Original

IN THE SUPREME COURT OF FLORIDA

THOMAS HIGGINS,

Petitioner,

v. CASE NO. 75,110

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA
CERTIFIED QUESTION

AMENDED PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

THOMAS HIGGINS,

Petitioner,

v. : CASE NO. 759110

STATE OF FLORIDA,

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AMENDED PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner, Thomas Higgins was the defendant in the trial court and the appellant in the First District Court of Appeal, and will be referred to as petitioner in this brief. A two volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. The appendix will be referred to as "A" followed by the appropriate page number.

II STATEMENT OF THE CASE AND FACTS

By information filed March 7, 1988, the petitioner was charged with first degree arson:, specifically, causing damage by fire or explosion to "a structure or contents thereof" (R 1). F.S., section 806.(1)(b). The cause proceeded to a jury trial on August 22 and 26, 1988.

At trial the evidence showed the petitioner was incarcerated in Union Correctional Institution (R 131). On January 20, 1988, a fire started in his one-man confinement cell (R 108, 109, 113). A mattress inside the cell caught fire (R 108, 113). The petitioner was removed from the cell by correctional officers and stated he had started the fire and would do it again, in order to obtain a transfer (R 108, 114, 115, 119). The petitioner also made a statement that he "would burn up the judge", although there was no judge present (R 117). Additionally, the petitioner stated that the fire had started accidentally when he dropped a cigarette (R 120).

The petitioner testified that he was on medication, thorazine, at the time of the fire (R 131-132). He stated he could not recall where he had obtained the cigarette (R 134). He was smoking the cigarette when he fell asleep. He wa5 awakened by the mattress burning him (R 143-135).

The petitioner was removed from the cell and taken to the psychiatric ward (R 136). The petitioner denied wanting a transfer (R 138) and denied telling the correctional officers that he would burn another mattress if he was not transferred

(R 139). The petitioner testified he could not clearly recall the events surrounding the fire (R *132,* 140).

At the conclusion of the evidence, the petitioner requested a jury instruction on the necessarily lesser included (category one) offenses of second degree arson and criminal mischief, and the permissive lesser included (category two) offense of attempted arson (R *127, 66*). The court instructed the jury only on the lesser included offenses of attempted arson and criminal mischief (R *144-145).* The petitioner objected to the lack of an instruction on second degree arson (R 152).

At the conclusion of the trial the petitioner was found guilty as charged (R *74).* On August *26, 1988,* the petitioner was adjudicated guilty and sentenced to eight years in state prison (R *70-73).* The petitioner appealed to the First District Court of Appeal, alleging that the trial court committed reversible error in denying the instruction on second degree arson (R 85).

The District Court initially issued a Per Curiam Affirmed decision (A 1). The Petitioner filed a motion for rehearing and certification, which was granted (A *2-4).* The District Court's opinion on rehearing held that second degree arson is not a lesser included offense of first degree arson, but recognizing that the schedule of lesser included offenses lists second degree arson as a necessarily lesser included offense, the District Court certified the following question (A *4-5):*

IS SECTION 806.01(2), FLA. STAT., SECOND DEGREE ARSON, A NECESSARILY LESSER INCLUDED OFFENSE OF SECTION 806.01(1), FLA. STAT., FIRST DEGREE ARSON?

The petitioner filed a notice to invoke the discretionary jurisdiction of this Court, pursuant to F. R. App. P. 9.030(a)(2)(v). This appeal follows.

III SUMMARY OF ARGUMENT

The trial court refused the petitioner's request to instruct the jury on the necessarily lesser included offense of second degree arson. The petitioner appealed this issue to the First District Court of Appeal, which affirmed the judgement and sentence, holding that second degree arson is not a lesser included offense of first degree arson. Recognizing the conflict between the schedule of lesser included offenses and it's decision, the District Court certified a question of great public importance to this Court.

The District Court's decision was error. The schedule of lesser included offenses is correct. All the constituent elements of the lesser offense are included within the greater offense. Second degree arson is defined as damage, by fire or explosion, to a structure. First degree arson is defined as damage, by fire or explosion, to dwellings or normally occupied structures or their contents. Thus, first degree arson contains all the elements of second degree arson, plus the additional elements of the structure being a dwelling or normally occupied structure and the damage being to structure or contents.

Thus, the trial court was without discretion to not instruct the jury on the necessarily lesser included offense of second degree arson. Since second degree arson is one step removed from the offense for which the petitioner was convicted, this was reversible error.

Even if this Court now decides that the schedule of lesser included offenses is not correct, this change in the law should not be retroactively applied to the appellant. The Due Process Clause prohibits the judiciary from applying changes in the law in an "ex post facto" manner. Here, changing the schedule would require redefining the constituent elements of the two offenses from the way they were defined at the time of the creation of the schedule of lesser included offenses and the petitioner's trial. Doing so would deprive the petitioner of his right to have the jury consider exercising its "pardon power".

IV ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT SECOND DEGREE ARSON IS NOT A NECESSARILY LESSER INCLUDED OFFENSE OF FIRST DEGREE ARSON.

In its decision below, the District Court of Appeal determined that second degree arson is not a lesser included offense of first degree arson and thus the trial court was correct in refusing the petitioner's request for a jury instruction on second degree arson. Recognizing the conflict between its decision and the schedule of lesser included offenses as approved by this Court, the District Court certified the following question:

> IS SECTION 806.01(2), FLA. STAT., SECOND DEGREE ARSON, A NECESSARILY LESSER INCLUDED OFFENSE OF SECTION 806.01(1), FLA. STAT.,?

The answer to this question, as reflected in the schedule of lesser included offenses, is yes. A necessarily lesser included offense is one whose constituent elements are included within the elements of the greater offense. Benjamin v. State, 462 So.2d 110 (Fla. 5th DCA 1985); Bell v. State, 437 So.2d 1057 (Fla. 1984). Here, the constituent elements of second degree arson are included within first degree arson.

Second degree arson is defined in section 806.01(2) as:

> Any person who willfully and unlawfully, by fire or explosion, damages or causes to be damaged any structure, whether the property of himself or another:, under any circumstances not referred to in subsection (1).

First degree arson is defined as:

> (1) Any person who willfully and unlawfully, by fire or explosion, damages or causes to be damaged:
> (a) Any dwelling, whether occupied or not, or it contents;
> (b) Any structure, or contents thereof, where persons are normally present, such as: Jails, prisons, or detention centers; hospitals, nursing homes, or other health care facilities; department stores, office buildings, business establishments, churches, or educational institutions during normal hours of occupancy; or other similar structure; or
> (c) Any other structure that he knew or had reasonable grounds to believe was occupied by a human being ...

The constituent elements of second degree arson are damage to a structure by fire or explosion. All of these elements are contained within first degree arson. Subsection (c) explicitly includes the elements of second degree arson (damage to a structure by fire or explosion), plus the additional element of knowledge on the part of the defendant, or reasonable grounds to believe, that the structure was occupied. Subsections (a) and (b) also include the elements of second degree arson (damage to a structure by fire or explosion), plus the additional element of the structure being a dwelling or other structure which is normally occupied.

The District Court's opinion states that, "Cplroof of damage to any structure described in first degree arson would prevent the proof of second degree arson because second degree arson covers damage only to structures not described in first degree arson.'' (A 4-5). This reasoning is incorrect because the fact that the structure was not a jail, prison, hospital,

church, et cetera is not an element that the state must prove to establish second degree arson.

The standard jury instruction for second degree arson requires only proof that the damage was to a structure, defined as "any building of any kind", "any enclosed area with a roof over it", any real property, portable building, vehicle, vessel, watercraft or aircraft. Stand. Jury Instr. (Crim.). The jury instructions and the statutory definition of "structure"[1], show that second degree arson includes damage by fire or explosion to all types of structures. The crime is enhanced to first degree arson when the structure is one which is normally occupied or a dwelling. The introduction to Laws of Florida, Chapter 79-108 (1979), which substantially redefined the arson statute, states;

> An act relating to arson;...delineating degrees of arson; applying the most severe penalty to persons who cause the damage or damage dwellings or structures reasonably known to be occupied; applying the most severe penalty for the damage, by fire or explosion, to certain property within certain institutions;...

An accused can not defend a charge of second degree arson by proving that he had actually committed first degree arson because the building was a school, hospital, et cetera. As

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[1] F.S., section 806.01(3) reads: "As used in this chapter, "structure" means any building of any kind, any enclosed area with a roof over it. any real praperty and appurtenances thereto, any tent or other portable building, and any vehicle, vessel, watercraft. or aircraft.

long as the proof shows damage by fire or explosion to a structure, the state has proven second degree arson. The state would not be required to prove the building was not one of those listed in first degree arson. Similarly, a defendant could not defend a charge of lewd, lascivious or indecent assault upon a child, F.S., section 800.04, which specifically excludes the crime of sexual battery', by claiming that the assault actually constituted a sexual battery; or that the amount of cannabis he possessed was in excess of 20 grams and thus he was not guilty of simple possession of cannabis, which is defined as possession of not more than 20 grams[3].

The opinion from the District Court also states that second degree arson is not a necessarily lesser included offense of first degree arson because "first degree arson can be proved by damage to specified structures or their contents, but ...second degree arson requires proof of damage to a structure only." (A 5) (emphasis original). This reasoning is

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[2]F.S., section 800.04:

Any person who:

(1) Handles, fondles or makes an assault upon any child under the age of 16 years in a lewd, lascivious, or indecent manner;

(2) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years;

(3) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years

without committing the crime of sexual battery is guilty of a felony of the second degree...

[3]F.S., section 893.13(1)(g).

structure only." (A 5) (emphasis original). This reasoning is also faulty. The fact that first degree arson includes more elements than second degree arson does not prevent second degree arson from being a necessarily lesser included offense of first degree arson. The question is whether the elements of the lesser offense are included within the elements of the greater offense, not the reverse. First degree arson includes damage to the structure or contents. Thus. the element of the lesser offense (structural damage) is included in the elements of the greater offense (structural or content damage).

This Court has also applied a Blockburger analysis to determine lesser included offenses. Borges v. State, 415 So.2d 1265 (Fla. 1982); Higdon v. State, 490 So.2d 1252 (Fla. 1986) (approving Judge Dauksch, below, citing to Blockburger). Even under this analysis, second degree arson is a necessarily lesser included offense of first degree arson. Blockburger v. United States, 284 U.S. 277 (1932) states that offenses are separate if each offense requires proof of an element the other does not. As stated above, first degree arson contains all the elements of second degree arson, plus two additional elements. The structure must be a dwelling or normally occupied and the damage may be to either the structure or its contents.

However, the reverse is not true. Second degree arson (damage by fire or explosion to a structure) does not contain an element not found in first degree arson. First degree arson includes structures (all occupied structures are structures, although not all structures are occupied structures).

Additionally, the damage in first degree arson includes damage to the structure.

This Court has also defined a necessarily lesser included offense as one which "is always included in the major offense". State v. Wimberly, 498 So.2d 929, 932 (Fla. 1986). In its opinion below, the First District Court of Appeal stated this definition as, "[i]f the greater offense is proved the lesser offense is also necessarily proved." (A 4). The District Court found that second degree arson failed this test because it is possible to prove first degree arson without proving second degree arson, as where the damage is only to contents.

However, this test should be applied by looking to the statutory elements of the offenses, not the proof at trial. First degree arson provides alternative ways of violating the statute, by damage to either the structure or its contents. It is immaterial that first degree arson can be committed without structural damage. As long as damage by fire or explosion to a structure (that is, second degree arson) is one of the statutory ingredients of first degree arson, second degree arson is a necessarily lesser offense, even if structural damage is only one of alternative ways of committing first degree arson.

This principle is demonstrated in Whalen v. United States. 445 U.S. 684 (1980). The Court held that a person could not be punished for rape when also sentenced for felony murder with rape as the underlying felony. The state argued that because felony murder can be committed by a killing during the

perpetration of six listed felonies, only one of which is rape, both felony murder and rape contained elements the other did not. That is, felony murder could be committed without committing rape, and rape could be committed without committing felony murder. The Court rejected this argument. Whalen stands for the principle that if an offense can be committed in different ways, and one of those ways depend upon committing a necessarily included lesser offense, the Blockburger statutory elements test does not require the imposition of separate punishments for the lesser offense merely because there are other ways to commit the crime. This likely was the rationale in deciding that second degree arson was a necessarily lesser included offense of first degree arson.

If this Court decides that second degree arson is not a necessarily lesser included offense of first degree arson, this change in the law should not be retroactively applied to the petitioner. At the time of trial, the schedule of lesser included offenses listed second degree arson as a category one lesser included offense of first degree arson. This schedule is presumptively correct. Ray v. State, 403 So.2d 956 (Fla. 1981).

The trial court denied the petitioner's request for the jury instruction on second degree arson, stating:

> Arson of the second degree involves only damage to a structure. And there's no proof of damage to a structure here. Second degree arson is structural damage to an unoccupied structure. There isn't any proof about any structural damage here (R 127).

The trial court mistakenly focused on the proof at trial in determining whether to give the jury instruction. The question thus becomes, whether a trial court has discretion to refuse an instruction on an offense listed as a category one, necessarily lesser included offense, based on the evidence produced at trial? This Court should answer this question in the negative.

The trial court was without discretion to refuse the instruction. As this Court stated in Wimberly, supra, a trial judge has no discretion in determining whether to instruct the jury on a necessarily lesser included offense. This requirement is based on a recognition of the jury's right to exercise its "pardon power". A trial judge is required to give an instruction on a necessarily lesser included offense, regardless of the degree of proof supporting the conviction for the greater offense. Id.; Braxson v. State, 510 So.2d 1255 (Fla. 1st DCA 1987) (trial court required to instruct on simple battery where charge is sexual battery with the threat or use of a deadly weapon, regardless of whether there existed any evidence supporting the offense); Curry v. State. 510 So.2d 317 (Fla. 4th DCA 1987) (trial court's refusal to instruct on the necessarily lesser included offense of theft in robbery trial was error, even though trial court found that there was a total lack of evidence as to the necessarily lesser included offense); Brown v. State, 206 So.2d 377 (Fla. 1968). Thus, at the time of trial, the law required the instruction on second degree arson.

The trial judge in the instant case made the same mistake as the trial judges in Wimberly, Broxson and Curry, in that he looked to the proof at trial to determine whether to give the instruction on the necessarily lesser included offense. Although it is uncontroverted that this offense occurred in a prison and that the damage was to contents alone, the trial judge was without discretion to not instruct on the necessarily lesser included offense of second degree arson.

The trial court does not have the power to eliminate certain offenses from the schedule of lesser included offenses on a case-by-case basis. As this Court stated in Wimberly, a change in the rules concerning lesser included offenses should be accomplished by rule change, not by an interpretation of this Court. Id., at *932.*

If the schedule is to be changed, it should not be done retroactively, as it would adversely affect the petitioner. In Marks v. United States. 430 U.S. 188 (1977), the United States Supreme Court recognized the illegality of court actions amounting to "ex post facto" applications of the law:

> The Ex Post Facto Clause is a limitation upon the powers of the legislature, and does not of its own force apply to the Judicial Branch of government. But the principle on which the Clause is based- the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties- is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment (citations omitted).

Id., 430 U.S. at 191. See also. Bouie v. Columbia, 378 U.S. *347 (1964).*

Thus, neither the District Court nor this Court, can now say the petitioner is not entitled to the instruction on second degree arson because it is not a necessarily lesser included offense of the charged offense. Reaching such a conclusion would involve defining the constituent elements of first and second degree arson differently than they were defined at the time of the creation of the schedule of lesser included offenses and the time this **offense** was committed. This would be a substantive change in the law, which would adversely affect the petitioner. Such a change would deprive the petitioner of his right to have the jury decide whether to exercise its "pardon power" by convicting him of the necessarily lesser included offense.

Finally, remanding this case for a new trial would not constitute a "useless act", as it did in State v. Strasser, *445* So.2d *322* (Fla. *1984).* There, the schedule of lesser included offenses was amended between the time of the defendant's trial and the decision on appeal. This court recognized that the trial court's refusal to give an instruction was error at the time of trial, but would not be error under the new schedule. Since the new schedule would be used at any retrial of the case, remand was a "useless act" and it was impossible for the Court to grant effectual relief. However, in the instant case the schedule has not been changed. It cannot be said that remand would be useless since the schedule may not be changed

by the time of retrial. It is not unlikely that the petitioner can receive a new trial before the time the procedures are completed to effect a change in the rules.

In conclusion, it is the petitioner's position that the trial court committed per se reversible error by refusing to instruct the jury on second degree arson, an offense one step removed from the offense for which the petitioner was convicted. State v. Abreau, 363 So.2d 1063 (Fla. 1978). The District Court wrongly concluded that second degree arson is not a necessarily lesser included offense of first degree arson. Rather, the schedule of lesser included offenses is correct in listing second degree arson a5 a necessarily lesser included offense of first degree arson because all the constituent elements of the lesser offense are included within the greater offense. However, if this Court decides that the schedule is incorrect, any change in the law should not be applied retroactively to this petitioner as it would be a violation of the Due Process Clause of the Constitutions of the United States and Florida.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse the decision of the First District Court of Appeal, vacate the judgement and sentence, and remand for a new trial.

Respectfully submitted,

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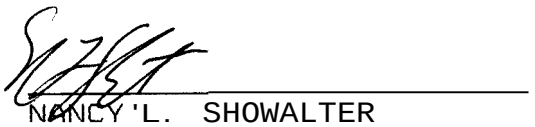
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioner has been furnished by hand delivery to Edward C. Hill, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner Thomas Higgins, #596130, Union Correctional Institution, Post Office Box 221, Raiford, Florida, 32083, this 8th day of January, 1990.



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