IN THE SUPREME COURT OF FLORIDA

JOSH GREEN, Petitioner vs. STATE OF FLORIDA, Respondent.	CASE NO. 65,804

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RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF FACTS

Respondent will quote facts from the record in addition to the facts quoted by petitioner which are germaine to the particular issue herein. Petitioner has quoted two state witnesses who testified at the trial and respondent will take additional quotes from these same witnesses from the trial transcript.

The first witness testifying on behalf of the state was a Mr. Crayton whose pertinent testimony is as follows:

> Q: And he fired in the direction of Boots and Jeans?
>
> A: It could have been over in this direction. It could have been in there. I couldn't tell you exactly where he aimed at.

(R 207).

In addition Mr. Crayton was unable to tell the exact angle of the rifle (R 207).

Another witness quoted by respondent was a Mr. Lasure. His relevant testimony is as follows:

> Q: . . . you saw that person was holding it (the gun) up in the air?
>
> A: It was shot up in the air about like that. I could see the barrel.
>
> Q: You could see the barrel?
>
> A: The end of it.

(R 230).

Mr. Lasure testified that he was in the army and knew about firearms (R 229-230, 231). On cross-examination he testified as

follows:

> Q: Okay. Now, you qualified as an expert with your M-16?
>
> A: Yes, I did, sir.
>
> Q: From this area to Boots and Jeans, if that was being held at that angle, based on your experience with an M-16, that bullet would fly way over the top?
>
> A: Way over the top.

(R 231).

After the close of the state's evidence (and after Mr. Crayton and Mr. Lasure had testified) the defense attorney made the following comments in his motion for a directed verdict:

> . . . the best inference that can be derived from the evidence is that Green fired a gun up in the air . . . They searched the Boots and Jeans area and there is no bullet hole or ricochet mark or anything like that at Boots and Jeans. The court does not know which direction Miss Starling (the victim) was standing when she got hit. There has been no testimony of that.

(R 233).

During the charge conference the defense attorney made the following comments regarding the disputed jury instruction:

> From him (that is the petitioner) recklessly discharging a firearm, it would be third degree murder.

(R 240).

The defense attorney also made the following comment regarding the jury instruction:

> . . . the felony that has been shown in this is discharging a firearm into an occupied dwelling, therefore, or at an occupied vehicle.

(R 244).

SUMMARY OF ARGUMENT

The rules that are in effect are the rules at the time of the trial and not the rules at the time of the offense. Pursuant to Florida Rules of Criminal Procedure 3.490 and 3.510, as well as the new schedule of lesser included offenses adopted by this court in the case of In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981), a degree crime in the case at bar must be properly alleged in the indictment. Since the elements of the disputed lesser included offense were never alleged in the indictment, the instruction was properly denied.

Under the newly adopted schedule promulgated by this court in the case of In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, supra, third degree felony murder can only be a category to lesser included of first degree felony murder and therefore logically cannot be a necessarily lesser included of premeditated murder which is a separate and distinct offense.

Additionally there is no evidence to support the jury instruction as well as lack of an allegation.

ARGUMENT

THE TRIAL COURT WAS CORRECT IN REFUSING TO INSTRUCT THE JURY AS TO THE OFFENSE OF THIRD DEGREE MURDER PREDICATED UPON SECTION 790.19 FLORIDA STATUTES (1981), WHERE THE INSTRUCTION WAS NOT SUPPORTED BY THE INDICTMENT NOR THE PROOF ADDUCED AT TRIAL.

A.

The rules that apply are the rules that are in effect at the time of trial and not those that were in effect at the time of the offense.

Petitioner initially analyzes this issue from the perspective of the criminal rules in effect at the time of the offense although not in effect at the time of the trial. Procedural rules are applied at the time of the trial regardless of whether they were in effect at the time of the offense or not. This issue has been resolved by this court in State v. Strasser, 445 So.2d 322 (Fla. 1983). At the defendant's initial trial under the old rules the judge was required to instruct on attempt regardless of whether there was any evidence of an attempt or not. This court, although finding error under the old rules, affirmed the conviction because the new rules would not require such an instruction and would apply at a new trial. See also, Sparrow v. State, 415 So.2d 28, 29 (Fla. 4th DCA 1982), discussing Florida Rule of Criminal Procedure 3.490 and stating:

> . . . since the rule had not been amended at the time of trial, they apply with undiminished vigor.

Id. at 29 (emphasis applied).

B.

> At the time of the trial Florida Rules of Criminal Procedure 3.490 and 3.510 apply as well as the newly adopted schedule of lesser included offenses promulgated by this court.

In the Matter of the Use by the Trial Courts of the Standard Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981), established a schedule of lesser included offense for each criminal offense. By doing this, the schedule revised and consolidated the old four categories of lesser included offenses established in Brown v. State, 206 So.2d 377 (Fla. 1968). These four categories were consolidated into two categories which are as follows:

> 1. Offenses necessarily included in the offense charge, which will include some lesser degrees of offenses.
> 2. Offenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence, which will include all attempts and some lesser degrees of offenses.

Id. at 596.

It is readily apparent from these two categories that the third degree murder instruction predicated on section 790.19, Florida Statutes (1981), can either be necessarily included in the offense charged or be an optional lesser included depending on the accusatory pleading and the evidence (encompassing the old Brown category four).

Examining the schedule itself, (see, Fla. Std. Jury Instr. (Crim.) - schedule of lesser included offenses) elucidates

the issue. For first degree (premeditated) murder, section 782.04(1), Florida Statutes (1981), third degree murder is not listed either as a category one nor a category two lesser included offense. Likewise for second degree murder (depraved mind) pursuant to section 782.04(2), Florida Statutes (1981), third degree murder is also not included in either category one nor category two as a lesser included offense. For first degree (felony) murder pursuant to section 782.04(1), third degree (felony) murder is listed as a category two lesser included offense. This court has declared that this schedule is presumptively correct. Ray v. State, 403 So.2d 956, 961, n.7 (Fla. 1981).

There is no question that first degree premeditated murder and first degree felony murder are two separate and divisible crimes which entail differing statutory elements to prove each offense. The question becomes then how can third degree felony murder be a necessarily lesser included offense of both premeditated murder and first degree felony murder. Since third degree felony murder would be a lesser included of first degree felony murder (although in the schedule it is listed as a category two), respondent is assuming for the sake of argument that it is a necessarily lesser included offense. For example, if a defendant is charged wtih first degree felony murder predicated upon a robbery, logically, third degree felony murder, predicated upon a grand theft could be or should be a lesser included offense. Therefore, third degree felony murder could not possibly be a necessarily lesser included offense of

first degree premeditated murder.

Looking at this issue from another perspective, could the state in this case over petitioner's objection seek a lesser included offense of third degree felony murder predicated upon section 790.19, based upon the indictment in the case at bar (R 326). The next step would be to ask if the statutory elements of section 790.19, are encompassed in the elements of a premeditated first degree murder indictment. The manifest answer is no. Nothing in the indictment in the case at bar remotely resembles any of the elements requried in section 790.19. The only possible way that third degree felony murder could be a lesser included of a premeditated murder indictment would be to have all the elements actually alleged in the accusatory pleading (i.e., a category two lesser included offense). Of course the elements would have to appear in the accusatory pleading and it is obvious that the elements of third degree murder predicated upon section 790.19 do not appear in the indictment in the case at bar (R 326).

In conjunction with the new criminal jury instructions and schedule of lesser included offenses this court promulgated new rules of criminal procedure in the case of <u>In re Florida Rules of Criminal Procedure</u>, 403 So.2d 979 (Fla. 1981). Specifically Florida Rules of Criminal Procedure 3.490 and 3.510 were amended. Rule 3.490 was amended to reflect that where a charge is divided into degrees, the judge is not allowed to instruct on any degree as to which there is no evidence (under the old rule all degrees regardless of a lack of evidence had

to be given to the jury). But it must be remembered that under the two categories of lesser included offenses in the new schedule a degree crime may be necessarily lesser included or may be an optional lesser included (i.e., a category two lesser included). As discussed supra, a third degree felony murder instruction if it applies at all to a premeditated first degree murder charge, must fall into this category two. Therefore, rule 3.510 (as opposed to 3.490) would apply in the case at bar. Rule 3.510 states in the pertinent part:

> Upon an indictment . . . which the defendant is to be tried for any offense the jury may convict the defendant of:
> (b) any offense which as a matter of law is a necessarily included offense or a lesser included offense of the offense charge in the indictment . . . and is supported by the evidence. The judge shall not instruct on any lesser included offense as to which there is no evidence.

The words "a lesser included offense of the offense charge in the indictment" clearly mandate that in the case at bar the elements of the third degree murder must be alleged in the indictment.

In Sparrow, supra, the defendant claimed that the giving of an instruction on a lesser included degree offense was not supported by any evidence. It must be remembered that this case was decided prior to the amendment of the jury instructions, the rules discussed herein, and the promulgation of the new schedule of lesser included offenses. The Fourth District quoted from this court in Gilford v. State, 313 So.2d 729 (Fla.

1975), as follows:

> In the Latin jargon we have always said, the probata must conform to the allegata. The one exception to this is the one which Brown recognizes, namely, Florida Statute section 919.14 (now crPR 3.490) which has been fixed as the requirement in those instances where the offense is divided into degrees, without specifying the degrees, and in that instance the trial judges mandated to instruct on such lesser degrees of a single offense. The distinction must be made between the one statutory instant of degrees without regard to proof and the basic proposition that there must be proof in all other instances in order to justify the "lesser included offense" charge being given. Any indications to the contrary in earlier decisions are hereby expressly overruled.

Id. at 29 (emphasis not supplied).

Respondent submits that under the new schedule of lesser included offenses as well as rules 3.490 and 3.510, as amended, have done away with this "degree exception." Hence the "probata must conform to the allegata." As such, the elements of the third degree murder in the case at bar must be alleged in the indictment.

In State v. Jones, 377 So.2d 1163 (Fla. 1979), a felony murder conviction based upon robbery was overturned because no instruction was given on the underlying felony or robbery. In declaring fundamental error, this court explained that a jury could not be left to its own devices as to what the underlying felony was. In the case at bar, by analogy, the jury should be apprised of the elements in the indictment. If

not, then such an instruction should not have been given.

In Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982), and Hunter v. State, 389 So.2d 661 (Fla. 4th DCA 1980), the state conceded that third degree felony murder was a lesser included offense. Rollins v. State, 369 So.2d 950 (Fla. 3d DCA 1978), was decided under prior law discussed herein. Brown v. State, 124 So.2d 41 (Fla. 1960), although talking in terms of third degree murder as a lesser included offense of first degree murder, seems to use third degree murder as a euphemism for a manslaughter as evidence by the following quotes:

> . . . the defendant is entitled to have the jury advised on all the degrees of unlawful homicide, including manslaughter.
>
> * * *
>
> To summarize . . . we . . . hold . . . in . . . a trial for first degree murder the accused, is entitled to have the jury instructed on all degrees of unlawful homicide including manslaughter . . .

Id. at 43 (emphasis supplied).

Another distinguishing feature is that all but Rollins were decided under prior law. Additionally for all four cases, the opinions do not reveal what specifically the allegations were in the respective information or indictment. None of these cases explicitly run contrary to the reasoning presented herein. To the extent that this court finds that there is conflict, these cases should either be distinguished or overruled.

C.

There was no evidence presented to support the third degree felony murder instruction predicated upon section 790.19 Florida Statutes (1981).

It is axiomatic that for a lesser included offense to be read to the jury, there must be evidence to support that instruction. Petitioner has quoted some testimony from state witnesses, i.e., a Mr. Crayton and Mr. Lasure. Looking at their entire testimony, (see Statement of the Facts, supra) it is apparent that there is no evidence to support this instruction. Even defense counsel below in his argument for a directed verdict admitted as much (R 233).

In Golden v. State, 120 So.2d 651 (Fla. 1st DCA 1960), a defendant was charged with assault with intent to commit murder and shooting at or into a dwelling house [pursuant to section 790.19, Florida Statutes (1958)]. The evidence showed that the defendant was armed with a gun and chased the victim toward the victim's house and shot at the victim while the victim was going into his house. Several bullets were found in the interior and exterior of the house. The First District declared that the gravamen of this offense is wantonly or maliciously shooting at or into a house. The court held that there was no evidence which directly or by inference could be said to establish the fact that the defendant was wantonly or maliciously shooting at or into the house per se. Id. at 653. Respondent submits that if the evidence in the Golden case could not support a jury instruction for this offense, then

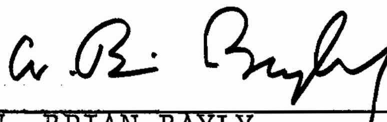
certainly in the case at bar the evidence could not support a jury instruction for third degree felony murder predicated upon section 790.19, Florida Statutes (1981). As such for this reason alone the opinion in Green v. State, 9 F.L.W. 1698 (Fla. 5th DCA, Aug. 2, 1984) should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court affirm the judgement and sentence of the trial court in all respects.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief on the Merits, has been furnished, by mail, to Larry B. Henderson, Assistant Public Defender, 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014, this 23rd. day of January, 1985.

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