IN THE SUPREME COURT OF FLORIDA

JAMES OTIS HERRINGTON,

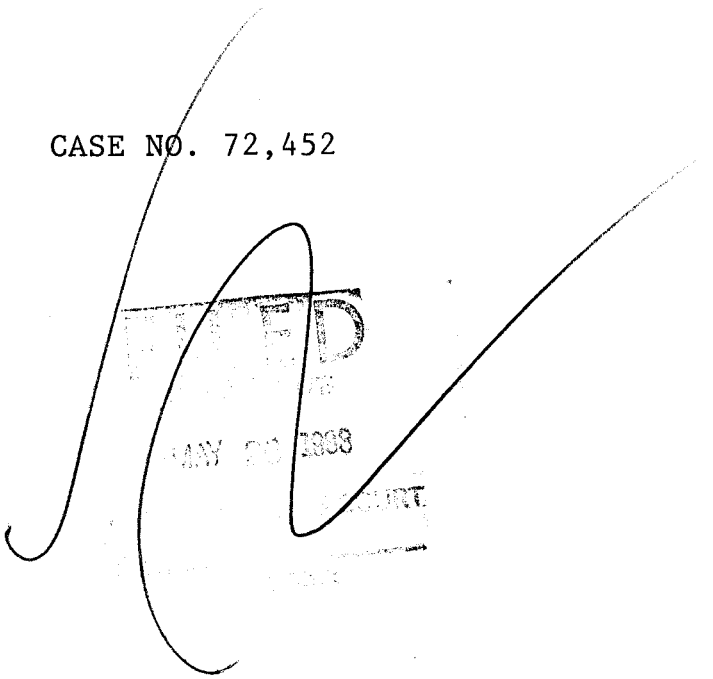
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 72,452



RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, and the Appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution in the trial court and the Appellee in the Fourth District.

In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"A" Appendix.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as found on page one (1).

SUMMARY OF THE ARGUMENT

Petitioner has not demonstrated that the decision of the Fourth District Court of Appeal in the instant case "expressly and directly" conflicts with other state appellate decisions pursuant to Florida Constitution, Article V, §3(b)(3).

POINT INVOLVED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL PRESENTS DIRECT AND EXPRESS CONFLICT UNDER THE MEANING OF ARTICLE V OF THE FLORIDA CONSTITUTION?

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT PRESENT DIRECT AND EXPRESS CONFLICT UNDER THE MEANING OF ARTICLE V OF THE FLORIDA CONSTITUTION.

Petitioner contends that the decision of the Fourth District that where the charging document does not allege the elements of third degree murder in a prosecution for second degree murder, that the defendant is not entitled to a category 2 instruction on third degree murder, conflicts with this Court's decision in Lewis v. State, 377 So.2d 640 (Fla. 1979); and Rodriguez v. State, 443 So.2d 286 (Fla. 3rd DCA 1983); Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982). Respondent submits that a close inspection of these decisions, as well as an amendment to Fla. R. Crim. P. 3.490, reveals that Petitioner's argument is without merit and that he has given those decisions an overly broad interpretation.

Petitioner cites this Court's decision in Lewis, 377 So.2d at 646, for the broad proposition that where a homicide has occurred, the jury must be instructed on all degrees of murder. In Lewis, the defendant contended that an instruction on the lesser included offense of aggravated battery was required to be given in a prosecution for first degree murder because the facts indicated he may have intended to commit an aggravated battery on the victim,

rather than kill the victim. In discussing why an instruction on aggravated battery was not necessary, this Court quoted dicta from Martin v. State, 342 So.2d 502, 503 (Fla. 1977) to which Petitioner points to as creating conflict. Martin, supra, resolved the issue of whether an aggravated assault instruction was required to be given in a homicide case. This Court noted that whether aggravated assault occurred as a part of a crime which resulted in the death of a victim was patently immaterial where it was only the jury's duty in a homicide prosecution to ascertain whether the defendant caused the victim's death, and if so, whether the homicide was justifiable or unjustifiable. Consequently, if the jury found homicide had occurred, it had to determine what degree of murder or manslaughter was involved, rather than determining whether a crime not involving the victim's death occurred.

Thus, upon closer inspection, it is clear that Lewis was attempting to point out why a trial judge does not have to "run down the gamut of the criminal lexicon" in instructing on a lesser included offense to homicide where such lesser offense did not involve the death of the victim. There is no conflict between Lewis, supra, and the case at bar, where Petitioner has artfully attempted to take this language and broaden its interpretation.

In Rodriguez v. State, supra, the court held

that an attempted manslaughter instruction was required to be given in an attempted first degree murder prosecution. Unlike the present case, the Rodriguez opinion makes it clear that an instruction on attempted manslaughter was supported by the evidence where the defendant attempted to commit a voluntary manslaughter, 443 So.2d at 290, f.n. 9, 291. Simply put, there is no conflict between a decision which holds that a lesser included offense instruction should have been given where there was evidence to support it, and the present case which held it was not required to be instructed on as a category 2, permissible, lesser included offense. Rodriguez does not expressly discuss whether the information supported such an instruction, and consequently, does not create conflict with the instant case which turns on a different legal question. To properly invoke the "conflict certiorari" jurisdiction of this Court, Petitioner must demonstrate that there is "express and direct" conflict between the decision challenged herein, and those holdings of other Florida appellate courts or this Honorable Court on the same rule of law to produce a different result. Dodi Publishing v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980). Johnson v. State, supra, is distinguishable from the present case on the same basis. In Johnson, the court found that there was sufficient evidence of third degree murder to support giving an

instruction in a prosecution for second degree murder in view of the defendant's repeated hitting and kicking the victim and the severity of the injuries suffered by the victim.

Finally, as Petitioner has overlooked, Fla. R. Crim. P. 3.490 was amended October 1, 1981, to provide that an instruction on all lesser degrees of murder is no longer required. Lewis v. State, supra, was decided prior to this amendment. As this Court recognized in Green v. State, 475 So.2d 235 (Fla. 1985), the rule was amended so as to provide that the judge "shall not instruct on any degree as to which there is no evidence." Thus, where third degree murder was at most a category 2 instruction, required to be supported by both the accusatory pleading and the evidence at trial, State v. Baker, 456 So.2d 421 (Fla. 1984), the instant decision is in accord with the new rule amendment and does not present conflict with the cases cited by Petitioner. Respondent therefore maintains that this Honorable Court should decline to grant Petitioner's application for discretionary review.

CONCLUSION

Based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court decline to accept jurisdiction of the case.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on Jurisdiction has been sent by courier to Gary Caldwell, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, FL 33401, this 24th day of May, 1988.

Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been sent by courier to Gary Caldwell, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, FL 33401, this 24th day of May, 1988.

Amy Lynn Dean
Of Counsel