IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

NICHOLAS VANCE FURR,

Respondent,

Case No. 66,855

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

BRIEF OF PETITIONER ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner, State of Florida, was the Appellee in the Second District Court of Appeal and will be referred to as "Petitioner" or "State" in this brief. Respondent, Nicholas Vance Furr, was the defendant in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, and the Appellant in the Second District Court of Appeal. Furr will be referred to as "Respondent" or by name in this brief.

STATEMENT OF THE CASE AND FACTS

Petitioner seeks to invoke the jurisdiction of this Court pursuant to Rule 9.030(a)(2)(a)(iv), Florida Rules of Appellate Procedure.

The pertinent facts are set forth in the opinion of the Second District Court of Appeal in Furr v. State, Case No. 84-613, opinion filed March 8, 1985.

> Appellant was indicted for first degree (felony) murder (Count 1) and armed robbery (Count 2). Following a jury trial, he was convicted as charged and sentenced to consecutive terms of life imprisonment without parole for twenty-five years as to Count 1 and fifty years imprisonment as to Count 2. The trial court subsequently denied appellant's motion for new trial but granted his motion to correct sentence and vacated the judgment and sentence as to Count 2, the underlying felony. . .
>
> In the case before us the evidence adduced at trial demonstrated that appellant entered the apartment with a loaded rifle and, while inside, sprayed shots around a room in which several people known to him were located. One of the shots struck the victim. Under these facts, the jury, if so

> instructed, could have exercised its inherent power of pardon and found appellant guilty of "an act imminently dangerous to another and evincing a depraved mind regardless of human life," i.e., that appellant's actions fit the statutory definition of second degree (depraved mind) murder provided in section 782.04(2), Florida Statutes (1983). Id. at slip opinion pp 1-2.

Based on this evidence, the District Court held that the trial court's refusal to instruct the jury on second degree murder, as a lesser degree of first degree felony murder was reversible error. The Court reinstated the judgment and sentence for armed robbery and further provided that if, on retrial, respondent was again convicted of first degree felony murder, the conviction and sentence for the underlying felony must be vacated. Petitioner has filed a timely notice to invoke the discretionary jurisdiction of this Court.

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL HOLDING THAT A DEFENDANT CHARGED WITH FIRST DEGREE FELONY MURDER IS ENTITLED TO AN INSTRUCTION ON SECOND DEGREE (DEPRAVED MIND) MURDER WHERE THERE IS EVIDENCE TO SUPPORT THE SECOND DEGREE CHARGE CONFLICTS WITH THE HOLDING TO THE CONTRARY OF THE FIFTH DISTRICT COURT OF APPEAL IN Green v. State, 453 So.2d (FLA. 5th DCA 1984)?

II.

WHETHER THE HOLDING OF THE SECOND DISTRICT COURT OF APPEAL THAT A DEFENDANT CONVICTED OF FELONY MURDER CANNOT BE CONVICTED OF THE UNDERLYING FELONY IS IN CONFLICT WITH THE DECISION OF THIS COURT IN Hawkins v. State, 436 So.2d 44 (Fla. 1983)?

SUMMARY OF THE ARGUMENT

In Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983) the Second District Court of Appeal certified the jury instruction question presented in this case to this Court. The Second District held in Linehan and in the instant case, that a second degree (depraved mind) murder instruction must be given when requested by a defendant charged with felony murder if there is evidence to support the lower degree. In Green v. State, 453 So.2d 526 (Fla. 5th DCA 1983) the Fifth District Court of Appeal reached a contrary conclusion on similar facts, creating express and direct conflict.

Further, the Second District's holding in the instant case that a defendant cannot be convicted of both felony murder and the underlying felony expressly and directly conflicts with this Court's holding in Hawkins v. State, 436 So.2d 44 (Fla. 1983).

ARGUMENT

ISSUE I

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS IN DIRECT CONFLICT WITH Green v. State, 453 So.2d 526 (Fla. 5th DCA 1984) on the same question of law.

Respondent argued successfully in the Second District Court of Appeal that the trial judge wrongfully denied his requested instruction on second degree murder.[1] This Court, in its order adopting the standard jury instructions in criminal cases, undertook substantial revisions in categories of lesser included offenses, establishing two catagories of lesser included offenses. Category I offenses are those offenses necessarily included in the offense charged. Category II offenses may or may not be included in the offense charged, depending on the allegata and probata. See In the Matter of the Use by Trial Courts of the Standard Jury Instructions in Criminal Cases and the Standard Jury Instructions in Misdemeanor Cases, 431 So.2d 594 (Fla. 1981); Florida Standard Jury Instructions in Criminal Cases (1981 Edition), page viii. Included in the standard jury instructions is a schedule of lesser included offenses for each criminal offense. According to that schedule, second degree depraved mind murder is neither a category I or a category II lesser included offense of first degree felony murder.

1/Petitioner challenged the adequacy of the request for this instruction and argued that the evidence failed to support second degree murder on direct appeal. These contentions were rejected by the District Court.

The Second District chose to ignore the standard jury instructions, instead relied on Rule 3.490, Fla. R.Crim.P., which provides that a trial court must instruct on all offenses lesser in degree to the offense charged for which there is evidence in the record, and reversed this cause for a new trial.[2]

In reaching this result, the Court of Appeals created direct conflict with Green v. State, 453 So.2d 526 (Fla. 5th DCA 1984). In Green, the Fifth District affirmed a trial court's refusal to give a third degree felony murder instruction in a first degree premeditated murder case despite evidence tending to support third degree murder. That court opined:

> The underlying felony urged by defense counsel-firing at an occupied dwelling or into an occupied car-contains different statutory elements than simple first degree murder. Therefore, neither Florida Rule of Criminal Procedure 3.510, nor Florida Rule of Criminal Procedure 3.490 require the giving of the requested instruction. Third degree felony murder is not a degree crime of simple premeditated murder.
>
> Id.at 527, 528 (Footnotes omitted)

Under the rationale espoused in Green, the Second District's holding in the instant case is incorrect because first degree felony murder and second degree (depraved mind) murder have different statutory elements. Cf. §782.04 Fla. Stat. (1983).

2/In Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983) the Court of Appeal discussed the apparent conflict between the Schedule of Lesser Included Offenses and Rule 3.490 and certified the question to this Court. Linehan v. State, Case #64,609 is now pending before this Court.

The decision of the Second District Court of Appeal at bar is in express and direct conflict with Green.

ISSUE II

THE HOLDING OF THE SECOND DISTRICT COURT OF APPEAL THAT A DEFENDANT MAY NOT BE CONVICTED OF BOTH FELONY MURDER AND THE UNDERLYING FELONY EXPRESSLY AND DIRECTLY CONFLICTS WITH Hawkins v. State, 436 So.2d 44 (Fla. 1983).

The Second District Court of Appeal has acknowledged that its conclusion that a defendant may not be convicted for both felony murder and the underlying felony is in apparent conflict with Hawkins v. State, 436 So.2d 44 (Fla. 1983). See Enmund v. State, 459 So.2d 1160 (Fla. 2d DCA 1984) review granted No. 66,264 (Fla. Dec. 12, 1984); Dixon v. State, No. 84-477 (Fla. 2d DCA Jan. 9, 1985) [10 F.L.W. 168] review granted No. 66,405 (Fla. Jan. 21, 1985).

This Court has agreed to review this question in Enmund and Dixon. In order to maintain uniformity in decisions throughout the state this Court should accept review in the instant case as well.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully requests that this Court accept jurisdiction of this matter, afford the parties an opportunity to address the merits of the issues raised herein, and resolve the conflict presented by the instant decision with the cases cited herein by reversing the decision of the District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John T. Kilcrease, Jr., Esq., Assistant Public Defender, Hall of Justice Building, 455 North Broadway, Bartow, Florida, 33830 this 17th day of April, 1985.

Ann Garrison Paschall
Of Counsel for Petitioner