JOHN MARTIN HIGDON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

IN THE SUPREME COURT

STATE OF FLORIDA

CASE NO. 66,753

PETITIONER'S INITIAL BRIEF ON MERITS

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PRELIMINARY STATEMENT

The official Record on Appeal in this cause consists of seven (7) volumes:

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For the purposes of this Brief, any reference to the Record on Appeal in this cause shall be captioned as "(R-V___, p. ___)", which shall refer to the appropriate volume number and the appropriate page number of the Record on Appeal.

The STATE OF FLORIDA was the Plaintiff in the trial court and the Appellee in the Florida Fifth District Court of Appeal. For the purposes of this Brief, the STATE OF FLORIDA will be referred to as the Respondent.

JOHN MARTIN HIGDON was the Defendant in the trial court and the Appellant in the Florida Fifth District Court of Appeal. For the purposes of this Brief, JOHN MARTIN HIGDON will be referred to as the Petitioner.

JOHN MARTIN HIGDON,

Petitioner,

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STATE OF FLORIDA,

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IN THE SUPREME COURT

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CASE NO. 66,753

STATEMENT OF THE CASE

On April 1, 1982, the STATE OF FLORIDA filed a five (5) count Information charging the Petitioner, JOHN MARTIN HIGDON, with the following criminal offenses:

a. Count I: driving while intoxicated resulting in a death; a violation of Section 860.01, Florida Statutes;
b. Count II: driving while intoxicated resulting in a death; a violation of Section 860.01, Florida Statutes;
c. Count III: failure to stop at an accident scene resulting in death or personal injury; a violation of Section 316.027, Florida Statutes;
d. Count IV: driving while license suspended or revoked; a violation of Section 322.34, Florida Statutes;
e. Count V: driving with foreign license during suspension or revocation; a violation of Section 322.30, Florida Statutes.

On April 27, 1982, the Defendant/Petitioner filed a written plea of not guilty.

Between the dates of April 19, 1983, and April 22, 1983, trial was held in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida, on the above-referenced charges.

On April 22, 1983, the jury returned its verdicts of guilty as to Count I of the instructed lesser included offense

of vehicular homicide, guilty as to Count II of the instructed lesser included offense of vehicular homicide, guilty as to Count III, guilty as to Count IV, and guilty as to Count V.

On July 29, 1983, there was filed the Court's Judgment and Sentence entered July 27, 1983.

On July 28, 1983, Defendant/Appellant/Petitioner timely filed his Notice of Appeal to the Florida Fifth District Court of Appeal, Daytona Beach, Volusia County, Florida.

On November 23, 1984, the Florida Fifth District Court of Appeal issued its Per Curiam Opinion affirming Petitioner's convictions and certifying the following question to be one of great public importance: (See Appendix "1"):

> Is the schedule of lesser included offenses promulgated by the Florida Supreme Court in 1981 in error in classifying vehicular homicide (Section 782.071) as a necessarily lesser included offense of DWI manslaughter (Section 860.01)?

On November 27, 1984, Petitioner timely filed his Motion for Rehearing pursuant to Rule 9.330 (a) (b) Florida Rules of Appellate Procedure.

On November 27, 1984, Petitioner likewise filed his Motion for Rehearing En Banc pursuant to Rule 9.331 (c) (1) (2) Florida Rules of Appellate Procedure.

On February 14, 1985, the Florida Fifth District Court of Appeal filed its Opinion On Motion for Rehearing withdrawing its previously issued Opinion of November 23, 1984, and adopting the previous dissent and reversing Petitioner's convictions for vehicular homicide pursuant to Section 782.071 Florida Statutes;

the Court certified the issues raised within said Opinion to be of great public importance so as "to resolve the discrepancy between the standard jury instructions and Baker". (See Appendix "2").

On March 14, 1985, the Florida Fifth District Court of Appeal vacated its Opinion of February 14, 1985, and readopted its Opinion of November 23, 1984, affirming Petitioner's convictions for vehicular homicide pursuant to Section 782.071 Florida Statutes (1981) and certifying the following question as one of great public importance: (See Appendix "3"):

> Is the schedule of lesser included offenses promulgated by the Florida Supreme Court in 1981 in error in classifying vehicular homicide (Section 782.071) as a necessarily lesser included offense of DWI manslaughter (Section 860.01)?

The Court likewise certified direct conflict by said Opinions of November 23, 1984, and March 14, 1985, and the Opinions of the Florida First District Court of Appeal in Houser v. State, 456 So.2d 1265 (Fla. 1st DCA 1984) and the Florida Second District Court of Appeal in Mastro v. State, 448 So.2d 626 (Fla. 2d DCA 1984).

On March 19, 1985, the Petitioner timely filed his Notice to Invoke Discretionary Jurisdiction to review the decision of the Court rendered on November 23, 1984.

On March 20, 1985, Petitioner timely filed his Amended Notice to Invoke Discretionary Jurisdiction to review the decision of the Florida Fifth District Court of Appeal rendered on March 14, 1985, which said Opinion certified a question to be of great public importance.

STATEMENT OF THE FACTS

The events which led to the conviction of Petitioner upon the charges of vehicular homicide, failure to stop at an accident scene resulting in death or personal injury, driving while license suspended or revoked, and driving with foreign driver's license during suspension or revocation arose out of an incident which occurred on the 24th day of February, 1982, at or near Lake Helen, Volusia County, Florida. The Petitioner was charged with having operated his motor vehicle while intoxicated resulting in the deaths of Edward K. Balken and Michael Rhodes as they rode bicycles along Kicklighter Road in Lake Helen, Florida. The Information charging Petitioner with the criminal offenses of driving while intoxicated resulting in death, charged as violations of Section 860.01 Florida Statutes (R-V. 7, p. 1058) read as follows:

> Count One Charge: driving while intoxicated resulting in a death, in violation of F.S. 860.01 Specifications of Charge: In that John Martin Higdon, on or about the 24th day of February, 1982, at or near Lake Helen, within Volusia County, Florida, did drive or operate a motor vehicle over the highways, streets or thoroughfares of Florida while intoxicated to the extent as to deprive John Martin Higdon of full possession of his normal faculties, within Volusia County, Florida, and the death of Edward K. Balken, a human being, was caused by the operation of said motor vehicle by John Martin Higdon while intoxicated.
>
> Count Two Charge: driving while intoxicated resulting in a death, in violation of F.S. 860.01 Specifications of Charge: In that John Martin Higdon, on or about the 24th day of February, 1982, at or near Lake Helen, within Volusia County, Florida, did drive or operate a motor vehicle over the highways, streets or thoroughfares of Florida while intoxicated to the extent as to deprive John Martin Higdon of full possession of his normal faculties, within Volusia County, Florida, and the death of Michael Rhodes, a human being, was caused by the operation of said motor vehicle by John Martin Higdon while intoxicated.

Testimony taken from numerous witnesses at trial indicated that Petitioner's white truck had been travelling at a high rate of speed and was swerving or weaving in a westerly direction on Kicklighter Road (R-V. 1, p. 47-48) when it impacted the two boys who had operated their bicycles into the roadway on Kicklighter Road (R-V. 1, p. 49-55).

Numerous witnesses testified that Petitioner was intoxicated, smelled like alcohol, was leaning and wabbling, was drunk, had slow and slurred speech and had impaired or lost balance. (R-V. 1, p. 70-76, 162-165; R-V. 3, p. 381-387).

Medical testimony established that the cause of the death of both young boys had been the impact of Petitioner's truck.

The sworn jury in Seventh Judicial Circuit Court Case No. 82-681-AA, State of Florida v. John Martin Higdon, returned a verdict in Count I of guilty of vehicular homicide; in Count II, a verdict of guilty of vehicular homicide; in Count III, a verdict of guilty of failure to stop at a scene of an accident resulting in death or personal injury; Count IV, a verdict of guilty of driving while licenses suspended or revoked; in Count V, a verdict of guilty of driving with foreign license during suspension or revocation. (R-V. 6, p. 932-933).

ARGUMENT

Issue

IS THE SCHEDULE OF LESSER INCLUDED OFFENSES PROMULGATED BY THE FLORIDA SUPREME COURT IN 1981 IN ERROR IN CLASSIFYING VEHICULAR HOMICIDE (Section 782.071) AS A NECESSARILY LESSER INCLUDED OFFENSE OF DWI MANSLAUGHTER (Section 860.01).

Section 860.01 Florida Statutes (1981) provided:

> Driving an automobile while intoxicated: Punishment. (1) It is unlawful for any person, while in an intoxicated condition or under the influence of intoxicating liquor, model glue, as defined in §877.11, or any substance controlled under chapter 893 to such extent as to deprive him of full possession of his normal faculties, to drive or operate over the highways, streets, or thoroughfares of Florida any automobile, truck, motorcycle, or other vehicle. Any person convicted of a violation of this section shall be punished as provided in §316.028.
>
> (2) If, however, damage to property or person of another, other than damage resulting in death of any person, is done by said intoxicated person under the influence of intoxicating liquor to such extent as to deprive him of full possession of his normal faculties, by reason of the operation of any of said vehicles mentioned herein, such person shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083, and if the death of any human being be caused by the operation of a motor vehicle by any person while intoxicated, such person shall be deemed guilty of manslaughter, and on conviction shall be punished as provided by existing law related to manslaughter.
>
> (3) Convictions under the provisions of this section shall not be a bar to any civil suit for damages against the person so convicted.

Section 782.07 Florida Statutes provides:

> Vehicular homicide. "Vehicular homicide" is the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another. Vehicular homicide is a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084.

The Information charging Petitioner with the criminal offense of driving while intoxicated resulting in a death, charged as violations of Section 860.01 Florida Statutes, read as follows:

> Count One Charge: driving while intoxicated resulting in a death, in violation of F.S. 860.01 Specifications of Charge: In that John Martin Higdon, on or about the 24th day of February, 1982, at or near Lake Helen, within Volusia County, Florida, did drive or operate a motor vehicle over the highways, streets or thoroughfares of Florida while intoxicated to the extent as to deprive John Martin Higdon of full possession of his normal faculties, within Volusia County, Florida, and the death of Edward K. Balken, a human being, was caused by the operation of said motor vehicle by John Martin Higdon while intoxicated.
>
> Count Two Charge: driving while intoxicated resulting in a death, in violation of F.S. 860.01 Specifications of Charge: In that John Martin Higdon, on or about the 24th day of February, 1982, at or near Lake Helen, within Volusia County, Florida, did drive or operate a motor vehicle over the highways, streets or thoroughfares of Florida while intoxicated to the extent as to deprive John Martin Higdon of full possession of his normal faculties, within Volusia County, Florida, and the death of Michael Rhodes, a human being, was caused by the operation of said motor vehicle by John Martin Higdon while intoxicated.

The question certified to this Court as being one of great public importance and also as being an issue which has caused a divergence of jurisdiction between the Florida First District Court of Appeal and the Florida Second District Court of Appeal as to one holding and the Florida Fifth District Court of Appeal and

Florida Fourth District Court of Appeal as to another holding is whether or not DWI manslaughter pursuant to former Section 860.01 Florida Statutes (1981) necessarily includes as a lesser offense manslaughter by vehicular homicide pursuant to Section 782.071 Florida Statutes (1981).

The Florida Second District Court of Appeal in Mastro v. State, 448 So.2d 626 (Fla. 2d DCA 1984) held that vehicular homicide is not a necessarily lesser included offense of DWI manslaughter. The Florida First District Court of Appeal in Houser v. State, 456 So.2d 1265 (Fla. 1st DCA 1984) has held that vehicular homicide is not a necessarily lesser included offense of DWI manslaughter. The Florida Fourth District Court of Appeal in Spillane v. State, 458 So.2d 838 (Fla. 4th DCA 1984) has held that vehicular homicide is a necessarily lesser included offense of DWI manslaughter. The Florida Fifth District Court of Appeal in the instant case has held that vehicular homicide is a lesser and necessarily included offense of DWI manslaughter.

So are the District Courts of Appeal in the State of Florida in conflict as to whether or not the schedule of lesser included offenses adopted by the Florida Supreme Court in 1981 is correct.

Petitioner herein seeks to raise the issue of whether or not, in light of the above-referenced charges of DWI manslaughter, vehicular homicide pursuant to Section 782.071 Florida Statutes was properly placed before the jury as an option upon which they could return a conviction. Petitioner not only asserts that vehicular homicide pursuant to Section 782.071 Florida Statutes is not a

necessarily lesser included offense of DWI manslaughter, and as such that the schedule lesser included offenses is incorrect, but also asserts that the charging document filed herein and upon which Petitioner was prosecuted and convicted fails to allege all of the essential elements of a vehicular homicide pursuant to Section 782.071 Florida Statutes and as such failed to properly apprise Petitioner that he was being tried for vehicular homicide. It is this essential due process notice argument which is the foundation of Petitioner's appeal.

In 1948, the Supreme Court of the United States in Cole v. Arkansas, 333 U.S. 196 (1948) established the rule of due process of law which applies herein. The Cole Court employed the following language:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused person in a criminal proceeding in all courts, state or federal. It is as much a violation of due process to send an accused to prison following conviction of a charge of which he was never tried as it would to convict him upon a charge that was never made.

In 1979, the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307 (1979) reiterated said position employing the following language:

> It is axiomatic that a conviction upon a charge not made constitutes a denial of due process.

As forthrightly affirmed in the Florida Supreme Court decision in Ray v. State, 403 So.2d 956 (Fla. 1981), a case if

carefully digested which reiterates the position taken by the United States Supreme Court in Cole, supra, and Jackson, supra, a charging document must allege all of the essential elements of the offense with which the defendant is eventually convicted or said document is fundamentally defective in support of a conviction for said charge.

Respondent apparently feels that an allegation of DWI manslaughter under Section 860.01 Florida Statutes (1981) with the accompanying allegation that a defendant was under the influence to the extent that his normal faculties were impaired, or similarly was "intoxicated" sufficiently apprises said individual that he will be tried not only upon the issue of whether or not his motor vehicle caused the death while he was "intoxicated" but also upon the issue of whether or not said individual operated his motor vehicle in a reckless manner likely to cause the death of, or great bodily harm to, another. As argued by Respondent in the instant case in the Fifth District Court of Appeal, Grala v. State, 414 So.2d 621 (Fla. 3d DCA 1982) evidence of intoxication is properly admitted on the issue of reckless operation. Such may well be the case. However, the admission of evidence as to intoxication on the issue of recklessness in operation in no way cures the fundamental defect of lack of notice. Wilson v. Eastmore, 419 So.2d 673 (Fla. 5th DCA 1982); James E. Wilson, Petitioner, vs. E. W. Pellicer, in his official capacity as Sheriff of Putnam County, United States District Court, Middle District of Florida, Jacksonville Division, Case No. 81-119-Civ-J-B.

In Brown v. State, 206 So.2d 377 (Fla. 1968), the Florida

Supreme Court addressed the issue of what does, and what does not, constitute a lesser included offense under Florida law. In Wheat v. State, 433 So.2d 1290 (Fla. 1st DCA 1983), the Florida First District Court of Appeal held that Brown, supra, has continuing vitality and is as yet unchanged. In reference to what constitutes a necessarily included offense, the Brown, supra, Court employed the following language:

> This section also stems from §919.16, which requires an instruction on "any offense which is necessarily included in the offense charged". The statutory mandate here requires that the lesser offense be necessarily included in the major offense charged by the accusatory pleading. This simply means that the lesser offense must be an essential aspect of the major offense. In other words, the burden of proof of the major crime cannot be discharged, without proving the lesser crime as an essential link in the chain of evidence. For example, in order to prove a robbery, the state must necessarily prove a larceny as an essential element of the major offense. This is so because every robbery necessarily includes a larceny. It is legally impossible to prove a robbery without also proving larceny. (Emphasis supplied).

In view of present Florida Supreme Court and District Court of Appeal case law it is difficult to understand the conflict which has arisen in determining whether or not vehicular homicide is a necessarily included offense of DWI manslaughter pursuant to Section 860.01 Florida Statutes (1981). The analysis contained in Ray, supra, and Torrence v. State, So.2d (Fla. 5th DCA 1983), Fifth District Court of Appeal Case No. 80-470, decided October 4, 1983, is simple: Is it necessary in proving a DWI manslaughter

that a vehicular homicide necessarily be proved? Clearly, it is not.

It is not necessary in proving a DWI manslaughter that a vehicular homicide be proved in accordance with the interpretation of both Section 860.01 Florida Statutes (1981) and Section 782.071 Florida Statutes. In the Fifth District Court of Appeal, Respondent argued, apparently successfully, that proof of intoxication is also proof of recklessness and that the causal element in DWI manslaughter is the same as the causal element in vehicular homicide. Such an allegation is patently incorrect and flies in the face of the specific holdings of the Florida Supreme Court and of District Courts of Appeal.

As the Florida Second District Court of Appeal clearly recognized in Mastro, supra, the following is the present law of the State of Florida:

> All of the elements of a Category 1 lesser included offense must be elements of the greater offense. See White v. State, 412 So.2d 28 (Fla. 2d DCA 1982). Vehicular homicide, a violation of §782.071 Florida Statutes (1981) requires proof that the defendant's reckless behavior caused the death for which he is charged. See E. G., JAC v. State, 374 So.2d 606 (Fla. 3d DCA 1979). However, conviction for DWI manslaughter apparently does not require proof that the defendant's negligent behavior caused the death. See Baker v. State, 377 So.2d 17 (Fla. 1979). Thus vehicular homicide requires proof of an element of causation that the greater offense of DWI manslaughter does not require. Accordingly, vehicular homicide is not a Category 1 lesser included offense of DWI manslaughter.

In 1979, the Florida Supreme Court in Baker v. State, 377 So.2d 17 (Fla. 1979) dealt with the argument that the DWI manslaughter statute, 860.01 (2) Florida Statutes, was unconstitutional in that neither negligence nor causation were elements of the crime embodied in the DWI manslaughter statute. In a detailed opinion authored by Mr. Justice Sundberg, the Court employed the following language:

> Accordingly, we hold 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.

The Court likewise held the following:

> The provision of the statute with reference to the death of a person being "caused" by the operation of the car is the equivalent of stating that the death resulted from his misconduct which had its inception at the time he took control of the car and proceeded to operate it while not in possession of his faculties.
>
> It is this very absence of the requirement of some nexus between the intoxication of the defendant and the death of the victim which causes the statute to be unconstitutional on due process grounds, contends the appellant.
>
> But to say it does not make it so. Statutes which impose strict criminal liability although not favored are nonetheless constitutional, particularly when the conduct from which the liability flows involves inculpability or constitutes malum in se as opposed to malum prohibitum.

Thus, in its Baker, supra, opinion has the Supreme Court of the State of Florida established that the causation or causal element in a DWI manslaughter case is merely the establishment by the State beyond its exclusion of a reasonable doubt that the vehicle driven by the charged individual was the instrument of death of the deceased. Neither negligence nor causation is an element of the crime embodied in DWI manslaughter and it is not necessary for the State to establish that the defendant in a DWI manslaughter prosecution operated his vehicle in such a fashion that his intoxication proximately caused the death of the deceased. It is enough for a conviction under DWI manslaughter that an intoxicated individual got behind the wheel of a motor vehicle.

In 1979, the Florida Third District Court of Appeal in its decision in J.A.C. v. State, 374 So.2d 606 (Fla. 3d DCA 1979) citing to Carl v. State, 144 So.2d 869 (Fla. 3d DCA 1962), and citing to McCreary v. State, 371 So.2d 1024 (Fla. 1979), reached the exact opposite conclusion in relation to vehicular homicide. In addressing what constitutes the causal or causation element of vehicular homicide, the J.A.C., supra, Court held:

> Unter these circumstances, the allegedly wrongful conduct of the respondent could not be deemed the proximate cause of the homicide since its effect was superseded by the decedent's own independent intervening act. Proximate causation is an essential requirement for conviction of the crime in question. (vehicular homicide pursuant to §782.071 Florida Statutes). (Emphasis supplied).

Pursuant to Baker, supra, and J.A.C., supra, and in conformity with what has long been the law of the State of Florida

in reference to DWI manslaughter and vehicular homicide, the causal element necessary for vehicular homicide is different and separate and apart from the causal element necessary for a conviction under DWI manslaughter. In a prosecution for a violation of Section 860.01 (2) Florida Statutes (1981) it is necessary only that the State of Florida prove that the vehicle the Petitioner drove was the instrument of death of the two individuals named in the Information. It in no way, shape or form necessitates proof that Petitioner's intoxication caused the death of the alleged victims. Totally to the contrary, in a prosecution for a violation of Section 782.071 Florida Statutes, it is an essential requirement that the State of Florida prove that Petitioner's reckless operation of a motor vehicle was the proximate cause of the death of the alleged victims. An allegation in a criminal Information of a violation of Section 860.01 (2) Florida Statutes (1981) in no way apprises or affords to Petitioner the constitutional notice that he would be tried and possibly convicted for having operated his motor vehicle in a reckless manner likely to cause death or bodily harm and that said reckless operation was the proximate cause of the death of the alleged victims. In a prosecution for a violation of Section 860.01 (2) Florida Statutes (1981), it is no defense that the alleged victims rode out in front of Petitioner's truck or in some way were the intervening cause of their own demise. Lacking the constitutional notice that he was also being tried for being the proximate cause of the alleged victims deaths by reckless operation of his motor vehicle, the Petitioner was not in a position to properly defend and bring

before the jury evidence relevant to that issue. In the final analysis, the issue at bar is a simple one. Under either a double jeopardy analysis pursuant to the United States Supreme Court holding in Blockburger v. United States, 284 U.S. 299 (1932) or a Baker, supra, element analysis, it is not necessary that a vehicular homicide be proven to prove a DWI manslaughter in that the causal element has been expressly construed as being different and an allegation of operation "while intoxicated" is not an allegation of actual reckless operation of the vehicle in a manner likely to cause death or great bodily injury. One can clearly operate a motor vehicle in a nonreckless manner, observing all speed and traffic signals, signs and requirements while extremely intoxicated. One obviously cannot operate a motor vehicle in a reckless manner likely to cause death or great bodily injury in the same way. Proof of recklessness in operation would require, and always has required, a showing of an erractic or dangerous driving pattern or design.

The Florida Fifth District Court of Appeal in the instant case apparently recognized that under a strict Blockburger, supra, analysis or an "elements" analysis vehicular homicide pursuant to Section 782.071 Florida Statutes could not be a necessarily included offense of DWI manslaughter. As the Court recognized, the causation element is proximate cause as to the former and strict liability as to the latter. However, the Florida Fifth District Court of Appeal reasoned that under Ray, supra, and Torrence, supra, the schedule of lesser included offenses was presumptively correct and, as such, that Court declined to reverse

the trial judge for relying on the same.

Clearly, the scheduled lesser included offenses is presumptively correct but just as clearly it is not binding. Linehan v. State, 422 So.2d 244 (Fla. 2d DCA 1983); Bragg v. State, 433 So.2d 1275 (Fla. 2d DCA 1983). The Supreme Court of Florida in its 1981 decision in In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases and the Standard Jury Instructions in Misdemeanor Cases, 431 So.2d 594 (Fla. 1981), employed the following language in reference to the use by the trial courts of the Standard Jury Instructions in Criminal Cases:

> The Court recognizes that the initial determination of the applicable substantive law in each individual case should be made by the trial judge. Similarly, the Court recognizes that no approval of these instructions by the Court could relieve the trial judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him.

In the instant case, it is difficult to fault the trial judge for relying upon the schedule of lesser included offenses contained in the Standard Florida Jury Instructions. However, when read in conjunction with the law which interpretes the elements of each offense and when read in conjunction with the law, both state and federal, which interpretes constitutional notice requirements in a charging document, it becomes crystal clear that vehicular homicide is not now, although clearly it could become with a change in the causal requirement, a necessarily lesser included offense of DWI manslaughter. As both the majority

and dissent in the instant case have held, the charging document in Petitioner's case clearly fails to place Petitioner's case within the Category 2 lesser included range which would require a proper allegation and proof based upon the charging document and evidence.

The trial court erred in instructing the jury in Petitioner's case that vehicular homicide was a lesser included offense of DWI manslaughter and thereby affording to the jury the opportunity to return a conviction for an offense with which Petitioner was never charged. In conformity with basic and fundamental due process of law and the authority and argument cited herein, Petitioner's convictions for vehicular homicide pursuant to Section 782.071 Florida Statutes must be vacated and the Petitioner must be discharged as to said charges.

SUMMARY OF ARGUMENT

Petitioner's grounds for reversal in this matter are based upon the trial court's allegedly erroneous instruction to Petitioner's jury that vehicular homicide pursuant to Section 782.071 Florida Statutes was a necessarily lesser included offense of DWI manslaughter pursuant to Section 860.01 Florida Statutes (1981).

Vehicular homicide is clearly not a necessarily lesser included offense of DWI manslaughter either under a double jeopardy test as set forth in Blockburger v. United States, 284 U.S. 299 (1932) or an analysis of elements tests under Ray v. State, 403 So.2d 958 (Fla. 1981).

Vehicular homicide is not a lesser included offense of DWI manslaughter for the following reasons:

A. The causal relationship is markedly different. DWI manslaughter requires no showing of proximate cause for conviction.

   Vehicular homicide requires both an allegation and a proof of proximate causation between the accused's reckless driving and the deaths.

B. An allegation of operation of a vehicle "while intoxicated" is not the same as an allegation of reckless operation of a vehicle likely to cause death or serious bodily injury.

Under a constitutional due process notice argument, the charging document in Petitioner's case failed to allege all of the essential elements of a vehicular homicide, since it is not a necessarily and lesser included offense of DWI manslaughter,

and therefore Petitioner was not sufficiently on constitutional due process notice of what was being adjudicated at his criminal trial. Such has long been held to be a clear violation of due process of the law and unconstitutional.

The Florida Second District Court of Appeal in Mastro v. State, 488 So.2d 626 (Fla. 2d DCA 1984), and the Florida First District Court of Appeal in Houser v. State, 456 So.2d 1265 (Fla. 1st DCA 1984) have ruled that vehicular homicide is not a necessarily lesser included offense of DWI manslaughter. The Florida Fourth District Court of Appeal in Spillane v. State, 458 So.2d 838 (Fla. 4th DCA 1984), essentially without opinion or articulated reasoning, and the Florida Fifth District Court of Appeal after twice reversing itself, have held that vehicular homicide is a lesser and necessarily included offense of DWI manslaughter.

Simply, the Florida Second District Court of Appeal and the Florida First District Court of Appeal are correct and the Florida Fourth District Court of Appeal and the Florida Fifth District Court of Appeal are wrong.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies hereof have been furnished by Federal Express to: HONORABLE SID J. WHITE, Clerk of Supreme Court, Supreme Court Building, Tallahassee, Fla. 32301; and a copy hereof by mail to: W. BRIAN BAYLY, ESQ., Assistant Attorney General, 125 N. Ridgewood Ave., 4th Floor, Daytona Beach, Fla. 32014; this 10th day of April, 1985.

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