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IN THE SUPREME COURT OF FLORIDA

JOSH GREEN, )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE NO.  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

PETITIONER'S BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

Mr. Josh Green was charged by Indictment with first degree murder (R325)<sup>1/</sup>. He was convicted of second degree murder (R306) and sentenced to a fifty-year term of imprisonment, with retention of jurisdiction over the first half (R320-321).

At the jury charge conference, defense counsel expressly requested a jury instruction on third degree murder (R239-245). The Court ruled "I am going to deny your motion for third degree. If you had been charged with a felony murder, it might have been a lot easier to do that. The way that third degree felony thing reads, it's so difficult to place that in any kind of simple

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<sup>1/</sup> (R ) refers to the Record on Appeal of the instant cause, Fifth District Court of Appeal Case No. 83-525.

first degree murder charge. All right, let's go ahead from there." (R245).

The jury was not charged on third degree murder. Prior to the jury retiring for deliberations, defense counsel renewed his previous objections to the jury charges, as acknowledged by the Court (R303).

A timely appeal of the conviction was taken to the Fifth District Court of Appeal. The appeal presented one issue for the Court's consideration, to-wit:

POINT I. THE TRIAL COURT COMMITTED REVERS-  
IBLE ERROR BY REFUSING, UPON TIMELY REQUEST,  
TO INSTRUCT THE JURY AS TO THE OFFENSE OF  
THIRD DEGREE MURDER, WHERE THE INSTRUCTION  
ON THIRD DEGREE MURDER WAS SUPPORTED BY THE  
INDICTMENT AND THE PROOF ADDUCED AT TRIAL,  
AND WHERE THE DEFENDANT WAS CONVICTED OF  
SECOND DEGREE MURDER.

Oral argument was had on July 10, 1984. Thereafter, the Court affirmed Mr. Green's conviction via Judge Sharp's opinion filed August 2, 1984 (Appendix "A").

Mr. Green timely filed a Notice to Invoke Discretionary Jurisdiction on August 24, 1984 (Appendix "B"). The Petitioner's Brief on Jurisdiction follows.

ISSUE

WHETHER EXPRESS AND DIRECT  
CONFLICT EXISTS BETWEEN GREEN  
V. STATE, \_\_\_ So.2d \_\_\_ (Fla.  
5th DCA August 2, 1984) [9 FLW  
1698] AND BROWN V. STATE, 124  
So.2d 481 (Fla. 1960); JOHNSON  
V. STATE, 423 So.2d 614 (Fla.  
1st DCA 1982); HUNTER V. STATE,  
389 So.2d 661 (Fla. 4th DCA 1980),  
AND; ROLLINS V. STATE, 369 So.  
2d 950 (Fla. 3d DCA 1978), cert.  
denied 367 So.2d 1126 (Fla. 1979).

In Green v. State, \_\_\_ So.2d \_\_\_ (Fla. 5th DCA August 2, 1984) [9 FLW 1698], the Fifth District Court of Appeal held that it was not reversible error for a trial court to refuse to give a timely requested instruction on third degree murder where a defendant had been charged with first degree murder and convicted of second degree murder notwithstanding that there was evidence to support the third degree murder instruction. The Court, through Judge Sharp, reasoned that third degree felony murder "is not a lesser included offense of premeditated first degree murder." (See Appendix "A", emphasis added), and concluded by amazingly announcing that "[t]hird degree murder is not a degree crime of simple premeditated murder." (Appendix "A"). No authority was given to support the Court's conclusion.

In Brown v. State, 124 So.2d 481 (Fla. 1960), (which case was concededly decided under the old rules of Criminal Procedure requiring a jury charge on all degrees of a charged offense regardless of proof,) this Court stated:

To make clear our position which we had hoped was sufficiently explicit in [Killen v. State, 92 So.2d 825 (Fla. 1957)], we repeat here that which we announced there to the effect that under Section 919.14,

Florida Statutes, as amended in 1939, F.S.A., the Court should in all cases instruct the jury on the various degrees of the offense charged in the indictment. When the offense charged is first degree murder, whether grounded on specifically alleged premeditated design, or whether committed in the perpetration of certain felonies as proscribed by Section 782.04, Florida Statutes, F.S.A., the defendant is entitled to have the jury advised on all the degrees of unlawful homicide, including manslaughter. There should be a further instruction that it is in the province of the jury to determine the degree. Killen v. State, supra.

Brown, supra, at 483. (Emphasis added). Thus, it is clear that this Court has expressly rejected the concluding rationale of the opinion here at issue. See also, Rollins v. State, 369 So.2d 950 (Fla. 3d DCA 1978), cert. denied, 367 So.2d 1126 (Fla. 1979); Hunter v. State, 389 So.2d 661 (Fla. 4th DCA 1980).

Further, the change in the Rules of Criminal Procedure makes no difference. The pertinent rule [Fla.R.Crim.P. 3.490] provides: "If the indictment or information charges an offense divided into degrees, the jury may find the defendant guilty of the offense charged or any lesser degree supported by the evidence. The judge shall not instruct on any degree as to which there is no evidence." (Emphasis added). The instant opinion in Green specifically alludes to the presence of evidence that would support the requested instruction. (See Appendix "A").

In Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982), the First District Court of Appeal reversed a conviction of second degree murder where the trial court refused to give a timely requested instruction on third degree murder that was supported by the evidence. This holding expressly and directly conflicts with the holding of the Fifth District Court of Appeal in Green,

supra.

This Court should exercise its discretionary jurisdiction to review this case because; 1) the opinion erroneously announces that "[t]hird degree murder is not a degree crime of simple premeditated murder; 2) the error is significant, and unless immediately corrected numerous convictions will become invalid due to misguided reliance by trial courts instructing other juries in first degree murder cases.

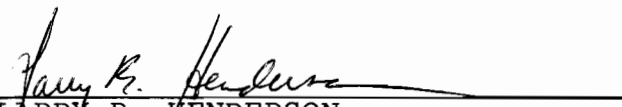


CONCLUSION

WHEREFORE, Mr. Green respectfully requests that this Court exercise its discretionary jurisdiction to review the instant decision based upon the express and direct conflict that clearly exists.

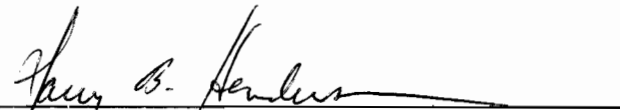
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, FL 32014 and Mr. Josh Green, Inmate No. 088767, Union Correctional Institution, P. O. Box 221, Raiford, FL 32083 this 29th day of August, 1984.

  
LARRY B. HENDERSON  
ASSISTANT PUBLIC DEFENDER