

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,                   :  
    Petitioner,                     :  
vs.                                    :  
NANCY STELLE DENE,                :  
    Respondent.                    :  
\_\_\_\_\_  
                                      :

DISCRETIONARY REVIEW OF THE DECISION  
OF THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

Brad Permar  
Assistant Public Defender  
Criminal Court Building  
5100-144th Avenue North  
Clearwater, Florida 34620

Counsel for Respondent

TOPICAL INDEX

	<u>PAGE</u>
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
 <u>ISSUE</u>	
WHETHER A CONVICTION UNDER SECTION 782.04, FLORIDA STATUTE, THE SECOND DEGREE FELONY MURDER SECTION IS LIMITED TO THOSE SITUATIONS WHERE THE PERSON WHO ACTUALLY KILLS THE INNOCENT VICTIM IS NOT ONE OF THE PRINCIPLES IN THE COMMISSION OF THE FELONY, BUT RATHER SOMEONE ELSE, SUCH AS A BYSTANDER OR LAW ENFORCE- MENT OFFICER. (As certified by the Second District Court of Appeal)	3-16
CONCLUSION	17
CERTIFICATE OF SERVICE	17

CITATIONS OF AUTHORITIES

	<u>PAGE</u>
<u>Adams v. State</u> , 341 So.2d 765 (Fla. 1976)	12
<u>Jefferson v. State</u> , 347 So.2d 427 (Fla. 1977)	5
<u>State v. Bradley</u> , 84 So. 677 (Fla. 1920)	10
<u>State v. Lowery</u> , 419 So.2d 621 (Fla. 1982)	4
<u>Wright v. State</u> , 344 So.2d 1334 (Fla. 2d DCA 1977)	7

OTHER AUTHORITIES

775.04(3), Florida Statute	15
782.04, Florida Statute	2
782.04(1)(a)(2)(3)(4)	6
<u>LaFave and Scott</u> , Substantive Criminal Law, Volume 2, page 233 West 1986	10
<u>Torcia, C. Wharton's Criminal Law</u> , Vol. 2, page 208, 14th Ed. 1979	8

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :  
Petitioner, :  
vs. : Case No. 71,232  
NANCY STELLE DENE, :  
Respondent. :  
\_\_\_\_\_ :

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts except as noted within the argument portion of this brief.

SUMMARY OF ARGUMENT

Petitioner has ignored the question certified, arguing the point that "presence at the scene" is the dispositive factor in Respondent's charge of Second-Degree Felony Murder. But the question certified deals with the issue of "death occurring at the hands of a co-felon" as to a charge of Second-Degree Felony Murder. Where the victim's death occurred at the hands of a co-felon, an accused may be culpable of other crimes but cannot be guilty of second-degree felony murder; that was the holding of the Second District Court of Appeal in State v. Hite, which holding was endorsed by this Honorable Court in State v. Lowery. Clear statutory language limits second-degree felony murder to cases where death occurs at the hands of someone other than a perpetrator or principle.

ISSUE

WHETHER A CONVICTION UNDER SECTION  
782.04, FLORIDA STATUTE, THE SECOND  
DEGREE FELONY MURDER SECTION IS  
LIMITED TO THOSE SITUATIONS WHERE  
THE PERSON WHO ACTUALLY KILLS THE  
INNOCENT VICTIM IS NOT ONE OF THE  
PRINCIPLES IN THE COMMISSION OF THE  
FELONY, BUT RATHER SOMEONE ELSE,  
SUCH AS A BYSTANDER OR LAW ENFORCE-  
MENT OFFICER.  
(As certified by the Second District  
Court of Appeal.)

Petitioner, State of Florida, contends that the Respondent, Nancy Stelle Dean, can be convicted of Second-Degree Felony Murder even though she was not present at the scene and even though death occurred at the hands of a co-felon. If a defendant can be convicted under that rationale he must also, if present at the scene where death occurs at the hands of a co-felon, be guilty of first degree felony murder, as will be demonstrated, infra. The only interpretation of Lowery supporting such an outcome would make useless the distinctions between the two degrees of felony murder. There would be no appreciable difference between the two subsections, and the second-degree felony murder subsection would be rendered mere surplusage. Legislative intent in promulgating separate classes of felony murder would be thwarted.

The Petitioner contends: "Under Lowery, the jury may return a verdict of second-degree murder even though the defendant was not

present at the scene of the crime. The evidence at bar [sic] showed Dene to be an accessory. Here, as in Lowery, the defendant was not at the scene when the victim was killed by a person other than the defendant. Therefore, as in Lowery, 419 So.2d at 624, the defendant may be found guilty of murder in the second-degree." Petitioner's brief, page 8, emphasis added.

Petitioner misses the point. The words "other than the person engaged in the perpetration" of the underlying felony do not mean anyone other than the Defendant, including co-felons present at the scene. That "the victim was killed by a person other than the defendant," does not mean that the Respondent is amenable to prosecution for second-degree felony murder. If that reading of the statute were true, a defendant who was present at the scene would be guilty of both first and second degree felony murder: Because he is present and because "the felon's liability for first degree murder extends to all of his co-felons who are personally present," 419 So.2d, at 623, the defendant is clearly guilty of first-degree felony murder. But, under the Petitioner's reading of Lowery, because the death occurred at the hands of "a person other than the defendant," the defendant is also guilty of second-degree felony murder. Thus, if five co-felons were present at the scene of an enumerated felony during which a victim's death was caused by one co-felon, the one co-felon would be guilty of only first-degree felony murder, but

each of the other four co-felons - as defendants - would be guilty of both first and second-degree felony murder. Each of the other four co-felons would share the one felon's liability for first-degree felony murder, and each would also be guilty of second-degree felony murder because death occurred at the hands of someone other than the individual defendant. As a result, it would be harder to prosecute and convict the one felon who did the killing, because the State has only one avenue for conviction, than it would for the other four less-culpable co-felons, subject to dual liability. It is doubtful the legislature intended such an outcome.

The legislature, in enacting the second-degree felony murder statute, meant to punish felons where the victim's death occurs at the hands of a bystander or police officer who happens on the scene and inadvertently causes death. Without that express distinction such homicides would go unpunished: the legislature did not want that, therefore, it set out the clear mandate that second-degree felony murder applies where death occurs at the hands of someone other than the person engaged in the felony, including co-felons.

Petitioner argues that the Second District Court of Appeal has misconstrued this Honorable Court's opinion in State v. Lowery, 419 So.2d 621 (Fla. 1982), interpreting the statute, but it appears that it is the Petitioner who misread

that case. In Lowery, this Court addressed Hite v. State, in which the Second District Court of Appeal ruled that second-degree felony murder required presence at the scene "and the killing must have been committed by someone other than him or one of his co-felons." 419 So.2d, at 623, emphasis added. This Court overruled Hite only "to the extent that it requires presence at the scene of a crime for a person to be guilty of second-degree felony murder." Id, at 624. This Court specifically found the Second District Court of Appeal's reasoning that death must occur at the hands of someone other than a co-felon to be "sound." Id, at 623. The Petitioner cannot ignore the dispositive factor sub judice, death at the hands of a co-felon, and then argue that the Second District Court of Appeal has misconstrued Lowery.

Petitioner also cites Jefferson v. State, 347 So.2d 427 (Fla. 1977), for the proposition that only an accessory before the fact not present at the scene can be found guilty of second-degree felony murder. Petitioner's brief, page 8. That may be true, but it is not the issue here. Also in Lowery this Court held, "it is evident that presence at the scene is required for a verdict of first-degree murder under the felony- murder statute. It is also evident that a verdict of guilty for second-degree felony murder does not require the defendant's presence." 419 So.2d 623, emphasis added. But the Respondent is not contesting

the issue of presence at the scene. The basis of the trial court's arrest of judgment and the Second District Court of Appeal's affirmance thereof was that death occurred at the hands of a co-felon.

The three degrees of felony murder are set out in Florida Statute 782.04, subsections (1)(a)(2), (3), and (4). Subsection (1)(a)(2) punishes murder at the hands of "persons engaged in the perpetration" of one of the enumerated felonies, and is denominated first-degree felony murder just as if the perpetrator or any co-felons present at the scene had formed a premeditated design to kill. "Persons engaged" would thus seemingly include principals in the first-degree. Subsection (3) punishes "persons engaged" in one of the enumerated felonies where, during the course of that felony, death occurs to an innocent person at the hands of someone "other than the person engaged in the perpetration." Here, "persons engaged" would still include principals in the first-degree, and the thrust of the statute is to infer criminal culpability to the perpetrators when a police officer or bystander intervenes to stop the commission of the enumerated dangerous felony, and causes death thereby. Subsection (4) punishes death which occurs during the commission of a non-enumerated, less inherently-dangerous felony; it is not applicable here. As written by the legislature, the three grades of felony murder are clear, precise and symmetrical, each

proscribing a definite class of crime. The Petitioner would destroy that clear and symmetrical legislative intent and distort the statute beyond its primary purpose.

The primary purpose of the felony-murder doctrine is to "prevent the death of innocent persons likely to occur during the commission of certain inherently dangerous and particularly grievous felonies." Wright v. State, 344 So.2d 1334 (Fla. 2d DCA 1977) (reversed on other grounds). The idea behind the Felony Murder Rule is to caution persons considering the commission of certain dangerous felonies that they will be held strictly accountable for any and all deaths which occur during the commission of the crime, no matter who causes death. The idea, presumably, is to persuade the perpetrators at the scene to commit the inherently dangerous felon in a non-lethal manner, on pain of having the intent to commit the felony transferred into intent to commit murder:

What the enumerated felonies always seem to have in common is the element of danger or violence. By holding a felony-murder strictly accountable, even though the homicide is unintended, the law is attempting to protect innocent lives - victims, law enforcement officers, bystanders. The law is not attempting merely to deter the commission of dangerous or violent felonies; presumably the punishment authorized by law for such felonies is sufficiently severe to accomplish that purpose. But rather, the law is attempting to deter the commission of such felonies in a dangerous or violent way."

Torcia, C. Wharton's Criminal Law, Volume II, p. 208, 14th Ed. 1979, (emphasis added).

Under Florida law then, First-Degree Felony Murder punishes all defendants present at the scene for death caused by a co-felon. Second-Degree Felony Murder punishes defendants for death caused by an innocent bystander or police; under Lowery, this is true regardless of whether the defendant is present at the scene. Thus it seems that in Lowery this Honorable Court carved out an extension to the idea that the felony murder rule is designed to control the execution of an inherently dangerous felony: none of the felons present at the scene can have any control over the actions of a third party who happens on the scene. But on analysis that too makes sense, even though it is not articulated as a rationale in Lowery. Consider the purpose of felony murder statute: control of the actions of co-felons so that the crime is conducted in a non-lethal manner. But the statute also seeks to punish felons for death caused by innocent bystanders. Clearly, a co-felon can have no such control over the actions of an innocent bystander, even if he is present at the scene, as he could over the actions of another co-felon. Presence at the scene confers no such control, so a person may be found guilty of second-degree felony murder, under Lowery, even though not present at the scene, because even at the scene he could not control the third party. But where death occurs at the

hands of a co-felon, the defendant's presence at the scene is highly relevant, since he can then control the commission of the enumerated felony so that it is committed in a non-dangerous or non-violent way. Clearly, it would be counterproductive to hold persons such as the Respondent, not present at the scene, responsible for the actions of a co-felon during the commission of a crime.

Lowery was thus an expansion of the felony murder rule to punish co-felons not present at the scene for death caused by a bystander or police officer. But to expand the doctrine even further, as Petitioner suggests, to confer culpability for second-degree felony murder even though the defendant is not present and even though death occurs at the hands of a co-felon, would be to distort the clear legislative intent in promulgating the rule in three distinct categories.

The felony murder doctrine transmogrifies intent to commit an enumerated felony into intent to commit murder. This Honorable Court has previously ruled that presence at the scene is not required for conviction of second-degree felony murder. But if the Petitioner's proposition is followed, the only appreciable distinction between first and second degree felony murder will be erased, thus expanding the felony murder statute beyond the limits of existing case and statutory law. There are ample reasons for not following that course of action. The felony

murder doctrine "expresses a highly artificial concept that deserves no extension beyond its required application."

LaFave and Scott, Substantive Criminal Law, Vol.2, page 233 West, 1986. Beyond that theoretical limitation is the limitation of Florida law; the Legislature has the sole authority to define criminal offenses, and the judiciary may not, under the guise of interpretation, broaden the scope of a penal statute beyond its clear meaning and intent, thereby creating a new offense. State v. Bradley, 84 So. 677 (Fla. 1920).

Under the law as it now exists, a defendant cannot be convicted of second-degree felony murder where death occurs at the hands of a co-felon: both Hite and Lowery hold that to be so. To change that now solely to punish the Respondent would be to broaden the scope of the second degree felony murder rule under the guise of judicial interpretation, creating a new offense where none existed before. Aside from other considerations, that reinterpretation of existing law would violate the ex post facto doctrine if applied to the Respondent. If the second-degree felony murder is to be broadened so drastically beyond its established parameters, the legislature should do the expanding.

Unfortunately, some confusion arises because of seemingly conflicting provisions within the Lowery opinion. Read one way, certain dicta could be inferred as allowing the proposition Petitioner sets forth. On the one hand is this Court's clear

holding that the plain meaning of the statute means that a defendant cannot be convicted of second-degree felony murder where death occurs at the hand of a co-felon: "the person who commits the killing cannot be charged as a principal in the commission of a felony, but rather someone else such as the victim, a bystander, a law enforcement officer, or anyone other than the one engaged in the perpetration of the underlying felony." 419 So.2d, at 623, emphasis added. Under that language, upholding the validity of Hite after the conjunctive "and" ("and the killing must have been committed by someone other than him or one of his co-felons"), the question certified by the Second District Court of Appeal would clearly be answered in the affirmative.

On the other hand, there is seeming conflict between that rule of law and the actual outcome of the Lowery case. "Lowery and Sizemore planned the robbery of Leroy Moss. Sizemore committed the robbery during which Moss was killed." Id, at 622, emphasis added. This Court went on to say that the evidence did "show that Greg Sizemore committed the robbery and murder," and further that during "the perpetration of the robbery, Moss was killed by a person other than Lowery (the person engaged in the perpetration or attempting to perpetrate the robbery). Under the statute, he may be found guilty of murder in the second-degree." Id, at 624. emphasis added. Under that seeming rule, a

defendant can be found guilty of second-degree felony murder even though he is not present at the scene and even though death occurs at the hands of a co-felon. And it is only under that liberal interpretation of Lowery that the relief Petitioner seeks can be granted.

But that language in Lowery was clearly dicta, not authority. This Court ruled on the question of whether presence at the scene was required for second-degree felony murder; this Court overruled Hite on that point, but specifically held valid the rationale that second-degree felony murder does not apply where death occurs at the hands of a co-felon. That there is seeming conflict in the specific facts of Lowery does not have the force of law to make the Respondent now guilty of second-degree felony murder. Two fact sentences conflict: that "Sizemore committed the robbery during which Moss was killed;" and "Sizemore committed the robbery and murder." 419 So.2d, at 621, 624. There is also an apparent conflict between the rationale Petitioner finds implied in Lowery, and in the holding of Adams v. State, 341 So.2d 765 (Fla. 1976), cited therein: "Only if the felon is an accessory before the fact and not personally present does liability attach" for second-degree felony murder. 419 So.2d, at 623. Under that rationale the second-degree felony murder rule is limited to non-present accessories before the fact. But Petitioner's rationale would extend that limitation to cover all

co-felons who are present: as shown, they would be guilty of both first and second degree felony murder. Moreover, two other legal rationales seem to conflict: Lowery, a "person who does not commit the crime with his own hands but is present, aiding and abetting the actual perpetrator, is a principal of the second degree." Id. at 623. But compare, where the statute "makes an accessory before the fact to the robbery (Lowery) a principal in the first degree or perpetrator of the robbery." Id., at 624. emphasis added. Under that seeming analysis, a co-felon present at the scene is a principal of the second degree, less culpable than an accessory before the fact, not present, who is a principal in the first degree. But those apparent conflicts do not affect the holding of Lowery: "We overrule Hite v. State, to the extent that it requires presence at the scene." Id. This court found "sound" the Second District Court Appeal's rationale that "the killing must have been committed by someone other than him or one of his co-felons." Id., at 623.

Further, analysis shows that second view of Lowery to be invalid, even aside from its direct conflict with this Court's affirmation that death cannot occur at the hands of a co-felon. For one thing, the facts of the case may not have shown Lowery's situation to be the same as Respondent's; the single sentence, on which the Petitioner must rely to make her proposition valid, averring that Lowery's co-felon "Sizemore committed the robbery

and murder" may simply have been a clerical error. For another thing, analysis of the law within Lowery itself shows that the Petitioner's contention is untenable.

The Petitioner contends, as has been noted, that Respondent can be convicted even though not present at the scene and even though death occurred at the hands of a co-felon. But Lowery also holds, "the felon's liability for first degree murder extends to all of his co-felons who are personally present[:] the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felons." Id., at 623. And on that same page is the holding that "presence at the scene of a crime is required for a verdict of guilty of first-degree murder under the felony murder statute." Id.

An example, using Lowery and Sizemore, shows the absurdity of Petitioner's position. There are two co-felons: Lowery and Sizemore. Sizemore commits the felony and causes the death of the victim. Lowery is present. Lowery is guilty of first-degree felony murder. If Lowery is not present, under the dicta at issue, he could be found guilty of second-degree felony murder. But that proposition is seemingly based on the sentence, "During the perpetration of the robbery, Moss was killed by a person other than Lowery (the person engaged in the perpetration or attempting to perpetrate the robbery). Under the statute, he may be found guilty of murder in the second degree."

There lies the confusion. Under that sentence, the words "other than the perpetrator" in the second-degree felony murder statute means that if death occurs at the hands of anyone other than the defendant, including co-felons present at the scene, there is culpability for second-degree felony murder. Under that extended reading of the statute, where the Lowery in our example is present at the scene, he is guilty of both first and second degree felony murder, and there is no appreciable distinction between the two degrees. Sizemore causes death; Lowery is present; Sizemore's "liability for first-degree extends to all of his co-felons who are personally present;" Lowery, being present, has culpability for first-degree felony murder. But, the victim is killed by a person other than Lowery (the person engaged in the perpetration of the felony); Sizemore is a person other than Lowery; Lowery is present; therefore, Lowery "may be found guilty of murder in the second-degree."

Such a conclusion is clearly inconsistent with legislative intent. The plain meaning of the words "by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony," set forth in 775.04(3), is to punish culpable co-felons where death occurs at the hands of someone other than a co-felon principal engaged in the commission of the felony; that is, at the hands of a bystander or police officer who comes onto the scene. For the reasons shown, that is the

only interpretation that makes valid the distinctions between the two degrees.

Whether persons such as the Respondent who are accessories before the fact of a crime in which death occurs at the hands of one of her confederates, even though the homicide is inadvertent, should be punished, is a question beyond the scope of this proceeding. If the law is to be now expanded to punish such misconduct, to warrant the relief the Petitioner requests, it is the Legislature which must do the expanding.


The Respondent respectfully requests that this Honorable Court answer the question certified by the Second District Court of Appeal in the affirmative.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, this Honorable Court should answer the certified question in the affirmative.


Respectfully submitted,

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

By   
Brad Permar  
Assistant Public Defender  
Criminal Court Building  
5100-144th Avenue North  
Clearwater, FL 34620

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Katherine Blanco, Assistant Attorney General Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, Florida 33602, this 17th day of November, 1987.

BY   
Brad Permar  
Assistant Public Defender