IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 88,412

STATE OF FLORIDA,

Petitioner,

vs.

NATHANIEL HARGROVE,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General

DON M. ROGERS
Assistant Attorney General
Florida Bar No. 0656445
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (407) 688-7759
FAX (407) 688-7771
Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the appellee in the Fourth District Court of Appeal. Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State or prosecution.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On December 10, 1992 the grand jury of Broward County, Florida indicted Respondent, Nathaniel Hargrove, for first degree murder. The record shows that Hargrove is a 58 year old male, with a low IQ and is confined to a wheelchair due to a leg amputation. (R 673-677)

The following rendition of the case and facts is copied directly from the opinion of the Fourth District in the present case. Hargrove v. State, 21 Fla. L. Weekly D1418 (Fla. 4th DCA June 19, 1996).

> Defendant was charged with murder "by shooting [victim] with a firearm." In his opening statement, the prosecutor told the jury that the evidence would show that, after being taunted by the victim, defendant "fired at least two and possibly three shots" and that "two shots we know entered the brain of [the victim] killing him instantly." In his opening statement, defense counsel began by stating that there were some "inconsequential" differences with the prosecutor's opening statement of the facts, but his entire statement to the jury was devoted to the insanity defense. In other words, he did not suggest that defendant had not shot the victim, or imply that there was any evidence suggesting that someone else shot him, or that he died by something other than a gunshot. During trial, two other persons in the truck with the victim testified to the shooting. At least three witnesses, including one police officer, testified that defendant told them immediately afterwards that he shot the victim. After his arrest and ***Miranda,*** warnings, defendant gave a confession in which he stated he shot the victim because the victim had carried on an affair with defendant's wife. Al though no weapon was ever found, the

investigating officers discovered bullets in defendant's room. The defense called no witnesses and adduced no evidence. In closing argument, defense counsel told the jury the only issue for them to decide was whether defendant was legally insane at the time of the shooting. The verdict found defendant guilty "as to Count 1 of the Indictment," [sic information?] of second degree murder.

Respondent was sentenced to fifteen years in the Department of Corrections followed by five years probation. (R 734)

SUMMARY OF THE ARGUMENT

In the present case it was unrefuted and conceded by respondent's trial counsel that respondent used a pistol to shoot the victim three times in the head causing his immediate death. Respondent proceeded to trial utilizing the affirmative defense of insanity. In such a case this court should carve out an exception to the holding in State v. Overfelt, 457 so. 2d 1385 (Fla. 1984) requiring the sentencing judge to impose the three year minimum mandatory sentence provided for in Fla. Stat. § 775.087(2) even in the absence of a specific factual finding of the jury that respondent possessed a firearm.

ARGUMENT

WHEN DEFENDANT IS CHARGED WITH COMMITTING A CRIME WITH THE USE OF A FIREARM BUT DOES NOT CONTEST ITS USE AND INSTEAD DEFENDS ON THE GROUND THAT HE WAS INSANE WHEN HE USED THE FOREARM, AND THE RECORD IS CLEAR BEYOND ANY DOUBT THAT DEFENDANT DID ACTUALLY USE THE FIREARM, MUST THE SENTENCING JUDGE IMPOSE THE MANDATORY MINIMUM SENTENCE?

In State v. Overfelt, 457 so. 2d 1385 (Fla. 1984) this court stated: 'The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury." The Fourth District felt compelled by this language to reverse the imposition of the three year mandatory minimum sentence as, at bar, the jury did not make an express finding that Respondent committed the crime with a firearm. Based on the facts of the present case the State of Florida and indeed, the Fourth District, believe an exception should be created to Overfelt rule.

In the present case Respondent was tried for first degree murder with a firearm and the jury returned a verdict convicting Respondent of second degree murder. The jury did not specifically determine, through a special verdict, that Respondent committed the crime while he was in possession of a firearm. The District Court below felt Overf elt precludes a trial judge from imposing the three

year minimum mandatory sentence required by section Fla. Stat. § 775.087(2)(a)(1) in the absence of a specific jury finding that the accused possessed a firearm. See, Overfelt, 457 So. 2d at 1387. This was consistent with the decison of the First District in Bowser v. State, 638 So. 2d 1042 (Fla. 1st DCA 1994).

At bar, Respondent never contested the fact that he shot the victim through the head with a firearm causing the victim's death. In fact, Respondent confessed to the crime and Respondent's counsel did not take issue with the State's rendition of the facts during opening statement. The sole defense asserted at trial was insanity. It is well established in Florida that insanity is an affirmative defense. Martin v. State, 323 So. 2d 666, 667 (Fla. 3d DCA 1975); Bitter v. State, 390 So. 2d 168, 169 (Fla. 5th DCA 1980); Fla. Std. Jury Instr. (Crim.) 3.04(b). This court has defined affirmative defense as follows:

> An "affirmative defense" is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them. In effect, an affirmative defense says, "Yes, I did it, but I had a good reason."

State v. Cohen, 568 So. 2d 49, 51 (Fla. 1990).

The State of Florida, and clearly the Fourth District Court of

Appeal', strongly feel that in a case where the use of the firearm is acknowledged and uncontested this court should carve out an exception to the Overfelt requirement. "There is no reason for the express finding by the jury in this circumstance, as there was in Overfelt, to resolve any contested issue of whether a firearm was the instrument of the crime or whether it was the [respondent] who used it." Hargrove, 21 Fla. L. Weekly at D1419. The exception would allow a trial judge to impose the three year mandatory minimum sentence in the absence of an express jury finding that the accused possessed a firearm during the murder in cases such as this case.

The present case cries out for such an exception. No miscarriage of justice could possibly result in the present procedural posture as Respondent himself, through the use of the affirmative defense of insanity, acknowledged that he committed murder with a firearm. "Here, there was no question as to whether defendant 'actually possessed a firearm while committing a felony.' That fact was conceded at trial." Hargrove, 21 Fla. L. Weekly at D1419. At bar the sole question respondent asked the jury to

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[1]The Fourth District stated: 'Not imposing the mandatory minimum for using that firearm seems irrational to us. It is the degradation of substance over design. Hargrove, 21 Fla. L. Weekly at D1419.

decide was the applicability of the insanity defense. From the start Respondent acknowledged he committed the crime with a firearm. To prohibit the trial judge from imposing the mandatory minimum sentence in the case at bar eviscerates the legislative intent of the statute and establishes illogical public policy in this State.

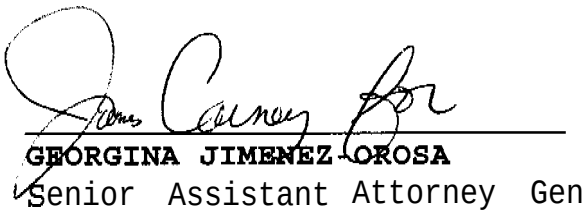
The State of Florida requests that this court carve out a narrow exception to the Overfelt rule that allows a trial judge to impose the mandatory minimum in cases such as the present case.

CONCLUSION

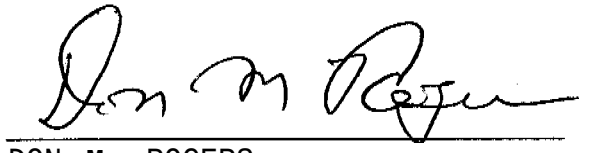
WHEREFORE, based on the above and foregoing arguments and authorities cited therein, Petitioner respectfully submits that this court should issue an opinion carving out an exception to the prior holding of this court in State v. Overfelt, 457 So. 2d 1385 (Fla. 1984) and answer the certified question in the affirmative.

Respectfully submitted,

ROBERT A. BTJTTERWORTH
Attorney General
Tallahassee, Florida



GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
West Palm Beach, Florida
Florida Bar No. 441510



DON **M.** ROGERS
Assistant Attorney General
Florida Bar No. 0656445
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759
FAX (407) 688-7771

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "PETITIONER'S INITIAL BRIEF" has been furnished by courier to: Joseph Chloupek, 421 3rd Floor, Criminal Justice Building, West Palm Beach, FL. 33401, this 26th day of July, 1996.

Of Counsel