

w/o o/a

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

FEB 12 1985

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

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[Signature]

JOSH GREEN,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 65,804

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
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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.

The State argues that "...under the schedule of lesser included offenses as well as Florida Rules of Criminal Procedure 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." (Respondent's brief at P.9) (emphasis added).

Petitioner respectfully submits that the State's reasoning is illogical. A first degree murder indictment will never ordinarily allege the elements of second or third degree murder, especially where felony first degree murder is alleged. Compare §782.04(1)(a)2, Fla.Stat. (1983) and §782.04(4), Fla. Stat. (1983). "If the indictment or information charges an offense divided into degrees [the allegata], the jury may find the defendant guilty of the offense charged or any lesser degree supported by the evidence [the probata]..." Fla.R.Crim.P. 3.490 (emphasis added).

Petitioner submits that if an instruction on third degree murder is supported by any evidence, viewed in a light most favorable to the requesting party, the instruction must be given where first degree murder is charged. Reversible error occurs where such an instruction is refused and the defendant is thereafter convicted of second degree murder, an

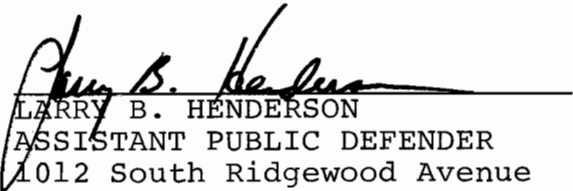
offense one step removed from the requested offense. That is precisely what occurred and, accordingly, the matter must be reversed for retrial.

CONCLUSION

Based upon the argument and authorities set forth in this brief and the Initial Brief of Petitioner, this Court is asked to reverse the conviction and to remand the matter for retrial.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Jim Smith, Attorney General in his basket at the Fifth District Court of Appeal, and mailed to Mr. Josh Green, Inmate No. 088767, Union C.I. P.O. Box 221, Raiford, Florida 32083 on this 11th day of February 1985.


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