and/or Abdul Hall.

\* \* \*

The State concedes that Milton’s convictions for attempted felony murder and the predicate felony of attempted second-degree murder all “*stemmed from a single criminal act of shooting.*” *Milton*, Appellee’s Answer Brief, p. 22. The State argues that the charges were nevertheless permissible because:

the subject case involves more than one victim, as the act of attempting to shoot certain victims constituted attempted second degree murder, and that same act of shooting also constituted attempted felony murder as to other victims who were not the intended target of the attempted second degree murder, but were in the immediate vicinity and thus in danger for their life [sic].

*Milton* Answer Brief, p. 27-28.

The problem with the State’s position is that the list of potential victims of the predicate felony of [attempted] second-degree murder identified in element No. 1 above is the *exact same list* of potential victims of the intentional act of shooting a firearm identified in element No. 2 above. Moreover, the “and/or” description of the potential victim list means that the jury may have convicted Milton of attempted felony murder by simply finding that he attempted second-degree murder of *just one of those individuals* by “shooting a firearm” at *just that same individual*.

In that event (and we have no way of knowing), there would have been “no intentional act that is not an essential element of the attempted [second-degree] murder as required by section 782.051[(2)].” *See*

*Tucker; Coicou*. The same of course holds true for the jury instruction in Count III as in Count II. Accordingly, the trial court abused its discretion in denying Milton's motion to dismiss the attempted felony murder charges.

**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**

As the Third District noted: "After the State's final amendments to the information, Milton renewed the objection . . . The trial court denied the motion." 36 Fla. L. Weekly at D1165. The trial court abused its discretion in denying the motion, because the final amended information did not allege the essential facts constituting the offenses charged.

"A charging document must provide adequate notice of the alleged essential facts the defendant must defend against." *State v. Rodriguez*, 575 So. 2d 1262, 1264 (Fla. 1991), *holding modified on other grounds by State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000) (citing Art. I, §§ 9, 16, Fla. Const.).

In recognition of this concern, Florida Rule of Criminal Procedure 3.140(b) 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); *see also* Fla.R.Crim.P. 3.140(d)(1) ("Each count of an indictment or information upon which the defendant is to be tried *shall allege the essential facts constituting the offense charged*." (emphasis supplied)).

*Id.* (emphasis in original).

Here, the Information – modified for the final time during the second day of trial testimony – was defective in at least two substantive ways. First, it did not identify attempted second-degree murder as the predicate felony for the three attempted felony murder charges. Second, the handwritten notations on Counts III and IV referred to the names of alleged victims who, according to the jury instructions, were pertinent solely to Count II. The final Information was anything but a “plain, concise and definite written statement of the *essential facts constituting the offense charged.*” *Id.*

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

The charges against Milton for shooting at a dwelling stemmed from the same single criminal act of shooting as did the charges against Milton 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 the *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 12 day of June 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**  
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