IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,639

JESUS DELGADO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

SECOND SUPPLEMENTAL BRIEF OF APPELLEE

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It is hereby certified that the text of this brief is printed in 12 point Courier New, a font that is not proportionately spaced.

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STATEMENT OF THE CASE AND FACTS

The Appellee relies on the Statement of the Case and Facts set forth in its initial Answer Brief of Appellee. This Supplemental Brief is directed solely to the following question presented by order of this Court:

> Is there any prohibition to the State charging a defendant with felony murder when the underlying felony is burglary and when the burglary is premised upon the intent to commit murder?

SUMMARY OF THE ARGUMENT

I. The Appellant's due process claim, based on alleged problems with jury instructions, is repetitive of the claim already presented in the initial briefs, is not responsive to the question presented for supplemental briefing, and is without merit for reasons previously presented to the Court.

II. The merger doctrine does not preclude charging felony murder based on burglary with the intent to murder. The merger doctrine exists only in a minority of jurisdictions, based on different statutory schemes. Its application has already been rejected in Florida by this Court.

III. This Court has repeatedly rejected the application of the double jeopardy doctrine to felony murder and the underlying felony.

IV. As the first three claims of the Appellant have no merit, the contention that the prosecutor engaged in misconduct by filing an indictment for felony murder is frivolous.

ARGUMENT

I.

DUE PROCESS DOES NOT PRECLUDE PROSECUTION UNDER A FELONY MURDER THEORY.

The Appellant initially claims that due process precludes prosecution under a felony murder theory because such a prosecution could allow confusing or contradictory jury instructions. This argument simply reiterates the claim already presented by the Appellant in the initial briefs. It is thus improper as it is not responsive to this Court's order for supplemental briefing.

As noted in the Appellee's Answer Brief, at pp. 23-29 and relied upon herein, the instant claim is also procedurally barred. Moreover, the jury instruction on felony murder in the instant case was a proper statement of the law. The Appellant's entire argument herein is predicated on the erroneous premise that felony murder "***must*** be established without the usual element of intent to kill." Second Supplemental Brief of Appellant at p. 2. However, while felony murder ***can*** be a nonintentional murder, it also includes any intentional killings during the course of a felony. Thus, this Court routinely affirms felony murder convictions based on intentional shootings during the course of convenience store

robberies - hardly a nonintentional killing. Additionally, as previously noted by the Appellee, there was no "confusion" in the instant case. The defendant herein was separately charged with armed burglary. The jury was specifically instructed that in order to find the defendant guilty of armed burglary as charged, it was required to find that "at the time of entering or remaining in the structure the defendant had a fully-formed, conscious intent to commit the offense of murder in that structure." (R. 278). The jury was further instructed that "even though an unlawful entering or remaining in a structure is proved, if the evidence does not establish that it was done with the intent to commit murder, the defendant must be found not guilty." Id. The jury found the defendant guilty of armed burglary as charged. The State thus respectfully submits that there is no prohibition against charging felony murder based on jury instructions.

II.

THERE IS NO PROHIBITION TO THE STATE CHARGING A DEFENDANT WITH FELONY MURDER WHEN THE UNDERLYING FELONY IS BURGLARY AND WHEN THE BURGLARY IS PREMISED UPON THE INTENT TO COMMIT MURDER.

Section 782.04(1), Florida Statutes, specifically enumerates burglary as one of the underlying offenses for felony murder, as first degree murder. The statute does not distinguish between variations of burglaries - i.e., burglary with intent to commit theft, burglary with an intent to commit murder, etc. For purposes of the felony-murder statute, burglary, in any and all of its variations constitutes a qualifying predicate offense for first-degree felony murder.

The cardinal rule of statutory construction is that a statute will be construed to give effect to legislation, and that intent will be divined from the words of the statute. Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997); In re Order on Prosecution of Criminal Appeals, 561 So. 2d 1130 (Fla. 1990); City of Tampa v. Thatcher Glass Corp., 445 So. 2d 578 (Fla. 1984); Smith v. City of St. Petersburg, 302 So. 2d 756 (Fla.

1974). The Florida legislature has spoken clearly in designating burglary as one of the predicate offenses for first-degree felony murder. As the legislature did so without any qualification as to different types of burglary, the cardinal rule of statutory construction compels the conclusion that burglary with an intent to commit murder is a qualifying predicate offense for first-degree felony murder. There is thus no prohibition against charging same. Indeed, as previously noted in the Appellee's Answer Brief at pp. 26-27, this Court, in accordance with the above rules of statutory construction, has specifically held that the State need only allege and prove that burglary was committed with the intent to commit "*an* offense, not the intent to commit a specified offense." Thus, the "exact nature of the offense alleged is surplusage so long as the essential element of intent to commit an offense is alleged and subsequently proven." Toole v. State, 472 So. 2d 1174, 1175 (Fla. 1985) (emphasis added); see also L.S. v. State, 464 So. 2d 1195 (Fla. 1985); State v. Waters, 436 So. 2d 66 (Fla. 1983). As such and in response to the Court's question herein, there is no prohibition against the burglary charge in the instant case.

The Appellant's attack on the foregoing rule of statutory construction derives from the felony-murder "merger" doctrine,

followed by a concededly minority of jurisdictions - primarily in New York and California. These minority courts have held that an underlying offense for felony-murder must be an independent offense - i.e., one which does not have as its purpose the murder or injury of the intended victim. The minority view, as detailed in section A herein, is based upon statutory schemes and constructions quite different than Florida's.

This Court has, moreover, expressly rejected the "merger doctrine" and the minority view in Robles v. State, 188 So. 2d 789 (Fla. 1966). As detailed in section B herein, this Court has expressly noted that the "merger doctrine" originated under different statutory schemes which have no bearing on Florida's statutory scheme with respect to felony murder. As further detailed in Section B herein, this Court's prior holding is also in keeping with the majority of jurisdictions in this country which have consistently and emphatically rejected the "merger doctrine" in recent decades. These majority jurisdictions, and indeed even some courts in the minority-view jurisdictions, have noted that the "merger doctrine" is predicated on an outright lack of respect for state legislatures; it is, in effect, in those minority jurisdictions to uphold it, a failure to denote the boundaries

which exist between the judiciary and the legislature in the constitutional doctrine of separation of powers. The State thus respectfully submits that in keeping with the *stare decisis* principle, this Court should adhere to its prior holding in Robles and retain the majority rule rejecting the merger doctrine.

A. The Minority View - New York and California Merger Doctrine

The merger doctrine has its roots in jurisdictions such as New York, in the early 20th century, under felony-murder statutes which did not distinguish between degrees of felony-murder - i.e., first-degree felony murder based on specifically enumerated offenses; and second-degree felony murder based on non-enumerated offenses. Such statutes as existed in New York literally rendered any killing during the course of any felony a first-degree murder. See People v. Huther, 77 N.E. 6 (N.Y. 1906); People v. LaMarca, 144 N.E. 2d 420 (N.Y. 1957); People v. Moran, 158 N.E. 35 (N.Y. 1927). Under such circumstances, the courts were concerned that all killings would necessarily constitute first-degree murder under the felony murder rule, since assault was a felony under New York law and an assault would, under New York law, exist in every killing. LaMarca,

144 N.E. 2d at 428.[1] Thus, New York developed its version of the merger rule, which required that the underlying felony "be one that is independent of the homicide and of the assault merged therein. . . ." Moran, 158 N.E. at 36. Obvious distinctions exist between the New York felony murder rule which gave rise to the merger doctrine and Florida's current statutory scheme. First, Florida's felony murder statute breaks the offense into two degrees, depending on whether the underlying felony is enumerated or non-enumerated. Second, neither assault nor battery are enumerated offenses in the Florida statutory scheme, and, as such, would not render all murders first-degree murders, as would the New York statute which gave rise to the merger doctrine.

The second significant jurisdiction to utilize the merger doctrine is California. The State of California does have two different classes of felony murder - enumerated and non-enumerated offenses. In the context of the non-enumerated offenses, the California Supreme Court, in People v. Ireland, 450 P. 2d 580, 590 (Cal. 1969), pronounced the following version of the merger

[1] The Kansas cases relied upon by the Appellant appear to have the same derivation, since the pertinent Kansas statute had defined first degree murder to include any killing during the perpetration of any felony. State v. Severns, 148 P. 2d 488, 491 (Kan. 1944); State v. Fisher, 243 P. 291 (Kan. 1926).

doctrine:

> . . . We therefore hold that a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged.

The foregoing ruling was pronounced in light of what California courts have viewed as the purpose of the felony-murder doctrine: deterring felons from killing negligently or accidentally. People v. Williams, 406 P. 2d 647, 650 at n. 4 (Cal. 1965); People v. Wilson, 462 P. 2d 22, 28 (Cal. 1969). Relying on such a purpose for the felony-murder rule, the California Supreme Court extended the reasoning of Ireland to the underlying offense of burglary with an assault. Wilson, 462 P. 2d at 28.

In reaching such a conclusion, the California Supreme Court, in Wilson, specifically "recognize[d] that *Ireland* dealt with a court-made rule. . . ." 462 P. 2d at 29 (emphasis added). Indeed, the Court, in Ireland, expressly acknowledged that it was intruding into the legislative domain and making policy determinations. 450 P. 2d at 590. Furthermore, the Ireland opinion utilized extensive language suggesting that its conclusion was based upon a determination that the underlying felony would constitute a

necessarily lesser included offense of felony-murder. 450 P. 2d at 590, n. 14.

In light of the reasoning of the California cases, several points should be made. First, the California Supreme Court has made it clear that its doctrine is merely a "court-made rule." In the face of Florida's explicit legislation, stating that a particular offense is a qualifying predicate offense, such "court-made rules" would have no justification. Courts, at least in Florida, do not make rules as to "substantive" matters, especially when the legislature has spoken. Second, to the extent that the California "court-made rule" appears to be grounded, at least in part, on a view that the underlying felony may constitute a necessarily lesser included offense, any such logic has clearly been repudiated by the line of cases emanating from this Court in State v. Enmund, 476 So. 2d 165 (Fla. 1985) (rejecting double jeopardy argument that multiple convictions for felony murder and underlying felony are improper, as Blockburger analysis compels conclusion that each offense has an element not existing in the other). Third, insofar as the California courts take the view that the sole purpose of the felony-murder statute is to deter felons from killing negligently or accidentally, Wilson, 462 P. 2d at 28,

such a limited view of the purpose of the felony-murder statute is unwarranted. An equally valid purpose of the felony-murder statute is simply a value judgment by the legislature that a murder committed during the course of enumerated felonies deserves to be punished more harshly than other murders, regardless of whether there is any deterrent effect. Fourth, the California courts, in reaching the foregoing conclusions, never once engage in what should be the bottom-line determination: the question of legislative intent. Fifth, subsequent California cases have limited the merger doctrine or criticized it, leaving California's position on the merger question utterly convoluted and beyond any reasonable, logical comprehension.[2]

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[2] California cases have, to some extent, either receded from or limited the merger doctrine in California, or, alternatively, have been harshly critical of their own judiciary's resolution of the merger issue. See People v. Teamer, 20 Cal. 4th 1454, 1460, 25 Cal. Rptr 2d 296 (Cal. App. 1993) (referring to the Wilson "court's statutory contortionism"); People v. Hansen, 9 Cal. 4th 300, 36 Cal. Rptr. 2d 609, 885 P. 2d 1022, 1030-31 (Cal. 1994) (departing from collateral felonious design test, and focusing instead on whether predicate felony for felony-murder doctrine would subvert legislative intent regarding mens rea requirements of murder statutes); People v. Poddar, 518 P. 2d 342 (Cal. 1974) (limits Ireland if underlying felony of assault was shown to be done with the type of malice which would typically exist in an intentional murder); People v. Mattison, 481 P. 2d 193 (Cal. 1971) (permitting felony-murder doctrine to apply, and rejecting merger, when underlying felony was willful administering of poison with intent of injuring a human being); People v. Blakeslee, 2 Cal App. 3d 881, 82 Cal. Rptr. 839 (Cal. App. 1969) (no merger where felony murder was based on assault with a deadly weapon as underlying felony).

B. Florida's Majority View and Rejection of the Merger Doctrine

This Court, in Robles v. State, 188 So. 2d 789 (Fla. 1966), for reasons outlined above, has refused to apply the merger doctrine to Florida's felony-murder statute. Robles presents an identical case, insofar as the underlying felony was burglary with an intent to commit an aggravated assault.[3] The Appellant urged this Court to adopt the merger doctrine, as developed in the New York cases discussed above. This Court refused to do so:

> . . . As appellant acknowledged, the concern of the New York court, which was to preserve the integrity of the statutory degrees of homicide, resulted from the fact that the statute of that state makes a homicide committed in the perpetration of any felony first degree murder. New York Penal Code, McKinney's Consol. Laws, c. 40, s. 1044. Since the phrase 'any felony' is broad enough to include even the aggravated assault that is usually involved in any homicide, the result would be that substantially every homicide would constitute first degree murder.
>
> It was to avoid this result that the New York court adopted the doctrine that the supporting felony had to be independent of the homicide. Even so, it should be noted that the New York court was not concerned with the

[3] "There is sufficient evidence in the record from which it could be concluded that appellant was guilty of the felony of burglary, in that he broke into the apartment with the intent to commit the felony of aggravated assault upon Mrs. Sterne. There is also ample evidence from which it could be found that he committed a homicide in the perpetration of such felony." 188 So. 2d at 792.

> situation in which the same act of violence that constituted the underlying felony also resulted in the homicide. It was held sufficient for application of the felony-murder rule if the underlying felony had some elements other than those contained in the crime of homicide. Thus, the court has held that the felony-murder rule applies when the underlying felony is, for example, rape, Buel v. People, 1879, 78 N.Y. 492, or kidnapping, People v. La Marca, 1957, 3 N.Y. 2d 452, 165 N.Y.S. 2d 753, 144 N.E. 2d 420, since those crimes have some elements which are different from those of homicide.
>
> It is obvious that the problem that motivated the New York court to adopt the above rule cannot exist under a statute like Florida's, which limits the felony murder rule to homicides committed in the perpetration of specified felonies, not including assault in any of its forms. Therefore, the logic of the New York cases cited does not apply in Florida.

188 So. 2d at 792 (emphasis added).[4] The Appellant's Second

[4] To whatever extent the New York reasoning could be extended to third-degree murder, felony murder as to the non-enumerated offenses, under s. 782.04(4), Florida Statutes, such reasoning is irrelevant to the limited felony-murder statute of s. 782.04(1), where only the enumerated felonies qualify, and assault is not such a qualifying felony. However, it should also be noted that the Fourth District Court of Appeal has similarly refused to apply the merger doctrine to third degree felony murder based on the underlying nonenumerated felony of aggravated battery. Doyle v. State, 513 So. 2d 188 (Fla. 4th DCA 1987). It should be noted that the Appellant cites Doyle for the proposition that the merger doctrine may be applicable. To the contrary, the Fourth District expressly rejected its application, holding that the Court "agree[s] with appellee's [the state's] analysis of the *Mills* case and with the contention that in the instant case no merger of the underlying felony of aggravated battery with the homicide is

Supplemental Brief feebly asserts that "the Robles case is distinguishable from the present case. . . ." Second Supplemental Brief of Appellant, p. 8. Nowhere in the text of the Appellant's brief is any distinguishing character of the Robles opinion pointed out. That is true for the simple reason that there is no such distinction which can be made.

A more recent Florida appellate court opinion, Mapps v. State, 520 So. 2d 92 (Fla. 4th DCA 1988), relying on Robles, similarly found that the merger doctrine did not apply to first-degree felony murder where the underlying enumerated felony, aggravated child abuse, was one which entailed the intentional infliction of a battery or torture on a child.

The Supplemental Brief of Appellant also cites Knowles v. State, 476 So. 2d 172 (Fla. 1985). This is apparently a miscitation, which, in actuality refers to Mills v. State, 476 So. 2d 172 (Fla. 1985). Once again, Mills lends no support to the Appellant's merger claim. In Mills, the defendant was convicted of first-degree felony murder, burglary and aggravated battery. The burglary was the underlying felony for the felony-murder

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required." 513 So. 2d at 190.

conviction.[5] The felony-murder conviction was upheld, and there was no claim that it somehow merged with the predicate felony of burglary. The defendant did argue, on appeal, that the aggravated battery conviction was improper, as a lesser included offense of felony murder. 476 So. 2d at 177. This Court rejected that argument, finding that aggravated battery was not a lesser included offense of felony murder. Nevertheless, this Court found that the dual convictions for felony murder and aggravated battery were improper since it was not believed to be proper "to convict a person for aggravated battery and simultaneously for homicide as a result of one shot gun blast. In this limited context the felonious conduct merged into one criminal act. We do not believe that the legislature intended dual convictions for both homicide and the lethal act that caused the homicide without causing additional injury to another person or property. Hence we vacate the sentence and conviction for aggravated battery." Id.

Several points need to be made here. First, Mills was not addressing merger of felony murder and its underlying felony, since the battery was not the underlying felony for the felony murder -

[5] "The state charged Mills with and the jury convicted him of first-degree felony murder with burglary being the underlying felony." 476 So. 2d at 177.

the underlying felony was the burglary. Second, while Mills did apply a merger doctrine, it did not affect the felony murder itself, it only affected the lower level offense. Thus, the felony murder would still stand under Mills. Third, and most significantly, Mills was a case which arose in the era of double-jeopardy/rule-of-lenity analysis which resulted in Carawan v. State, 515 So. 2d 161, 169 (Fla. 1987), at which time this Court was applying a double jeopardy analysis which focused on the broad nature of the offense, as opposed to the literal statutory elements of the offense ("Mills was grounded in the rule of lenity, since the crime in question addressed essentially the same evil, i.e., the battering of a human being in a manner likely to cause grievous harm."). In the aftermath of Carawan, the legislature amended section 775.021(4), Florida Statutes, making it clear that the legislature intended multiple convictions and punishments except for true lesser included offenses, based on an assessment of their statutory elements.[6] In view of that subsequent legislation, resulting in this State's appellate court opinions reverting to pure Blockburger analysis, the result of Mills must be highly questionable today, since Mills had found that the aggravated

[6] See Ch. 88-131, section 7, Laws of Florida; State v. Smith, 547 So. 2d 613 (Fla. 1989).

battery was not a lesser included offense, based on Blockburger analysis.[7]

As a result of the foregoing distinctions discussed above, and set forth as to the New York and California merger doctrines, courts of the majority of other jurisdictions have typically rejected the merger doctrine. For example, the State of Washington has had a statutory scheme comparable to that in Florida: first-degree murder, second-degree murder, manslaughter, and different degrees of felony-murder, depending upon whether the underlying felony is enumerated or non-enumerated. State v. Harris, 421 P. 2d 662 (Wash. 1966). Given such a scheme, the Court expressly rejected the New York merger doctrine:

> In light of the distinctions made in our own statutes, we see no reason why we should adopt the New York "merger rule," i.e., that the precedent felony, if an assault on the person killed, is merged in the resulting homicide. If we assume that such a merger has been desirable in New York, the answer is that Washington never has been confronted with the same reason for adopting the merger rule that

[7] As noted in Smith, 547 So. 2d at 615-16, the 1988 legislative amendments reflected that the legislature did not agree with this Court's interpretation of legislative intent in Carawan, and, of necessity, in Mills, which was, for all practical purposes, the same as the reasoning in Carawan. Thus, the merger language in Mills has been clearly repudiated by subsequent legislative amendments.

has existed in New York.

421 P. 2d at 664. Colorado[8] has likewise had a comparable statutory scheme, and, it too has reached the same conclusion, in light of the different statutory scheme, noting, in the process, that the New York-California merger doctrine is the minority rule:

> Whether a defendant may be charged with felony murder based upon a burglary committed with intent to assault or to murder is a matter of first impression in Colorado. The People and the defendant agree that a majority of jurisdictions hold that a burglary charge premised on an underlying crime of assault may sustain a finding of felony murder. *See People v. Miller*, 32 N.Y. 2d 157, 344 N.Y.S. 2d 342, 297 N.E. 2d 85 (1973); *Blango v. United States*, 373 A. 2d 885 (D.C. App. 1977); *State v. Reams*, 292 Or. 1, 636 P. 2d 913 (1981). Defendant, however, would have us follow the jurisdictions which have held that when assault is not a discrete crime named in the felony murder statute, *see* s. 18-3-102(1)(b), C.R.S. (1986 Repl. Vo. 8B), it cannot be the crime necessary to sustain a count of felony murder by burglary. *See People v. Wilson*, 1 Cal. 3d 431, 82 Cal. Rptr. 494, 462 P. 2d 22 (1969). We decline to do so.

People v. Lewis, 791 P. 2d 1152, 1152 (Colo. Ct. App. 1989). The Colorado court followed the principle of interpreting a statute in accordance with the plain meaning of its words. Thus, since burglary was an enumerated predicate offense, that was the

[8] The Appellant has mistakenly listed Colorado as being of the minority view.

beginning and end of the inquiry:

> Giving the statutes involved an interpretation consistent with their plain language, we agree with the People that, inasmuch as both murder and assault are crimes which may underlie a felony burglary, there is no logic or reason to preclude a felony murder charge from being based upon a burglary charge that, in turn, is premised upon either an intent to assault or an intent to murder. [citations omitted]
>
> Contrary to the argument of the defendant, we find no ambiguity in the felony murder statute. The fact that the definition of felony murder includes burglary, but does not include all the crimes which may underlie that offense does not imply a legislative intent to restrict burglary as a predicate charge solely to those cases in which the underlying intended crime is also listed in the felony murder statute.

791 P. 2d at 1153-54.

Oregon similarly has a felony-murder statute based on enumerated offenses. State v. Reams, 636 P. 2d 913 (Or. 1981). Since 1971, one of the enumerated offenses has been first degree burglary, which included, as alternative manners of committing the burglary, an armed burglary or a burglary with an attempt to cause physical injury to any person. 636 P. 2d at 915, n. 3.[9] In the

[9] Florida's burglary statute is comparable, since it expressly includes enhanced manners of committing the offense, including a burglary with an assault or battery or an armed burglary. Section

face of such legislation, specifically enumerating burglary as a predicate offense for felony murder, the Court rejected the merger doctrine:

> Upon examination of the provisions of the felony murder statue. . . and the first degree burglary statutes . . . we believe that the intention of the legislature in the adoption of these statutes in 1971 is expressed by the clear and unambiguous terms of these statutes to the effect that a person who commits burglary in the first degree and who in the course of that crime causes the death of another person not a participant in the crime, as in this case, is guilty of criminal homicide (i.e., felony murder) and that a person who, as in this case, enters a dwelling unlawfully with a gun with the intent to commit an assault on some person who may be in that house is guilty of burglary in the first degree. It follows, in our opinion, that this court is not at liberty to consider what the legislature might have intended or provided on the assumption that it did not consider the problems now raised by this defendant, much less to construe the terms of this statute so as to avoid problems which it may or may not have considered at the time of its adoption of these statutes in 1971.

636 P. 2d at 918. Even if the intention to include first-degree burglary as an enumerated predicate for felony murder was an "'arbitrary' decision, the legislative intention to include each of

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810.02, Florida Statutes. The Florida legislature, in including burglary as an enumerated predicate for felony murder, is presumed to be aware that the enumerated predicate includes such alternatives.

these crimes is clear." 636 P. 2d at 918-19.

Indeed, as pointed out in Reams, even in New York, which recognizes the merger doctrine, burglary is an enumerated offense and, as a result, burglary with an intent to commit an assault or murder is a valid predicate offense even in New York. Thus, the New York Court of Appeals, in People v. Miller, 297 N.E. 2d 85, 87 (N.Y. 1973), held:

> It should be apparent that the Legislature, in including burglary as one of the enumerated felonies as a basis for felony murder, recognized that persons within those domiciles are in greater peril from those entering the domicile with criminal intent, than persons on the street who are being subjected to the same criminal intent. Thus, the burglary statutes prescribe greater punishment for a criminal act committed within the domicile than for the same act committed on the street. Where, as here, the criminal act underlying the burglary is an assault with a dangerous weapon, the likelihood that the assault will culminate in a homicide is significantly increased by the situs of the assault. When the assault takes place within the domicile, the victim may be more likely to resist the assault; the victim is also less likely to be able to avoid the consequences of the assault, since his paths of retreat and escape may be barred or severely restricted by furniture, walls and other obstructions incidental to buildings. Further, it is also more likely that when the assault occurs in the victim's domicile, there will be present family or close friends who will come to the victim's aid and be killed. Since the purpose

> of the felony-murder statute is to reduce the disproportionate number of accidental homicides which occur during the commission of the enumerated predicate felonies by punishing the party responsible for the homicide not merely for manslaughter, but for murder . . . the Legislature, in enacting the burglary and felony-murder statutes, did not exclude from the definition of burglary, a burglary based upon the intent to assault, but intended that the definition be 'satisfied if the intruder's intent, existing at the time of the unlawful entry or remaining, is to commit *any* crime.'"

Once again, even in a merger jurisdiction, legislative intent controls as to specifically enumerated predicates for felony murder.

The Oregon Court further defended its own position vis-a-vis such California cases as Wilson, supra. The reasoning of the California cases was rejected as it would fail to "honor the terms of this statute as the best evidence of the intention of the legislature." 636 P. 2d at 920. The Court's own conceptions of "logic and reason" are irrelevant when confronted by legislative intent as manifested in statutory language. Id. Second, there was no basis for concluding, as the California courts did, that the sole purpose of the felony-murder statute was to deter felons from

negligent or accidental killings. Id.[10] Third, even though some "illogical" fact patterns could be conceived under felony murder rule using burglary with an intent to assault as the predicate, the Court could not "say that it would have been so unreasonable for the legislature to make such a distinction for the reasons as stated by the New York court in *Miller* as to require this court to construe these statutes in a manner contrary to their clear and unambiguous terms." Id.

Continuing with the majority reasoning on this issue, Texas appellate courts have reached the same conclusion, rejecting the merger doctrine outright, when the state legislature has designated deadly conduct as the underlying felony qualifying for prosecution as felony murder. Saenz v. State, 976 S.W. 2d 314, 317 (Tex. App. 1998) ("We agree with our sister courts that the felony merger doctrine does not prevent the State from using a defendant's deadly conduct as the basis for a charge of felony murder."). Similarly, the Court held: "By the plain language of the statute, only manslaughter is exempted as an underlying felony under the felony merger rule." Id. An extensively analytical opinion, going through

[10] To the same effect, see People v. Thurman, 584 N.E. 2d 1069, 1074 (Ill. App. 1991)(rejecting limited reading of purpose of felony-murder statute).

changes of Texas law and the evolution and abandonment of the merger doctrine, can be found in Rodriguez v. State, 953 S.W. 2d 342 (Tex. App. 1997). As detailed therein, Texas's first-degree murder statute currently includes a felony-murder provision which renders a homicide first-degree murder based on any underlying felony except manslaughter. Based on such express statutory language, the court concluded that the legislature has spoken, and any felony other than manslaughter will satisfy the state's felony murder doctrine. 953 S.W. 2d at 354. "Our legislature within its constitutional role remains free to abolish felony murder or limit its application or effect to other felonies. It is not the role of courts to abolish or judicially limit or expand a constitutionally valid statutory offense clearly defined by the legislature." Id. Thus, a felony murder conviction predicated on the felony of shooting a firearm into an occupied automobile was upheld under Texas state law including all felonies except manslaughter as qualifying predicate offenses for felony murder.

Many other jurisdictions have reached comparable results, rejecting the merger doctrine in light of felony murder statutes which enumerate specific predicate offenses, and further rejecting the merger doctrine as to either burglary with an intent to assault

(or murder), or as to any other underlying felony which has the element of violence directed towards the ultimate victim of the murder. See, State v. Lopez, 847 P. 2d 1078, 1089 (Ariz. 1992) ("Comparing Arizona and California felony-murder law shows that California case law is not persuasive in this area. In California, burglary with the intent to commit an assault cannot be a predicate felony for felony-murder. . . . Such a burglary can support felony-murder in Arizona."(citations omitted)); People v. Viser, 343 N.E. 2d 903, 909 (Ill. 1975) (aggravated battery qualified as underlying felony for felony-murder); Commonwealth v. Claudio, 634 N.E. 2d 902 (Mass. 1994) (in a jurisdiction where felony-murder statute does not enumerate qualifying offenses, burglary with intent to commit armed assault on occupant can serve as predicate for felony murder, notwithstanding claim that the assault merged with the ultimate homicide); Commonwealth v. Berry, 648 N.E. 2d 732, 742 (Mass. 1995) (burglary with assault qualified as underlying felony); Wright v. State, 440 S.E. 2d 7 (Ga. 1994) (aggravated assault by mutual combat would suffice as underlying felony for felony-murder conviction); Jones v. State, 454 S.E. 2d 482 (Ga. 1995) (possession of firearm by convicted felon sufficed as underlying felony for felony-murder conviction); State v. Abraham, 451 S.E. 2d 131 (N.C. 1994) (assault with deadly weapon

with intent to kill was valid felony-murder predicate offense as it was an enumerated offense); State v. McJimpson, 901 P. 2d 354, 360 (Wash. App. 1995) (felony-murder properly based on assault as predicate); State v. Duke, 892 P. 2d 120 (Wash. App. 1995) (same); State v. Adorno, 695 A. 2d 6 (Conn. App. 1997) (burglary with intent to place victim in fear of serious physical injury qualified as underlying offense under felony-murder statute); Smith v. State, 499 So. 2d 750 (Miss. 1986) (declining to follow California merger doctrine, and refusing to reduce capital murder charge of felony murder where underlying felony was burglary); People v. Jones, 530 N.W. 2d 128 (Mich. App. 1995) (rejecting California merger doctrine as to felony murder with underlying felony of burglary with an assault, pointing out that the deterrence rationale of felony murder, upon which California relies, is not the sole basis for the felony murder statute, as the purpose is also enhanced punishment).

In view of the foregoing, it should be manifestly clear that there is no prohibition to using burglary with intent to commit murder or an assault as the underlying felony for Florida's felony-murder statute. Burglary is expressly designated as an enumerated qualifying predicate. Legislative intent is the first question, the middle question, and the final question - and that intent is

clear once burglary was designated. The designation of burglary does not carry with it any qualification such as to distinguish between burglary for pecuniary gain or burglary with an intent to commit some form of violence. Under such circumstances, the answer to this Court's question is clear; there is no prohibition against charging burglary with intent to commit murder.

III.

PROSECUTION FOR FELONY MURDER AND BURGLARY WITH INTENT TO COMMIT MURDER DOES NOT RESULT IN ANY DOUBLE JEOPARDY VIOLATIONS.

As is evident from the foregoing, many states expressly recognize the right of the State to prosecute for both felony murder and burglary with the intent to murder. Contrary to the Appellant's argument, there is no double jeopardy violation. This Court has long-recognized that convictions for felony murder and the underlying felony do not violate the double jeopardy clause. State v. Enmund, 476 So. 2d 165 (Fla. 1985). The predicate felony of burglary with intent to murder does not present any different conclusion for the reasons set forth in Enmund. Enmund was based on two alternative conclusions. First, double jeopardy analysis hinges, first and foremost, on legislative intent. Thus, even if two or more offenses are the "same" for double jeopardy purposes, such dual convictions are permissible if the legislative intent to so punish them is clear. Enmund, 476 So. 2d at 167; Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S.Ct. 673, 74 L.Ed. 2d 535 (1983); Albernaz v. United States, 450 U.S. 333, 340, 101 S.Ct. 1137, 67 L.Ed. 2d 275 (1981). This Court found "sufficient intent that the legislature intended multiple punishments when both a murder and a felony occur during a criminal episode." 476 So. 2d at

167. The rulings in Enmund have recently been reaffirmed by this Court, in the aftermath of United States Supreme Court decisions regarding double jeopardy. Boler v. State, 678 So. 2d 319 (Fla. 1996).

Additionally, this Court also found that "an underlying felony is not a necessarily lesser included offense of felony murder. . . ." 476 So. 2d at 167. Thus, since the offenses of felony murder and the underlying felony have different elements from one another and thus do not give rise to a lesser included offense, they would not involve the "same" offense for Blockburger analysis and would not result in a double jeopardy violation.

It should also be noted that several Florida appellate court opinions have upheld dual convictions for felony-murder and burglary, including burglaries which are based on either an intent to kill or to assault. See, Holsworth v. State, 522 So. 2d 348, 353 (Fla. 1988) (convictions for felony murder and burglary which was with an intent to commit a battery); Wright v. State, 617 So. 2d 837, 840 (Fla. 4th DCA 1993) (convictions for felony murder and burglary which appears to be with an intent to commit an assault or to murder); Mills, supra.

Furthermore, even if any double jeopardy problem did arise, it would not affect the felony-murder conviction itself; it would only preclude the conviction for the underlying felony. For that very same reason, it is again apparent that the Appellant is interjecting an issue which is not responsive to this Court's supplemental briefing question.

IV.

THE CLAIM OF PROSECUTORIAL MISCONDUCT IS NOT RESPONSIVE TO THIS COURT'S ORDER FOR SUPPLEMENTAL BRIEFING, IS PROCEDURALLY BARRED, AND IS WITHOUT MERIT.

The Appellant lastly claims that obtaining an indictment in the circumstances of the instant case constitutes prosecutorial misconduct. The alleged misconduct occurred because the prosecutor expected to "gain some sort of trial advantage." Appellant's Second Supplemental Brief at p. 11. The Appellant concludes that the indictment in the instant case should thus have been quashed and dismissed. Id.

The State would first note that the issue of dismissing the indictment is utterly nonresponsive to this Court's order for supplemental briefing. Second, a request for dismissal of an indictment must be made before or upon arraignment. Fla.R.Crim.P. 3.190(c). The indictment in the instant case was filed in July, 1993. In more than three (3) years of pretrial and trial proceedings and more than an additional three (3) years of appellate proceedings, including an opportunity for full initial and supplemental briefings, never once has the Appellant raised the issue of dismissal of the indictment, let alone explained the "some sort of trial advantage" argument relied upon in these supplemental

proceedings. The State respectfully submits that such an unexplained premise at this juncture is also procedurally barred. Moreover, as seen in the preceding points in this brief, pursuant to well-established precedent from this Court and the majority of the courts in this country, there is no prohibition against a charge of felony murder in the circumstances of the instant case. The State thus fails to see any "misconduct" in seeking an indictment on this basis.

CONCLUSION

Based on the foregoing, the convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPELLEE'S SECOND SUPPLEMENTAL BRIEF** was furnished via U.S. Mail to **ROY D. WASSON**, Suite 450 Gables One Tower, 1320 South Dixie Highway, Miami, Florida 33146-2025, this 30th day of March, 1999.

_____
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