

IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,062

OSCAR TRAYLOR,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1961

ROBERT GODFREY
Special Assistant Public Defender
Florida Bar No. 0162795

Counsel for Appellant

TABLE OF CONTENTS

CERTIFICATE OF TYPE SIZE AND STYLE	ii
TABLE OF AUTHORITIES	iii
ARGUMENT	1
CONCLUSION	5
CERTIFICATE OF SERVICE	5

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that this brief was prepared using 14-point Times New Roman type.

TABLE OF AUTHORITIES

Cases	Page
<i>Gonzalez v. State</i> , 585 So. 2d 932 (Fla. 1991)	1, 2
<i>Miller v. State</i> , 460 So. 2d 373 (Fla. 1984)	4
<i>Minor v. State</i> , 707 So. 2d 1184 (Fla. 3d DCA 1998)	3
<i>Pinkerton v. State</i> , 534 So. 2d 425 (Fla. 5th DCA 1988)	3
<i>Roulhac v. State</i> , 648 So. 2d 203 (Fla. 1st DCA 1994)	4
<i>State v. Tinsley</i> , 683 So. 2d 1089 (Fla. 5th DCA 1996)	1
<i>Strickland v. State</i> , 437 So. 2d 150 (Fla. 1983)	1
<i>Wallace v. State</i> , 665 So. 2d 313 (Fla. 2d DCA 1995)	2, 3

ARGUMENT

The first ten pages of the state's brief on the merits are, except for a few inconsequential word changes, just a copy of the state's jurisdictional brief, in which it argued that this case does not expressly conflict with *Gonzalez v. State*, 585 So. 2d 932 (Fla. 1991). Only in the last two pages, where the state urges that this case is controlled by *Strickland v. State*, 437 So. 2d 150 (Fla. 1983), is any new argument presented.¹ The state is wrong on both points.

The major error in the state's argument is that it fails to see the significance of the fact that this case involved a charge of attempted **felony murder**. As such, the actual underlying felony that might support such a charge is crucial in determining whether or not the use of a weapon was "an essential element" of the crime, and thus whether or not the conviction may be reclassified pursuant to section 775.087, Florida Statutes (1987).

Here, the only **charged** felonies that could provide support for the attempted felony murder conviction both involved the use of a weapon as an essential element. Thus, while the information for the charge of attempted first-degree murder alleged that it was done while engaged in the perpetration of a burglary and/or a sexual battery, the **only** burglary alleged in this case was one committed with a deadly weapon and

¹ The state's argument concerning the applicability of *Strickland* it taken directly from the decision of the district court of appeal in *State v. Tinsley*, 683 So. 2d 1089 (Fla. 5th DCA 1996), but with quotation marks and page citations omitted.

the **only** sexual battery alleged in this case was also one committed with a deadly weapon. The jury acquitted Traylor of burglary here, finding him guilty of the lesser included offense of trespassing, which would not support a felony first degree murder conviction. The only underlying felony that could support an attempted felony murder conviction here, then, was the sexual battery – and that was charged and proven not as a simple sexual battery but as a "sexual battery with a deadly weapon." Thus, under the facts of this case, the attempted murder conviction, to the extent it was based on attempted felony murder², **necessarily involved** the use of a weapon, thus making reclassification improper. This Court's opinion in *Gonzalez v. State*, 569 So. 2d 782 (Fla. 1991) is therefore directly on point and controlling.

A very similar case to the present one was found in *Wallace v. State*, 665 So. 2d 313 (Fla. 2d DCA 1995). There, the defendant was convicted of felony second degree murder with a firearm, and armed burglary of a dwelling with a firearm. "The charge of armed burglary with a firearm provided the underlying support for the felony

² The attempted first-degree murder charge was based upon alternative theories of premeditation or felony murder. R. 17. It is impossible to tell from the verdict form which theory the jury based its verdict upon, as the form simply says "ATTEMPTED MURDER FIRST DEGREE; AS CHARGED IN COUNT TWO OF THE INFORMATION." *See* R. 22. The state, then, correctly does not make any kind of harmless error argument here. If the reclassification is improper under a felony murder theory, then it is improper period because there is no way to say beyond a reasonable doubt that the conviction was based solely upon the theory of premeditation.

murder conviction. Thus, the trial court should not have enhanced the felony murder conviction based upon the use of a firearm." *Id.* at 314. Other district courts of appeal, including the Third, have also recognized that it is necessary to look at the underlying felony itself to determine if use of a weapon was an essential element of the crime of felony murder.

Thus, in *Pinkerton v. State*, 534 So. 2d 425 (Fla. 5th DCA 1988), the defendant was convicted of third degree murder based on a killing that occurred during the commission of an aggravated battery. While recognizing that an aggravated battery may be committed without the use of a deadly weapon, the district court nevertheless found reclassification improper under the facts of the case before it because "the jury specifically found that defendant had committed the aggravated battery . . . while using a deadly weapon. Therefore, the deadly weapon was an essential element of the underlying crime of aggravated battery, and reclassification was improper." *Id.* at 426; *see also Minor v. State*, 707 So. 2d 1184 (Fla. 3d DCA 1998) ("Where, in a third-degree murder case, an essential element of the underlying felony is use of a deadly weapon, it is impermissible to apply the weapon/firearm enhancement statute"); *Roulhac v. State*, 648 So. 2d 203 (Fla. 1st DCA 1994) (court, in reviewing a conviction for attempted first-degree felony murder with a firearm, looked to the information and jury verdict **of the underlying felony itself** to determine that the

underlying felony involved the use of a firearm, thus making reclassification inapplicable).

In sum, a conviction for attempted felony murder must have a felony as its underlying basis, and the elements of attempted felony murder therefore include the elements of the actual underlying felony. Where, as here, the only possible underlying felony is "sexual battery with a deadly weapon," then a conviction for attempted felony murder necessarily involves the use of a weapon as an essential element, thereby making a reclassification of the crime improper.

The three cases relied upon by the state are easily distinguishable. Neither *Strickland*, *Tinsley*, nor *Miller v. State*, 460 So. 2d 373 (Fla. 1984), involved a charge of felony murder, and so there was no need to consider the essential elements of the crime as informed by the elements of the underlying felony itself.

CONCLUSION

For the foregoing reasons, as well as those stated in the opening brief, appellant's sentence of life imprisonment should be vacated and the case remanded for resentencing.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14th Street
Miami, Florida 33125
(305) 545-1961

By: _____
ROBERT GODFREY
Special Assistant Public Defender
Florida Bar No. 0162795

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Reply Brief On The Merits was delivered by mail to Linda Katz, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, RiverGate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131, this 9th day of July, 1999.

Robert Godfrey
Special Assistant Public Defender
Florida Bar No. 0162795