

IN THE SUPREME COURT OF FLORIDA

NOV 18 1983
CLERK, SUPREME COURT
By _____
Deputy Clerk

JAMES OTIS HERRINGTON,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

Case No. 72,452

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	7
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Dicicco v. State</u> , 496 So.2d 864 (Fla. 2d DCA 1986)	4
<u>Green v. State</u> , 475 So.2d 235 (Fla. 1985)	5,6
<u>Hunter v. State</u> , 389 So.2d 661 (Fla. 4th DCA 1980)	4
<u>Perry v. State</u> , 522 So.2d 817 (Fla. 1988)	4
<u>Piantadosi v. State</u> , 399 So.2d 382 (Fla. 3d DCA 1981)	5
<u>Scurry v. State</u> , 521 So.2d 1077 (Fla. 1988)	5,6
<u>State v. Abreau</u> , 363 So.2d 1063 (Fla. 1978)	4
<u>State v. Baker</u> , 456 So.2d 419 (Fla. 1984)	5
<u>State v. Daophin</u> , 13 FLW 621 (Fla. Oct. 20, 1988)	5
 <u>OTHER AUTHORITIES</u>	
<u>FLORIDA RULES OF CRIMINAL PROCEDURE</u>	
Rule 3.490	5
Rule 3.510	5

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit and appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution in the trial court and the appellee in the Fourth District Court of Appeal.

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

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statements in his initial brief.

SUMMARY OF ARGUMENT

Petitioner relies on the summary in his initial brief.

ARGUMENT

1. At page 12 of its brief respondent has asserted: "Even if there was evidence to support an instruction on third-degree murder, any failure to give it was harmless, since the trial court instructed on manslaughter which was only one step removed from the crime of which Petitioner was convicted. Perry v. State, 522 So.2d 817 (Fla. 1988); State v. Abreau, 363 So.2d 1063 (Fla. 1978)." Not only does respondent ignore that Perry and Abreau do not support its position,¹ it neglects to mention that every appellate court to address the issue has rejected such an argument. In Hunter v State, 389 So.2d 661 (Fla. 4th DCA 1980) the court reversed the defendant's second degree murder conviction where the judge instructed on manslaughter, but refused to instruct on third-degree murder. The court wrote that the refusal to instruct on third-degree murder was reversible per se. Relying on Hunter, the Second District Court of Appeal wrote at page 865 of Dicicco v. State, 496 So.2d 864 (Fla. 2d DCA 1986): "The fact that an instruction has been given on another

¹ In Perry, the defendant was convicted for first-degree murder, and the jury was instructed on second-degree murder, so that the failure to instruct on third-degree murder -- an offense two steps removed -- was harmless. Abreau presented a virtually identical situation. Neither deals with the situation at hand, where the judge refused to instruct on a lesser offense that was only one step removed.

lesser included offense carrying the same penalty does not suffice." See also Piantadosi v. State, 399 So.2d 382, 384, n. 4 (Fla. 3d DCA 1981).

2. For the rest, respondent's brief shows confusion about the difference between Florida Rules of Criminal Procedure 3.510 and 3.490. Rule 3.510(b) provides that the jury may convict the defendant of "any offense which as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence." Rule 3.490 provides that, where the offense charged is one "divided into degrees, the jury may find the defendant guilty of the offense charged or any lesser degree supported by the evidence."

Now since homicide is an offense divisible into degrees, the trial court must under rule 3.490 instruct on all degrees of homicide supported by the evidence. Green v. State, 475 So.2d 235 (Fla. 1985). There is no need to resort to cases construing rule 3.510.

Thus respondent simply misses the point when it relies on State v. Baker, 456 So.2d 419 (Fla. 1984) and State v. Daophin, 13 FLW 621 (Fla. Oct. 20, 1988). Neither case involves a refusal to instruct on a lower degree of a crime divisible into degrees. Hence neither case involves the issue raised in Green and at bar; Baker and Daophin involve rule 3.510, while Green and the case at bar involve rule 3.490. In Scurry v. State, 521 So.2d 1077 (Fla. 1988), this Court rejected sub silentio the application of Baker to a refusal to instruct on a lesser degree of homicide.


See Justice Grimes' dissenting opinion at page 1079 of Scurry.
It is Green that controls this case, and this Court should
reverse the decision of the lower court affirming the conviction
and sentence.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, petitioner respectfully requests this Court to reverse the decision of the lower court and remand this cause with proper directions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Michael J. Hellman, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401 this 16 day of November, 1988.



Of counsel