IN THE SUPREME COURT OF FLORIDA

THOMAS HIGGINS,

Petitioner,

v.

CASE NO. 75,110

STATE OF FLORIDA,

Respondent.

FILED
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FEB 20 1990
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ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA
CERTIFIED QUESTION

REPLY BRIEF OF PETITIONER

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I PRELIMINARY STATEMENT

This brief is filed in reply to the answer brief of the respondent, State of Florida, which will be referred to as "AB" followed by the appropriate page number in parentheses.

II ARGUMENT

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

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.

The constituent elements of first degree arson are:

(1) damage by fire or explosion
(2) to a structure
(a) that is a dwelling - 806.01(1)(a)
or (b) that is normally occupied - 806.01(1)(b)
or (c) that is known to be occupied - 806.01(1)(c)

The constituent elements of second degree arson are:

(1) damage by fire or explosion
(2) to a structure

The schedule of lesser included offenses correctly lists second degree arson as a necessarily lesser included offense of first degree arson because all the constituent elements of the lesser offense are included within the greater offense. The fact that the greater offense contains additional elements is irrelevant to this determination.

In its answer brief the respondent argues that the trial court had "judicial discretion in determining what is a lesser offense" (AB **4, 9).** Contrarily, State v. Wimberly, **498** So.2d **929, 932** (Fla. **1986)** held:

> The trial judge has no discretion whether to instruct the jury on a necessarily lesser included offense. Once the judge determines that the offense is a necessarily lesser included offense, an instruction must be given.

The determination that an offense is a necessarily lesser included offense should be made by looking to the schedule of lesser included offenses approved by this Court and the statutory elements of the respective offenses. The trial court does not have the "discretion" to do as it did in this case, and look to the proof at trial in determining whether to give an instruction on a necessarily lesser included offense. The trial court refused the instruction because there was no proof at trial of damage to the structure (R 127). However, the proof at trial is irrelevant. Wimberly specifically rejects the argument that a trial judge need not instruct the jury on necessarily lesser included offenses for which the judge determines there is no supporting evidence. Id., at 930.

The respondent also argues that instructing the jury on the necessarily lesser included offense would be "the ultimate sandbag and a perversion of our jury system", because, if a verdict was returned on second degree arson, the petitioner would prevail on a post-trial motion for judgement of acquittal due to the failure of proof of an essential element, damage to a structure (AB *8).*

This emotional plea is without foundation. First, this ignores the fact that first degree arson can be proven by damage to the structure or contents. Here the information

charged the petitioner with damage to the "structure or contents" (R 1). Moreover, this Court held in Ray v. State, 403 So.2d 956, 961 (Fla. 1981) that it is not fundamental error to convict a defendant under an erroneous lesser included offense instruction if defense counsel requested the improper instruction. See, Cherry v. State, 389 So.2d 1201 (Fla. 1st DCA 1980) rev. denied, 410 So.2d 1337 (1980) (defendant estopped from arguing error where he failed to make objection to instruction on lesser offense not charged or proven by the evidence); Schaffer v. Pulido, 492 So.2d 1157 (Fla. 3rd DCA 1986) (party who submitted jury instruction invited error and could not complain in motion for new trial or appeal).

In the initial brief, the petitioner asserts that even if this Court decides that second degree arson is not a necessarily lesser included offense, this decision should not apply retroactively to the petitioner, as it would amount to an ex post facto application of the law. The respondent attempts to refute the petitioner's ex post facto argument by stating that the "law defining lesser included offenses has not changed" (AB 10). This misses the point. What is being redefined is not the definition of necessarily lesser included offenses, but rather, the definitions of first and second degree arson.

It is the statutory elements of an offense which determine if it is listed as a category one lesser offense. Moving second degree arson from category one to category two of the schedule requires defining the elements of first and second

degree arson differently than they were defined at the time second degree arson was placed in category one. This is a substantive change in the law, adversely affecting the petitioner. Application to this petitioner of any change in the schedule of lesser included offenses is a violation of the Due Process Clause of the Constitutions of the United States and Florida. Such a change deprives the petitioner of his right to have the jury consider whether to exercise its "pardon power" by convicting him of the necessarily lesser included offense.

This Court should remand this case for a new trial.

III 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 Reply 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 20th day of February, **1990.**

NANCY L. SHOWALTER