

SUPREME COURT OF FLORIDA

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CASE NO. 88,638

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JESUS DELGADO,

Appellant,

-vs.-

THE STATE OF FLORIDA,

Appellee.

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APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

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**CERTIFICATE OF TYPE STYLE AND FONT**

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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**ARGUMENT**

**I.**

**THE STATE'S POSITION THAT THE JURY WAS  
PROPERLY INSTRUCTED ESTABLISHES ERROR  
PER SE IN THE INDICTMENT FOR FELONY MURDER**

The State, in its Second Supplemental Answer Brief, defends the jury instruction which was given below as "a proper statement of the law." *Id.* at 3. The State's position would require juries to be told that they could convict a defendant of first degree murder without finding any intent to kill, even where the underlying felony required intent to commit murder. That is a *non sequitur*. Where the necessary outcome of indicting a defendant for a given crime is that the jury is given hopelessly contradictory instructions, the fact of such an indictment is error per se, and the conviction based thereon must be reversed.

The State argues on page 3 of its brief that felony murders based on intentional shootings during the course of convenience store robberies are intentional killings. That is not necessarily true. If the killing is intentional, there is no need in such a

case for a felony murder instruction. If, on the other hand, the State fails to establish intent to kill, felony murder is still applicable in a convenience store robbery case—not because the Defendant is shown to have intended the victim's death—because a shooting which was intended by Defendant to scare or only wound the victim accidentally kills.

Unlike the present case, it is not necessary in a convenience store robbery case to establish that the defendant intended to kill the victim in order to sustain a conviction of felony murder. And the presence of such intent would obviate the need for a confusing jury instruction such as the one given here. Therefore, this Court should not accept the State's suggestion that because a defendant in a convenience store case intended to pull the trigger, resulting in death, that such a case necessarily involves an intentional felony murder.

The State argues on pages 5 and 6 of its brief that the indictment was proper because the legislature did not limit the types of burglary which could support a conviction of felony murder to burglaries committed for a purpose other than to commit murder on the premises. The legislature did not need to impose any such qualification or limitation upon the felony murder doctrine, because it would be unnecessary for the felony murder doctrine to be operative at all where such a burglary had occurred with the intent to kill. The resulting death would be premeditated murder,

which could be established without the need for any internally-contradictory and prejudicial jury instructions such as those given here.

A recurring theme throughout the State's Second Supplemental Brief is that principles of statutory construction compel the conclusion that the Defendant's indictment for felony murder was proper. However, apart from the soundness of the general principles of statutory construction discussed by the State in its brief, one very simple principle of statutory construction is that a statute should not be construed to be meaningless and without any legitimate purpose.

If a defendant commits a burglary with the intent to kill and a victim is killed during the course of that burglary, the State has proven a case of premeditated murder, and there is no need to resort to the statutory scheme of felony murder. Therefore, the fact that the felony murder statute by its literal terms seems to apply to such a case does not support the proposition that the felony murder doctrine is applicable to that case. There being no need to rely upon the felony murder doctrine where intent to kill is proven, and the necessary result of applying the felony murder doctrine in such a case being hopeless confusion of the jury with a statement of an inapplicable legal doctrine (that no intent to kill need be proven), the legislature could not have intended such

an absurd result, even if the literal language of the statute would permit such a result in theory.

This Court should reject the State's argument that it is helped by the line of cases which holds that the exact nature of the offense which a defendant intends to commit while on premises need not be alleged in an indictment, so long as some offense was intended and that intent is proven in the trial of the burglary count. It is simply begging the question to say that burglary with intent to commit murder will support a conviction of felony murder, because any sort of burglary has been held to suffice whether or not specifically alleged. The present case does not involve the sufficiency of the allegation of intent to commit an underlying offense, nor does it involve the pleading of one intended offense and the proof of another. Therefore, those cases which hold that any sort of intended crime is sufficient are not on point.

The State does not really dispute that the evidence in this case compel the conclusion that the *only* underlying offense which could have been intended was the offense of intentional murder. It is only in this limited factual setting that the present case must be decided, and it is irrelevant that the felony murder conviction could have been affirmed had the Defendant been shown to have intended the underlying crime of theft or something other than murder.

The State backtracks somewhat from its argument by attempting to rely upon the cases which hold the merger doctrine inapplicable where the underlying felony is burglary with intent to commit an assault, rather than intent to kill. However, Defendant does not herein argue that the merger doctrine should apply where the underlying felony is intent to commit an assault, as the courts in a minority of jurisdictions have decided, for the simple reason that the intent to commit an assault does not require the intent to kill and does not result in the contradictory jury instruction which was given here.

Therefore, even if this Court should agree that felony murder remains viable where the burglary is committed with the intent to assault the victim, such a holding would not be dispositive of the case at bar. This Court should find the felony murder doctrine inapplicable, and not subject to being alleged in an indictment, where the only underlying felony is burglary with intent to kill.



CONCLUSION

Where the only possible underlying felony in a felony murder case is burglary committed with the intent to kill the victims, application of the felony murder doctrine creates a hopeless conflict in the jury instructions. On the one hand, the jury is instructed that intent to kill is a necessary element of burglary. On the other hand, the jury is instructed that it may convict the Defendant of felony murder *without* finding any intent to kill. It is error per se to indict a defendant for a crime which compels the jury to be hopelessly confused by the instructions. Therefore, the question posed by the Court should be answered so as to require reversal.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy hereof was served via U.S. Mail, upon Fariba N. Komeily, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on this, the 9<sup>th</sup> day of April, 1999.

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ROY D. WASSON