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PRELIMINARY STATEMENT

The Petitioner, State of Florida, was the Appellee in the Second District Court of Appeal and will be referred to as "Petitioner" or "State" in this brief. Respondent, Nicholas Vance Furr, was the defendant in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, and the Appellant in the Second District Court of Appeal. Furr will be referred to as "Respondent" or by name in this brief. Petitioner will use the symbol "R" followed by the appropriate page number in reference to the record on appeal.

STATEMENT OF THE CASE AND FACTS

The pertinent facts are set forth in the opinion of the Second District Court of Appeal in Furr v. State, 464 So.2d 693 (Fla. 2d DCA 1985).

Appellant was indicted for first degree (felony) murder (Count 1) and armed robbery (Count 2). Following a jury trial, he was convicted as charged and sentenced to consecutive terms of life imprisonment without parole for twenty-five years as to Count 1 and fifty years imprisonment as to Count 2. The trial court subsequently denied appellant's motion for new trial but granted his motion to correct sentence and vacated the judgment and sentence as to Count 2, the underlying felony....

In the case before us the evidence adduced at trial demonstrated that appellant entered the apartment with a loaded rifle and, while inside, sprayed shots around a room in which several people known to him were located. One

of the shots stuck the victim. Under these facts, the jury, if so instructed, could have exercised its inherent power of pardon and found appellant guilty of "an act imminently dangerous to another and evincing a depraved mind regardless of human life," i.e., that appellant's actions fit the statutory definition of second degree (depraved mind) murder provided in section 782.04(2), Florida Statutes (1938). Id. at 694.

Based on this evidence, the District Court held that the trial court's refusal to instruct the jury on second degree murder, as a lesser degree of first degree felony murder was reversible error. The Court reinstated the judgment and sentence for armed robbery and further provided that if, on retrial, respondent was again convicted of first degree felony murder, the conviction and sentence for the underlying felony must be vacated. Petitioner filed a timely notice to invoke the discretionary jurisdiction of this Court, and this Court entered an order accepting jurisdiction on August 23, 1985. Petitioner's argument on the merits follows.

#### SUMMARY OF THE ARGUMENT

Since first degree felony murder and second degree depraved mind murder have different statutory elements, the latter is not a necessarily lesser included offense of the former and the trial court was not required to instruct the jury on second degree murder. Green v. State, 453 So.2d 526 (Fla. 5th DCA 1984). But see contra Linehan v. State, 10 F.L.W. 439 (Fla. Aug. 29, 1985).

Respondent may lawfully be convicted and sentenced for both felony murder and the underlying felony. State v. Enmund, 10 F.L.W. 441 (Fla. Aug. 29, 1985).

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED  
RESPONDENT'S REQUEST FOR AN INSTRUCTION  
ON SECOND DEGREE MURDER

Petitioner is aware that this Court has recently determined in Linehan v. State, supra, that second degree (depraved mind) murder is a necessarily lesser included offense of first-degree felony murder. Linehan would appear to control the issue here.

Respondent would most respectfully urge this Court to reconsider the Linehan holding. As noted by Justice Shaw in his dissenting opinion in Linehan, these crimes have different statutory elements. Id. at 440, 441; Green v. State, supra.

By rejecting the Blockburger<sup>1</sup> test in this instance while continuing to utilize it in others, this Court has added further confusion to an already murky area of the law and appears to create conflict with Section 775.021(4), Florida Statutes (1983).

Finally, before affirming the decision of the Second District as to this issue, petitioner would urge this Court to consider two arguments rejected by the lower court.

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1/Blockburger v. United States, 284 U.S. 299 (1932).

First, there appears to be only reference to a second degree murder instruction in the record. Respondent's counsel, Ms. Studybaker, stated "...we would object to the Court not giving second degree murder as to Count I..."(R. 758) It is impossible from this brief reference to ascertain whether defense counsel sought an instruction on second degree felony murder or second degree depraved mind murder. Since the record does not reflect the precise instruction desired or the basis for the objection to the failure to give the instruction, Petitioner would submit that appellate review of this issue was inappropriate. Lucas v. State, 376 So.2d 1149 (Fla. 1979); Steinhorst v. State, 412 So.2d 352 (Fla. 1982).

Secondly, a review of the record in this case reveals that there is no evidence tending to suggest that the murder was committed by an individual evidencing a depraved mind or reckless disregard for human life. Beth Ann Murphy, an eye witness to the crime, testified that Respondent fired a shot directly at the victim, Larry Wilson, from a distance of three to five feet away (R. 272). In its opinion, the Second District relies on the fact that shots were sprayed around the room as evidence of second degree murder sufficient to require an instruction. This occurred immediately after the victim was shot (R. 273) and is insufficient evidence of a depraved mind murder.

This Court should reverse the lower court's order requiring a new trial and reinstate respondent's conviction and

sentence for felony murder.

ISSUE II

RESPONDENT MAY PROPERLY BE CONVICTED  
OF AND SENTENCED FOR THE UNDERLYING  
FELONY IN A FELONY MURDER SITUATION

At trial in the case at bar, the jury returned verdicts for felony murder and the underlying felony, armed robbery. The trial court initially convicted and sentenced respondent for both offenses, but subsequently vacated the conviction and sentence for armed robbery. The district court of appeal reinstated the armed robbery conviction but held that if, on retrial, respondent were again convicted of felony murder, he could not be convicted of the underlying felony. Furr v. State, supra at 694,695.

This Court has resolved this issue in State v. Enmund, supra. It is now clear that a defendant may be convicted of and sentenced for both felony murder and the underlying felony. The holding of the Second District to the contrary must be reversed.



CONCLUSION

Based on the foregoing arguments and authorities, petitioner respectfully requests that this Court reverse the decision of the Second District as to each issue raised and remand the case to the trial court to reinstate respondent's conviction and sentence for the underlying felony of armed robbery. Should this Court determine that Linehan v. State requires affirmance of that portion of the lower court's order requiring retrial, petitioner would urge this Court to rule that on retrial, if respondent is again convicted of first degree felony murder he may be convicted of and sentenced for both the felony murder and the underlying felony of armed robbery. That portion of the Second District's opinion which reinstates respondent's armed robbery conviction should be allowed to stand.

Respectfully submitted,

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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 John T. Kilcrease, Jr., Esq., Assistant Public Defender, Hall of Justice Building, 455 North Broadway, Bartow, Florida, 33830 this 12th day of September, 1985.

  
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Of Counsel for Petitioner