IN THE SUPREME COURT OF FLORIDA

THOMAS WAYNE HOUSER,

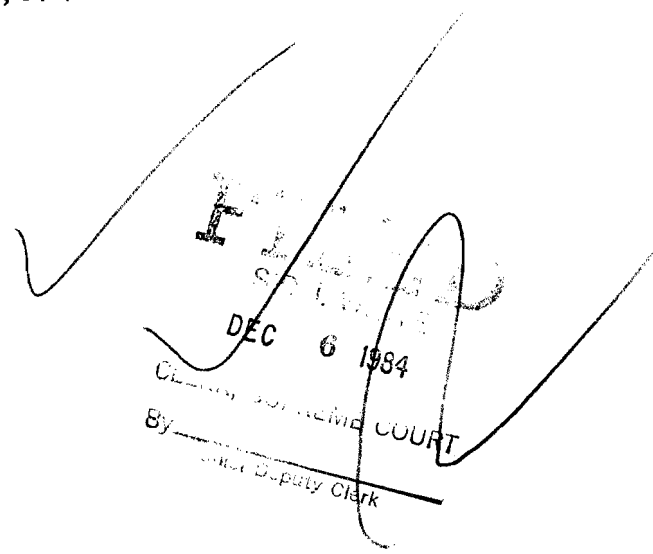
Petitioner,

vs. CASE NO. 66,074

STATE OF FLORIDA,

Respondents.

_____/



RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, Thomas Wayne Houser, was the Defendant in the trial court below and the Appellant in the District Court of Appeal. He will be referred to in this Brief as the Petitioner. The Respondent was the State in the trial court and the Appellee in the District Court of Appeal. The Respondent will be referred to as the State in this Brief.

STATEMENT OF THE CASE AND FACTS

Respondent accepts as accurate Petitioner's Statement of the Case and Facts as recited at pages 2 and 3 of his initial brief.

ISSUE I

WHETHER EVIDENCE OF BLOOD ALCOHOL CONTENT ESTABLISHED BY CHEMICAL ANALYSIS PRIOR TO THE ADOPTION OF HRS RULES RELATING THERETO MAY BE ALLOWED INTO EVIDENCE AT A TRIAL SUBSEQUENT TO THE ADOPTION OF SUCH RULES.

This issue was addressed by the First District Court of Appeal in Drury v. Harding, 443 So.2d 360 (Fla. 1st DCA 1983), holding that these HRS rules are procedural in nature and may be applied to chemical tests administered prior to their adoption. The First District Court of Appeal noted that the Fifth District Court of Appeal had reached a similar result in State v. Fardelman, 9 F.L.W. 1760 (Fla. 5th DCA August 9, 1984). Drury v. Harding, supra, is now pending before this Court on certified question, Case No. 64,727. A copy of the decision in Drury v. Harding is attached hereto in the Appendix to this brief.

A. Retrospective Application of HRS Rules and Regulations Does Not Violate the Statutory Provision.

Effective July 1, 1982, Florida's Driving Under the Influence (DUI) law was revised and amended in a manner which substantially strengthened the statute. The legislative revision challenged by Petitioners was the change in delegation of responsibility for adopting rules and regulations governing the administration of chemical

tests. Previously two state agencies, HRS and the Department of Highway Safety and Motor Vehicles (henceforth DHSMV), shared authority for rulemaking. However the revised statute delegated the function to a single administrative agency, HRS. Also of importance to this cause was a change in the compliance requirement standard. Previously the statute required "strict" compliance to the rules, however after revision, the standard was changed to "substantial" compliance. Section 316.1932(1)(f)9, Fla. Stat. (1982).

Inasmuch as the revised statute became effective July 1, 1982, Petitioner contends that HRS should have adopted rules prior to that date. HRS did adopt "emergency rules" in December 16, 1982, however Petitioners were each arrested, charged and tested during the interim. Petitioners claim there were no valid rules as required by Section 316.1932. At the time of their arrest, Petitioners submitted to chemical tests for blood alcohol content pursuant to Section 316.1932, Fla. Stat. (Supp. 1982). Each now argues that since there were no rules in effect between July 1, 1982 and December 16, 1982, the results of tests conducted under the "old" rules were inadmissible as evidence at trial.

The DHSMV - HRS regulations in existence in June 1982, prior to statutory revision, are virtually identical to the emergency rules adopted by HRS in December, 1982 and those formally adopted in March, 1983 after a public

hearing. Petitioners, arrested between July and December 1982, were tested pursuant to the same procedures and standards used before July 1, 1982 and after December 16, 1982 (or March, 1983).

Both the circuit and district appellate courts concluded that the rules and regulations adopted on December 16, 1982 were strictly procedural. Drury v. Harding, at 361. The rules were designed to permit the introduction of test results into evidence without the requirement of expert testimony to formulate a predicate for the test's reliability. Id. citing State v. Bender, 382 So.2d 697 (Fla. 1980). The purpose of the DHSMV - HRS rules, and later the HRS rules, was to "ensure that only reliable evidence is placed before a jury." Drury v. Harding, at 361. The First District reasoned that the law at the time of trial governed the admissibility of evidence:

> This Court finds the rules to be procedural in nature and we approve the decision of the Circuit Court, thereby allowing the test results to be introduced at trial, subject, of course, to a proper predicate for admissibility showing that the rules were complied with.

Id.

Petitioners submit that such a holding overlooks the plain language of 316.1932(1)(f)1 and violated a statutory right to have the chemical test results excluded when the tests were not conducted in conformity with duly

enacted administrative rules and regulations. (PB 8-9) Petitioner's argument is based upon a literal interpretation of Section 316.1932(1)(f)1, Fla. Stat.[1] Petitioners argue that the phrase "shall have been adopted by the Department of Health and Rehabilitative Services" and the words "shall be adopted after public hearing" require the promulgation of new rules specifying the manner of blood alcohol testing methodology. Petitioners further submit that the instant statutory provision is criminal and must be strictly construed. Petitioners maintain that Florida courts "are not at liberty to ignore" the "plain and unequivocal language" of Section 316.1932(1)(f)1. (PB 8-9).

A review of Chapter 82-155, Laws of Florida, offered in support of Petitioner's supposition, does not reflect a legislative mandate that new rules and regulations be enacted or adopted. (See, Section 316.1932(2)(a), Ch. 82-155 at p. 481).

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[1]Section 316.1932(1)(f)1 states:

> (f)1. The tests determining the weight of alcohol in the defendant's blood shall be administered at the direction of the arresting officer substantially in accordance with rules and regulations which shall have been adopted by the Department of Health and Rehabilitative Services. Such rules and regulations shall be adopted after public hearing, shall specify precisely the test or tests which are approved by the Department of Health and Rehabilitative Services for reliability of result and facility of administration, and shall provide an approved method of administration which shall be followed in all such tests given under this section.

Admittedly, criminal statutes are to be strictly construed. Earnest v. State, 351 So.2d 957 (Fla. 1977). However this legal concept has been utilized in cases challenging the ambiguity of a statutory provision. In Earnest v. State, this Court reviewed the phrase "in his possession" referred to in Section 775.087(2), Florida Statutes, providing for a minimum mandatory sentence for possession of a firearm during a commission of certain specified offenses. Justice England, writing for this Court, held the reference did not clearly include vicarious possession. The opinion reiterated the long standing legal principle upon which Petitioners now rely:

> The statute being a criminal statute, the rule it must be contrued strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms. . . .

Earnest at 958-959 (emphases added) quoting State v. Wershow, 343 So.2d 605, 608 (Fla. 1977). See also, Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927). The State submits that the spirit of the new DUI law and the intent of the Legislature can be demonstrated best by the noticeable change in compliance standards (from "strict" to "substantial" compliance). §316.1932(1)(f)1, Fla. Stat. (1982).

The revisions in the DUI law are indicative of legislative response to public pressure seeking tougher penalties and more strident enforement of existing laws.

See, Evans, One More for the Road, the Florida Bar Journal, October 1982.[2] Public response has prompted the United States Supreme Court to comment:

> The situation underlying this case--that of the drunk driver--occurs with tragic frequency on our nation's highways. The carnage caused by drunk drivers is well documented and needs no recitation here. This Court, although not having the daily contact with the problem that the State courts have, has repeatedly lamented the tragedy.

South Dakota v. Neville, 103 S.Ct. ____, 74 L.Ed. 748, 755 (1983). See also Breithaupt v. Abram, 352 U.S. 432, 439 (1957).

Thus while criminal statutes must be strictly construed, it is also presumed that the legislature intended to enact a valid law. Legislative acts are to be construed, if fairly possible, so as to avoid unconstitutionality. State v. Canova, 94 So.2d 181, 184-185 (Fla. 1957). Furthermore, this Court has often emphasized the importance of legislative intent:

> A statute should be construed to give effect to the evident legislative intent, even if the result seems contradictory to the rules

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[2]This article states at p. 694:

> The new law now requires the administration and analysis of alcohol tests to comply substantially with existing rules that control such testing. If actual testing procedures do not comply with approved techniques, test results may be admitted into evidence provided the differences are not substantial.

> of construction and the strict letter of the statute; the spirit of the law prevails over the letter.

Garner v. Ward, 251 So.2d 252, 256 (Fla. 1971).

Contrary to Petitioner's assertions, courts must not look solely to isolated words and/or phrases in interpreting the meaning of a statute. Instead, as this Court stated in State v. Webb, 398 So.2d 820 (Fla. 1981):

> It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute. Furthermore, construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided.

Id. at 824. The primary guide to statutory interpretation is the determination of the legislative intent. Ormond Beach v. State ex rel Del Marco, 426 So.2d 1029, 1031 (Fla. 5th DCA 1983). The legislative intent behind a statutory enactment must be ascertained and effectuated. American Bakeries Co. v. Haines City, 131 Fla. 790, 180 S. 524, 532 (1938). Ambiguity in meaning or content must yield to the legislative purpose. Ormond Beach at 1031 citing Smith v. City of St. Petersburg, 302 So.2d 756 (Fla. 1974).

It is apparent from review of Chapter 82-155 that the Florida Legislature intended to strengthen the state's DUI statute. The obvious purpose of the changes in the DUI law was to enact harsher penalties for convictions,

to provide for easier administration of procedures, and to relax evidentiary requirements at trial. The legislative action was intended to halt the carnage, the slaughter, the senseless loss of life caused by drunk drivers on the highways within the State of Florida. See generally, South Dakota v. Neville.

Whenever a repealing act substantially re-enacts the provisions of the act repealed, as did Section 316.1932 of Section 322.261, Florida Statutes, the earlier statute is to be construed in a manner which does not destroy or interrupt its operation. See Forbes v. Board of Health of Escambia County, 27 Fla. 189, 9 S. 446, 447 (Fla. 1891); McKibben v. Mallory, 293 So.2d 48, 53 (Fla. 1974); American Bakeries Co. Haines City at 532. Under, this legal theory the operation of Section 316.192, is deemed to be continuous and uninterrupted. The rules and regulations promulgated pursuant to the DHSMV - HRS enactment, which are substantially similar to the subsequently promulgated rules and regulations of HRS, should apply continuously until replaced.

Respondent submits the retroactive application of the new rules and regulations does not violate the legislative spirit of Section 316.1932 and that neither the decisions of the circuit court nor the First District Court of Appeal departs from essential requirements of law.

Respondent further submits that the adoption of emergency rules by HRS prior to a public hearing does not lend credibility to Petitioner's argument. The argument

concerning the motivation of HRS in enacting rules of an "emergency" nature was not raised by Petitioner's prior to review by the First District.

B. Retrospective Application of HRS Rules and Regulations Does Not Violate State and Federal Proscriptions Against Ex Post Facto Laws.

Petitioners have not addressed the retroactive application argument previously raised and rejected in these cases. However it is clear that rules and regulations of an administrative agency, when made under the power conferred by statue, carry with them the full force and effect of that statute. Florida Livestock Board v. W. G. Gladden, 76 So.2d 291 (Fla. 1954); Bystrom v. Equitable Life Assurance Society of the United States, 416 So.2d 1133, 1142 (Fla. 3d DCA 1982). The same general rules of statutory construction applicable to statutes also apply to administrative rules. See, State v. Atlantic Coast Line R. Co., 47 S. 969 (Fla. 1908).

Florida courts have repeatedly held that statutory changes in procedure are applicable to pending cases. Batch v. State, 405 So.2d 302 (Fla. 4th DCA 1981); Harris v. State, 400 So.2d 819 (Fla. 5th DCA 1981). In Love v. Jacobsen, 390 So.2d 782 (Fla. 3d DCA 1980), the Third District stated:

> . . . [P]rocedural rights granted by a statute may be applied retroactively because no vested rights in any mode of procedure exist. Ex Parte Collett, 337 U.S. 55, 93 L.Ed.2d 1207 (1949). If the statute does not affect vested rights or create new obligations, it may be applied retroactively.

Id. at 783 (emphasis added).

In Harris v. State, the question presented was whether an amended Rule of Criminal Procedure could be applied to a pending case when the effective date of the amendment occurred after the date of the defendant's arrest. The Fifth District held the amended rule could be applied to the pending case.

> While statutory changes in the law are normally presumed to apply prospectively, procedural changes are to be applied to pending cases.

Id. at 820.

In Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977), the newly enacted death penalty statute was held applicable to Dobbert's trial even though the statute was not in effect at the time the crimes were committed. On appeal, Dobbert alleged the retroactive application of the new statute violated his constitutional protection against ex post facto application of laws. In affirming the conviction, the United States Supreme Court held that the changes in Florida's death penalty statute, made operative subsequent to Dobbert's crime but before his trial date, were merely procedural. The changes did not affect the quantum of punishment and therefore could be applied to Dobbert's pending case.

The current Rules 10 D-42.21 to D-42.32 govern the method of conducting chemical breath tests. The rules dictate operational and maintenance procedures required for breath testing instruments and test procedures, enumerate training and permit requirements for test operators and instructors, and further clarify the approved testing methods. The rules are entirely procedural and under the aforementioned caselaw, clearly apply to cases pending at the time of their formal adoption.

The issue is not whether such rules existed at the time of the Petitioner's arrest. As long as the rules are in effect at the time of trial, no possible prejudice could exist in rules of procedure. At trial, the State should be expected to show that the intoxilyzer maintenance and testing procedures were performed in accordance with the newly adopted HRS Rules, which were effective as of March 8, 1983. Accord, Drury v. Harding at 361.

The fact that Section 316.1932(1)(f)1 Fla. Stat., does not explicitly provide for retroactive application of any new rules promulgated does not preclude application of the March 8, 1983, rules to Petitioner's pending case. Florida law permits retroactive application even in the absence of a legislative directive. Love v. Jacobsen at 783.

Respondent emphasizes that Petitioners have not been prejudiced by retrospective application of the newly adopted HRS rules. As previously stated the DHSMV - HRS rules in effect prior to the July 1, 1982 amendment,[3] the Emergency Rules effective December 16, 1982,[4] and the current HRS rules effective March 8, 1983,[5] are nearly identical. Petitioners have failed to establish how they were prejudiced by application of these consistent procedureal rules. The new rules are nothing more than a ratification of the old rules with respect to the intoxilyzer test. Under this set of facts, the justification for retroactive application is even more compelling.

In McKibben v. Mallory, a comparable situation was presented which involved Florida's new Wrongful Death Act. The Act became effective on July 1, 1972. The deceased died prior to the effective date, but the cause of action was filed under the new Act. The defendant contended that the new Act served to abrogate all worngful death actions where death occurred prior to July 1, 1972. Noting that courts should avoid construing a statute so as to lead to absurd results,

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[3]Rules 10 D-42 and 95 B-3, existing under Old Ch. 322. 262, Fla. Stat.

[6]Rules 10 DER 82-141-154, existing under the current §316.1932(1)(f), Fla. Stat.

[7]Rules 10 D-42.21 - 42.32.

this Court ruled as follows:

> [W]here a statute has been repealed and substantially re-enacted by a statute which contains additions to or changes in the original statute, the re-enacted provisions are deemed to have been in operation continuously from the original enactment whereas the additions or changes are treated as amendments effective from the time the new statute goes into effect.

Id. at 53. (emphasis added).

The instant situation is analogous. HRS adopted new rules and regulations regarding breath testing procedures which did nothing more than ratify or re-enact the rules that had previously existed under the former Chapter 322. (The DHSMV - HRS rules) The new rules should relate back to the date of each Petitioner's arrest. See also Gordon v. John Deere Company, 320 F.Supp. 293 (N.D. Fla. 1970) (statutes which are procedural or remedial in nature may be applied retroactively provided it operates in furtherance of a remedy or confirmation of a right already existing); U.S. v. Arredondo,31 U.S. 691, 713, 8 L.Ed. 547, 556 (1932) (a legislative ratification of an act done without previous authority is of the same force as if done by pre-existing power and relates back to the act done).

While the above cases deal with ratification by means of a subsequent statute, it is clear that the same rules of statutory construction apply with respect to administrative rules. See, State v. Atlantic Coast Line R. Co; Florida Livestock Board v. W. G. Gladden; Bystrom v.

Equitable Life Assurance Society of the United States at 1142. The logic of the case law is clear: an accused does not have vested rights in procedural rule or statute, therefore rules and statutes may be applied to pending cases. This is especially true when new rules or statutes merely re-enact and ratify that which previously existed under former rules and statutes.

In Stovall v. Denno, 388 U.S. 293, 297 (1967), the Supreme Court of the United States indicated certain criteria to be considered when evaluating the propriety of retroactive application of a rule: (1) the purpose to be served by the new standards, (2) the extent of the reliance by law enforcement authorities on the old standards, and (3) the effect on the administration of justice of retroactive application of the new standards. With the instant rules, the purpose is to ascertain whether a suspect is under the influence of intoxicants. Law enforcement relied totally upon the old rules which are virtually identical to the newly adopted rules. The effect of not permitting retroactive application of the March 8, 1983 standards would severely prejudice the administration of justice. A paramount body of evidence essential to, and reiable in, determining guilt or innocence would be excluded from the trier of fact.

Both Judge Harding and the Court of Appeal, First District, have held retrospective application of the new HRS rules and regulations is consistent with, and does not

depart from the essential requirements of law. Respondent urges this Court to affirmatively answer the certified question thereby establishing conclusively that the admission of the test results into evidence at trials conducted subsequent to adoption of the new HRS rule is proper.

ISSUE II

WHETHER EVIDENCE DERIVED FROM CHEMICAL ANALYSIS FOR BLOOD ALCOHOL CONTENT MAY BE ADMISSIBLE IF THE STATE DOES NOT PRESERVE A BLOOD SAMPLE SUSCEPTIBLE OF FURTHER ANALYSIS BY THE DEFENSE.

Appellant argues that since the blood samples of Appellant were not refrigerated from December 21, 1982 (five days after the blood was analyzed by F.D.L.E. Crime Laboratory Analyst Peter Lardizobal--R 549) to April 5, 1983 (almost four months after the blood sample was drawn, at which time the Defendant's court appointed chemist attempted to analyze the samples), he was denied his right of controntation and his due process right to a fair trial (AB 13-15; R 65-66, 142-146, 469-473). The trial court denied the motion to suppress, stating that there is no requirement that blood samples be kept refrigerated and that Appellant had failed to demonstrate that the evidence (the blood alcohol test results) was in any way tainted (R 472). Appellee submits that the trial court properly denied the motion to suppress.

In State v. Cooper, 391 So.2d 332 (Fla. 3d DCA 1980), the defendant moved to suppress blood alcohol test results based on the fact that one of the samples was inadvertently destroyed. The trial court suppressed all of the evidence based on Brady v. Maryland, 373 U.S. 83 (1963). The appellate court reversed the order of

suppression, stating that the evidence favorable to the Defendant was not the blood itself, but rather the results of the medical examiner's analysis of that blood.

In G.E.G. v. State, 389 So.2d 325 (Fla. 5th DCA 1980), the court stated that the Defendant's right of confrontation is restricted to witnesses and does not include physical evidence. In that case, the court stated:

> In criminal cases in which an essential element is the possession of a particular substance identifiable only by chemical analysis, such as drugs, as distinguished from cases involving objects that can be identified from common experience, such as burglary tools or firearms, the primary evidence of the identity of the chemical substance is not the substance itself but the testimony of the chemist. The chemist, and not the substance, is the witness which the accused can confront and cross-examine.

389 So.2d at 326.

In State v. Lee, 422 So.2d 76 (Fla. 2d DCA 1982), the court considered whether the State must preserve a sample of a defendant's breath in a DUI case. The court found that there had been no evidence in the trial court to support a denial of due process and that because of this lack of evidence, the trial court's order suppressing results of the State's blood alcohol level breath test must be vacated. While the court did not indicate what its ruling would be with such evidence, it specifically rejected the argument that the failure to retain a breath sample is tantamount to suppression of evidence. 422 So.2d at 78.

See also California v. Trombetta, 35 Crim.Law 3127 (1984).

In this case, the Appellant did not request production of the blood samples until almost four months after the car wreck. See Breedlove v. State, 413 So.2d 1, 4 (Fla. 1982) [when the allegedly favorable information is available to the defense through "reasonably diligent preparation," a due process claim will not be sustained]. Further, Appellant introduced no evidence that refrigeration of the blood samples would have established a reasonable doubt as to his guilt. Moreover, Appellant has failed to demonstrate any prejudice. See Strahorn v. State, 436 So.2d 447 (Fla. 2d DCA 1983) [the mere possibility that non-preserved evidence might have helped the Defendant is not a sufficient showing of prejudice]. Thus, the trial court did not err in denying Appellant's motion to suppress the blood alcohol test results on the ground raised in this issue on appeal.

ISSUE III

PETITIONER MAY BE SEPARATELY CONVICTED AND SENTENCED FOR DWI MANSLAUGHTER AND VEHICULAR HOMICIDE FOR EFFECTING A SINGLE DEATH.

The opinion of the First District Court of Appeal correctly applied the Blockburger test and amended §775.021(4), Florida Statutes (1983) to the instant facts and affirmed Appellant's separate convictions and sentences for DWI manslaughter and vehicular homicide, consistent with this Court's construction of the same judicial and legislative authority. See State v. Baker, ___ So.2d ___ (Fla. 1984), 9 F.L.W. 209; Scott v. State, ___ So.2d ___ (Fla. 1984), 9 F.L.W. 209; Borges v. State, 415 So.2d 1265 (Fla. 1982).

This Court restated the principles of the Blockburger test in State v. Charles Baker, ___ So.2d ___ (Fla. 1984), 9 F.L.W. 282 wherein Justice MacDonald wrote:

> In Blockburger v. United States, 284 U.S. 299 (1932), the Supreme Court considered whether a single act could result in multiple punishments and stated:
>
> > The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.
>
> Id. at 304. The Court later explained the Blockburger test:
>
> > As Blockburger and other decisions applying its principle reveal, the Court's application of the test focuses on the statutory

> elements of the offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.

Iannelli v. United States, 420 U.S. 770, 785 n. 17 (1975) (citations omitted). Blockburger "means that two statutory offenses are essentially independent and distinct if each offense can possibly be committed without committing the other offense." 425 So.2d at 50 (Cowart, J., dissenting) (emphasis in original). The Blockburger test is a rule of statutory construction which "should not be controlling where, for example, there is a clear indication of contrary legislative intent." Albernaz v. United States, 450 U.S. 333, 340 (1981).

In Borges v. State, we held that separate convictions and sentences did not violate the double jeopardy clause. We relied on Albernaz to reach the conclusion that

> where the legislature has expressed its intent that separate punishments be imposed upon convictions of separate offenses arising out of one criminal episode, the Double Jeopardy Clause is no bar to such imposition.

415 So.2d at 1267. Shortly after Borges, we acknowledged the Iannelli explanation of Blockburger: "In applying the Blockburger test the courts look only to the statutory elements of each offense and not to the actual evidence to be presented at trial or the facts as alleged in a particular information." State v. Carpenter, 417 So.2d 986, 988 (Fla. 1982) (emphasis supplied).

Id. at 283.

This Court has previously addressed the issue of whether the statutory elements of DWI manslaughter and vehicular homicide are the same in an earlier Baker v. State, 377 So.2d 17 (Fla. 1979). In Baker, supra, the defendant

challenged the constitutionality of §860.01(2), Florida Statutes (1977), Florida's then existing DWI manslaughter provision. The Court held "that neither negligence nor proximate causation is an element of the crime embodied in §860.01(2), Florida Statutes (1977), and the failure to include them as elements of proof does not deprive Appellant of due process of law." Id. at 20. Section 860.01(2) has been renumbered §316.1931(2) to emphasize the legislative focus of the statute--driving while intoxicated. This point was raised in f.n. 2 of the District Court's opinion below.

In Vela v. State, 450 So.2d 305 (Fla. 5th DCA 1984), the Court recognized the offenses of DWI manslaughter and vehicular homicide require proof of different elements in apparent satisfaction of the Blockburger test but found the offenses to be "degree" crimes of the broader crime of homicide, thus barred by double jeopardy. Vela at 308. The court found that the elements of DWI manslaughter requires proof of the following elements:

(1) that the victim is dead

(2) that the death was caused by the operation of a motor vehicle by the defendant; and

(3) that the defendant was intoxicated at the time he operated the motor vehicle. Id. at 308.

Likewise, the elements of vehicular homicide are the following:

(1) that the victim is dead;

(2) that the death was caused by the operation of a motor vehicle by the defendant; and

(3) that the defendant operated the motor vehicle in a reckless manner likely to cause the death of, or great bodily harm to another person.

The above crimes clearly are not "degree' crimes because the State does not necessarily prove the minor offense before proving the major offense. All that can be said is that these crimes are equal offenses requiring proof of a different third element.

The compelling state interest in sustaining a violation of the above penal statutes lies in the consequences of a subsequent appellate or collateral attack which reverses one of the judgments for lack of proof.

However, this Court and the United States Supreme Court agree that merely satisfying the Blockburger test does not answer the question whether the legislature intended that separate offenses and sentences may arise out of one transaction. Charles Baker v. State, supra, at 283 and Ohio v. Johnson, ___ U.S. ___ 35 Crim.L. 3130 (1984).

In Ohio v. Johnson, the Court in discussing a similar question involving legislative intent stated that:

> In the federal courts the test established in Blockburger v. United States, 284 U.S. 299, 304 (1932), ordinarily determines whether the crimes are indeed separate and whether cumulative punishments may be imposed. See Albernaz v. United States, 450 U.S. 333, 337 (1981); Whalen v. United States, 445 U.S. 684, 691 (1980). As should be evident from our decision in Missouri v. Hunter, ___ U.S. ___ (1983), however, the Blockburger test does not necessarily control

> inquiry into the intent of a state legislature. Even if the crimes are the same under Blockburger, if it is evident that a state legislature intended to authorize cumulative punishments a court's inquiry is at an end.

Id. at 3132.

This Court must look to §775.021(4), Florida Statutes (1983) to determine if the legislature intended to authorize cumulative punishment. Section 775.021(4) reads:

> Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilty, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

It is clear that the Blockburger test has been incorporated into Florida law and mandates separate punishments for the separate offenses of DWI manslaughter and vehicular homicide. The instant trial court wisely exercised the sentencing discretion afforded him in §775.021(4) when he ordered Petitioner to serve concurrent sentences for each violation of the penal statutes involved in this case.

CONCLUSION

Based on the foregoing argument and the authority cited herein, Respondent respectfully requests this Honorable Court affirm the judgment and sentence of the trial court below.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Terry P. Lewis, Special Assistant Public Defender, Post Office Box 10508, Tallahassee, Florida 32302, this 5th day of December, 1984.

Gary L. Printy

GARY L. PRINTY