B-5

IN THE SUPREME COURT OF FLORIDA

FRANK ARMENIA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 68,039
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Petitioner, FRANK ARMENIA, was charged by information on March 8, 1984 with causing the death of Jennings Cole Overstreet on December 2, 1983 by operation of a motor vehicle while under the influence of alcoholic beverages to the extent that he was deprived of his normal faculties, driving while intoxicated manslaughter, in violation of Section 316.1031(2) (sic) and Section 782.07, Florida Statutes (R503). A second amended information filed April 24, 1984 dropped the citation of Section 782.07 and corrected the misprint of Section 316.1931(2) (R500).

Armenia moved to dismiss the charge on April 26, on the grounds that the evidence submitted in response to his demand for discovery indicated that the vehicle containing Overstreet was solely at fault for the accident, that its driver rather than Armenia was at fault for causing the collision. He argued that if the State's argument against the appointment of an accident reconstruction expert was upheld - that driving while intoxicated manslaughter under Section 316.1931(2), Florida Statutes (1983), as interpreted by Baker v. State, 377 So.2d 17 (Fla. 1979), is a strict liability crime requiring no proof that Armenia was in any way at fault for the accident leading to the charge - such an interpretation would be a violation of his right to due process and equal protection under the Fourth and Fourteenth Amendments to the United States Constitution (R493-495). The motion to dismiss was denied May 25 (R455) after a hearing May 24 (R401-

412).

At the trial September 17-19, 1984 an eyewitness of the incident, William Hart, testified that he was driving east in the outside lane into Kissimmee on U.S. 192 just after leaving the Sizzler Restaurant at approximately 7:15 p.m. on December 2, 1983 when he observed two cars facing him in the turn lane ahead leading into the Twin Dragons Restaurant. The first car turned in, and the second began to make the turn as Hart was getting close. He honked his horn, flashed his lights, and slowed down, and the second car came to a stop in the eastbound passing lane. He felt that if it continued through he would have had a collision with it. As he passed in front of it, it continued its turn. He kept his attention focused on this second car because he wanted to make sure it did not hit him, and after he passed it he looked in his rearview mirror. He saw the headlights of a vehicle behind him, and when the car making the left turn had cut behind him, it blocked the headlights and the collision occurred. He said that if the turning car had remained stopped, any vehicle behind his could have done the same thing he did and continued on its way without a collision occurring (R14-20,24-29).

An accident reconstruction expert described the approximate location of the point of impact as the far south side lane going eastbound (R229-230), and gave it as his opinion that Armenia, the driver of the vehicle whose headlights Hart saw behind him in the rearview mirror, did not have time to avoid the accident (R246).

A former police officer leaving the Twin Dragons heard

the crash, and saw a green and white Pontiac sliding down in the ditch in front of the Restaurant and another vehicle accelerating across the westbound lanes and into the ditch on the north side. He ran to the Pontiac and pulled the driver, Armenia, back off the steering wheel and noticed an odor of alcohol from him (R31-33). The first police officer to arrive at the scene, Kenneth Anglemire, found two people unconscious in the car on the north side, a blue Thunderbird, a female behind the steering wheel and a male in the front passenger side who died as a result of the accident (R41-43,81). When he went across to Armenia and got close to him he did not notice any odor of alcohol (R55-56).

The police traffic homicide investigator who arrived later, John Myers, said that he smelled alcohol, though not a strong odor, on Armenia as he and two ambulance attendants removed him from his vehicle, and later asked Anglemire to go down to the hospital to get a blood sample from Armenia (R82-83,104). From his observations at the accident scene it was his opinion that Armenia was not driving in an improper manner at the time of the accident (R96-97). He talked to the eyewitness Hart at the scene and Hart's version of what occurred was consistent with Myers' findings (R100-101).

The nurse who treated Armenia at the hospital did not notice any alcohol odor or anything unusual that might have indicated he was intoxicated (R70-72), but the testing of the blood sample taken from Armenia resulted in a .21 blood alcohol level reading (R63-68,106-107,122-125,132).

Another driver who was travelling east on U.S. 192 into

Kissimmee the same evening to have dinner with his wife at the Twin Dragons or the Sizzler, Carl Ikonen, observed a car make a U-turn a hundred feet or more in front of him three or four miles out of Kissimmee. He put on his brakes, while the other car went off into the shoulder of the eastbound right lane for a short distance before adjusting and driving on in front of Ikonen by two to three car lengths. Several times the other car drifted out of its lane. Twice Ikonen tried to pass and the other car speeded up, so he stayed behind him in the slow lane. As they came to the city limits and the traffic light at Airport Road, they both slowed down for the red light. The car in front swerved over as if to make a right turn and hit the gravel, but as the light changed to green speeded up to continue into Kissimmee. Ikonen saw a car making a turn ahead hit the car in front of him broadside at the entrance to the Twin Dragons Restaurant. He did not see a vehicle making the turn into the restaurant before the one that became involved in the collision, or any vehicle coming out of the Sizzler Restaurant parking lot and pulling onto the road eastbound just before the collision occurred. He was about twenty car lengths behind at the time of the accident (R143-161).

The judge gave the standard jury instruction on manslaughter:

> Before you can find the defendant guilty of manslaughter, the State must prove the following three elements beyond a reasonable doubt. First, that Jennings Cole Overstreet is dead: second, the death

> was caused by the operation of a motor vehicle by the defendant and third, that the defendant was intoxicated at the time he operated the motor vehicle (R320).

Over Armenia's objection, he gave the following special instructions requested by the state:

> The term caused by the operation of a motor vehicle by any person while intoxicated is defined as the equivalent of stating that death resulted from the misconduct which had its inception at the time said person took control of the car and continued to operate it while not in possession of his faculties.
>
> Proof of negligence in the operation of an automobile is not necessary to establish the offense of manslaughter by operation of an automobile while intoxicated (R321).

The jury returned a verdict of guilty of DWI manslaughter as charged in the information, and Armenia was adjudicated guilty (R333,445,437-438). He was sentenced to twelve years in prison on November 1, 1984 (R356,439-440). Motions for new trial and arrest of judgment had been filed October 1, and a hearing was held November 9 (R442-444,387- 398). The judge stated his disagreement with the Baker interpretation of the causation language in the DWI manslaughter statute, but felt bound by it to deny the motions (R397-398). Notice of appeal was timely filed November 15 (R424).

On December 5, 1985 the Fifth District Court of Appeal affirmed the judgment and sentence. It considered two points

raised on appeal regarding the continuing viability of the Baker interpretation of the DWI manslaughter statute: that this Court in its standard jury instructions adopted after Baker has listed vehicular homicide, which requires a casual link between the defendant's recklessness and the victim's death, as a necessarily lesser included offense of manslaughter, and has approved causation language in the DWI manslaughter instruction. Armenia asked that the question of Baker's continuing viability be certified to this Court. The District Court agreed that the standard jury instructions and schedule of lesser included offenses supported the argument that this Court has impliedly receded from Baker, but said that any direction in this area should come from this Court itself. It felt like the trial court that it was constrained by Baker, but certified the following question as one of great public importance:

> Is it necessary to prove that there was a causal relationship between the manner of operation of defendant's motor vehicle or his inability to avoid the accident because of his intoxication and the death of the victim to convict for a violation of Section 316.1931, Florida Statutes (1983)?

Petitioner invoked the discretionary jurisdiction of this Court December 6, 1985 and received a copy of the briefing schedule December 18.

SUMMARY OF THE ARGUMENT

Petitioner was convicted of DWI manslaughter and sent to prison for twelve years even though witnesses testified that he did not cause the death by the way he drove his car, nor was he culpably negligent in not avoiding the collision. Instead, the testimony agreed that the other driver drove into his path while recklessly trying to make a turn. The Petitioner was convicted on the basis of the Baker construction of the DWI manslaughter statute, which requires for conviction only that a person involved in a fatal collision be found legally intoxicated, even though he did not in fact cause the collision nor was he at fault for not avoiding it.

In its listing of vehicular homicide, which requires a causal connection between a defendant's operation of a vehicle and a victim's death, as a necessarily lesser included offense of DWI manslaughter, and in the continued use of causation language in the standard instruction for DWI manslaughter, in the Standard Jury Instructions adopted after Baker, this Court has impliedly receded from the Baker construction of the statute. Such construction is not warranted by the basic principle of statutory construction that words of common usage should be construed in their plain and ordinary sense. To substitute the language of actual or descriptive or temporal causation (the succession of acts leading to an event), by using the words "resulted from", for moral and legal causation is not justified. If the legislature had meant the former, it could have used the words "result-

ed from" instead of "caused by", just as if this Court had meant to incorporate the Baker construction into the Standard Instructions, it could have used "resulted from".

The Baker interpretation fails to distinguish between the difference in kind, not just in degree, between the moral and legal culpability in driving while intoxicated and that additional and more serious culpability involved in being responsible for the death of another human being by one's reckless or negligent operation of a vehicle, attributable to that intoxicated condition. Only the latter is genuine and true DWI manslaughter. To convict Armenia for the fortuitous circumstance that he was driving in the wrong place at the wrong time is arbitrary and capricious, not related to the legitimate state objective of discouraging driving by the intoxicated, which is achieved by punishing such intoxicated driving, not by punishing for what Armenia is not morally, hence not legally, responsible for - the death of the victim.

ARGUMENT

THE QUESTION CERTIFIED BY THE DISTRICT COURT SHOULD BE ANSWERED AFFIRMATIVELY AND PETITIONER'S CONVICTION OVERTURNED BECAUSE HIS OPERATION OF A MOTOR VEHICLE DID NOT CAUSE THE DEATH OF THE VICTIM, NOR WAS HE CULPABLY NEGLIGENT IN NOT AVOIDING THE COLLISION.

At every stage of this case, the Baker interpretation of the DWI manslaughter statute has been the dominant factor, and has "resulted in" Armenia being put in prison for twelve years. In that sense, it can be said that Baker has "caused" Armenia's imprisonment. This temporal causal link extends through a succession of events, but does not bring with it the implication of moral culpability and legal fault. By contrast, the Baker interpretation of the DWI manslaughter statute as applied through the judicial system to Armenia has imputed moral culpability and legal fault, through the causal chain, for the death of Overstreet. Thus, a legal determination has been made that Armenia is the moral cause of Overstreet's death and should be punished. With respect, Petitioner asks this Court to consider that a confusion of actual or temporal and moral causation is at the heart of the Baker interpretation of the DWI manslaughter statute, and to re-consider such an interpretation.

This confusion of actual and moral causation can be seen in the special jury instructions (R321) modeled on Baker and the line of cases on which Baker relies. 377 So.2d at 18. By defining "caused by" as the equivalent of "resulted from", moral responsibility, which is the source of legal fault in the crimi-

nal law, the mens rea, has become confused with descriptive or temporal causality. Of course, in the latter sense, the death of Overstreet "resulted from" the chain of events that could be said to have begun when Armenia got into his car that evening, and continued as he drove along 192, just as it could be said to have "resulted from" a similar chain of events that began with Overstreet and his companion getting into their car, and continued as they drove along 192 in the opposite direction. However, the fact that Armenia was later found to be legally intoxicated at the time of the collision makes him morally responsible for Overstreet's death, and at fault in criminal law - the moral and legal cause - only if he was responsible for the collision, and the legal intoxication could consequently be connected with that responsibility, either because it affected the manner of his operation of his vehicle or because it made him unable to avoid the collision.

If he was not in fact responsible for the collision - the efficacious cause - that he was legally intoxicated does not make him morally responsible for the collision and Overstreet's death, and should not subject him to the criminal penalty for manslaughter. He was morally responsible only for being legally intoxicated and driving, and was subject to the criminal penalty for that crime, if properly charged and convicted.

The Baker case says that the DWI statute, formerly Section 860.01(2) now Section 316.1931(2), imposes strict criminal liability. 377 So.2d at 19. It recognizes that such strict liability statutes are not favored but are nonetheless

constitutional, particularly when the conduct from which the liability flows constitutes malum in se, involves moral culpability or responsibility, and not just malum prohibitum, which does not involve such culpability. It then invokes the "classic examples" of felony murder and statutory rape. However, on examination neither supports a case for DWI manslaughter being a strict liability crime. In People v. Aaron, 299 N.W.2d 304 (Mich. 1980), the Michigan Supreme Court made a comprehensive study of felony murder law and pointed out its dubious historical origins and its now three decades old abandonment in England, its country of origin. Statutory rape is a different situation from DWI manslaughter as strict liability. The perpetrator of the former is morally responsible for the criminal act of rape. That he believed his victim to be older than the statutory age does not change his moral responsibility except by degree. However, not just the degree of moral responsibility, but the kind, changes between that involved in driving while intoxicated, and being involved in an accident resulting in death, and that involved in actually causing - being morally responsible for - a death while so intoxicated. It is the Baker lack of recognition of the difference in the kind of moral responsibility involved, not just the degree, and what should be a corresponding difference of legal effect, that makes it an anomaly in the criminal law.

Baker maintains that because the legislature has not revisited the statute, the judicial construction accurately reflects legislative intent to make DWI manslaughter a strict

liability crime not requiring negligence and proximate causation. 377 So.2d at 19. This in effect creates a "no fault" DWI manslaughter statute, and as well as the serious constitutional due process problems alluded to by Judge Dauksch in his concurrence below, there are basic questions of statutory interpretation involved.

A fundamental principle of such interpretation is that where the language of a statute is unambiguous it must be accorded its plain meaning. Jenny v. State, 447 So.2d 1351,1353 (Fla. 1984). Words of common usage should be construed in their plain and ordinary sense. Tatzel v. State, 356 So.2d 787,789 (Fla. 1978). Petitioner asks this Court to consider that the words of the DWI manslaughter statute, "If the death of any human being is caused by the operation of a motor vehicle by any person while so intoxicated, such person shall be deemed guilty of manslaughter", Section 316.1931(2)(c), Florida Statutes, mean that the intoxicated person must cause the death by his operation of a motor vehicle - the plain and ordinary meaning signifying moral culpability for the death. If the legislature had wanted to construct a strict liability statute it could have used the very words "resulted from", instead of "is caused by"; "resulted from" does not have the direct implication of moral fault that "is caused by" has.

As for the argument that the legislature has not attempted to change the language of the statute and thus sanctioned the judicial construction, the political and public policy reality of who and what are involved in this matter must be

recognized. The legally intoxicated who become involved in road accidents in which someone is killed, even if they themselves were not directly responsible for the death, hardly constitute a potentially strong legislative lobby. In any case, common sense would suggest that their number will be much smaller than that of the intoxicated to whom the death can be imputed, either because the intoxication affected the manner in which the intoxicated operated his vehicle at the moment of the accident, or because it made him unable to avoid the collision.

The record of this case demonstrates the importance of there being an immediate eyewitness like Mr. Hart, whose testimony can show that Armenia did not acually cause the collision, but that the other car had made such a collision unavoidable. Without such testimony it is most unlikely that an intoxicated person's condition would not imply responsibility, the legal cause, for the collision, an implication almost impossible to overcome in a legal forum, even if in the moral forum, where the judge is generally silent, the defendant was responsible only for his condition and not for the death. Anyone who reads the record of this case, especially the testimony of Mr. Ikonen who was following Armenia and spoke of his erratic driving, must be struck by the central importance of the immediate eyewitness's testimony, as well as Mr. Ikonen's, that the Overstreet vehicle made a left-hand turn directly into the path of Armenia's vehicle. This testimony supported the accident reconstruction expert's opinion that Armenia did not have time to avoid the accident.

The prosecuting attorney for the State impliedly accepted that Armenia was not responsible for the collision. He invoked Baker and its predecessors at every stage in answer to Armenia's claim that he did not cause the collision or the death, but he did not attempt to directly refute Armenia's claim (R402-403,456-492). No witness came forward to accuse Armenia of causing the collision. The only eyewitnesses, including the one who accused Armenia of erratic driving, described the other car as causing the collision with Armenia's. The trial judge himself expressed his distress with Baker and with being compelled to adjudicate guilty of manslaughter someone who does not appear to be the cause of the death, and said this would be the time to revisit Baker (R397-398,496).

Petitioner, unlike the petitioner in Baker, is not arguing against the constitutionality of the statute, but against the constitutionality of Baker's interpretation of the statute. While that interpretation has arguably a rational basis - to deter drunk driving - it is not rationally related to such a purpose. As Justice Boyd said in his dissent in Baker, the statute as interpreted selects a few of those who engage in the reckless and criminal conduct of drunk driving and metes out to them a harsher punishment, depending on circumstances in no way related to the offender's actual culpability. 377 So.2d at 21. It does so by confusing the concept of moral cause with actual cause, the chain of events that began with the accused getting into his vehicle, and attributing the negligence of so doing while legally intoxicated to the moment of collision, while

substituting the initial misconduct of drunk driving for the additional misconduct of causing a death. In reality these are separate acts of misconduct - driving while intoxicated, and manslaughter - and can be connected morally only if the person responsible for getting into the vehicle while intoxicated is also responsible for the fatal collision that took place while he was driving intoxicated. The irrationality of holding otherwise is shown in the example Justice Boyd describes - the Baker construction of the statute means that a person properly stopped at a stop light and struck from behind by a negligent driver, who dies from the injuries received in the collision, can be convicted of DWI manslaughter and imprisoned for fifteen years merely because he happened to be legally intoxicated at the time. Id. Common sense rebels at such law and calls its constitutionality in question. There is no war between the Constitution and common sense. Mapp v. Ohio, 367 U.S. 643,657, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Since Baker, the legislature has taken steps to more effectively deter people from driving while intoxicated, by increasing the punishment for such misconduct. It can, if it wills, increase the penalty for true DWI manslaughter - where the intoxicated person is responsible for the fatal collision - by increasing the sentencing guidelines scoresheet points for such an offense. But attributing the additional misconduct of manslaughter to the drunk driver, in the fortuitous event that he becomes involved in a fatal collision not his fault or attributable to his negligence, offends the basic concept of fairness

enshrined in the due process and equal protection clauses of the state and federal Constitutions, is arbitrary and capricious, and the penalty in such a case, as Justice Boyd said, constitutes excessive punishment in violation of the Eighth and Fourteenth Amendments. Id. at 22.

The Supreme Court of Wyoming, which like Florida has a vehicular homicide statute whose purpose is to reduce the homicides caused by drunk drivers and to deter all intoxicated persons from driving their vehicles, has still recognized that this worthy purpose can be reconciled with the requirement that the proscribed conduct proximately cause the death. Hodgins v. State, No. 83-143 (Wyo. September 11, 1985), in 37 Crim.L.Rep. 2476. Likewise New Hampshire, in 36 Crim.L.Rep. 2142, and Louisiana, in 36 Crim.L.Rep. 2476.

As noted in the decision of the district court in this case, the standard jury instructions adopted after Baker has listed vehicular homicide as a necessarily lesser included offense of DWI manslaughter:

> ... this schedule will be an authoritative compilation upon which a trial judge should be able to confidently rely.

Use by trial courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594,597 (Fla. 1981).

Vehicular homicide requires proof of a causal relationship between the defendant's recklessness and the victim's death. Since all the elements of a necessarily lesser included are by definition elements of the major offense, the element of causal

relationship between the recklessness and the death in vehicular homicide demands a similar causal relationship between driving while intoxicated and the death in DWI manslaughter.

This Court has also approved language in the standard jury instruction for DWI manslaughter requiring that the State must prove that the death was "caused by" the operation of a motor vehicle by the defendant, not just "resulted from". Just as the legislature originally could have used the "resulted from" language in formulating the statute, the same language could have been used in the standard instruction to formalize the Baker interpretation and construction of the statute. In both cases, this language was not used. Instead, the statutory language and the standard instruction use the language which in its ordinary plain meaning signifies a causal relationship between the operation of the vehicle and the victim's death. In both instances - the schedule of lesser includeds, the instruction on DWI manslaughter - their adoption by this Court supports the argument that the Court has impliedly receded from the Baker construction of the statutory language, and acknowledged its ordinary meaning, which would require a causal relationship between the intoxicated person's operation of his vehicle and the victim's death, not just his presence in the vehicle, while intoxicated, at the time of a fatal collision.

Such a causal relationship was absent in this case. Armenia did not cause the death by his operation of his vehicle, even though he was later found to be legally intoxicated, nor was he culpably negligent in failing to avoid the fateful collision,

which happened not because of his fault but because the other vehicle made a reckless turn into his path.

CONCLUSION

BASED UPON the arguments made and authorities cited herein, Petitioner asks this Honorable Court to answer affirmatively the question certified by the District Court of Appeal, and to overturn his conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, and mailed to Frank Armenia, Inmate No. 095572, Union Correctional Institute, #70-224, Post Office Box 221, Raiford, Florida 32083, all on this 7th day of January, 1986.

Michael L. O'Neill

MICHAEL L. O'NEILL
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