

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

EARL ENMUND,

Respondent.

CASE NO. 66,264

FILED

SID J. WHITE

FEB 8 1985

CLERK, SUPREME COURT

By *m*
Chief Deputy Clerk

PETITIONER'S REPLY BRIEF ON MERITS

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&782.04	1

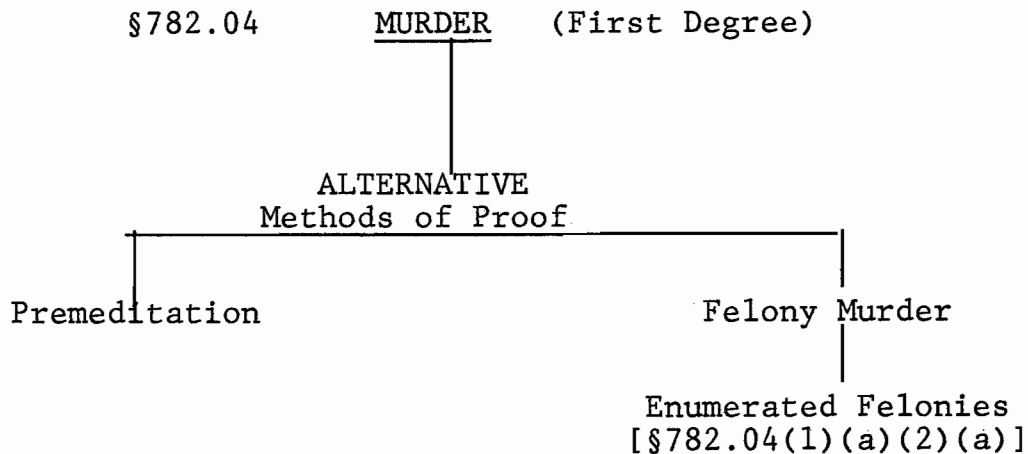
ARGUMENT

ISSUE I.

WHEN A DEFENDANT IS CONVICTED OF
FIRST DEGREE MURDER, CAN HE BE
CONVICTED OF AND SENTENCED FOR
THE UNDERLYING FELONY FROM WHICH
THE MURDER RESULTS?

Petitioner completely agrees with Respondent that "Whether a lesser offense is necessarily included in a greater offense is determined by examining the statutory elements of the two offenses" (Respondent's brief, page 7). However, Petitioner disagrees with Respondent that the two offenses that must be examined in this case are felony murder and robbery. Petitioner contends that the two offenses are murder (first degree) and robbery.

Premeditated murder and felony murder are not separate statutory offenses. The generic statutory offense is simply murder, and first degree murder has two alternative methods of proof: (1) premeditation, and (2) felony murder. The following diagram illustrates this:



Because it is possible to commit first degree murder without committing an underlying felony, the felony used to prove "felony murder" can never be a necessarily lesser included offense of first degree murder. Because only the statutory elements of first degree murder are looked to and not the facts alleged in a particular information or the evidence presented at trial, it is apparent that separate convictions as well as separate sentences are appropriate in felony murder/underlying felony situations.

If the Florida legislature did not intend separate convictions and sentences in felony murder/underlying felony situations, it could have legislated that result by proscribing the different species of felony murder under separate statutory provisions instead of listing the different species in the alternative in the murder statute.

This Court's recent decision in Wicker v. State, __So.2d__ (Fla. 1985)[10 FLW 33; case nos. 64,958 and 64,985, January 10, 1985], supports Petitioner's analysis. Wicker was convicted of three separate counts: burglary (first-degree), involuntary sexual battery, and robbery. The Second District Court of Appeal set aside the sexual battery conviction, reasoning that a defendant could not be convicted of both the first degree felony burglary and the assault which served as the basis therefor, because finding that the defendant committed the assault was indispensable to the conviction of first degree felony burglary. The State argued that Wicker could be con-

victed of both burglary and sexual battery. This Court agreed with the State, stating that the district court erroneously analyzed the allegations in the charging document to determine whether the convictions could stand instead of analyzing the offenses' statutory elements. This Court examined the statutory elements of burglary and sexual battery and concluded that they were separate offenses.

If the analysis applied by this Court in Wicker is applied in the present case, it will be found that the two offenses to be examined are murder (first degree) and robbery (not felony murder and robbery), and that they are separate offenses.

ISSUE II.

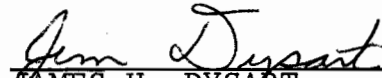
Petitioner stands on its previous argument as to this issue.

CONCLUSION

The Second District Court of Appeal's certified question is a "loaded" question because it assumes that the two offenses to be considered are felony murder and the underlying felony. "Felony murder" is not a separate statutory offense, it is merely one of two alternative methods of proving first degree murder. If the Second District had applied this Court's decision in State v. Baker, __So.2d__ (Fla. 1984)[9 FLW 282] to the instant case in the same manner this Court applied Baker in Wicker v. State, supra, the court would not have reached the result it did. Instead it would have concluded that Enmund could be convicted of and sentenced for robbery as well as murder.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

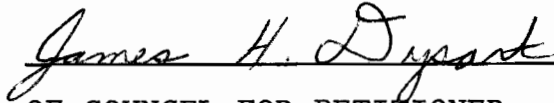


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Paul C. Helm, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Blvd., Bartow, Florida 33830 on this 5th day of February, 1985.


OF COUNSEL FOR PETITIONER