IN THE SUPREME COURT OF FLORIDA

TERRY P. SANDERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC05-2115

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The State charged Petitioner with attempted first-degree murder by discharging a firearm and inflicting great bodily harm upon David Snow. (Vol. I: R18). The State furnished pretrial notices that Petitioner qualified as a violent career criminal and habitual felony/violent felony offender. (Vol. I: R32-33).

During the jury charge conference, the trial court stated it was "having a problem" concerning lesser included offenses, particularly with the inclusion of aggravated battery because that offense was "the same degree of felony as the other crimes" and would give the State "two bites at the apple for a 10-20-LIFE offense." Defense counsel agreed that aggravated battery should not be charged. (Vol. II: T142-45, 166). The court discussed the attempted second-degree murder instruction, including all the choices for the jury to make respecting discharging the firearm and inflicting great bodily harm. Petitioner did not object. (Vol. II: T153-59, 169-72).

The evidence at trial showed that on May 16, 2002, Petitioner went to Club Turbulence in Tampa's Ybor City. Gainous, Forbes and Doland were present with Petitioner at the club. At one point, Petitioner, Forbes and Doland were physically ejected from the club by the club's security "bouncers." (Vol. III: T197, 206-07). Petitioner and his

friends were angry and struggled with the security personnel. (Vol. III: T197, 206-07, 232).

Later, Petitioner and his friends returned to the club. By that time, the club was closed and the men were denied entry. David Snow, a club bouncer, explained to Doland that if he felt there was a problem, he should contact the club's management. (Vol. III: T197-99, 210-11, 229). As he was being forced to leave, Doland started pointing towards the bouncers' locations while saying something to Petitioner. (Vol. III: T219-220, 233-34). Suddenly, Petitioner said, "F-you", pulled out a gun, and pointed the weapon in the direction of the club's bouncers. David Snow attempted to flee, and ended up getting shot by a bullet that went all the way through Snow's leg. Vol. III: T200-02, 211, 221, 223-25, 234-35, 245-46). Petitioner was dressed in a red shirt. (Vol. III: T225).

Corporal Schurig of the Tampa Police Department responded to a reported disturbance at the club. When he arrived, Corporal Schurig observed two males and a female standing by the front door of the club. One of the males had a gun in his right hand, and he fired into the club. The shooter was wearing a red shirt. Corporal Schurig saw the shooter's face when the shooter turned to run away. Corporal Schurig identified Petitioner as the shooter. (Vol. IX: T282-84, 289, 292).

Petitioner and another man jumped into Gainous's van shortly after Gainous heard the sound of gunshots. Petitioner was "riled" and using profanity. He had a gun and told Gainous to drive. Petitioner was wearing a red shirt. (Vol. IV: T318-20).

The defense did not present any evidence, and argued in closing that the State had failed to prove Petitioner's identity as the shooter. (Vol. IV: T326-29, 333, 350). The trial court instructed the jury on attempted second-degree murder as a lesser included offense of the charged crime, without objection. The court also instructed on attempted voluntary manslaughter. (Vol. I: R64-65; Vol. IV: T357-61, 368-70).

On February 24, 2004, the jury returned a verdict finding Petitioner guilty of attempted second-degree murder by discharging a firearm and inflicting great bodily harm. (Vol. I: R80-81; Vol. IV: T382). In a motion for new trial, Petitioner argued that his conviction on attempted second-degree murder, with the special findings that Petitioner discharged a firearm and inflicted great bodily harm, violated the prohibition against double jeopardy because the 10-20-LIFE statute both reclassified the offense and provided for a sentence of 25 years up to life in prison. (Vol. I: R82-83, 151-52). Petitioner argued that because the trial court could sentence him up to life in prison, "it would be the same as if

he’d committed a capital” crime. (Vol. I: R164-65).

The trial court opined that Petitioner’s double jeopardy argument was without merit, and further stated Petitioner was convicted of a first degree felony because of the 10-20-LIFE statute, and the fact that the court had discretion to sentence Petitioner up to life in prison did not convert the classification into a life felony. (Vol. I: R158-59, 164-65). Petitioner requested the lowest possible sentence under the statute, which is 25 years. (Vol. I: R166-67).

The trial court found that Petitioner qualified as a habitual felony offender, and specifically found that the facts of the case and Petitioner’s criminal history called for a life sentence. (Vol. I: R114-21, 178, 181-82).

Petitioner filed a timely notice of appeal in the Second District Court of Appeal on April 23, 2004. (Vol. I: R125-28). Petitioner relied upon the Fourth District’s holding in Franklin v. State, 877 So. 2d 19 (Fla. 4th DCA 2004), and this Court’s ruling in Ray v. State, 403 So. 2d 956 (Fla. 1981), to argue that the trial court erred in listing attempted second-degree murder while discharging a firearm and inflicting great bodily harm on the verdict form as a lesser included offense to attempted first-degree murder while discharging a firearm and inflicting great bodily harm, because the sentence he received

was the same as the sentence he could have received for the main offense, and longer than he could have received for one or more of the "greater" offenses listed on the verdict form. The Second District affirmed, ruling, "Especially in the absence of any objection, we conclude that it is permissible for the trial court to place lesser offenses on the verdict form in an order that generally gives the trial court the discretion to impose a lesser penalty, even if that order also gives the trial court the discretion to impose an equal or greater penalty." Sanders v. State, 912 So. 2d 1286, 1289 (Fla. 2d DCA 2005). The Second District opined, "In this case, we are holding that an offense is lesser in 'penalty' not only when the conviction for the lesser offense is guaranteed to result in a lesser penalty, but also when it will give the trial judge discretion to impose a lesser penalty than the offenses listed higher on the verdict form. We are permitting the trial court to instruct on such a lesser offense even if it could give the trial court discretion to impose a sentence as long as the sentence for the main offense and even longer than the sentence for another lesser offense that is listed higher on the verdict form." Id., at 1290-91. Recognizing the importance of the issue in light of complex modern sentencing methods, the Second District certified the following to this Court as a question of great public

importance:

> **IN ORDER FOR AN OFFENSE TO BE A LESSER-INCLUDED OFFENSE, MUST IT NECESSARILY RESULT IN A LESSER PENALTY THAN EITHER THE PENALTY FOR THE MAIN OFFENSE OR THE NEXT GREATER OFFENSE ON THE VERDICT FORM?**

SUMMARY OF THE ARGUMENT

This Court should answer the question posed by the Second District in the negative. Under this Court's precedent, and considering the jury's pardon power and the advent of modern day sentencing schemes, in order for an offense to be a lesser included offense, it need not *necessarily* result in a lesser penalty than either the penalty for the main offense or the next greater offense on the verdict form.

This Court's decision in Ray addressed a fundamental error analysis to be used when the trial court has, without objection, instructed the jury on a lesser offense that is neither necessarily nor permissively lesser included in the charged offense. Under the fundamental error analysis set forth in Ray for *that particular circumstance*, the instruction on the improper lesser offense will not be deemed fundamental error if (1) the improperly charged offense is lesser in degree *and* penalty than the main offense, or (2) defense counsel requested the improper charge and relied on it. This fundamental error test in Ray recognizes a defendant's due process right to be placed on notice of the specific charge against him.

Any due process concern disappears where the lesser offense is either a necessary or permissive lesser included offense of

the charged offense. Where, as here, the defendant's due process rights have not been implicated, the other analysis discussed in Ray applies: the conviction for either a necessary or permissive lesser included offense is appropriate where the lesser penalty is *either* lesser in degree "*or* one subject to a lesser penalty." Ray, 403 So. 2d at 961 (emphasis added).

In the context of reclassification and enhancement statutes, such as 10-20-LIFE, this Court should adopt the reasoning of the Second District in this case and hold that where a reclassification statute dictates that the offense of conviction is reclassified to an offense level equal to or greater than a higher offense listed on the verdict form, conviction on the lesser offense will be permissible so long as the trial court has *discretion* to impose a lesser penalty then the offenses listed higher on the verdict form.

Alternatively, this Court should rule that courts must examine a crime and its lesser included offenses in the abstract, without regard to any reclassification or enhancement of which a defendant may have been found guilty, in determining whether a conviction on a lesser included offense is proper.

ARGUMENT

IN ORDER FOR AN OFFENSE TO BE A LESSER-INCLUDED OFFENSE, MUST IT NECESSARILY RESULT IN A LESSER PENALTY THAN EITHER THE PENALTY FOR THE MAIN OFFENSE OR THE NEXT GREATER OFFENSE ON THE VERDICT FORM?

Petitioner asserts that he was convicted of an "improper lesser included offense." He argues that a lesser offense must carry a lesser penalty than the charged offense, and that his sentence under §775.087(2)(a)3, Florida Statutes (2002), ("10-20-LIFE") improperly "resulted[1] in a term of natural life." Petitioner complains that this life sentence was the same sentence he would have received had he been convicted of the main charged offense, and therefore it could not be a "lesser" offense.

Jurisdiction

Florida Rule of Appellate Procedure 9.030(a)(2)(v), provides the jurisdiction of this Court may be invoked to pass upon a question certified to be of great public importance.

Standard of Review

Ordinarily, the trial court's decision on the giving or

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1 In fact, the trial court had discretion to sentence Petitioner to 25 years up to life under 10-20-LIFE. A life sentence was not mandatory, as Petitioner's argument would make it seem.

withholding of a specific jury instruction is reviewed for abuse of discretion. See, e.g., James v. State, 695 so. 2d 1229, 1236 (Fla. 1997)(noting that a trial court has wide discretion in instructing the jury). Petitioner complained that the trial court should never have instructed the jury on attempted second-degree murder as a lesser included offense of attempted first degree murder because it was not truly "lesser" where he did not receive a "lesser" penalty. This argument was not presented in the trial court, where Petitioner approved the instruction on attempted second-degree murder as a lesser included offense, and merely argued in his motion for new trial that the reclassification and enhancement of his offense under 10-20-LIFE violated double jeopardy. Therefore, the district court properly reviewed the issue under the fundamental error standard of review. See F.B. v. State, 852 so. 2d 226, 229 (Fla. 2003)(ruling that the "sole exception to the contemporaneous objection rule applies where the error is fundamental"; and "an error is deemed fundamental when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process")(internal citation omitted).

The Certified Question Should Be Answered In The Negative

The Second District posed the question, "In order for an offense to be a lesser-included offense, must it *necessarily*

result in a lesser penalty than either the penalty for the main offense or the next greater offense on the verdict form?" Sanders, 912 so. 2d at 1291 (emphasis added). This Court should answer the question in the negative.

The Second District's Analysis

Petitioner was charged with attempted first-degree murder while discharging a firearm and causing great bodily harm. He was convicted of attempted second-degree murder and the jury made a specific finding that Petitioner discharged a firearm and caused great bodily harm. He relied on Franklin v. State, 877 So. 2d 19 (Fla. 4th DCA 2004), and Ray v. State, 403 So. 2d 956 (Fla. 1981), to support his argument on appeal that it was error to list attempted second-degree murder while discharging a firearm and inflicting great bodily harm on the verdict form as a lesser offense because he received a sentence that was the same as the sentence he could have received for the main offense, and that it was actually longer than the sentence he could have received for one or more of the "greater" offenses on the verdict form.

Petitioner argued in the district court, as he does here, that the lesser included offense of which he was convicted was not a true "lesser" offense because the penalty imposed – life

imprisonment – was not less than the penalty for the main offense with which he was charged. The district court pointed out that Petitioner's "penalty is actually greater than the penalty he might have received if the jury had selected option D2 [attempted first-degree murder without the use of a firearm], rather than option E on the verdict form [attempted second-degree murder by discharging a firearm and causing great bodily harm, the charge of which Petitioner was convicted]." Sanders, 912 So. 2d at 1288. The district court went on to analyze Franklin, 877 So. 2d at 19, noting that the opinion did not explain in detail the verdict form used at trial, but that it was possible to glean from the outcome that if the choices were laid out in a similar fashion to the instant case, the verdict form listed "the varieties of attempted second degree murder" ending with attempted second-degree murder without a firearm (a second-degree felony), then listed the "lesser" offense of aggravated battery while discharging a firearm and causing great bodily harm (a first-degree felony). Id.

The Second District went on to state that the Franklin court focused on the argument that the reclassified form of aggravated

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2 The district court's opinion includes an appendix containing the verdict form used at Petitioner's trial. Sanders, 912 So. 2d at 1291-93.

battery does not carry a lesser punishment than attempted second-degree murder while discharging a firearm and inflicting great bodily harm. Id., at 1289. "Attempted second degree murder is actually a lesser offense, *both in degree and sentence*, than aggravated battery once aggravated battery has been reclassified due to the firearm. Thus, Franklin's jury appears to have been given a verdict form that unquestionably listed the lesser offenses in an order that was not descending in penalty." Id. (Emphasis added).

In Petitioner's case, the trial court did not instruct on aggravated battery in any form because it concluded that it was not a lesser offense and that instructing on it would give the State "two bites at the apple." "The offenses listed on Mr. Sanders' verdict form began with life felonies and ended with a third-degree felony. The offenses were not listed in an order that guaranteed that the trial court *must* impose a lesser penalty, but if one considers all the various sentencing schemes, they are listed in an order that does give the trial court *discretion* to impose a sentence that is less severe than the preceding option on the verdict form." Sanders, 912 So. 2d at 1289 (emphasis added).

The Second District pointed out that Ray, 403 So. 2d at 956, on which the Franklin court relied in reaching its decision,

involved an offense that was not a lesser offense because its substantive elements did not permit it to be either a necessary or permissive lesser offense. Sanders, 912 So. 2d at 1289-90. *In that context*, this Court held in Ray that an erroneous lesser included charge will not be considered fundamental error if: (1) the improperly charged offense is lesser in degree and penalty than the main offense, or (2) defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action. Id., at 1290; Ray, 403 So. 2d at 961.

The Second District held:

> We conclude that the offenses listed on the verdict form were all appropriate lesser offenses of the main charge and that the order in which they were listed was also appropriate. This is not a situation like Franklin in which a "lesser" offense was actually greater in degree and punishment than the offense that immediately preceded it on the verdict form, and the same both in degree and punishment than the main offense charged. Especially in the absence of any objection, we conclude that it is permissible for the trial court to place lesser offenses on the verdict form in an order that generally gives the trial court the *discretion to impose a lesser penalty*, even if that order *also gives the trial court the discretion to impose an equal or greater penalty*.

Sanders, 912 So. 2d at 1289 (emphasis added).

Franklin Misinterpreted Ray

The decision of the Fourth District Court in Franklin misapplies this Court's holding in Ray. Therefore, Petitioner's reliance on Franklin is misplaced. In reaching its conclusion, the Fourth District claimed it was following the reasoning of this Court in Ray v. State, 403 So. 2d 956 (Fla. 1981), where, the Franklin court said, this Court held that a lesser included offense is by definition an offense which carries a lesser penalty. Franklin, 877 So. 2d at 20. However, the majority of the Fourth District Court panel misapprehended the law as set forth in Ray.

The issue before this Court in Ray was whether it was fundamental error to convict a defendant under an erroneous lesser included offense when he had the opportunity to object. Ray, 403 So. 2d at 958. This Court began its opinion by saying, "To dispose of this case, we must first determine whether committing a lewd and lascivious act on a minor under the age of fourteen is a lesser included offense of sexual battery of a person over the age of eleven." Id., at 959. After considering – and rejecting – the idea that the crime might be either necessarily or permissively included as a lesser offense of the charged crime, this Court stated, "It is also not 'lesser' because both section 794.011(5) and section 800.04 are second degree felonies." Id. This Court ruled, "If the instant

complained-of instruction had been a permissible lesser included offense, i.e., a crime of lesser degree *or* one subject to a lesser penalty or had been includable under category 3 or 4 of Brown [v.State, 206 So. 2d 377 (Fla. 1968)][3], the district court would have been correct in affirming the conviction." Id., at 961 (emphasis added).

Thus, the language this Court used in Ray cannot in any reasonable way be taken to mean that every permissible lesser included offense must, by definition, be one in which a defendant is subject to a lesser penalty. Id. In fact, in very clear language – by the use of the disjunctive "or" – this Court said that while a crime of lesser penalty might be one type of permissible lesser included offense, another type of crime was equally suitable as a lesser included offense: "a crime of lesser degree." Id.

Respondent acknowledges that the Ray opinion immediately goes on the state that it is not fundamental error to instruct

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3 In In re Standard Jury Instructions (Criminal Cases), 431 So. 2d 594, 596 (Fla. 1981), this Court consolidated the four categories of lesser included offenses delineated in Brown into (1) offenses necessarily included in the offense charged, which will include some lesser degrees of offenses; and (2) offenses which may or may not be included in the offense charged, which will include all attempts and some lesser degrees of offenses.

on the improper lesser offense if the "improperly charged offense is lesser in degree *and* penalty than the main offense." Id. (Emphasis added). However, this use of the conjunctive was in the context of this Court's ruling on the fundamental error analysis to be used when a lesser offense was incorrectly charged to the jury that, by its substantive elements, was neither a necessary nor permissive lesser included offense. Id.

The problem with Ray's conviction was not that he was convicted of an otherwise appropriate lesser included offense that was not lesser in penalty than the charged offense, as Petitioner bemoans here. The problem with Ray's conviction was that he was convicted of a crime that was *neither* lesser in degree *nor* a permissible lesser included offense of the charged offense. Id. This Court in Ray clearly stated that Ray's conviction would have been properly affirmed on appeal if it had been a viable necessary or permissive lesser included offense and had been either lesser in degree "*or* one subject to a lesser penalty." Id. (Emphasis added). In other words, if Ray had been charged with crime *A* (a first-degree felony), and the trial judge had instructed Ray's jury on the necessarily lesser included offense of crime *B* (a second-degree felony), Ray's conviction for crime *B* would have been affirmed even if Ray had received the same sentence for crime *B* that he could have

received for crime *A*. Ray, 403 So. 2d at 961.

The problem with convicting an accused of a crime that is neither a necessary nor a permissive lesser included offense, as happened in Ray, is that the defendant's due process rights are implicated. See Cole v. Arkansas, 333 U.S. 196 (1948)("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."). This due process concern – lack of notice of the specific charge – vanishes when an accused is *not* convicted of a crime that is neither a necessary nor a permissive lesser included offense, as happened in Petitioner's case. To state it plainly, Petitioner was convicted of a necessary lesser included offense; therefore, he had notice of the specific charge.

In Nesbitt v. State, 889 So. 2d 801 (Fla. 2004), the defendant was charged, *inter alia*, with attempted second-degree murder with a weapon. By agreement of both the prosecution and the defense, Nesbitt's jury was instructed on aggravated assault with a deadly weapon as a lesser offense, and Nesbitt was ultimately convicted of that crime. Id., at 802-03. On review, this Court determined that aggravated assault with a deadly

weapon was not a permissive lesser included offense of attempted second-degree murder with a weapon where the element of "intentionally or knowingly caus[ing] great bodily harm" was not alleged in the charging document. Id., at 802.

Therefore, Nesbitt faced the same problem Ray faced: he was convicted of an offense which by its substantive elements could not be a lesser included offense of the charged crime. Because Nesbitt's conviction raised the specter of a due process violation, See Cole, 333 U.S. at 196, this Court analyzed whether his conviction constituted fundamental error under Ray. Under Ray, Nesbitt's conviction for the improper lesser offense would not be a violation of due process, and thus not fundamental error, if: "(1) the improperly charged offense is lesser in degree *and* penalty than the main offense, or (2) defense counsel requested the improper charge or relied on it." Nesbitt, 889 So. 2d at 803, citing, Ray, 403 So. 2d at 961. This Court concluded that Nesbitt's conviction for aggravated assault met the first alternative under the Ray fundamental error test; that is, attempted second-degree murder with a weapon is a first-degree felony punishable by up to thirty years in prison, and aggravated assault is a third-degree felony punishable by up to five years in prison. Id.

The Nesbitt decision is another example of a circumstance

when Ray's fundamental error analysis (i.e., the determination of whether the defendant had been denied due process) came into play. As previously stated, when the accused has been convicted of an offense which was either a proper necessary or permissive lesser included offense, as happened in Petitioner's case, the due process concern which gave rise to the fundamental error analysis announced in Ray and utilized again in Nesbitt disappears. When the defendant's due process rights have not been implicated, the other analysis discussed in Ray applies: the conviction for either a necessary or permissive lesser included offense is appropriate where the lesser offense is *either* lesser in degree "*or* one subject to a lesser penalty." Ray, 403 So. 2d at 961.

At least one other district court of appeal weighed in on the issue, and published an opinion which provides some guidance. In S.L.S. v. State, 404 So. 2d 1105 (Fla. 1st DCA 1981), the juvenile was charged with sexual battery on a person eleven years of age or younger; however, the trial court granted the juvenile's motion for judgment of acquittal at the close of the State's case, and the cause proceeded on the offense of attempted sexual battery. At the close of all the evidence, the trial court, over the juvenile's objection, adjudicated the juvenile delinquent for the offense of lewd, lascivious or

indecent assault. Id. On appeal, S.L.S. argued he was adjudicated delinquent for an improper lesser offense. Id. The First District first noted that the offense on which the juvenile was adjudicated was, in today's parlance, a permissive lesser included offense to the charged crime. Id. The court rejected the idea that in order for an offense to be considered lesser, there is a requirement that it be one subject to a lesser penalty. Id. In so doing, the First District held, "We do not view Ray as imposing an absolute requirement that in order to be a proper lesser included offense . . . the offense must be one subject to a lesser penalty." Id., at 1106.

In sum, the Fourth District in Franklin misinterpreted this Court's ruling in Ray; therefore, Petitioner's reliance on the Franklin court's reasoning is misplaced. Nesbitt does not advance Petitioner's cause because it dealt with the fundamental error analysis announced in Ray and not the alternative analysis provided, which is applicable to Petitioner's case. When the defendant has been convicted of a proper necessary or permissive lesser included offense, the other analysis discussed in Ray applies: the conviction for either a necessary or permissive lesser included offense is appropriate where the lesser offense is *either* lesser in degree "*or* one subject to a lesser penalty." Ray, 403 So. 2d at 961. (Emphasis added).

Lesser Included Offenses In the Context of Reclassification and Enhancement Statutes

Answering the Second District's certified question in the negative would continue to allow for the jury "pardon." A look at the case law involving lesser included offenses in the context of reclassification and enhancement statutes supports this argument.

In Miller v. State, 438 So. 2d 83 (Fla. 4th DCA 1983), approved, 460 So. 2d 373 (Fla. 1984), the defendant was charged with second-degree murder with a handgun, and the jury returned a verdict of guilty on the lesser included offense of attempted second-degree murder. The court ruled that the offense at conviction was lesser included in spite of the fact that, because of the existing enhancement statute, the trial court reclassified the attempted second-degree murder from a second-degree to a first-degree felony and sentenced the defendant to twenty years in prison, five years more than the maximum sentence he would have received for the lesser included offense minus the enhancement. Miller, 438 So. 2d at 84. This Court agreed with the Fourth District that the reclassification provisions apply to offenses "impliedly charged" as lesser included offenses. Miller, 460 So. 2d at 374.

In Rivers v. State, 425 So. 2d 101, 105 (Fla. 1st DCA 1982), the defendant, who was charged with robbery with a firearm,

alleged the trial court erred in refusing to give a jury instruction on the lesser included offenses of robbery with a deadly weapon and robbery with a weapon. The defendant stipulated at trial that he entered a store and committed the robbery with a shotgun. Id. In upholding the trial court's refusal to give the requested instructions, the First District opined, "There was no evidence upon which to base a finding that the shotgun was not a firearm. Robbery with a deadly weapon and robbery with a weapon carry the same penalty as the offense charged. Each offense is a felony of the first degree. No offense is deemed to be a lesser offense if it carries the same penalty as the crime under consideration." Rivers, 425 So. 2d at 105. (Internal citation omitted).

Significantly, however, when this Court was invited to join in similar reasoning as that set forth in Rivers, it declined to do so. In State v. Weller, 590 So. 2d 923, 927 (Fla. 1991), the defendant was charged with two first-degree felonies, trafficking in 400 grams or more of cocaine, and conspiracy to traffic in 400 grams or more of cocaine. At trial, the defendant requested instructions on lesser included offenses, including the first-degree felony of conspiracy to traffic in cocaine in amounts less than 400 grams but more than 200 grams (which carried a minimum mandatory sentence of five years), and

the first-degree felony of conspiracy to traffic in cocaine in amounts less than 200 grams but more than 28 grams (which carried a minimum mandatory sentence of three years). Id. The trial court denied the defendant's request, and the Fourth District reversed based on the failure to give the requested instructions. Weller v. State, 501 so. 2d 1291 (Fla. 4th DCA 1986).

On review, this Court admitted that "at first blush," it would be inclined to agree with the trial court and hold that two trafficking offenses were not lesser included offenses of the conspiracy offense since all of them were first-degree felonies and the Court had previously stated that offenses were not "lesser" if they carried the same penalty. Weller, 590 So. 2d at 927, citing, State v. Carpenter, 417 So. 2d 986 (Fla. 1982). However, this Court in Weller opined that in spite of their shared status as first-degree felonies, two of the three offenses were lesser included because they carried different *minimum* penalties. Id.

In State v. Estevez, 753 So. 2d 1, 4 (Fla. 1999), this Court stated that while a statute might limit a trial judge in sentencing once a specific conviction is secured, "none of its provisions obviates the jury's inherent power to 'pardon' a defendant by convicting the defendant of a lesser offense."

Unquestionably, the issue in this case would not have arisen without the imposition of 10-20-LIFE to Petitioner's sentence. Judge Stone's dissent in Franklin addressed the jury's inherent "pardon" power in the context of the operation of an enhancement statute:

> The jury was given the option of finding Franklin guilty of attempted second-degree murder with a firearm (with special additional findings as to discharge and injury), or lessers that included attempted second-degree murder or aggravated battery with a firearm (with special additional findings to be made as to whether a firearm was discharged and whether great bodily harm was inflicted). The jury could have determined that the offense was committed without discharge or without great bodily harm.

Franklin, 877 So. 2d at 21 (Stone, J. dissenting).

The reason for the rule requiring trial courts to instruct juries on lesser included offenses is based on the concept of jury pardons. See, e.g., State v. Abreau, 363 So. 2d 1063 (Fla. 1978); Amado v. State, 585 So. 2d 282, 283 (Fla. 1991)("We still allow juries to convict on lesser offenses under our recognition of the jury's right to exercise its 'pardon power.'")(citation omitted). As Judge Stone's dissent in Franklin pointed out, when properly instructed, juries faced with special verdicts delineating facts that could lead to enhanced sentences have the discretion to make factual findings that could allow the

defendant to receive a punishment that is less severe than the crime charged.

The Second District recognized this fact in its decision in Petitioner's case. Sanders, 912 So. 2d at 1289. The jury was given a special verdict form that gave it the option to choose whether Petitioner had committed the charged offense or the two lesser included offenses, and specifically whether Petitioner had committed any of the three options by discharging a firearm and causing serious bodily injury. Id. Although the offenses on Petitioner's verdict form were not listed in an order that guaranteed that the trial court *must* impose a lesser penalty, they were listed in an order that gave the trial court the *discretion* to impose a sentence that was less severe than the preceding option on the verdict form. Id.

The Second District's opinion harmonizes the jury's pardon power and this Court's precedent in the context of modern day reclassifications and enhancements and should be approved by this Court. Under Ray and Sanders, if the offense of conviction was either a necessary or permissive lesser included offense, and if it was either lesser in degree or penalty than the charged offense, then the defendant's conviction on the offense was proper. In a situation, such as this one presents, where a reclassification statute dictates that the offense of conviction

is reclassified to an offense level equal to the next higher offense on the verdict form, conviction on the lesser offense will still be permissible so long as the trial court has *discretion* to impose a lesser penalty than the offenses listed higher on the verdict form. Sanders, 912 So. 2d at 1290.

Accordingly, this Court should answer the question posed by the Second District in the negative. Under this Court's precedent, and considering the jury's pardon power and the advent of modern day sentencing schemes, in order for an offense to be a lesser-included offense it need not *necessarily* result in a lesser penalty than either the penalty for the main offense or the next greater offense on the verdict form. Id.

Alternatively, this Court should adopt a rule in which Florida courts examine crimes without regard to the possibility of reclassification or enhancement to determine whether a lesser included offense was properly charged. As stated previously, the purpose of allowing lesser included offenses is to provide the jury with the opportunity to grant a "jury pardon." Amado, 585 So. 2d at 283. Legally, there really is no other reason for the submission of lesser included offenses for the jury's consideration. See Mosley v. State, 482 So. 2d 530, 531-32 (Fla. 1st DCA 1986)("It is only because the Supreme Court of Florida has adopted the phenomenon of the 'jury pardon' as part

of the jurisprudence of our State that a defendant can be heard to complain about the failure to instruct on lesser offenses notwithstanding the fact that he has been properly proved and found guilty of the offense charged.")(footnote omitted). See also, Bufford v. State, 473 So. 2d 795, 796 (Fla. 5th DCA 1985)("The requirement that the jury be charged on lesser included offenses is solely based on the jury's pardon power."), review denied, 482 So. 2d 347 (Fla. 1986). Moreover, except in cases in which the State seeks the death penalty, juries are not instructed on the sentence that may be imposed for the offense for which the defendant stands trial. Fla. R. Crim. P. 3.390(a).

At the same time, it is the province of the legislature to formulate appropriate penalties for crimes. See, e.g., Lightbourne v. State, 438 So. 2d 380, 385 (Fla. 1983)("[T]he determination of maximum and minimum penalties is a matter for the legislature."), cert. denied, 465 U.S. 1051 (1984). For example, in the 10-20-LIFE statute, the Legislature set forth its intent in §775.087(2)(d): "It is the intent of the Legislature that offenders who actually possess, carry, display, use, threaten to use, or attempt to use firearms or destructive devices be punished to the fullest extent of the law . . . ." Subsection (2)(c) demands that if the mandatory minimum prison

terms exceed the maximum sentences otherwise provided, "then the mandatory minimum sentence *must* be imposed." §775.087(2)(c), Fla. Stat. (2002)(emphasis added).

It is true that a trial court may enhance a defendant's sentence or apply the minimum mandatory sentence for use of a firearm under 10-20-LIFE only after the jury has made a finding that the defendant committed the crime while using a firearm. State v. Overfelt, 457 So. 2d 1385, 1387 (Fla. 1984). Additionally, a factor such as a firearm, is treated as the "functional equivalent" of an element of the offense for purposes of the Due Process Clause when its existence increases the penalty for a crime beyond the prescribed statutory maximum. Apprendi v. New Jersey, 530 U.S. 466, 494 n. 19 (2000). However, such a factor is not transformed into a substantive element of the offense for double jeopardy purposes by virtue of the requirement of a specific jury finding.[4] See, e.g., Mills

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4 The converse is shown in the prohibition against imposing an enhanced sentence for the use of a weapon or firearm where an essential element of the underlying felony *is* the use of a weapon or firearm. See, e.g., State v. Tripp, 642 So. 2d 728, 730 n.2 (Fla. 1994)(opining that reclassification of the defendant's attempted armed robbery conviction because the defendant used a deadly weapon was improper because "attempted armed robbery is a felony in which the use of a weapon is an essential element").

v. State, 822 So. 2d 1284 (Fla. 2002)("Consistent with . . . legislative intent, offenses which are . . . reclassified as felonies pursuant to section 784.07 qualify as felony offenses for purposes of habitual felony offender status, and such treatment does not offend double jeopardy."); State v. Whitehead, 472 So. 2d 730, 732 (Fla. 1985)(finding no improper "double enhancement" – and thus no double jeopardy violation – in applying both §775.087(1)(providing that, when a person commits a felony with a firearm, his sentence is to be reclassified one category higher), and §775.087(2)(providing for minimum mandatory sentences for possession or use of a firearm in the commission of certain enumerated felonies)). See also Smith v. State, 547 So. 2d 613, 614 (Fla. 1989)(opining that "'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended'"), quoting, Missouri v. Hunter, 549 U.S. 359, 366 (1983).

Moreover, and most basically, a defendant may still be convicted of the underlying offense without any proof of the enhancer. This would not be possible if the enhancer were an essential substantive element of the offense. Thus, for example, Petitioner could have been convicted of attempted second-degree murder without any proof that he discharged a

firearm inflicting great bodily harm. §784.04(2), Fla. Stat. (2002); §777.04(1), Fla. Stat. (2002).

A factor that is not a substantive element of the offense for double jeopardy purposes should not be taken into consideration in determining if a lesser included offense was properly charged to the jury. To allow courts to do so would be to create a new hierarchy of lesser and greater offenses based solely on the proof necessary to enhance the punishment for an offense that is, based on its statutorily defined elements, only one offense. Stated another way, because an enhancement or reclassification factor is not a substantive element of the offense for double jeopardy purposes, such factor has no place in an analysis of whether a lesser offense was properly charged. Courts should view the charged crime and its necessary and permissive lesser offenses in the abstract, without regard to any enhancer.5

To summarize, Franklin v. State, 877 So. 2d 19 (Fla. 4th DCA

5 Obviously, if the purportedly lesser "included" offense was neither a necessary nor permissive lesser offense as defined in the law, In re Standard Jury Instructions (Criminal Cases), 431 So. 2d at 596, then the fundamental error standard set forth in Ray, 403 So. 2d at 961, would still obtain and a reviewing court would have to determine that the improperly charged offense was either "lesser in degree and penalty" than the main offense, or that defense counsel requested the improper charge or affirmatively relied on it to affirm the conviction.

2004), misapplied this Court's ruling in Ray v. State, 403 So. 2d 956 (Fla. 1981); therefore, Petitioner's reliance on Franklin is unavailing. At a minimum, this Court should answer the Second District's certified question in the negative and rule that in order for an offense to be a lesser-included offense it need not *necessarily* result in a lesser penalty than either the penalty for the main offense or the next greater offense on the verdict form. Sanders, 912 So. 2d at 1290. Alternatively, this Court should declare that factors which are not substantive elements of an offense must not be taken into consideration in determining whether an offense is a proper lesser included offense to the charged crime.

CONCLUSION

Respondent respectfully requests that this Honorable Court answer the certified question in the negative. Alternatively, Respondent respectfully requests that this Court rule that factors which are not statutory elements must not be taken into consideration in determining whether an offense is a proper lesser included offense to the charged crime.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Kimberly Nolan Hopkins, Esq., Special Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, FL 33831, on February 20, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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