

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN  
CRIMINAL CASES - REPORT NO. 2007-05

CASE NO.  
SC07-1420

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COMMENT OPPOSING INCLUSION OF FIRST AND SECOND DEGREE FELONY  
GRAND THEFT AS PERMISSIVE LESSER INCLUDED  
OFFENSES OF ROBBERY, § 812.13(2)(c)

I.

The table of lesser included offenses for second degree felony robbery, § 812.013(2)(c), includes first degree felony grand theft, § 812.014(2)(a), as a lesser included offense. Undersigned counsel submits that this is erroneous for the reason that first degree felony grand theft is both greater in degree and in penalty than second degree felony robbery § 812.014(2)(c) and therefore cannot qualify as a lesser included offense. The Court in *Sanders v. State*, 944 So.2d 203 (Fla. 2006) held that a defendant can properly be convicted of a lesser included offense in those circumstances where the mandatory minimum sentence for a lesser included offense is the same as the mandatory minimum sentence applicable to the charged crime due to the operation of the 10-20-life mandatory minimum sentencing statute for use of a firearm during the commission of a felony, § 775.087. In *Sanders*, however, the Court did not hold that a lesser included crime can be a crime which is *greater* in degree than the crime charged. Constitutional guarantees to adequate notice and to due process of law make it

almost inconceivable that a person charged with a second degree felony could be convicted of a first degree felony "lesser" included offense at jury trial and could be sentenced to thirty years in prison when he was only charged with a second degree felony crime punishable by fifteen years imprisonment. Such a conviction would also violate the Florida and United States Constitutions' protection against double jeopardy in that a person who goes to trial, and thereby jeopardy attaches, on a second degree felony would be subjected to the increased penalty of a first degree felony conviction for a "lesser" included offense.

Allowing lesser included offenses to include crimes of greater degree and penalty than that of the crime charged would also violate the Florida and United States Constitutions' right to trial by jury. A person who pleads guilty to second degree felony robbery would be told in the plea colloquy with the court pursuant to Fla. R. Crim. P. 3.172(c)(1) that the maximum penalty provided by law is fifteen years imprisonment. However, under the schedule of lesser included offenses before the Court in the instant case, the defendant charged with second degree felony robbery who exercises his constitutional right to a jury trial could be convicted of first degree felony grand theft and be sentenced to thirty years in prison. The result is that the person is punished more severely for exercising his constitutional right to have a jury determine his guilt. This

outcome violates a citizen's constitutional right to trial by jury and violates due process of the law.

The fact that there might be a schedule of lesser included offenses for a particular crime does not provide a defendant with meaningful notice that he could be facing double the prison sentence of the crime he is charged with committing if he decides to exercise his constitutional right to a jury trial. In determining whether a crime qualifies as a permissive lesser included crime of the charged crime, the trial court must analyze the information or indictment and the proof introduced at trial to determine if the elements of the permissive lesser included offense have been alleged and if evidence has been introduced to support the giving of the instructions. *State v. Wimberly*, 498 So.2d 929, 931 (Fla. 1986). This is no easy task.<sup>1</sup> There is often protracted argument at the jury charge conference concerning which, if any, permissive lesser included offenses should be given in light of the particular wording of the crime charged in the state's information. The party arguing for a permissive lesser included offense will advocate an expansive

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<sup>1</sup> The difficulty of deciding what offense or offenses constitute a lesser included offense was recognized in *Florida Standard Jury Instructions in Criminal Cases* p. 619 (5th ed. 2005): "One of the difficult problems in instructing a criminal jury is to make certain that it is properly charged with respect to the degrees or categories of guilt that may be applicable to a given crime...Because it is often so difficult to determine these categories, the committee prepared a list of the offenses applicable to each of the crimes for which standard jury instruction had been drafted."

reading of the state's information. The party opposing the instruction will argue a strict, narrow construction of the wording of the information. What the trial court's decision will be is not predictable. Given this uncertainty that is routinely experienced during trial, it cannot be said that a schedule of lesser included offenses gives a person adequate notice of what he might be convicted of. Compounding this uncertainty is that many crimes do not have standard jury instructions and therefore there is no schedule of lesser included offenses. If the Court allows permissive lesser included offenses to be crimes that are greater in degree and penalty than the charged offense and there is no schedule of lesser included offenses for a particular crime, the defendant would have no notice of what he might be convicted of at trial and the state would have the incentive to be "creative" in its wording of its informations so that the state can surprise the court and the defendant at trial with its argument for instruction on a permissive lesser included offense which could result in a prison sentence that increases the maximum penalty of the charged crime by a factor of three or even six (e.g., a person charged with a third degree felony being convicted of a "lesser" included offense that is a second degree or first degree felony).

The argument above doesn't even address the issue of what evidence will be introduced at trial. The trial court should

only instruct the jury on a permissive lesser included offense if there is evidence introduced at trial which supports the giving of the instruction. *Wimberly, supra*. A defendant will not know with any real degree of certainty what evidence that the state will ultimately be able to introduce at trial. It violates the constitutional right to be informed of the accusation (Article 1, section 16, Fla. Const.) if the Court were to allow convictions and sentences for permissive lesser included offenses which are greater in degree and penalty than that of the crime charged.

## II.

The lesser included crimes table for second degree felony robbery, § 812.13(2)(c), includes second degree felony grand theft as a permissive lesser included offense. Counsel submits that second degree felony grand theft should be deleted as a permissive lesser included offense because it is a crime of the same degree and penalty - a second degree felony - as robbery, which is a second degree felony crime. Furthermore, because of the Florida criminal punishment code, second degree felony grand theft carries what is for all practical purposes a mandatory minimum prison sentence of twenty-one months in prison while there is no mandatory minimum prison sentence for second degree felony robbery.

Second degree felony robbery, § 812.13(2)(c), is a level 6 crime under the criminal punishment code (CPC). § 921.022(3) Fla. Stat. (2006)(see page 1036 of volume 5 of 2006 Fla. Stat.). Second degree felony grand theft, § 812.014(2)(b), is a level 7 crime under the criminal punishment code (see page 1038 of volume 5 of 2006 Fla. Stat.). A level 6 crime such as second degree felony robbery scores 36 points under the criminal punishment code. § 921.0024(1)(a) Fla. Stat. (2006). The court can sentence a defendant with a CPC total sentence points score of less than 44 points to probation or even a monetary fine with no probation. § 921.0024(2) Fla. Stat. (2006). However, a person convicted of a level 7 crime such as second degree felony grand theft must be sentenced to at least 21 months in prison, which is the lowest permissible prison sentence for a person convicted of a level 7 crime. § 921.0024(1)(a) and (2).<sup>2</sup>

As can be seen from the example above, a conviction for the permissive lesser included offense of second degree felony grand theft results in essentially what is a mandatory minimum prison sentence of 21 months while a conviction for the charged crime of second degree felony robbery does not result in the

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<sup>2</sup> A downward departure sentence pursuant to § 921.0026 can only be imposed if certain facts exist. In reality, these facts rarely exist and counsel submits that the existence of downward departure sentences does not negate the argument that level 7 crimes result in a mandatory minimum prison sentence of 21 months while level 6 crimes have no mandatory minimum prison sentence.

imposition of a mandatory prison sentence. Although both crimes are second degree felony crimes, the "lesser" included crime results in a mandatory prison sentence but the charged crime does not. The Court in *Sanders v. State*, 944 So.2d 203 (Fla. 2006) did not authorize convictions for lesser included offenses which result in a *greater* mandatory sentence than that of the charged crime. As noted previously, the Court in *Sanders* only held that it is permissible for a person to be convicted of a lesser included offense which results in the *same* mandatory prison sentence as that of the charged crime because of the 10-20-life mandatory minimum sentencing and reclassification statute.

### III.

Counsel submits that second degree felony grand theft should be deleted from the table of lesser included offenses for second degree felony robbery because the two crimes are of the same degree and for that reason alone second degree felony grand theft cannot qualify as a lesser included offense of second degree felony robbery. It is important to recognize that in *Sanders v. State*, 944 So.2d 203 (Fla. 2006), the Court was considering lesser included offenses which were reclassified in degree and which included mandatory prison sentencing by the operation of the 10-20-life statute, § 775.087(1) Fla. Stat.

(2006).<sup>3</sup> The holding of the *Sanders* decision, counsel submits, is limited to the particular facts of that case. The *Sanders* decision, counsel submits, is not applicable to cases where reclassification and sentencing enhancement statutes like 10-20-life are not applicable to the charges filed by the state.

In *Sanders*, the Court made reference to the limited scope of its decision: "While reclassification and enhancement statutes have made it difficult for trial courts to prepare appropriate verdict forms, the basic premise of what constitutes a proper lesser included offense has not changed." *Sanders* at 207. Counsel submits that the basic premise of what constitutes a proper lesser included crime is that the lesser included crime must be of a lesser degree and therefore lesser in penalty than that of the crime charged. The following explanation of lesser included offenses is from *Florida Standard Jury Instructions in Criminal Cases*, p. 620 (5th ed. 2005): "1. No offense is deemed to be a lesser offense if it carries the same penalty as the crime under consideration. See *Ray v. State*, 403 So.2d 956 (Fla. 1981); *State v. Carpenter*, 417 So.2d 986 (Fla. 1982)."

In *State v. Carpenter*, *supra*, the Court concluded that, "Whereas here two crimes carry the same penalty, section

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<sup>3</sup> In *Sanders* the defendant was charged with a life felony but was convicted of the lesser included offense of attempted second degree murder, a second degree felony. § 781.04(2); § 777.04(4)(c). The 10-20-life statute enhanced the degree of conviction to a first degree felony (§775.087(1)(b)), but the lesser included offense for which *Sanders* was convicted was a second degree felony.



775.021(4) does not prohibit consecutive sentencing, since one crime is not the lesser of the other." *Carpenter*, 417 So.2d at 987. See also *State v. Weller*, 590 So.2d 923,927 (Fla. 1991)("We previously have stated that offenses are not 'lesser' if they carry the same penalty."). From the *Carpenter* decision there resulted a line of decisions which have held a lesser included offense cannot be of the same degree as the charged offense: *Parks v. State*, 437 So.2d 790, 792 (Fla. 2d DCA 1983); *Foster v. State*, 596 So.2d 1099, 1101 (Fla. 5th DCA 1992); *Kurtz v. State*, 564 So.2d 519, 522 (Fla. 2d DCA 1990); *Ladd v. State*, 714 So.2d 533, 534 (Fla. 1st DCA 1998); *Nurse v. State*, 658 So.2d 1074, 1077-1081 (Fla. 3d DCA 1995)(extensive explanation of the rationale for the rule that a lesser included crime must be lesser in degree than that of the crime charged with historical basis rooted in common law). Counsel submits that the Court's decision in *Sanders* does not reverse the *Carpenter* decision and does not reverse the decisions cited above. The *Sanders* decision only qualifies the *Carpenter* decision by making a limited exception to the rule of lesser included offenses set forth in *Carpenter* and its progeny *only* in prosecutions in those cases where reclassification and mandatory sentencing statutes such as 10-20-life are applicable to crimes charged by the state's information.

IV.

If the Court reaches the conclusion that - in prosecutions where sentencing enhancement and reclassification statutes such as § 775.087 are not applicable - a lesser included offense cannot be of the same degree as that of the crime charged, then first degree felony grand theft should also be deleted from the lesser included offense table for robbery with a weapon, § 812.13(2)(b), because both of those crimes are first degree felony crimes.

Respectfully submitted this \_\_\_ day of October 2007.

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R. Blaise Trettis

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing comment has been sent by U.S. mail delivery to Judge Terry D. Terrell, committee chair, c/o Les Garringer, Office of the General Counsel, Office of State Courts Administrator, 500 S. Duval St., Tallahassee, FL 32399-1925 this \_\_\_ day of October 2007.

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