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IN THE SUPREME COURT OF FLORIDA

JARVIS GERRARD GREEN

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

SC14-1354

DCA Case No. 2D12-4828

**AMENDED JURISDICTIONAL BRIEF OF RESPONDENT**

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## **STATEMENT OF THE CASE AND FACTS**

The State of Florida charged Petitioner with one count of burglary of an unoccupied dwelling and one count of petit theft (V. 1/R. 5-7). Prior to trial, the defense sought to exclude a 911 call recording as hearsay (V. 2/T. 6-7). The State argued that the recording would be an exception to hearsay as a spontaneous statement (V. 2/T. 6). The trial court denied the motion in limine (V. 2/T. 6-7). The jury acquitted Petitioner of the theft but convicted him of the burglary.

Following the verdict, counsel for Petitioner filed a "Motion For New Trial, Judgment Of Acquittal And Arrest Of Judgment." (V. 1/R. 10-21). The motion raised four grounds for relief. Ground "I" alleged that Petitioner was entitled to a new trial pursuant to Rule 3.600(b)(6) of the Florida Rules of Criminal Procedure because the trial court erred in admitting the 911 recording into evidence (V. 1/R. 11-13). Ground "II" requested a new trial under Rule 3.600(b)(7) for the trial court's refusal to give a jury instruction. Ground "III" alleged that a judgment of acquittal should be granted because there was insufficient evidence that "the property at issue was suitable for habitation", and that the evidence did not overcome the hypothesis of innocence that Petitioner entered only to "rest and clear his head." (V. 1/R. 18-19). This ground was

brought under Rule 3.380 (V. 1/R. 18). Finally, ground "IV" cited to case law and alleged that Petitioner was entitled to an arrest of judgment because the jury's verdict was truly inconsistent (V. 1/R. 19-20).

At the subsequent hearing, counsel for Petitioner argued each ground except for "III" - judgment of acquittal - per the court's instruction to "move on to number four." (V. 1/R. 39). The following discussion occurred when it was time for the prosecutor to respond to the defense argument:

COURT: Okay. Take a moment and I just want to come forward to - I'm focusing on one and four. Those are the two matters I'm focusing on.

STATE: On the 911 call and the inconsistent verdict?

COURT: Yeah, those are the two big issues that concern me the most. Two and three, not so much.

(V. 1/R. 41)

Following argument, the court issued the following ruling:

All right. Well, this is a confusing situation. I'm going to try to get where I want to go.

As to argument one, the admission of hearsay, I think the trial court erred in allowing that and allowing it to become a feature of the trial. I'll deny the Motion as to Counts Two, Three and Count Four. As to Count One - or excuse me, as to points two, three, and four. As a result of that I will grant the motion for judgment of

acquittal as to point one. Acquit it down  
to Trespassing.

(V. 1/R. 48)

The State objected for the record (V. 1/R. 48), and timely  
appealed to the Second District Court of Appeal. The Second  
District reversed, holding that after granting the motion for  
new trial, the trial court should have ordered a new trial  
rather than acquitting Petitioner of the burglary and entering  
judgment for trespass. State v. Green, 39 Fla. L. Weekly D1276  
(Fla. 2d DCA June 18, 2014).

#### **SUMMARY OF THE ARGUMENT**

The Second District in Green held that the trial court,  
having granted Petitioner's motion for new trial under Rule  
3.600(b)(6), should have ordered a new trial rather than  
acquitting him of burglary and entering judgment for the  
permissive lesser included offense of manslaughter. This  
holding does not expressly and directly conflict with any cases  
from this Court or another district court. Therefore, this  
Court does not have jurisdiction to review the opinion of the  
Second District.

## ARGUMENT

### ISSUE I

#### DOES GREEN CONFLICT WITH EXPOSITO AND RICHARS? (Restated by Respondent)

Petitioner asserts that this Court has jurisdiction to review the Second District's decision in State v. Green, 39 Fla. L. Weekly D1276 (Fla. 2d DCA June 18, 2014), because it expressly and directly conflicts with Exposito v. State, 891 So. 2d 525 (Fla. 2004) and Richars v. State, 792 So. 2d 570 (Fla. 4th DCA 2001). In Exposito, the defendant filed a motion for new trial or a reduction of his trafficking conviction to possession with intent to distribute pursuant to Florida Rule of Criminal Procedure 3.620. Id. at 527. The trial court adjudged the defendant guilty of the lesser-included offense of possession with intent to sell, and the State appealed. Id. In addressing whether a state appeal of the trial court's ruling was permissible, this Court concluded that "the plain language of section 924.07(1) does not authorize the State to appeal an order reducing the charge under rule 3.620." Id. at 528.

Likewise, in Richars, the State appealed an order granting the defendant's motion to reduce his conviction to a lesser included offense under Rule 3.620. Richars, 792 So. 2d at 571. The Fourth District dismissed the appeal because the State was not authorized to appeal a ruling under Rule 3.620. Id.

However, Petitioner ***did not bring the post-trial motion under Rule 3.620.*** Rather, it was brought under Rules 3.380, 3.580, 3.590, 3.600(b)(6), and 3.600(b)(7) (V. 1/R. 10-21). The record further reflects that: trial counsel did not cite to Rule 3.620 in the written post-trial motion; neither trial counsel, nor the State, nor the court verbally referenced Rule 3.620 at the motion hearing; and trial counsel never even requested, either verbally or in writing, that the burglary conviction be reduced to trespass. It is therefore unsurprising that the Second District expressly (and repeatedly) stated in its opinion that "Rule 3.620 is inapposite." Green, 39 Fla. L. Weekly at D1277. Indeed, the court emphasized that the plain language of the rule makes it applicable only to necessarily lesser included offenses, which Petitioner's case did not involve.<sup>1</sup>

The question before the Second District was not whether the State can appeal a verdict reduction under Rule 3.620. Rather, the issue presented was whether the trial court, having accepted Petitioner's argument on a motion for new trial under Rule 3.600(b)(6), could grant any relief other than ordering a new

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<sup>1</sup> The State notes that even if this Court were to review the certified question as to whether Rule 3.620 includes permissive lesser included offenses, Petitioner would still receive a retrial in this case. Moreover, he would only obtain relief if this Court rules in his favor, he is again convicted of burglary, and he successfully moves for post-verdict judgment of acquittal (a highly unlikely scenario given the strength of the State's evidence even without the challenged hearsay evidence).



trial. The Second District answered in the negative. In short, the trial court provided the wrong relief after it granted Petitioner's motion for new trial. Regardless of Petitioner's characterizations, this was not an appeal from a "reduction of verdict." Nor did the Second District conclude that the State had the right of appeal from a ruling under Rule 3.620. Under article V, section 3(b)(3), Florida Constitution, conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Reaves v. State, 485 So. 2d 829 (Fla. 1986). The cases upon which Petitioner relies contain no facts or language from which this Court can extrapolate disagreement on any point of law. this Court must decline to exercise jurisdiction on this basis.

## **ISSUE II**

### **DOES GREEN CONFLICT WITH OPINIONS FROM THIS COURT OR OTHER DISTRICTS ON AN ISSUE OF DOUBLE JEOPARDY? (Restated by Respondent)**

Petitioner asserts that the opinion in Green conflicts with opinions from other district courts and this Court on an issue of double jeopardy. Petitioner argues that a new trial in this case would violate double jeopardy, citing case law that "[holds] that a retrial following a reduction of verdict violates the prohibition against double jeopardy." (Initial brief, p. 7). The initial fault in this argument is Petitioner's failure to recognize that the trial court only

granted relief based upon the introduction of inadmissible hearsay at trial. That was the basis for the motion for new trial under Rule 3.600(b)(6), not for a judgment of acquittal, and certainly not for a "reduction of verdict." This was a State appeal from the trial court's ruling on a motion for new trial that provided Petitioner relief not authorized by law. This fact is easily verified by the record, and was easily accepted by the Second District.

Accordingly, double jeopardy was not a concern in this case and the Second District never addressed it. Nevertheless, Petitioner holds steady in his position that the Second District's mandate to retry him after a "reduction of verdict" violates double jeopardy. He cites to four cases, beginning with Ramos v. State, 457 So. 2d 492 (Fla. 3d DCA 1984). In Ramos, the trial court entered a post-verdict order acquitting the defendant of first-degree murder, and entering judgment for the lesser included offense of second-degree murder. Id. at 493. The defendant appealed this conviction, and the State cross-appealed the judgment of acquittal. Id. The defendant moved to dismiss the State's appeal. Id. The Third District held that, because the court's order was a ruling on a question of law, the State was expressly authorized to cross-appeal it by statute when the defendant also appealed. Id. As to double jeopardy, the court determined that it was not a bar to the

State's right of appeal:

The State's cross-appeal is not subject to dismissal even in instances where double jeopardy would bar a retrial of the defendant. Simply stated, our jurisdiction to hear the State's cross-appeal is unaffected by the fact that we might not be able to effectively grant the relief sought by the State.

Id. at 493-94 (internal citations omitted).

But even if, *arguendo*, our jurisdiction to entertain the State's cross-appeal were affected by double jeopardy considerations, it is clear that double jeopardy is a consideration only when a retrial of the defendant would be necessitated by a reversal of the trial court's ruling.

Id. at 494, n. 6.

It is this last statement on which Petitioner appears to hang his proverbial hat. He attempts to persuade this Court that this resulted from the trial court granting a motion for judgment of acquittal or a motion for "reduction of verdict." However inartful the trial court may have been in addressing the multi-ground post-verdict motion, the record reflects that the court, in fact, granted a motion for new trial under Rule 3.600(b)(6). Thus, Ramos and its limited double jeopardy analysis is inapposite to Green. So, too, is Ramos v. State, 505 So. 2d 418, 421 (Fla. 1987) (agreeing with the Third District that double jeopardy did not bar the State's cross-appeal), Hudson v. State, 711 So. 2d 244, 246 (Fla. 1st DCA 1998) ("When

an appeal is taken from a judgment of acquittal that comes after the jury has determined the facts, no question of double jeopardy arises."), and State v. Rincon, 700 So. 2d 412, 414 (Fla. 3d DCA 1997) (noting that reversal of a post-verdict judgment of acquittal would result in a reinstatement of the jury's verdict and not in a retrial). Conflict on this ground simply does not exist, and this Court should decline to exercise its jurisdiction accordingly.

### **ISSUE III**

#### **SHOULD THIS COURT EXERCISE ITS JURISDICTION TO REVIEW THE CERTIFIED QUESTION? (Restated by Respondent)**

Pursuant to Florida Rule of Appellate Procedure 9.120(d), "[i]f jurisdiction is invoked under rule 9.030(a)(2)(A)(v) (certifications of questions of great public importance by the district courts to the supreme court), no briefs on jurisdiction shall be filed." Respondent is prevented by the rule from responding to this issue.

### **CONCLUSION**

This Court does not have jurisdiction to review the Second District's opinion under article V, section 3(b)(3), Florida Constitution because the Second District's opinion does not conflict with any decisions from this Court or another district court.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served electronically via the Florida Courts eFiling Portal to Robert D. Rosen, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, at rosen\_r@pd10.state.fl.us and walsh\_j@pd10.state.fl.us on this 25th day of August, 2014.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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