

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT**

**CASE NO: CF81-1860**

**ANTHONY W. BROOM,**  
Defendant,

vs.

**STATE OF FLORIDA,**  
Plaintiff,

---

APPEAL BRIEF TO THE MOTION FOR  
POSTCONVICTION RELIEF  
Rule 3.850(b)(2), Fla.R.Crim.P.

---

Defendant:

Anthony W. Broom, *pro se*  
DC# 081443 / Dorm E2-108L  
Mayo Correctional Institution Annex  
8784 West U.S. Hwy 27  
Mayo, FL 32066

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## PRELIMINARY STATEMENT

It is the Legislature, through its definition of statutory elements of an offense, that determines whether offenses are lesser-included or separate. Therefore, the standard jury instruction and rules of criminal procedure must give way to that legislative decision. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) is controlling and the courts can not look to the evidence rather than to the statutory evidence.

When the indictment fails to charge depraved-mind the second-degree murder conviction violates Amendments V and XIV of the United States Constitution and the defendant must be discharged and the conviction and sentence vacated.

It is a further violation of the same constitutional amendments when the State does not present any evidence for a depraved-mind during trial and the jury does not find any elements for a depraved mind. The conviction and sentence must be vacated and the defendant discharged.

## STATEMENT OF THE CASE

In the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida, case number CF81-1860A1-XX, Anthony W. Broom (“Broom”) was charged by Indictment, returned August 21, 1981, with one count of First-Degree Premeditated Murder, §782.04, Fla. Stat., allegedly committed June 24, 1981, and trial commenced on November 30, 1981, and concluded on December 2, 1981. The jury returned a verdict of guilty to the lesser-included offense of Second-Degree Depraved Mind Murder, §782.04(2), Fla. Stat. On December 23, 1981, the court exceeded the experimental mandatory sentencing guidelines range of twenty (20) to twenty-five (25) years and imposed an upward departure sentence of natural life with a three (3) year minimum mandatory. Counsel of record at all stages of the trial court proceedings was Richard Barest, Esq., 2920 Franklin Street, Lakeland, FL 33801.

Notice of Appeal to the Second District Court of Appeal was filed on December 30, 1981, DCA docket number: 87-17, raising, *inter alia*, “the evidence was insufficient to support the conviction.” On September 24, 1982, the court per curiam affirmed without opinion. Broom v. State, 422 So.2d 848 (Fla. 2nd DCA 1982) (Table), *cert. denied*, 424 So.2d 760 (Fla. 1982) (Table). Counsel on appeal was Jack T. Edmond, Esq., Bartow, Florida 33801.

On January 4, 1983, Broom, *pro se*, filed a Motion for Mitigation of

Sentence in the trial court. On January 7, 1983, the court corrected the sentence to reflect credit for 179 days jail time, and denied the Motion on January 10, 1983.

On February 24, 1983, Broom, *pro se*, filed a Petition for Writ of Habeas Corpus, 28 U.S.C. §2254, in the United States District Court, Middle District of Florida, raising, *inter alia*, “failure to prove the corpus delicti.” The court denied the Petition without a hearing on March 24, 1985, and on August 23, 1983, the Eleventh Circuit Court of Appeals per curiam affirmed without opinion. Broom v. Fortner, 772 F.2d 916 (11th Cir. 1983) (Unpublished).

On December 10, 1985, Broom, *pro se*, filed his first Rule 3.850 Motion raising:

- I: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO FILE A MOTION TO DISMISS THE CHARGE UNDER FLA.R.CRIM.P. 3.190(c)(4);
- II: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO IMPEACH STATE’S WITNESSES;
- III: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO OBJECT TO MISLEADING JURY INSTRUCTIONS.

On December 13, 1985, an Amended Motion was filed to alter Ground One to allege:

- I: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO FILE A PETITION FOR WRIT OF HABEAS CORPUS TO HAVE THE CHARGE DISMISSED UNDER §907.045, FLA. STAT.

On February 7, 1986, the court denied the Motion without an evidentiary hearing,

rehearing denied February 20, 1986.

On February 27, 1986, a *pro se* Notice of Appeal to the Second District Court of Appeal was filed, case number 86-538. On March 21, 1986, the court per curiam affirmed without opinion. Broom v. State, 487 So.2d 298 (Fla. 2nd DCA 1986) (Table). Mandate issued on May 12, 1986.

On September 19, 1986, Broom, *pro se*, filed his second Rule 3.850 Motion with Memorandum of Law, raising:

- I: THE INDICTMENT WAS OBTAINED THROUGH THE KNOWING USE OF FALSE INFORMATION;
- II: INSUFFICIENT EVIDENCE;
- III: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR 1) FAILING TO INVESTIGATE OR CALL WITNESSES; 2) FAILING TO MOVE TO DISMISS THE PROBABLE CAUSE AFFIDAVIT; AND 3) DENYING BROOM THE RIGHT TO TESTIFY;
- IV: CUMULATIVE FUNDAMENTAL ERROR.

On February 11, 1987, the court summarily denied the Motion without an evidentiary hearing.

On February 23, 1987, Broom, *pro se*, filed a Notice of Appeal to the Second District Court of Appeal, case number 87-608. On March 27, 1987, the court per curiam affirmed without opinion. Mandate issued April 17, 1987.

On or about December 23, 1986, Broom, *pro se*, filed a Petition for Writ of Habeas Corpus in the Sixth Judicial Circuit Court, in and for Pinellas County,

Florida (where incarcerated). The court denied the Petition on March 24, 1987, but granted rehearing on May 27, 1987, and on July 28, 1987, granted the Petition.

The State appealed to the Second District Court of Appeal, which reversed on March 4, 1998. State v. Broom, 523 So.2d 639 (Fla. 2nd DCA 1988).

On or about October 4, 2001, Broom, *pro se*, filed a Petition for Writ of Habeas Corpus in the trial court. On November 15, 2001, the court denied the petition, rehearing denied May 9, 2002.

On July 14, 2002, Broom, *pro se*, filed a Notice of Appeal to the Second District Court of Appeal, case number 2D02-2623. On May 30, 2003, the court per curiam affirmed without opinion, rehearing denied July 22, 2003.

On September 19, 2003, Broom, *pro se*, filed a Rule 3.850(h) Motion in the trial court. On September 25, 2003, the court dismissed the Motion.

On April 19, 2005, Broom, *pro se*, filed a Motion for Leave to File a Successive Rule 3.850 Motion beyond the 2-year limit or alternatively a Petition for Writ of Habeas Corpus under Rule 3.850(h). On June 21, 2005, the court denied the Motion, rehearing denied July 8, 2005.

On October 13, 2005, Broom, *pro se*, filed a Petition for Writ of Habeas Corpus in the Supreme Court of Florida. On January 20, 2006, the court dismissed this Petition, rehearing denied April 13, 2006.

On April 9, 2006, Broom, *pro se*, filed a Motion to Correct Illegal Sentence



in the trial court. On August 17, 2006, the court denied the Motion, rehearing denied unknown.

On May 17, 2006, Broom, *pro se*, filed a "Great Writ" in the United States Supreme Court, which was returned without action.

On or about July 17, 2006, Broom, *pro se*, filed an Application to File a Second or Successive Petition, pursuant to 28 U.S.C. §2244(b), in the Eleventh Circuit Court of Appeals. On August 4, 2006, the court denied the Application.

On November 17, 2006, Broom, *pro se*, filed a Petition for Writ of Habeas Corpus in the First District Court of Appeal. On or about December 15, 2006, the court denied the Petition, rehearing denied February 5, 2007.

On July 16, 2007, Broom, *pro se*, mailed a letter to the Florida Supreme Court which the court construed as a Petition for Writ of Habeas Corpus and dismissed on August 22, 2007.

On April 24, 2008, Broom, *pro se*, filed a Petition for Writ of Habeas Corpus in the United States District Court, Northern District. On April 30, 2008, the court transferred the Petition to the United States District Court, Middle District of Florida. On June 23, 2008, the court dismissed the Petition.

On July 7, 2008, Broom, *pro se*, filed a Motion for Relief from Judgment in the United States District Court, Middle District of Florida. The court denied the Motion on July 10, 2008.

On July 28, 2008, Broom *pro se*, filed an Application for Certificate of Appealability in the Eleventh Circuit Court of Appeal. On December 2, 2008, the court denied the Application Motion for Reconsideration denied January 22, 2009.

The Ground in the postconviction 3.850(b)(2) motion was based on new decision issued by the Supreme Court of Florida in Coicou v. State, 39 So.3d 237 (April 2010), that must be applied retroactively in this instant case because it is substantive in nature.

This Appeal Brief is now being filed on the 21 day of June 2012.

This is not a complete statement of the case, for the Defendant has no way of keeping copies of all filings. The Court will have to rely on the Court Docket Sheet for the complete filings.

### ARGUMENT

#### CONVICTION OF AN OFFENSE NOT CHARGED VIOLATED DUE PROCESS UNDER AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION

The lower court order found that the Defendant was charged with first-degree murder, not first-degree felony murder. He was convicted of the lesser-included offense of second-degree murder with a firearm. It is well-established that second-degree murder is a lesser-included offense of first-degree murder, Exhibit A.

However, what the lower court has overlooked is that premeditated murder

and felony murder are not numbered in the statute as separate and independent offenses, but only ways in which criminal liability for first-degree murder may be charged and prosecuted. The difference between a charge of premeditated murder and a charge of felony murder is a difference in the State's theory of how the Defendant committed the single offense of first-degree murder. First-degree murder as defined in §782.04(1)(a), Florida Statute constitutes one offense even though there may be alternate theories by which criminal liability for first-degree murder may be charged and prosecuted. Therefore, just as the Florida Supreme Court held in Coicou v. State, 39 So.3d 237 (Fla. June 28, 2010) that second-degree murder is not a lesser-included offense of first-degree felony murder, as such, neither can second-degree be a lesser-included offense of first-degree premeditated murder.

In Coicou, supra, the Court agreed with Justice Shaw's dissent in Linehan, 476 So.2d at 1266 (Fla. 1985)(Shaw, J., dissenting), that the majority of the Court has departed from Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), codified in §775.021(4), Fla. Stat. (1983), in looking to the evidence rather than to the statutory elements of first-degree felony murder and second-degree depraved mind murder and following Sanders v. State, 944 So.2d 203, 206 (Fla. 2006). ("Necessarily lesser-included offenses are those offenses in which the statutory elements of the lesser-included offense are always subsumed

within those of the charge offense,” (Emphasis added)).

In the instant case, Broom was likewise denied due process under Amendment V and XIV of the United States Constitution, as construed in Blockburger, supra, and codified in §775.021(4), Florida Statutes (1983). Because Broom was charged with first-degree premeditated murder with a firearm, but ultimately convicted, pursuant to the authority of Fla.R.Crim.P. 3.490, of second-degree depraved mind murder with a firearm. Whereas the offense for which Broom was convicted contains an element of depraved mind murder without any premeditation, that is not contained in the offense charged, due process was violated.

The indictment in this case Exhibit B, alleged in pertinent part that:

Broom...from a premeditated design to effect the death of a human being, unlawfully did kill a human being, to wit; Charlotte, Martz, by shooting her with a firearm, in violation of section 782.04, Florida Statute, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Florida.

The petit jury’s verdict Exhibit C, finds the following:

We the jury find the defendant Anthony W. Broom, guilty of second degree murder with a firearm, the lesser included offense to that charged in the indictment. So say we all.

The Sentencing Transcript of the proceeding Exhibit D, at page 522 (number in bottom right hand corner) states:

THE COURT: All right, sir. The jury having considered the evidence submitted in support of this particular charge, and having returned a verdict finding you guilty of second degree murder with a firearm, I now adjudge you guilty of the offense of second degree murder with a firearm and I sentence you to serve a life sentence of imprisonment in the Florida State penitentiary, specifically noting a three-year minimum mandatory consistent with the terms of the verdict found by the jury.

The oral pronouncement Exhibit D, supra, reflects an adjudication of second-degree murder with a firearm. A lesser-included offense Exhibit C, supra, to that as charged in the indictment found by the petit jury. However, as seen in the indictment, Exhibit B, supra, second-degree murder is not charged as a lesser-included offense, i.e., the essential element of depraved mind, which is not an element of the offense charged in the indictment, violating due process of law.

Moreover, there is no indicator that the jury found the “depraved mind” element of second-degree murder. Thus, the jury in this case did not find all of the elements of the alleged lesser offense.

In Coicou, at 39 So.3d 242, Justice Shaw reasoned that offenses are separate and not lesser-included if each offense contains an element that the other does not have. Justice Shaw further noted that it is the **Legislature**, through its definition of statutory elements of offense, that determines whether offenses are lesser-included or separate. Therefore, standard jury instructions and the rules of criminal procedure must give way to that **legislative** decision. See *id.* (citing §775.021(4)),

Florida Statute (1983)). Justice Shaw found that the majority of the Florida Supreme Court and the District Court below had departed from Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), in looking to the evidence rather than to the statutory elements of first-degree felony murder and second-degree depraved mind murder, (citation omitted).

Also use of a firearm is not an essential element of any homicide offense, but constitutes a separate offense for which a defendant can be convicted and sentenced with the homicide offense. Use of a firearm is a third element that increases the penalty for the crime.

In this case, the lower court departed from the essential requirement of law. Chapter 782.04(1)(a), Florida Statute (1979) clearly states that:

The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being...is murder in the first degree...

And Chapter 782.04(2), clearly defines that:

The unlawful killing of a human being when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second-degree...

The charging indictment in this case alleged:

Broom...from a premeditated design to effect the death of a human being, unlawfully did kill a human being...by shooting her with a firearm...

This clearly shows second-degree depraved mind murder was not charged in a manner encompassing a showing of a depraved mind, the required mental element of second-degree murder. Second-degree murder requires a showing a recklessness of a depraved mind without regard for human life.

Second-degree murder can not be a lesser-included offense of first-degree murder since it includes the element of a depraved mind. The judge's instruction to the jury Exhibit E, at page 470, in this case lays out the elements of second-degree murder and states that second-degree murder is a lesser-included offense of first-degree murder. However, none of the three (3) acts that make up a depraved mind came up in the trial. There was no evidence introduced at trial to support any of the acts, let alone all of the acts, as the instructions suggest all of the acts of depraved mind must have been proven by the State.

Depraved mind is not charged as an element in the indictment and is an element that the State did not attempt to prove.

The mental state required to convict the defendant of homicide depends on the nature and the degree of the particular crime charged. In prosecution for first-degree premeditated murder the requisite intent involves a premeditated design to effect death, whereas in a prosecution for second-degree depraved mind murder,

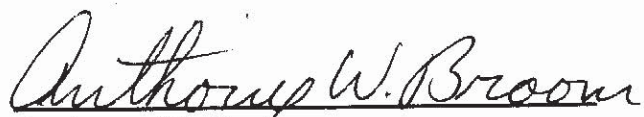
the mental state necessary to commit the crime involves an imminently dangerous act that illustrates a depraved indifference to human life.

Having been convicted of an offense not charged, in violation of due process resulting in a miscarriage of justice, the judgment and sentence are void and/or illegal and/or in excess of the trial court's jurisdiction and must be vacated. Sustaining the conviction and sentence for an offense lesser in degree than the offense charged but where all of its elements were not charged, under the authority of Fla.R.Crim.P. 3.490 and Linehan, is constantly to and/or an unreasonable application of Blockburger and in violation of the Legislation's intent.

**RELIEF SOUGHT**

**WHEREFORE**, premises considered, the Defendant moves this Court to vacate the judgment and sentence and to immediately discharge the Defendant; and to grant all such further relief to which Defendant is entitled and that this Court deems just and proper.

Respectfully Submitted,


  
Anthony W. Broom, *pro se*



**UNNOTARIZED OATH/VERIFICATION**


PURSUANT TO §92.525, FLORIDA STATUTES

**UNDER PENALTIES OF PERJURY**, I declare that I have read the foregoing document and that the facts stated herein are true and correct.

  
Anthony W. Broom, *pro se*

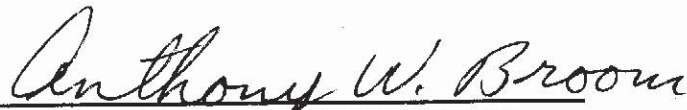
**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY**, that a true copy of the foregoing document was placed in the hands of Mayo Correctional Institution Annex officials to forward by U.S. Mail to: Office of the Attorney General, 3507 E. Frontage Road, Ste. 200, Tampa, FL 33607 on this 21 day of June, 2012.

  
Anthony W. Broom, *pro se*

**CERTIFICATE OF COMPLIANCE**

**I HEREBY CERTIFY**, that this document has been prepared on a computer word processor using the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

  
Anthony W. Broom, DC# 081443  
Mayo Correctional Institution Annex  
8784 W. U.S. 27  
Mayo, FL 32066

# Exhibit A

IN THE CIRCUIT COURT  
FOR THE TENTH JUDICIAL CIRCUIT  
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO.: CF81-1860

v.

ANTHONY W. BROOM,

Defendant.

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**ORDER DENYING DEFENDANT'S BELATED AND SUCCESSIVE MOTION FOR  
POST-CONVICTION RELIEF**

**THIS MATTER** comes before the Court on Defendant's pro se *Belated and Successive Motion for Post-Conviction Relief*, filed on February 23, 2012, pursuant to Rule 3.850(b)(2). After review of the Motion, case file, and applicable law, the Court finds as follows:

The Court has previously granted Defendant permission to file this belated and successive Motion for post-conviction relief. In his Motion, Defendant claims that he is entitled to relief because he was convicted of a crime with which he was not charged. Defendant cites Coicou v. State, 39 So.3d 237 (Fla. 2010) as support for his claim.

In Coicou, the Supreme Court of Florida stated that second-degree murder was not necessarily a lesser included offense of first-degree felony murder, receding from the Court's previous position as stated in Linehan v. State, 476 So.2d 1262 (Fla. 1985). Defendant is mistaken in asserting that the decision in Coicou is applicable to the instant case. Defendant was charged with first-degree murder, not first-degree felony murder. *See attached Information*. He was convicted of the lesser included offense of second-degree murder with a firearm. *See attached Judgment*. It is well-established that second-degree murder is a lesser included offense of first-degree murder. Coicou has no application to Defendant's case.

Based on the above, it is hereby **ORDERED AND ADJUDGED** that Defendant's Motion is **DENIED**. Defendant has thirty (30) days from the date of this Order to appeal this Order to the Second District Court of Appeal.

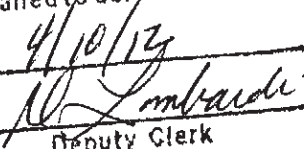
ORDERED at Bartow, Polk County, Florida, this 10 day of April, 2012.

  
\_\_\_\_\_  
KARLA F. WRIGHT, Circuit Judge

cc:  
-- Anthony Broom, Mayo CI Annex, 8784 W. US 27, Mayo, FL 32066  
-- Office of the State Attorney, Polk County

KFW/sly

I hereby certify that copy  
of the foregoing order was  
mailed to defendant this

4/10/12  
  
\_\_\_\_\_  
Deputy Clerk

# EXHIBIT B

Case No. 81-1000 Term of the year of our Lord one thousand nine hundred and eighty one

**The State of Florida**

6

ANTHONY W. BROOM

**Indictment for**

FIRST DEGREE MURDER (CF)  
F. S. 782.04

**In the Name and by the Authority of the State of Florida:**

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of Polk upon their oath do present that ANTHONY W. BROOM of the County of Polk and State of Florida, on the twenty fourth day of June in the year of our Lord one thousand nine hundred and eighty one in the County and State aforesaid from a premeditated design to effect the death of a human being, unlawfully did kill a human being, to-wit: Charlotte Martz, by shooting her with a firearm, in violation of Section 782.04, Florida Statutes, contrary to the Statute in such cases made and provided and against the peace and dignity of the State of Florida.

FILED - CRIMINAL DIVISION  
E. J. BOB... CLERK  
MOBILE AND... COUNTY COURTS  
81 AUG 21 PM 3 30

A TRUE BILL

Presented in Open Court this 21 day of August, 1981  
Leon E. Evans Foreman of Grand Jury

Judge Sewell — NO Bond — In Custody of Jail

# EXHIBIT C

1 say anything or do anything or I don't want any quick or 38  
2 sudden movement from anybody. I don't want the jury  
3 disturbed in any way.

4 After they have delivered their verdict, they will  
5 be permitted to leave. You are to remain in your place.  
6 You may be asked to stand, but I want you to remain in  
7 your place until such time as the jury leaves this court-  
8 room. Again, do not under any set of circumstances offer  
9 any response to the verdict. If you do, appropriate  
10 sanctions will be imposed by me.

11 All right. Please bring in the jury.

12 (The jury returned to the courtroom at 5:22 p.m.)

13 THE COURT: Now which of your number is the foreman?  
14 State your name, please.

15 JUROR: William T. Eken.

16 THE COURT: All right. Have you reached a verdict?

17 MR. EKEN: Yes, we have, Your Honor.

18 THE COURT: All right. Would you hand your verdict  
19 to the bailiff?

20 All right. Publish the verdict.

21 CLERK: Case number CF81-1860. Bartow, Florida,  
22 December 2nd, 1981. We, the jury, find the defendant,  
23 Anthony W. Broom, guilty of second degree murder with a  
24 firearm, the lesser included offense to that as charged  
25 in the indictment. So say we all. William T. Eken,



1 foreperson.

2 THE COURT: All right. Now I am going to start with  
3 you, Mr. Padgett, and I am going to ask you the question  
4 whether or not this verdict is your individual verdict,  
5 and if so, I want you to say yes, and then I am going to  
6 ask each of your number to state your name and tell me  
7 whether or not it is your verdict.

8 Mr. Padgett?

9 MR. PADGETT: Yes.

10 JUROR: Ralph Swanson, yes.

11 JUROR: Connie Waldeck, yes.

12 JUROR: Elsie Quigley, yes.

13 JUROR: Albert Jones, yes.

14 JUROR: William Eken, yes.

15 JUROR: Larry Broussard, yes.

16 JUROR: Judy Tulacro, yes.

17 JUROR: Emily Levey, yes.

18 JUROR: Henry Goldsmith, yes.

19 JUROR: William Gilbert, yes.

20 JUROR: Pat Becker, yes.

21 THE COURT: All right. Now I want to read something  
22 to you. I want to advise you of some very special privi-  
23 leges enjoyed by jurors. No juror can ever be required  
24 to talk about the discussions that occurred in the jury  
25 room except by court order. For many centuries our society

# EXHIBIT D

1           As I said, I'm not guilty of what I'm charged.  
2 The State didn't prove my guilt, and it was on the burden  
3 of the State to prove my guilt. Therefore, I didn't feel  
4 like I ever had to take the stand and state any reason  
5 why I wasn't guilty. I think it was better to leave  
6 things the way it was. And in my appeal, then I might  
7 have to make a statement.

8           As it stands right now, as I said, I'm not  
9 guilty. I believe in your heart and in your mind you  
10 honestly know that I'm not guilty. And in the position  
11 you hold, I don't see how you can sit there and judge  
12 the rulings of our society and our court the way it's  
13 written to take and, uh, find a man guilty of something  
14 the State hasn't proved beyond a reasonable doubt.

15           THE COURT: Anything further, sir?

16           THE DEFENDANT: No, sir, that's left up to you.

17           THE COURT: All right, sir. The jury having con-  
18 sidered the evidence submitted in support of this  
19 particular charge, and having returned a verdict finding  
20 you guilty of second degree murder with a firearm, I now  
21 ~~adjudge you guilty of the offense of second degree murder~~  
22 ~~with a firearm and I sentence you to serve a life sentence~~  
23 ~~of imprisonment in the Florida state penitentiary,~~  
24 ~~specifically noting a three-year minimum mandatory~~  
25 ~~consistent with the terms of the verdict found by the~~

1 sentence as they would a specific term and plug it into  
2 their matrix and make a determination as to the amount of  
3 time he will actually be required to serve before he's  
4 eligible for parole.

5 MR. BAREST: Well, that would be the Parole Commis-  
6 sion's matrix, but --

7 THE COURT: I understand. I've already checked it  
8 out. I've already made my investigation.

9 MR. BAREST: Then it's not necessary for you to  
10 write a written opinion on this?

11 THE COURT: No.

12 MR. BAREST: I would like to make my Motion  
13 Supersedeas Bond, Your Honor.

14 THE COURT: All right.

15 MR. BAREST: Comes now the defendant, Tony Broom,  
16 by and through his undersigned counsel, pursuant to the  
17 Florida Rules of Criminal Procedure and Criminal Practice,  
18 post-trial release and the principles enunciated in  
19 Younghans vs. State, 90 So. 2d 308, (Florida 1956), moves  
20 Honorable Court for a post-trial release in the form  
21 supersedeas bond and as grounds therefor, sets forth  
22 as follows: in accordance with the Younghans criteria,  
23 the defendant's facts are as follows:

24 He's a thirty-three-year-old male, previously  
25 married and divorced, with one child, and who has lived

# EXHIBIT E

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JUROR: Could we see the gun?

THE COURT: You are going to have all the exhibits, including the weapon. At this time I will tell you this. There is a live cartridge, and I understand it is among the items of evidence. I may not be correct in that regard, but I will instruct you you are not, under any set of circumstances, to place a live cartridge in the gun. It is as simple as that. Maybe some folks would be so inclined, but I am instructing you you are not to do it.

Now let's proceed with this. There is a face page and then there is an introductory page, and I am not going to read that introductory page. We will start with the third page and start in this manner.

In this case the defendant is accused of murder in the first degree.

Murder in the first degree includes the lesser crimes of murder in the second degree and manslaughter, all of which are unlawful.

A killing that is excusable or was committed by the use of justifiable deadly force is lawful.

If you find that Charlotte Martz was killed by the defendant, you will then consider the circumstances surrounding the killing in deciding if the killing was murder in the first degree, murder in the second degree,

1 manslaughter, or whether the killing was excusable or  
2 resulted from justifiable use of deadly force.

3 The killing of a human being is justifiable homicide  
4 and lawful if necessarily done while resisting an attempt  
5 to murder or commit a felony upon the defendant, or to  
6 commit a felony in any dwelling house in which the  
7 defendant was at the time of the killing.

8 The killing of a human being is excusable, and there-  
9 fore lawful, when committed by accident and misfortune  
10 in doing any lawful act by lawful means with usual ordinary  
11 caution and without any unlawful intent, or by accident  
12 or misfortune in the heat of passion, upon any sudden and  
13 sufficient provocation, or upon a sudden combat, without  
14 any dangerous weapon being used and not done in a cruel  
15 or unusual manner.

16 I now instruct you on the circumstances that must be  
17 proved before the defendant may be found guilty of first  
18 degree murder or any lesser included crime.

19 Before you can find the defendant guilty of first  
20 degree murder, the State must prove the following three  
21 elements beyond a reasonable doubt:

- 22 1. The person alleged to have been killed is dead.
- 23 2. The death was caused by the criminal act or  
24 agency of the defendant.
- 25 3. There was a premeditated killing of the person

1       alleged to have been killed.

2               "Killing with premeditation" is killing after  
3       consciously deciding to do so. The decision must be  
4       present in the mind at the time of the killing. The law  
5       does not fix the exact period of time that must pass  
6       between the formation of the premeditated intent to kill  
7       and the killing. The period of time must be long enough  
8       to allow reflection by the defendant. The premeditated  
9       intent to kill must be formed before the killing.

10              The question of premeditation is a question of fact  
11       to be determined by you from the evidence. It will be  
12       sufficient proof of premeditation if the circumstances of  
13       the killing and the conduct of the accused convince you  
14       beyond a reasonable doubt of the existence of premedita-  
15       tion at the time of the killing.

16              If a person has a premeditated design to kill one  
17       person and in attempting to kill that person actually  
18       kills another person, the killing is premeditated.

19              Before you can find the defendant guilty of second  
20       degree murder, the State must prove the following three  
21       elements beyond a reasonable doubt:

- 22              1. The person alleged to have been killed is dead.
- 23              2. The death was caused by the criminal act or agency  
24       of the defendant.
- 25              3. There was an unlawful killing of the deceased by



1 an act imminently dangerous to another and evincing a  
2 depraved mind regardless of human life.

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3 An act is one "imminently dangerous to another and  
4 evincing a depraved mind regardless of human life" if it  
5 is an act or series of acts that:

6 ①. A person of ordinary judgment would know is  
7 reasonably certain to kill or do serious bodily injury to  
8 another, and

9 ②. Is done from ill will, hatred, spite or an evil  
10 intent, and

11 ③. Is of such a nature that the act itself indicates  
12 an indifference to human life.

13 In order to convict of second degree murder, it is  
14 not necessary for the State to prove the defendant had a  
15 premeditated intent to cause death.

16 Before you can find the defendant guilty of manslaughter,  
17 the State must prove the following two elements beyond a  
18 reasonable doubt:

- 19 1. The person alleged to have been killed is dead.  
20 2. The death was caused by the act, procurement or  
21 culpable negligence of the defendant.

22 I will now define "culpable negligence" for you.  
23 Each of us has a duty to act reasonably toward others.  
24 If there is a violation of that duty, without any conscious  
25 intention to harm, that violation is negligence. But