IN THE SUPREME COURT OF FLORIDA

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JOSH GREEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 65,804

PETITIONER'S BRIEF ON THE MERITS

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SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Mr. Josh Green was charged by indictment with first degree murder (R 325)[1/]. He was convicted of second degree murder (R 306) and sentenced to a fifty year term of imprisonment, with retention of jurisdiction over the first half (R 320-321).

At the jury charge conference, defense counsel expressly requested a jury instruction on third degree murder (R 239-245). 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 first degree murder charge. All right, let's go ahead from there." (R 245).

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

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 (R 303).

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 REVERSIBLE 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.

Mr. Green timely filed a notice to Invoke Discretionary Jurisdiction on August 24, 1984. This brief follows.

STATEMENT OF THE FACTS

A fight between a black man [Rudolph Canady] and several white persons erupted at approximately 11:00 o'clock p.m. on May 7, 1981, at the "Boots and Jeans Bar" in Osceola County, Florida (R19-26). A group of white men armed with boards, bottles and what-have-you chased Rudolph out of the bar and down the street toward a housing project (R 25-26, 36-37,204,211,215,226).

Some of the residents of the housing project observed the fracas and combined to chase the gang of white people back to the bar (R 26,211). Suddenly, several shots were fired, and Kristi Media Starling, while standing in front of her date by a pickup truck was struck by a .22 caliber bullet on the left side of her head just above the ear, and Ms. Starling died as a result of said gunshot injury. (R 26-27 30,45,90,95). Ms. Starling's position at the time the authorities arrived upon the scene indicated that the shot had come from a northerly direction, whereas Appellant was seen to have obtained a .22 caliber rifle and fired said rifle three times from an opening in a fenced area on McLaren Circle, an area <u>south</u> of where Ms. Starling was struck (R 34-38,206-207,215-216,227). Witnesses saw Appellant firing the rifle in an upward direction at the Boots and Jeans Bar (R 37-38,45-47, 215-216,227,230-231).

Appellant made two statements more than a year apart to police after the incident (R 107-115,119-128). Additionally, three inmates testified that Appellant had admitted his participation in the incident, at one time stating

that Ms. Starling had been struck with crossfire. (R 178). The State's firearm expert testified that, although the fatal bullet was consistent with coming from the rifle Appellant fired, he could not say with any degree of certainty that Appellant's rifle fired the fatal bullet (R 192-193).

SUMMARY OF ARGUMENT

The trial judge, at the jury charge conference, was specifically asked to instruct the jury on the offense of Third Degree Murder as a lesser-included offense of the First Degree Murder offense upon which Appellant was being tried. Under the old law, which law was in effect at the time the offense was committed, it was mandatory for the trial court to instruct on all degrees of an offense where said crime was divided into degrees, notwithstanding the pleadings and proof. Under the new law, which law was in effect at the time of trial, an instruction on an offense in lesser degree than the offense charged is required to be given only upon timely request and where the evidence adduced at trial and the pleading supports the giving of the requested information. Under either of the above rationales, the trial judge committed reversible error by refusing to instruct the jury as to the offense of Third Degree Murder.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE 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.

Third degree murder is defined as "[t]he unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb..." Section 782.04(4), Florida Statutes(1981). The offense of Third Degree Murder is listed as a Category"2" lesser-included offense under the Schedule of Lesser Included Offenses set forth in the Florida Standard Jury Instructions In Criminal Cases, which schedule took effect on October 1, 1981 ... a date after the commission of the instant offense [May 7, 1981 (R 325)].

In <u>Brown v. State</u>, 206 So.2d 377 (Fla. 1968), the Supreme Court of Florida set forth the following categories of lesser included offenses:

1. Crimes divisible into degrees.
2. Attempts to commit offenses.

3. Offenses necessarily included in the offense charged

4. Offenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence.

Id. at 381 (emphasis theirs).

Insofar as crimes divisible into degrees, Rule 3.490, Florida Rules of Criminal Procedure (1981) provided:

> If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

This rule, in effect at the time of the offense, clearly required the giving of an instruction on Third Degree Murder. Gilford v. State, 313 So.2d 729 (Fla. 1975); Sparrow v. State, 415 So.2d 28 (Fla. 4th DCA 1982); Gillion v. State, 411 So.2d 341 (Fla. 4th DCA 1982); Hunter v. State, 389 So.2d 661 (Fla. 4th DCA 1980); Rollins v. State, 369 So.2d 950 (Fla. 3d DCA 1978).

Similarly under the new Schedule of Lesser Included Offenses, an instruction on Third Degree Murder was required where there was evidence adduced at trial that would support a conviction of Third Degree Murder. Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982); Shrum v. State, 401 So.2d 941 (Fla. 5th DCA 1981).

There can be no doubt in the instant case that sufficient evidence exists upon which to base a conviction of

Third Degree Murder. Appellant, at a distance of over a hundred yards (R 75), fired a .22 caliber rifle three (3) times in the direction of the Boots and Jeans bar.

> Q. (By the prosecutor): What, if anything, did you see Josh do?
>
> A. (By Mr. Creyton): I seen (sic) Josh go to the truck and get a rifle and go to the fence and shoot three times.
>
> Q. What direction did you see him shoot?
>
> A. Towards Boots and Jeans.

(R 204).

> Q. (By the defense attorney): You say you saw somebody over by the fence?
>
> A. (By Mr. Lasure): Over here by the road.
>
> Q. What direction were they (sic) pointing it?
>
> A. Towards Boots and Jeans.
>
> Q. How was the rifle being pointed?
>
> A. In the air.

(R 230)

In Green v. State, 9 FLW 1698 (Fla. 5th DCA August 2, 1984), the Fifth District Court of Appeal held that it was not reversible error for the trial court to refuse to give the timely requested instruction on third degree murder because the 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." The opinion stated that "Green

testified he fired either at a nearby bar or at the truck" The defendant did not testify at trial, but such testimony was adduced from other witnesses.

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").

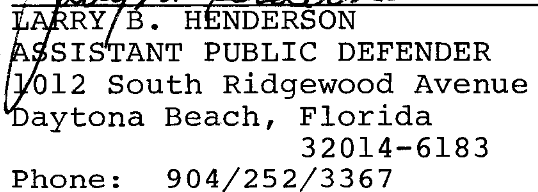
In Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982), the First District Court of Appeal reversed a conviction of second degree murder where the trial court refused to give a timely requested instruction on third degree murder that was supported by the evidence. This holding expressly and directly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

CONCLUSION

BASED UPON the argument and authority set forth in this brief, this Court is respectfully asked to vacate the decision of the Fifth DCA in the instant cause and to remand with directions to reverse Petitioner's conviction and remand the matter for retrial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, at 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida, 32014, and to Mr. Josh Green, Inmate No. 088767 Union Correctional Institution, P.O. Box 221, Raiford, Florida 32083 this 3rd day of January, 1985.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER