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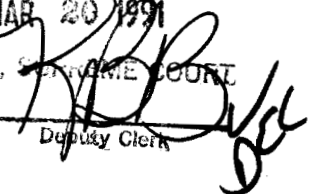
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**IN THE SUPREME COURT OF FLORIDA**

MAR 20 1991

CLERK, SUPREME COURT

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GUADALUPE GONZALEZ,  
Petitioner,  
vs.  
STATE OF FLORIDA,  
Respondent.

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Case No. 77,078

**PETITIONER'S BRIEF ON THE MERITS**

RICHARD L. JORANDBY  
Public Defender  
15th Judicial Circuit of Florida  
Governmental Center/9th Floor  
301 North Olive Avenue  
West Palm Beach, Florida 33401  
(407) 355-2150

ELLEN MORRIS  
Assistant Public Defender  
  
Counsel for Petitioner

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**PRELIMINARY STATEMENT**

Petitioner was the defendant in the trial court and appellant in the Fourth District Court of Appeal. Respondent was the prosecution in the trial court and the appellee in the District Court of Appeal.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

SR = Supplemental Record

STATEMENT OF THE CASE AND FACTS

Petitioner Guadalupe Gonzalez was informed against for one count of second degree murder with a firearm [Count I of the Information] and three counts of attempted second degree murder with a firearm [Counts II, III, and IV of the Information] (R 574-575). Following trial by jury, Petitioner was convicted of the lesser-included offense of third degree murder with a firearm [Count I of the Information] and with three counts of aggravated battery with a firearm [Counts II, III, and IV of the Information] (R 555-557, 599-601). Petitioner was accordingly adjudged guilty of these offenses (R 653-654).

At the sentencing hearing held September 6, 1988, Petitioner unsuccessfully disputed the enhancement of the primary offense at conviction from a second degree felony to a first degree felony (R 562-572). This finding increased Petitioner's guidelines score from a range of seven to twelve years to a range of twelve to seventeen years (R 562-566, 570-571, 651-652). The trial judge sentenced Petitioner to four concurrent fifteen year sentences with a mandatory three year minimum for the use of a firearm as to all four sentences (R 570-572, 655-659).

On appeal to the Fourth District Court of Appeal, Petitioner challenged the propriety of the enhancement of his conviction for third degree murder, a second degree felony, to a first degree felony based upon his use of a weapon. Since the use of the weapon was an essential element of the underlying felony of discharge of a destructive device, Petitioner maintained that it cannot be the basis for enhancement. The Fourth District Court of Appeal

affirmed the sentence but acknowledged conflict with Franklin v. State, 541 So.2d 1227 (Fla. 2d DCA 1989). Judge Anstead dissented as to the sentencing issue. On February 28, 1991, this Court accepted jurisdiction to review the conflict thus created with the decision of another district court of appeal. Art. V, § 3(b)(3), Fla. Const. (1986). This brief on the merits follows.

## SUMMARY OF ARGUMENT

### I.

Reclassification of Petitioner's third degree murder conviction from a second degree to a first degree felony was improper. Because the third degree murder was predicated upon the underlying charge of unlawful discharge of a destructive device, to wit: a firearm, the firearm was an essential element of the underlying felony and could not then enhance the conviction. E.g. Sections 790.001(4), (6), (13), Florida Statutes; Section 775.087(1), Florida Statutes. The charging document, proof, jury instructions and specific verdict form particular to the facts of this case establish that the firearm was an essential element. Moreover, a substantial body of cases, including this Court's recent decision in Lareau v. State, 16 F.L.W. S71 (Fla. Opinion filed January 10, 1991) and Franklin v. State, 541 So.2d 1227 (Fla. 2d DCA 1989) with which the Fourth District acknowledged conflict, mandate vacation of Petitioner's sentence for third degree murder.



## ARGUMENT

### POINT I

PETITIONER'S SENTENCE MUST BE REVERSED WHERE THE TRIAL COURT IMPROPERLY RECLASSIFIED HIS THIRD DEGREE MURDER CONVICTION FROM A SECOND-DEGREE FELONY TO A FIRST DEGREE FELONY.

In Count I of the Information, Petitioner was charged with second degree murder "...by shooting said Vincente Jimenez with a firearm..." (R 574). The jury was instructed on the lesser included offense of third degree murder. The underlying felony was "unlawfully discharging a destructive device." (R 534). The only "destructive device" that was alleged or proven was a firearm. The jury made the specific finding that Petitioner had used a firearm in the commission of the offense (R 574, 599).

Third degree murder, the primary offense at conviction, is a second-degree felony. Section 782.04(4), Florida Statutes (1987). Yet Petitioner's guideline score was based on a conviction for a first degree felony, which placed Petitioner in the next higher cell of twelve to seventeen years imprisonment, rather than the correct guidelines cell of seven to twelve years imprisonment (R 562-567, 571, 651-653, 655). This erroneous reclassification of the conviction from a second degree felony to a first degree felony was the result of the utilization of Section 775.087(1), Florida Statutes.

Section 775.087(1) provides:

Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or a firearm is an essential element, and during the commission of such felony the defendant commits an aggravated battery, the felony for

which the person is charged shall be reclassified as follows:

\* \* \*

(b) In the case of a felony of the second degree, to a felony of the first degree.

(emphasis added).

Section 790.001(6), Florida Statutes, defines "firearm" to include "...any destructive device."<sup>1</sup> Section 790.001(13) defines weapon to include "...any other deadly weapon except a firearm..."<sup>2</sup> Section 790.001(4) defines "destructive device" as follows:

(4) "Destructive device" means any explosive, incendiary, or poison gas bomb, grenade, mine, rocket, missile, or similar device and includes any type of weapon which will, is designed to, or may readily be converted to expel a projectile by the action of any explosive and has a barrel with a bore of one-half inch or more in diameter and ammunition for such destructive devices, but not

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<sup>1</sup> Section 790.001(6), Florida Statutes, provides:

(6) "Firearm" means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a riot; the inciting or encouraging of a riot; or the commission of a murder, an armed robbery, an aggravated assault, an aggravated battery, an aircraft piracy, a kidnapping, or a sexual battery.

<sup>2</sup> Section 790.001(13), Florida Statutes, provides:

(13) "Weapon" means any dirk, metallic knuckles, slingshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife.

including shotgun shells or any other ammunition designed for use in a firearm other than a destructive device. "Destructive device" does not include:

(a) A device which is not designed, redesigned, used, or intended for use as a weapon;

(b) Any device, although originally designed as a weapon, which is redesigned so that it may be used solely as a signaling, line-throwing, safety, or similar device;

(c) Any shotgun other than a short barreled shotgun; or

(d) Any nonautomatic rifle (other than a short-barreled rifle) generally recognized or particularly suitable for use for the hunting of big game.

(emphasis added).

Notably, Section 790.001(4) includes the statutory definition of "firearm". In the present case, the jury specifically found that the destructive device discharged was a firearm (R 599). Because the firearm was an essential element upon which Petitioner's third degree murder conviction was based, reclassification under Section 775.087(1)(b) was improper.

Nevertheless, the Fourth District Court of Appeal declined to reverse the trial court's enhancement of Petitioner's sentence, stating "...the mere fact that a firearm is used in the commission of a crime does not necessarily make it an essential element of that crime." Gonzalez v. State, 569 So.2d 782, 784 (Fla. 4th DCA 1990). The Fourth District acknowledged conflict with the Second District in Franklin v. State, 541 So.2d 1227 (Fla. 2d DCA 1989).

Franklin v. State, like the present case, involves a third degree murder conviction. The underlying felony in Franklin was

aggravated battery by use of a deadly weapon. The Franklin court held:

"First, under Miller v. State, 460 So.2d 373 (Fla. 1984) appellant's second degree murder charge, for purposes of reclassification, included all lesser offenses. Thus he was effectively charged with third degree murder. Second, although all third degree murder charges do not necessarily involve the use of a weapon (section 782.04(4), Florida Statutes (1987)), the information here specifically charged appellant with the use of a weapon. Third, the third degree murder jury instruction specifically required that in order to find appellant guilty of third degree murder, the jury would have to find that appellant had used a deadly weapon in the course of a battery. Finally, the jury was asked to and did make a specific finding that appellant used a weapon during the commission of the offense."

Franklin v. State, supra, 541 So.2d 1227 at 1228-1229.

The Franklin decision was more recently reviewed and reaffirmed by the Second District in State v. Trejo, 555 So.2d 1321 (Fla. 2d DCA 1990):

"[I]n order to have returned that particular verdict it was essential for the jury to have accepted that a weapon was employed; they were instructed accordingly and they made a specific finding that Franklin had used a weapon. Because under these narrow circumstances, the weapon was an essential element of the offense, application of the reclassification statute was error.

Trejo v. State, supra, 555 So.2d at 1321-1322 (fn. omitted). In a footnote, the Trejo opinion notes further that in Franklin the information alleged that a weapon had been used and the jury instruction also mentioned the weapon element. Id., 555 So.2d at 1322, fn. 1.

In finding Petitioner guilty of third degree murder, the jury would have to find that Petitioner, like Franklin, had used a

firearm in the course of the underlying felony. Further, the jury here, as in Franklin, made a specific finding that Petitioner used a weapon during the commission of the offense. Consequently, these facts demonstrate that the firearm was an essential element of the crime for which Petitioner was convicted, just as the firearm was an essential element of the crime for which Franklin was convicted.

Petitioner maintains that the Fourth District wrongly decided his case and that the Second District's decision in Franklin should prevail. The Gonzalez majority seems to suggest, without saying so directly, that the use of the firearm did not make it an essential element of the underlying felony upon which Petitioner's third degree murder conviction was based. This cannot be supported by the particular facts of this case nor can it be supported by numerous case decisions.

First, Petitioner will analyze decisions involving convictions for third degree murder. These decisions are most pertinent because they are factually and analytically akin to Petitioner's case. Next, Petitioner will discuss decisions involving convictions for offenses other than third degree murder. These cases are analogous to Petitioner's case and further demonstrate the impropriety of the reclassification in Petitioner's case. The case law discussed herein encompasses every case cited by the majority and the dissent in Gonzalez and will demonstrate the weight of decisional authority mandates vacation of the reclassification of Petitioner's conviction for third degree murder.

Turning first to decisions involving third degree murder, the Fifth District in Pinkerton v. State, 534 So.2d 425 (Fla. 5th DCA

1988) concluded that reclassification of third degree murder predicated upon aggravated battery from a second degree to a first degree felony was improper. Since the aggravated charged as an proved involved a deadly weapon and the jury made a specific finding to this effect, the deadly weapon was an essential element of the underlying felony (aggravated battery). Section 784.045(1)(b), Fla. Stat. (1987). Likewise, in Webb v. State, 410 So.2d 944 (Fla. 1st DCA 1982), the First District concluded that the third degree felony conviction predicated upon either aggravated assault (by use of a firearm) or aggravated battery (by use of a firearm) prohibited reclassification.<sup>3</sup>

The Gonzalez majority included only one third degree murder case in its string citation, Pedrerera v. State, 401 So.2d 823 (Fla. 3d DCA 1981). The Third District in turn affirmed the case with a lengthy string citation of authority. On rehearing by the appellant, Pedrerera refers to enhancement of sentences for

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<sup>3</sup> Vause v. State, 424 So.2d 52 (Fla. 1st DCA 1983) approved in part but quashed on other grounds, Vause v. State, 476 So.2d 141 (Fla. 1985) was cited by the dissent in Gonzalez. Vause is instructive, first, because it also involves a third degree murder conviction. There, the underlying felony was a shooting into an occupied vehicle. Second, Vause, involves the application of Section 775.087(2). Subsection (2) provides for the three year mandatory minimum sentence. The District Court decision in Vause recognizes that the two subsections of Section 775.087 serve two different purposes and are independent of each other. Case authority does not always distinguish between these subsections. As a result, inconsistent decisions may result. In fact, the First District used the Vause case to correct an intradistrict conflict and to recede from Skipper v. State, 400 So.2d 797 (Fla. 1st DCA 1981). Parenthetically, the Vause court affirmed the imposition of the three-year mandatory minimum because, as in the instant case, the defendant had in his possession a firearm. It bears mention that Petitioner received the three year mandatory minimum and makes no challenge to the use of subsection (2) of the reclassification statute.

aggravated battery and third degree murder. The court set aside the enhancement of the aggravated battery based upon "...the facts of the instant case." Id., 401 So.2d at 824. The Court upheld enhancement on third degree murder stating "...the mere fact that a firearm was used in commission of the crime does not make it a necessary element as in the case of aggravated assault, which is statutorily defined to be committed by use of a deadly weapon." Id. Because the factual underpinnings are not provided, the Pedrer decision is problematic. However, Petitioner submits that the facts of his case establish that the firearm was just as essential an element to his third degree murder conviction as the firearm was to Pedrer's aggravated battery conviction.

To summarize, the decisions pertaining to third degree murder involve factual scenarios closest to that in Gonzalez. The cases from the First, Second, and Fifth Districts consistently demonstrate that where use of a weapon is an essential element of the underlying felony in third degree murder cases, the sentence cannot be reclassified under 775.087(1). Pertinent to this determination is (1) how the offense is charged in the information and proven, e.g., Webb, Pinkerton, Franklin, Trejo citing Franklin, Webb; and (2) how the jury is instructed and whether the jury makes a factual finding that the defendant used a weapon, e.g. Franklin; Webb; see State v. Overfelt, 457 So.2d 1385 (Fla. 1984) and Douglas v. State, 523 So.2d 704 (Fla. 2d DCA 1988). Each of these determinants exist in Petitioner's case and compel vacating the reclassification of his third degree murder conviction.

Before turning to District Court decisions in cases involving reclassification of offenses other than third degree murder this

Court's recent decision in Lareau v. State must be considered. Lareau v. State, 16 F.L.W. S71 (Fla. Opinion filed January 10, 1991). Lareau pleaded guilty to aggravated battery by causing great bodily harm. Section 794.045(1)(a), Florida Statutes (1985). The plea included the three year minimum mandatory sentence for use of a firearm. Section 775.087(2). This Court upheld the Fourth District Court of Appeal decision which permitted reclassification of the aggravated battery from a second degree felony to a first degree felony pursuant to Section 775.087(1)(b). Lareau reasons that because the use of the firearm was incidental to the aggravated battery conviction predicated upon great bodily harm. At the same time, Lareau recognized that:

"...aggravated battery with the use of a deadly weapon, section 784.045(1)(b) is not subject to reclassification pursuant to section 775.087(1) because the use of a weapon is an essential element of the crime..."

Lareau, supra, 16 F.L.W. at 71 (emphasis added). Critical to the Lareau reclassification was how the aggravated battery was charged and pled. Because the aggravated battery was predicated upon great bodily harm and because Lareau pled to use of a firearm both the three year mandatory minimum sentence and the degree reclassification under the enhancement statute applied to him. Considering the principles this Court posits in Lareau the importance in Petitioner's case of the charging document, jury instructions, and proof and findings of fact in his case are underscored. Lareau demonstrates the error of Petitioner's reclassification under the record in his case. The District Court decision in Lareau was not mentioned or acknowledged by the



Gonzalez majority.<sup>4</sup> However, Judge Anstead, discussing Lareau v. State, 554 So.2d 638 (Fla. 4th DCA 1989) states:

"...this court noted that a defendant convicted of aggravated battery by using a weapon may not be subjected to further enhancement of the penalty because when so charged the use of a weapon is an essential element under the aggravated battery offense set out in section 784.045(1)(b). This is true even though the offense of aggravated battery may be alleged and proven without involvement of a weapon. See also Cherry v. State, 540 So.2d 146 (Fla. 4th DCA 1989); Constantino v. State, 521 So.2d 338 (Fla. 4th DCA 1988). In other words, we have previously held that even though use of a weapon is not a necessary element in every aggravated battery case, when it is charged that way it is not proper to enhance the conviction. The same situation is involved herein where the appellant was convicted of third degree murder and the predicate felony involved the use of a weapon."

Cherry, supra involves an aggravated battery where use of the weapon is an essential element of the offense. Section 784.045(2), Fla. Stat. (1987). There, the Fourth District vacated reclassification of the aggravated battery from a second degree to a first degree felony, citing Pinkerton v. State, supra. The Fourth District ruled similarly in Constantino v. State, supra, which involved improper reclassification of two aggravated assault convictions. No additional facts are provided but the Fourth District cited Griffin v. State, 509 So.2d 980 (Fla. 2d DCA 1987). Griffin holds that the accused's aggravated battery conviction, a second-degree felony, was erroneously reclassified as a first

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<sup>4</sup> This Court's decision in Lareau had not been filed when the Fourth District Court of Appeal rendered Gonzalez. Petitioner's motion for rehearing and/or rehearing en banc and/or certification was denied December 5, 1990, little more than one month prior to this Court's opinion in Lareau.

degree felony because it was committed with a deadly weapon. Since the deadly weapon was an essential element of aggravated battery, the lower court erred in reclassifying the conviction. As Griffin demonstrates, the importance of the charging document cannot be overemphasized. In Griffin the information alleged "unlawfully, actually and intentionally touch[ed] or...[struck], or intentionally cause[d] bodily harm to...[victim], and in so doing used a deadly weapon." The Griffin court reasoned that because the information charged only bodily harm and not great bodily harm the "...addition of the charge 'in so doing used a deadly weapon' was essential to constitute the offense of aggravated battery".

To summarize: the above-discussed cases involving the underlying felony in aggravated battery and aggravated assault cases further fuel Petitioner's contention that reclassification is precluded because the firearm was an essential element of the underlying felony in his case. Indeed, Petitioner's facts are even more compelling because the discharge of the destructive device and/or firearm not only was an element of the underlying felony as the weapon was in the aggravated assault and aggravated battery cases, it essentially was the underlying felony.

Turning next to the remaining cases cited by the District Court majority below, review of these cases is not particularly instructive because, as in Pedreras, the pertinent facts - how the offense is charged and proven, how the jury is instructed, and whether factual findings (as to the use of a firearm) are made - are not included. Nonetheless, these cases will be reviewed if only to demonstrate that, notwithstanding the District Court

decision, Petitioner is still entitled to reclassification from the first degree felony to a second degree felony.

Andrade v. State, 564 So.2d 238 (Fla. 3d DCA 1990) holds that enhancing the defendant's conviction on three counts of attempted murder under both reclassification provisions of Section 775.087 was not error. No further facts are offered. Likewise, State v. Smith, 470 So.2d 764 (Fla. 5th DCA 1985) approved 485 So.2d 1284 (1986) provides no underlying facts. The opinion only states that Smith pled to second degree murder with a firearm and holds that reclassification under both provisions of the reclassification statute was proper. Similarly, Williams v. State, 407 So.2d 223 (Fla. 2d DCA 1981) states only that the defendant pled to the charges of attempted first degree murder, robbery, kidnapping, aggravated battery, sexual battery and trespass with a firearm.

Some facts are provided in Strickland v. State, 415 So.2d 808 (Fla. 1st DCA 1982), affirmed 437 So.2d 150 (1983), which approves reclassification from a first degree to a life felony. Strickland was charged with and convicted of attempted first degree (premeditated) murder with a shotgun. The District Court stated that because the use of the firearm was not an essential element of attempted first degree murder, enhancement under Section 775.087 was proper. This Court also concluded that because the use of the firearm was not an essential element of attempted first degree murder, the enhancement was correct. The facts in Petitioner's case are distinguishable from those of Strickland because the use of the firearm was essential to proof of third degree murder whereas the use of the shotgun in Strickland was incidental to proof of attempted first degree (premeditated) murder. Despite the

citation of Strickland in Gonzalez, the fact remains that neither Strickland opinion supports reclassification would be proper in Petitioner's case.

The remaining case cited by the majority in Gonzalez is Ingraham v. State, 527 So.2d 222 (Fla. 5th DCA), review denied, 534 So.2d 400 (1988). Ingraham involves, in part, convictions for sexual battery by "...actual physical force likely to cause serious personal injury..." during which a firearm was used. The Fifth District concluded that because the sexual battery was predicated on "actual force likely to cause serious personal injury", e.g. section 794.011(3), rather than by the statutory alternative, use of a deadly weapon, the use of the weapon was incidental. Consequently, reclassification was permissible. Ingraham can be likened to Lareau and the other aggravated assault and aggravated battery cases previously discussed. In such cases, the pleadings and factual findings are determinative. Where the use of the weapon is an essential element to the underlying charge, as in Petitioner's case, further enhancement is precluded. Where the use of the weapon is incidental to proof of the offense, as in Lareau and Ingraham, reclassification is permissible.

Based upon the foregoing analysis, the Fourth District Court of Appeal erred in rejecting the principle that because the use of the firearm was an essential element upon which Petitioner's third degree murder conviction was predicated, enhancement under Section 775.087(1) is prohibited. The Second District Court of Appeal in Franklin v. State, supra, is correct in its expression and application of this principle. Accordingly, this Court must reverse the Fourth District Court of Appeal with directions that

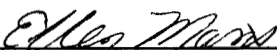
this cause be remanded so that Petitioner may be resentenced for a second degree felony.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Appellant respectfully requests this Court to reverse the judgment and sentence of the Fourth District Court of Appeal and to remand this cause with proper directions.

Respectfully Submitted,

RICHARD L. JORANDBY  
Public Defender  
15th Judicial Circuit of Florida  
Governmental Center/9th Floor  
301 North Olive Avenue  
West Palm Beach, Florida 33401  
(407) 355-2150

  
\_\_\_\_\_  
ELLEN MORRIS  
Assistant Public Defender  
Florida Bar No. 270865

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Douglas J. Glead, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 18<sup>th</sup> day of March, 1991.

  
\_\_\_\_\_  
Counsel for Petitioner