

O.A. 6-6-91

047 w/app.

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**IN THE SUPREME COURT OF FLORIDA**

GUADALUPE GONZALEZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 77,078

**PETITIONER'S REPLY BRIEF ON THE MERITS**

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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 symbols will be used:

R = Record on Appeal

SR = Supplemental Record on Appeal

A = Appendix

STATEMENT OF THE CASE AND FACTS

Petitioner will rely upon his Statement of the Case and Facts filed in his Brief on the Merits.

## 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 775.089(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 its Answer Brief Respondent contends that the determinative issue as to enhancement of Petitioner's sentence is whether use of a firearm is an essential element of second degree murder. Although Petitioner was not convicted of second degree murder, Respondent claims the pertinent inquiry is limited to a statutory analysis of second degree murder. In the alternative, Respondent asserts that even if third degree murder is the relevant offense, the statutory elements preclude a firearm as an essential element. These contentions will be considered below. Notwithstanding the foregoing, Petitioner maintains that the pertinent inquiry involves third degree murder, the offense at conviction. While third degree murder does not necessarily involve the use of a weapon, under the instant facts the weapon was an essential element of the offense. Here, the only underlying felony the jury could have found was discharge of a destructive device. The only destructive device the jury could have found, in turn, was a firearm. Because the firearm was an essential element of third degree murder under the present facts enhancement from a second degree to a first degree felony was improper.

Initially, it bears mention that virtually all of the case authority cited and analyzed by Petitioner in his brief on the merits was not addressed by Respondent. The most glaring omission was any discussion of Franklin v. State, 541 So.2d 1227 (Fla. 2d



DCA 1989) the case which conflicts with the decision below. Respondent's neglect does not change the fact that the weight of authority establishes (1) how the offense is charged and proven e.g. Webb v. State, 410 So.2d 944 (Fla. 1st DCA 1982); Pinkerton v. State, 534 So.2d 428 (Fla. 5th DCA 1982); Franklin v. State, 541 So.2d 1227 (Fla. 2d DCA 1989); State v. Trejo, 555 So.2d 1321 (Fla. 2d DCA 1990), and (2) how the jury is instructed and (3) whether the jury makes a factual finding that the defendant used a weapon. E.g. Franklin v. State, *supra*; Webb v. State, *supra*; see also State v. Overfelt, 457 So.2d 1385 (Fla. 1984) determines if the weapon is an essential element of the convicted offense. These factors have been utilized by the First, Second, and Fifth Districts. Webb, Pinkerton, Franklin.<sup>1</sup>

Turning to Respondent's argument, Respondent fails to present any compelling reason to abandon the holdings of the cases Petitioner cites. Respondent also ignores the established law of this Court as well as that of the District Courts of Appeal. Lareau v. State, 16 F.L.W. S71 (Fla. Opinion filed January 10, 1991); Franklin, Webb, Pinkerton. Rather Respondent seeks a "quick fix" for the determination of whether a firearm is an essential element, claiming first that the courts need only review the crimes set forth in the charging document. Under this scenario even if the factfinder determines that the accused committed a lesser included offense, the only review as to enhancement is limited to the original charge. Respondent fails to cite any case in support

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<sup>1</sup> To avoid undue repetition, Petitioner will rely upon his discussion of these cases in his Brief on the Merits.

of this idea. Petitioner maintains that this argument flies in the face of decisions of the District Courts of Appeal, as well as of this Court, that find the pivotal offense is that for which the defendant is convicted and not the offense charged. Lareau v. State, supra (where the defendant was charged under attempted first degree murder and convicted of aggravated battery, aggravated battery was the offense that was analyzed by this Court to determine whether the firearm was an essential element); Franklin, supra (where the defendant was charged with second degree murder but convicted of third degree murder, the Second District looked to third degree murder, the lesser offense); Pinkerton, supra. Consequently Respondent has not and cannot support its first claim that the offense charged and not the offense at conviction is the critical determination.

Respondent next states in the alternative that even if the offense at conviction is determinative, enhancement here is proper. Respondent claims that under the statutory definition, third degree murder does not include a firearm as an essential element. In so arguing, Respondent implies that a firearm can never be an essential element of third degree murder for enhancement purposes. This is simply wrong. Franklin v. State, supra. Third degree murder may include a firearm as an essential element. In this context, the third degree murder is analogous to aggravated assault and aggravated battery. The latter two offenses, under certain circumstances may include a firearm as an essential element. This Court recently held so in Lareau, supra. See also Cherry v. State, 554 So.2d 638 (Fla. 4th DCA 1989) (aggravated battery improperly reclassified); Griffin v. State, 509 So.2d 980 (Fla. 2d DCA 1987)

(aggravated battery improperly reclassified); Constatino v. State, 521 So.2d 338 (Fla. 4th DCA 1988) (improper classification of aggravated assault). These circumstances can include whether a firearm is included in the charging document, how the jury is instructed and any findings of fact by the jury in the verdict form. In Lareau, this Court concluded that because the conviction for aggravated battery was predicated upon great bodily harm and not use of a weapon, the enhancement statute was applicable. Otherwise put, this Court found that the weapon was not an essential element of the aggravated battery. In contrast, the third degree murder conviction here was predicated solely on the use of the firearm and not some other underlying felony. Thus, the firearm is an essential element of third degree murder in Petitioner's case. Notably, Respondent fails to discuss Lareau in this regard.<sup>2</sup>

Respondent relies upon two cases Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982) and Pedrerera v. State, 401 So.2d 823 (Fla. 3d DCA 1981) for the proposition that a firearm can never be an essential element of third degree murder. These cases are not persuasive. First, in Streeter v. State, unlike the present case, the jury did not find that a weapon was used. While the District Court does state that the statutory definition of third degree murder does not include a firearm as an essential element, it is merely dicta. Second, in Pedrerera v. State, the Third District upheld an enhancement for use of a firearm in a third degree

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<sup>2</sup> Respondent merely mentions Lareau but has not effectively disputed Petitioner's application of its holding to the instant facts.

murder. However, because insufficient underlying facts are presented it is impossible to know if the firearm was an essential element in that case. It is entirely possible that the underlying felony was predicated upon an offense not involving a firearm. Therefore, it is far from clear how the Third District would rule under, for example, the present facts.<sup>3</sup>

Respondent's citation to non-third degree murder cases are similarly distinguishable from the present facts. i.e. Strickland v. State, 415 So.2d 808 (Fla. 1st DCA 1982), affirmed 437 So.2d 150 (1983) (enhancement proper in attempted first degree murder because the firearm was incidental to the offense while in our facts, the use of a firearm is essential to the offense at conviction). Lentz v. State, 567 So.2d 997 (Fla. 1st DCA 1990); Williams v. State, 476 So.2d 286 (Fla. 1st DCA 1985) (attempted first degree murder); Williams v. State, 407 So.2d 223 (Fla. 2d DCA 1981). In attempted first degree murder, a firearm is not an essential element, just as a firearm is not an essential element of aggravated battery causing serious personal injury. Lareau, supra.

To summarize: Respondent failed to provide any reason to abandon the holdings of the cases Petitioner has discussed or to ignore the decisional authority of this Court as well as of the District Courts of Appeal. Lareau, supra; Franklin, supra; Pinkerton, supra. Moreover, under the unique facts of this case,

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<sup>3</sup> Respondent's reliance upon Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987) in this regard is similarly misplaced. There, the First District indicated enhancement was proper in a manslaughter case. However, because the manslaughter conviction was reversed, this is dicta.

the use of a firearm was an essential element of third degree murder.

The jury here had to find that Petitioner had committed third degree murder by discharging a destructive device. Moreover the discharge of the destructive device was the only underlying felony of third degree murder upon which the jury was instructed. In the same vein, the firearm was the only destructive device upon which the jury was instructed. The jury made a specific finding in its verdict that a firearm was used (R 599). Therefore, under the present facts, Petitioner was charged with a felony for which use of a weapon was an essential element. Enhancement for use of the weapon was accordingly improper.

Based upon the foregoing, this Court must reverse the Fourth District Court of Appeal and remand this cause so that Petitioner may be resentenced for a second degree felony.

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Douglas J. Glaid, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 24<sup>th</sup> day of April, 1991.



Counsel for Petitioner