O/a 1-7-88.

IN THE SUPREME COURT OF FLORIDA

| | |
|---|---|
| KENNETH SCURRY,<br>Petitioner,<br>v.<br>STATE OF FLORIDA,<br>Respondent. | Case No. 70,525 |

DISCRETIONARY REVIEW OF THE DECISION OF
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

# BRIEF OF RESPONDENT ON MERITS


ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

**LAUREN HAFNER SEWELL**
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT


/sas

## TABLE OF CONTENTS

| | PAGE NO. |
|---|---|
| PRELIMINARY STATEMENT | 1 |
| SUMMARY OF THE ARGUMENT | 2 |
| ARGUMENT | 4 |
| ISSUE: | 4 |
| WHETHER THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON SECOND DEGREE MURDER AS A LESSER INCLUDED OFFENSE OF FIRST DEGREE FELONY MURDER. | |
| CONCLUSION | 14 |
| CERTIFICATE OF SERVICE | 14 |

## TABLE OF CITATIONS


| | PAGE NO. |
|---|---|
| Adams v. State, 341 So.2d 765 (Fla. 1976) | 11 |
| Enmund v. State, 399 So.2d 1362 (Fla. 1982) | 10 |
| Goodwin v. State, 405 So.2d 170 (Fla. 1981) | 10 |
| In the Matter of Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981) | 5 |
| Jefferson v. State, 128 So.2d 132 (Fla. 1961) | 10 |
| Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983) | 6, 7 |
| Linehan v. State, 476 So.2d 1262 (Fla. 1985) | 4, 8 |
| Mills v. State, 476 So.2d 172 (Fla. 1985) | 7 |
| Scurry v. State, 506 So.2d 4 (Fla. 2d DCA 1987) | 9 |
| Simpson v. Wainwight, 439 F.2d 948 (5th Cir. 1971) | 10 |
| State v. Bruns, 429 So.2d 307 (Fla. 1983) | 8 |
| State v. Furr, 493 So.2d 432 (Fla. 1986) | 8, 10 |
| State v. Wimberly, 498 So.2d 929 (Fla. 1986) | 5, 8 |
| The Florida Bar Re: Standard Jury Inst., 508 So.2d 1221 (Fla. 1987) | 8 |
| Tison v. Arizona, 481 U.S. ___, 109 S.Ct. ___, 95 L.Ed.2d 127 (1987) | 11 |
| OTHER AUTHORITIES: | |
| Rule 3.490, Fla. R. Crim. P. | 7 |

## PRELIMINARY STATEMENT

KENNETH SCURRY will be referred to as the "Petitioner" in this brief and the STATE OF FLORIDA will be referred to as the "Respondent". The Record on Appeal will be designated by the letter "R" followed by the appropriate page number.

## SUMMARY OF THE ARGUMENT

Petitioner is not entitled to a second degree murder charge because second degree murder is not a necessarily included lesser offense of first degree felony murder. In spite of the statement to the contrary in Linehan II, infra. the law does not support that proposition.

The lower court in Linehan did not find second degree murder a necessarily included offense, but rather found the facts of that case supported the instruction. However, this Court, with no analysis of the two offenses, pronounced the offense a necessarily included one. Not only is this pronouncement inconsistent within the case and with the lower court's opinion, but it is inconsistent with Florida's scheme of jury instructions and the Rules of Criminal Procedure. Linehan II, therefore, cannot be relied upon to require the giving of the second degree depraved mind murder charge in this case. To any degree the opinion can be relied upon for this assertion, it should be modified.

Neither is the petitioner entitled to the instruction when analyzing the facts of this case, for several reasons. First, it is unknown what the actual perpetrator would have been charged with. He may not have been entitled to a lesser on second degree murder charge either which would preclude petitioner's entitlement. The state further asserts that Glover would not have been entitled to the instruction because a depraved mind "defense" goes to the intent to commit murder. The intent to

commit murder is immaterial in the felony murder context.

The second reason the petitioner was not entitled to the instruction is that co-felons in a felony murder context are equally guilty of first degree murder, even if the death was an accident. They may not share defenses. Even if it would have been proper to allow Glover the depraved mind "defense", it would not have been permissible to allow petitioner to profit from the defense. Since the only intent at issue is petitioner's intent to commit the underlying felony, the co-felon's state of mind during the murder is immaterial.

Therefore, the judge did not err in refusing to give the instruction on second degree depraved mind murder.

## ARGUMENT

## ISSUE

WHETHER THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON SECOND DEGREE MURDER AS A LESSER INCLUDED OFFENSE OF FIRST DEGREE FELONY MURDER.

The petitioner argues that the lower court erred in failing to instruct the jury on second degree murder as a lesser included offense of first degree felony murder. His argument has two prongs: (1) second degree depraved mind murder is a necessarily included lesser offense of first degree murder; and (2) the facts support an instruction on second degree depraved mind murder. However, the law does not support either of these assertions.

This Court, in Linehan v. State, 476 So.2d 1262 (Fla. 1985) (Linehan II), said "We . . . find that second degree murder is a necessarily included offense of first degree . . . felony murder." Id. at 1265. However, when read in conjunction with the rest of the opinion, this statement does not appear to truly reflect the court's holding. To the degree the opinion can be relied upon to support this statement, it should be modified.

The Linehan II case does not actually support the proposition that second degree murder is a necessarily included lesser offense of first degree felony murder because the statement of the law is nonresponsive to the question asked and the opinion while purporting to affirm the lower court, is actually inconsistent with the lower court's opinion.

The opinion addressed a certified question which the court

answered in the affirmative.

> Whether a jury instruction on second degree (depraved mind) murder is necessary, if supported by the evidence, when defendant is charged with first degree (felony) murder. Linehan at 1263. (emphasis supplied).

The bald assertion that second degree murder is a necessarily included offense of first degree felony murder does not respond to the question.

This answer is rendered non-responsive to the question by our scheme of jury instruction. Florida jury instructions currently divide lesser included offenses into those necessarily included and those which may or may not be included. In the Matter of Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981). Necessarily included lesser offenses incorporate some lesser degree offenses, but not all. State v. Wimberly, 498 So.2d 929 (Fla. 1986). The rest of the lesser degree offenses and other offenses supported by the evidence are contained in category 2 offenses. Wimberly, supra. The major differences between these categories is whether the judge must instruct the jury on the offense regardless of the evidence or whether he has the discretion to omit the instruction where the evidence does not support the charge. Wimberly, supra. The opinion in Linehan II overlooks this difference.

The question asked in Linehan II was whether the judge had to give the instruction for second degree murder, if it was supported by the evidence. By answering "yes" because second

degree murder is a necessarily included lesser offense, and by deleting any references to the necessity for supporting evidence, an inconsistency has been created. This inconsistency allows the defense bar to urge the results not contemplated by the court.

The second indicia that Linehan II cannot support the proposition that second degree is a necessarily included lesser is the inconsistency created between Linehan I and Linehan II. The lower appellate court in Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983) Linehan I) clearly decided the second degree instruction was required in that case because the evidence supported the charge. Linehan had set his girlfriend's apartment on fire which resulted in the death of a tenant. The court found "under the evidence concerning the nature of the actions of the defendant . . ." Linehan I at 254 ". . . [s]econd degree depraved mind murder . . . could be supported by the evidence in this case." Linehan I at 255. The lower court did not find second degree a necessarly included offense as Linehan II does.

Additionally, it is notable that while both courts in the Linehan cases called for the correction of the jury instruction schedule of lesser included offenses. Linehan I at 255, Linehan II at 1265. The crime of second degree (depraved mind) murder was not included in the lists for either category 1 or 2 offenses of first degree felony murder. See Schedule of Lesser Included Offenses, Fla. Standard Jury Instructions in Criminal Cases. This Court specifically asked that the schedule be amended to include second-degree murder as a necessarily lesser included

offense of first-degree felony murder. Linehan II at 1265. The court further suggested Florida Rule of Criminal Procedure 3.490 and the schedule of lesser included offenses be reviewed in light of the decision and in light of Judge Grimes' concurring opinion in Linehan I. Linehan II at 255.

Judge Grimes, in his concurrence in Linehan I, was addressing problems with the schedule and Rule 3.490 in light of the fact that second degree depraved mind murder was included as neither category of lesser included offenses. He was not referring to the fact that the offense was not a necessarily included one.

Even more indicative of the fact that second degree murder is not a necessarily included lesser offense of first degree murder is the absence of any analysis in Linehan II of the definition and/or requirements for an offense to be listed as necessarily included.

The elements of felony murder are (1) the unlawful killing of (2) a human being by (3) a person engaged in the perpetration of, or attempt to perpetrate, (4) a specified felony. Mills v. State, 476 So.2d 172 (Fla. 1985). The elements of second degree murder are (1) the victim is dead, (2) the death was caused by the criminal act or agency of the defendant and (3) there was an unlawful killing by an act imminently dangerous to another and evincing a depraved mind regardless of human life. **Fla. Std. Jury Instr.** Such analysis would fail as all the elements of second degree depraved mind murder are not subsumed in the

elements of first degree felony murder. See, Linehan II, Justice Shaw dissenting.

Further evidence that second degree (depraved mind) murder is not a necessarily included lesser offense of first degree felony murder is contained in the latest change to the jury instructions as published in The Florida Bar Re: Standard Jury Inst., 508 So.2d 1221, 1229 (Fla. 1987). There are no category 1 necessarily lesser included offenses for first degree felony murder; second degree murder is listed as a category 2 offense.

Because of the foregoing, appellant cannot rely on the bald assertion out of Linehan II to support his argument that it was error for the lower court to omit the second degree murder instruction. To the extent that Linehan can be relied upon to reach a result contrary to that envisioned by the Court, the opinion should be modified.

Appellant's reliance on State v. Furr, 493 So.2d 432 (Fla. 1986) is misplaced. There, this Court correctly said that second degree depraved mind murder is a lesser included offense of first degree felony murder. The opinion does not state it is a necessarily included lesser. The opinion does, however, harken back to Linehan II. For the reasons above, Linehan cannot be relied upon for the proposition that the offense is a necessarily included one. Furr is therefore not controlling in this case. Also, Furr was a case where the circumstances of the case supported a second degree murder charge.

State v. Wimberly, 498 So.2d 429 (Fla. 1986) and State v.

Bruns, 429 So.2d 307 (Fla. 1983) likewise do not mandate reversal in this case. While it is true that a judge commits reversible error in failing to instruct on necessarily included lessers, second degree murder is not in this category. Hence, any error in failing to instruct the jury must lie in the fact that the evidence supported a conviction for second degree depraved mind murder; it does not.

In relying on the second prong of his argument petitioner makes several intriguing but untenable suppositions. Petitioner asserts that because the facts of the case entitle the shooter (Glover) to an instruction on second degree murder, he too was so entitled.

Appellant's first tenuous premise is that Glover would have been charged with first degree murder, and that he would have been entitled to a second degree instruction. These are mere speculations which cannot support reversal. We have no idea what Glover would have been charged with. Had it been manslaughter there would be no consideration of second degree murder. And, as established by the Second District Court of Appeals, the evidence in this case fell short of second degree depraved mind murder. Scurry v. State, 506 So.2d 4 (Fla. 2d DCA 1987). We cannot rely on the assertion that petitioner's co-felon was entitled to an instruction on the lesser crime.

Another major inconsistency arises in surmising Glover would have been entitled to a second degree instruction. The state would assert, even aside from the fact that the evidence in this

case would not support such instruction, that a second degree (depraved mind) instruction was not warranted even in Furr or Linehan. A depraved mind goes to intent to commit murder. Since intent, other than that necessary to commit the underlying felony, is immaterial in a felony murder, the existence of a depraved mind should not be a defense to the crime. Where the actual perpetrator is not entitled to the lesser charge, there is no question that the co-felon would not be entitled.

The next faulty premise is that, assuming a depraved mind can be a defense to felony murder, the felony murder rule allows the lessening of the criminal liability of co-felons or the sharing of defenses. Where multiple defendants commit an enumerated felony and someone dies as a result, all defendants are guilty of felony murder. Felony murder is a "strict liability" crime. Even where the death is coincidental or accidental the defendants are still liable for felony murder. See, Simpson v. Wainwright, 439 F.2d 948 (5th Cir. 1971); Jefferson v. State, 128 So.2d 132 (Fla. 1961).

> If the accused was present aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute [robbery], he is equally guilty, with the actual perpetrator of the underlying felony, of first degree murder. Goodwin v. State, 405 So.2d 170 (Fla. 1981) citing Enmund v. State, 399 So.2d 1362 (Fla. 1982). (emphasis supplied)

The critical fact is participation in the underlying felony, Goodwin, supra at 172. Under the felony murder rule, state of

mind is immaterial and even an accidental killing during the felony is murder. Adams v. State, 341 So.2d 765 (Fla. 1976). The mental condition of the actual perpetrator during the killing itself is therefore not imputable to the co-defendant.

Further, support for the proposition that the non-shooter is not entitled to a lesser charge is the United States Supreme Court's opinion in Tison v. Arizona, 481 U.S. ___, 109 S.Ct. ___, 95 L.Ed.2d 127 (1987). There, the court affirmed the death penalty for non-shooter defendants because they intended, contemplated or anticipated that a life would or might be taken during a felony murder. If the co-defendant who is not the actual perpetrator is subject to a death penalty for anticipating possible lethal force, it is unreasonable to think that the actual shooter's mental state can in any way lessen the co-defendant's liability in this case.

To find otherwise would require reliance on another defective assumption; that co-defendants are entitled to share defenses. Usually defenses are personal and cannot be applied to reduce any one else's liability. For instance, had Scurry been insane, Glover wouldn't have been entitled to that defense had he gone to trial. Had Glover been entitled to a duress or intoxication defense, petitioner could not have benefitted from them. As maintained above this depraved mind goes to the shooter's intent at the time of the murder. Such intent is immaterial to even the shooter's intent to commit the underlying felony; it cannot possibly be applicable to the non-shooter's

intent at the time of the robbery. So even if Glover had been entitled to a second degree (depraved mind) defense and instruction (which the state does not concede) Scurry would not have been so entitled.

Another faulty premise the petitioner indulges in is the thought that the circumstances of the actual murder can be taken in isolation. In his brief, petitioner outlines the circumstances of the shooting (i.e., the gun fired accidentally and killed the clerk as Glover was leaving the premises). Had murder been the only crime going on, the entitlement to a second degree instruction might have been valid. However, the co-felons were in the process of committing a robbery when the shooting occurred. By virtue of the felony murder rule, the circumstances of the offense cannot be considered in isolation.

In summary, the law does not support the assertion that second degree depraved mind murder is a necessarily included lesser offense of first degree felony murder. Therefore, the court did not err in failing to give that instruction to the jury. Neither is petitioner entitled to the instruction on the facts of this case. We do not know if even the shooter would have been entitled to a second degree murder instruction, we cannot assume he would have been. It is the state's argument that he would not have been since the depraved mind is a defense to the murder itself and in felony murder the only applicable defenses are those that go to the ability to form the intent to commit the underlying felony. That question is not, however,

before the court in this case. Besides that, the Second District Court of Appeal has already found the circumstances did not warrant the lesser instruction.

Assuming Glover would have been entitled to the instruction petitioner would not have been because the depraved mind defense is personal to the shooter and is not imputable to the non-shooter co-felon. The felony murder rule does not authorize shared defenses. Glover's mental state at the time of the murder cannot be material to the petitioner's intent to commit the robbery. Therefore, the trial court did not err in failing to give the second degree depraved mind murder instruction even on the facts of this case.

## CONCLUSION

Respondent respectfully requests this Honorable Court to affirm the Second District Court of Appeal's opinion in Scurry v. State, 506 So.2d 4 (Fla. 2d DCA 1987). Petitioner's request for reversal of his conviction and sentence and remand for new trial should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

*Lauren Hafner Sewell*

LAUREN HAFNER SEWELL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

## 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, Polk County Courthouse, P. O. Box 9000, Drawer PD, Bartow, Florida 33830, this 22nd day of October, 1987.

*Lauren Hafner Sewell*

OF COUNSEL FOR RESPONDENT