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IN THE SUPREME COURT OF FLORIDA

BARBARA ANN MAGAW,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT
ESCAMBIA COUNTY, FLORIDA

CIRCUIT COURT NO. 86-3947
DISTRICT COURT NO. BS-353
SUPREME COURT NO. 72,419

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APPELLANT'S MAIN BRIEF

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## STATEMENT OF THE CASE AND THE FACTS

On July 2, 1986, the Appellant was involved in a traffic accident in which Ray Barnes, Jr., was killed. On August 12, 1986, Appellant was charged by Information with DWI/Manslaughter, in violation of Section 316.1931, Florida Statutes (1985). (R-335).

On January 26, 1987, a hearing was held on Appellant's Oral Motion to Perpetuate the deposition of Scotty Sanderson of the Pensacola Police Department, since it appeared he might be unavailable for trial. (R-433). Appellant's trial attorney, during argument on the motion, informed the Court and the prosecution that he was unsure if he would call the witness, but that in case he decided not to, he did not want the State to use the deposition, since it would preclude him from cross-examination. (R-434). Appellant's attorney explained to the Court and the State that he would only be able to question on direct and would not be able to cross-examine the witness. (R-434).

During trial, the State attempted to read this deposition into evidence in its case in chief. Appellant objected on the grounds he previously raised; that it would preclude cross-examination and impeachment of the witness. (R-76-78). The trial Court overruled Appellant's objection and the deposition was read into evidence. (R-78,79).

On January 22, 1987, the State filed a Motion in Limine to prevent Appellant from arguing causation to the jury. (R-357). The trial Court granted the State's motion. (R-433).

The case was called to trial on January 28, 1987. (R-9-333). The Appellant was found guilty by a jury. (R-332). A pre-sentence investigation (PSI) was ordered and a Category I sentencing guidelines score sheet was prepared by the State. (R-333,411,499). Sentencing was set for March 17, 1987. (R-332). The State scored one prior offense, Attempted Sale and Distribution of a Controlled Substance (amphetamines), as a third degree felony instead of as a first degree misdemeanor. (R-411,499). The State also assessed 21 points for victim injury, over Appellant's objection. (R-411,395-401).

The total points scored were 117, leading to a guideline sentence of 3-7 years. (R-411). The Court imposed sentence of five years state prison and permanently revoked Appellant's driver's license. (R-401,402). Notice of Appeal to the First District Court of Appeal was filed on March 18, 1987. (R-412).

On April 15, 1988, the First District Court of Appeal rendered its opinion in Magaw v. State, 523 So.2d 672 (Fla. 1st DCA 1988). The District Court affirmed the trial court and certified the following question; "Is the holding of Armenia v. State, 497 So.2d 638 (Fla. 1986) still valid in light of Section 316.193(3)(c) Florida Statutes (Supp. 1986)?" Id. at 763-64. Appellant's petition for review was filed in the First District Court of Appeal on May 11, 1988. This Court accepted jurisdiction on May 17, 1988.

## SUMMARY OF THE ARGUMENT

The errors which took place in this case started the night the Appellant was involved in the accident which gave rise to a charge of driving while intoxicated manslaughter (hereinafter, DWI/Manslaughter) and continued through the trial and sentencing.

The certified question should be answered in the negative. Armenia v. State, 497 So.2d 638 (Fla. 1986) is no longer valid in light of the recent legislative revision of the drunk driving laws. This revision shows a clear legislative intent that causation should be an element in a drunk driving manslaughter offense. Furthermore, Armenia is grounded in Baker v. State, 377 So.2d 17 (Fla. 1979) and the rationale of Baker is no longer valid. The prosecution also violated the appellant's right to cross-examination and the right to confront her accusers by using, in the prosecution's case in chief, a perpetuated deposition taken by Appellant.

Thus, the trial itself is riddled with error and a new trial should be afforded the Appellant.

The errors in sentencing are no less egregious. After ruling that causation was not an element, the Court assessed points for victim injury on Appellant's sentencing score sheet.

The trial Court also scored one offense as a substantially greater degree offense than Appellant was actually convicted of. Specifically, the Court scored a first degree misdemeanor as a third degree felony. Although,

either of these sentencing errors, by itself, would not change the Defendant's guidelines cell, the sum of these errors resulted in Appellant being placed in a higher cell. Thus, Appellant's presumptive sentence was 3-5 years incarceration in State Prison, rather than 12-30 months incarceration or community control. These errors constitute an illegal sentence and can be corrected at any time, and this Court should remand the case for a new sentencing hearing on these grounds.

## ARGUMENT

I. IS THE HOLDING OF ARMENIA V. STATE, 497 So.2d 638 (FLA.1986) STILL VALID IN LIGHT OF SECTION 316.193(3)(C) FLORIDA STATUTES (SUPP. 1986)?

Clearly, the answer to the certified question is "No". The First District Court of Appeals affirmed the trial court's denial of appellant's request to argue causation to the jury. Magaw v. State, 523 So.2d 762 (1st DCA 1988). Although the First District agreed that Section 316.193(3)(c) required causation as a necessary element, the court noted that Armenia was decided one day after the effective date of 316.193(3)(c). Id. at 763. Thus, the court reasoned that the case was controlled by Armenia.

The district court is incorrect in this reasoning. This Court's statement in Armenia that "Nothing has occurred since Baker which would warrant receding from that case" (Armenia v. State, 497 So.2d at 639) does not apply to the statutory amendment in question. The repeal of Section 316.1931 and amendment of 316.193(3)(c) is evidence of the legislature's prior intent. This new evidence was not considered in Armenia; Armenia's appeal was based on changes in the Florida Standard Jury Instructions and the Schedule of Lesser Included Offenses, not changes in the very statute itself. Armenia v. State, 479 So.2d 260, 262 (Fla. 5th DCA

1985). Thus, Armenia is not controlling.

There can be no doubt that the legislature intends for causation to be an element of prosecutions under Section 316.193(3)(c). The statute clearly states;

(3) Any person:
(a) Who is [driving under the influence];
(b) Who operates a vehicle; and
(c) Who, by reason of such operation, **causes**:.....
3. The death of any human being is guilty of DUI manslaughter...

Section 316.193(3)(c), Fla. Stat. (Supp. 1986)(emphasis added). The placement of the word "causes" makes it clear that the legislature contemplates proof of a causal connection between the operation of a vehicle while under the influence and the death of a human being.

This represents a change from the language of the DWI/Manslaughter statute, Section 316.1931, Florida Statutes (1985), construed in Armenia, Baker v. State, 377 So.2d 17 (Fla. 1979), and so many others. Section 316.1931 provided, "...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...." Construing this language, this Court held that the legislature intended that causation not be an element of DWI/Manslaughter. Baker, at 20. The Baker Court's primary rational was that the legislature had never amended the statute even though it was first implied in 1926 that causation was not an element. However, this 1986

revision of the statute not only shows a legislative intent that causation be an element in future DUI/Manslaughter prosecutions; it is also strong evidence that the legislature intended causation to be an element under the former DWI/Manslaughter statute. While generally a court must apply the laws at the time of the offense, courts should give great deference to legislative statements about interpretation or construction of statutes. This is true even when those statements are made after the act occurs, especially when the change is made to clarify existing law. See State v. Lanier, 464 So.2d 1192, 1193 (Fla. 1985). The legislature, having specifically changed and made clear this particular portion of the drunk driving/manslaughter laws, clearly shows their displeasure at the current state of the law regarding causation. This legislative pronouncement of intent was signed into law by the governor only nine days after the date of Appellant's offense. Session Law Chapter 86-926. It's effective date, October 1, 1986, is less than four months after the date of appellant's offense and long before her trial. Session Law Chapter 86-927, the bill immediately subsequent, (though unrelated to the new DUI statute) states that 86-927 shall take effect July 1, 1986. By implication, the Florida Legislature passed the new DUI/Manslaughter law, thus making official its pronouncement of legislative intent, prior to Appellant's offense. Thus,

this legislative pronouncement of intent should be applied to Appellant's case, Armenia notwithstanding.

Additionally, Armenia was premised upon Baker. Armenia, 497 So.2d at 639. Since Baker's primary underpinning was legislative intent, and since the revision of DWI/Manslaughter clearly shows the legislature intended causation to be an issue, Baker is no longer good law. Therefore, since Armenia is based on Baker, and Baker is no longer good law, Armenia is no longer controlling.

The undermining of the legislative intent ground of Baker is only the final nail in Baker's coffin. Baker held that DWI/Manslaughter is a strict liability offense. Id. at 19. Under Baker, persons charged with DWI/Manslaughter may not put forth evidence or argument that their intoxicated operation of the vehicle did not cause the death. Id. The Trial Court in this case went even further and refused to allow Appellant to put forth evidence and argument that her operation of the vehicle (as opposed to her intoxication) did not cause the death. (R-433, 492-96). Thus, Appellant was deprived not only of the opportunity to show that there was no causal relationship between her intoxication and the death, but between her operation of the vehicle and the death as well. Under this interpretation, intoxication plus motor vehicle plus death always equals up to 15 years; even though the death was purely fortuitous and

totally unrelated to the individual's conduct or degree of fault. Clearly, this offends enlightened notions of fundamental fairness and due process.

The Baker holding was based on comparisons to felony murder, statutory rape, and the Court's perception of legislative intent. Baker, at 19. The Court noted that both felony murder and statutory rape are strict liability offenses, yet they were well known at common law and are clearly constitutional. The Court also noted that there was no doubt that the legislature intended that causation not be an element; the legislature had not amended the statute since 1926 (when the Court first indicated that causation was not an element). Cannon v. State, 91 Fla. 214, 207 So. 360 (1926); Baker, at 19. Baker was founded on faulty premises and this Court should re-evaluate and overrule Baker.

Baker's legislative intent ground no longer stands due to the recent legislative revision, moreover, it should never have stood. An analysis of the DWI/Manslaughter statute also shows that the legislature always intended causation to be an element. It is an accepted rule of statutory construction that where a statute does not specifically define words of common usage, such as "causes", such words must be given their plain and ordinary meaning. See Southeastern Fisheries Assoc. v. Department of

Natural Resources, 453 So.2d 1351 (Fla. 1981). Section 316.1931, Florida Statutes (1985), the statute under which appellant is charged, provided in pertinent part; "....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, Fla. Stat. (1985). Giving those words their plain and ordinary meaning, particularly the word "caused", it is clear the legislature intended for the intoxicated defendant's operation of her vehicle to have caused the death. Furthermore, "cause" is defined as "That which produces an effect, result, or consequence; the person, event, or condition responsible for an action or result." American Heritage Dictionary (1981). "Cause" is also defined as; "Culpable. Blamable; censurable; involving the breach of a legal duty or the commission of a fault." Black's Law Dictionary, 4th Ed. Rev. (West 1968). Thus, unless the manner of operation of the motor vehicle was in some way faulty (such as by being intoxicated), and that faulty operation caused the accident, the legislature never intended for the DWI/Manslaughter statute to apply. If the legislature had intended for the statute to merely require that a death result from the accident, they would have said "if the death of any person results from an accident involving an intoxicated person, such person will be deemed

guilty of Manslaughter." The legislature used the word "caused" not "results", under the rules of construction they must have meant "caused".

It is also an accepted rule of statutory construction that statutes are to be construed in order to avoid absurd or inequitable results. See Adams v. Dickinson, 264 So.2d 17 (Fla. 1st DCA 1972); Dorsey v. State, 402 So.2d 1178 (Fla. 1981). Can it be argued that the result in Justice Boyd's hypothetical in Baker is not, at the very least, inequitable? Baker, at 21. (Boyd, J., dissenting). Many other examples spring to mind. Driver A, intoxicated with a blood alcohol level of .15, is driving north. Driver B, intoxicated with a blood alcohol level of .25 is driving south. Driver A's operation of his vehicle is perfect, but Driver B is swerving all over the road at 25 miles per hour over the speed limit. Driver B crosses the center line and a head-on collision occurs. Driver A is wearing his seatbelt and lives. Driver B is not, goes through the windshield and dies. Is it equitable that Driver A receive 15 years in state prison, lose her civil rights, and suffer the additional sanctions imposed by an "infamous" (felony) offense? Assume additionally that behind Driver A is an ambulance. Inside the ambulance, the paramedic is performing cardio-pulmonary resuscitation of a heart attack patient with no palpable pulse. Unable to stop in time, the

ambulance runs into the back of Driver A. The ambulance and paramedic are incapacitated. The heart attack patient is not successfully resuscitated. Should Driver A be charged with causing his death as well? These hypothets demonstrate the absurd and inequitable results that can occur under this construction of the statute. Under Adams and Dorsey, this could not possibly be the correct construction of the statute.

Baker's comparisons to felony murder and statutory rape are also misplaced. While it is true that felony murder is a strict liability statute, in that it abrogates the mens rea requirement for the homicide, a careful examination of the historical rationale clearly shows that it is not analogous to the DWI/Manslaughter statute. The felony murder rule is based on a doctrine of transferred intent, the intent to commit the felony is merely transferred to the homicide. W. LaFave, Handbook on Criminal Law 545 fn. 2 (1972) (hereinafter LaFave). Additionally, one of the earliest justifications for the rule was that common law felonies were capital offenses, thus the rule merely transferred the intent to commit a capital crime to the homicide caused by the criminal act. LaFave, at 546 fn. 4. Under the felony murder rule, the intent to commit the base felony must still be proven. Since the defendant had the intent to commit the base felony, by operation of law, that intent is transferred to

the resulting death. DWI/Manslaughter is inherently different. The base offense, DWI, requires no intent. Whatever transferral takes place is not from a felony to another felony, rather a misdemeanor is enhanced to a second degree felony. This is a particularly disconcerting, since under Baker the enhancement can take place as a result of purely gratuitous circumstances not caused by the defendant. A perfect example of this can be seen in Justice Boyd's hypothetical, in which a defendant, though intoxicated, is operating his vehicle in a perfectly safe manner, stopped at stop light, and unexpectedly struck from behind by another individual who is more intoxicated and driving his vehicle in a reckless manner. Baker, 377 So.2d at 21 (Boyd, J., dissenting); See also Armenia, 497 So.2d at 639-40 (Boyd, J., dissenting). This example clearly shows the inherent distinctions between the felony murder rule and the DWI/Manslaughter statute. Although the felony murder rule operates through the doctrine of transferred intent, in DWI/Manslaughter there is no intent (mens rea) which can be transferred. Furthermore, Baker stands for the proposition that a causal relationship between the DWI and the death need not be shown. Under the felony murder rule, however, there must be a causal relationship between the base felony and the death. See Manuan v. State, 377 So.2d 1158 (Fla. 1979); Gomez v. State, 496 So.2d 982 (Fla. 3rd DCA 1986). If the comparison to the felony murder rule is taken to its

proper conclusion, then there must be some causal relationship between the defendant's intoxicated operation of a motor vehicle and the death for a DWI/Manslaughter conviction. The felony murder rule is certainly not persuasive authority that causation is not an issue.

The comparison to statutory rape is equally misplaced and inapplicable to the issue of causation. There is no issue of causation in a statutory rape case. Statutory rape is merely based on the unremarkable proposition that persons below a certain age are conclusively presumed to be too immature to consent to sex. The statute imposes "strict liability" only in that it imposes a burden of perfect information on adults. The defendant must be certain and correct that his partner is an adult; the law will not recognize a reasonable mistake where this is concerned. This abrogates intent, not causation. A better analogy would be if the legislature increased the sentence in situations where the minor became pregnant or contracted AIDS. Would it not seem unreasonable and in violation of due process to impose the increased penalty where it can not be shown that the defendant was the father, or where the minor contracted the disease from sharing a contaminated needle and not from having sex with the Defendant?

Clearly, the rationale of Baker is faulty. This Court should implement the legislature's intent that

causation be an element and overrule Baker and Armenia.

Even if this Court should uphold Baker, and find that proximate cause between the driver's intoxicated operation of the motor vehicle and the death is not an element, proximate cause between the operation of the motor vehicle and the death is an element. Otherwise, the statute imposes absolute liability, with neither intent nor proximate cause, and is thus fundamentally unfair and violates due process. Even in tort law, strict liability only abrogates negligence. Proximate cause must still exist for recovery. In Ingram v. Pettit, 340 So.2d 922 (Fla. 1976), this Court held that punitive damages may not be recovered from an intoxicated driver without proof that the driver's conduct was otherwise "willful and wanton" or "without regard to the safety of persons or property", provided that the "other necessary elements for punitive damages, i.e., proximate cause and compensatory damages, are proven." Id., at 924 (emphasis added). In the instant case, should decedent's estate bring suit against appellant for wrongful death, seeking compensatory and punitive damages, proximate cause must be established to afford recovery for the punitive damages. To then say that the State need not prove proximate cause in order to obtain a criminal conviction against this same appellant is illogical and is a convolution of the law. How can it be said that due process is preserved when the law requires more proof to

recover mere money than to obtain a felony conviction for an infamous crime and impose 15 years in the state prison? Is due process really preserved when we protect the pocket book more than the personal liberty that we profess to hold so dear? Such a construction is repugnant to all enlightened concepts of due process of law.

The legislature intends for causation to be an element in DWI/Manslaughter convictions. This is clear from the statutory language. Over the years, the statute has been misconstrued. Causation has been whittled away from the point where there was no requirement that proximate cause between intoxication and the accident be proven, to the point we have now reached, where the state argues that there is no need to prove even proximate cause between the appellant's driving and the death. In response to these problems, the legislature amended the statute to make it even more clear that causation is an element. The First District Court of Appeal was bound by Armenia, (which, though decided after the legislative revision, did not consider the legislative revision); thus, the district court felt constrained to deny appellant's relief. Magaw, at 763. Ultimately, it is of no matter. The last bastion of reasoning behind Baker has been proven false. This Court should overrule Baker and Armenia, answer the certified question in the negative, and hold that the state must prove the Appellant's intoxicated operation

of her motor vehicle was the proximate cause of the death, or alternatively, that the Appellant's operation of her motor vehicle was the proximate cause of the death.

II. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO DENY APPELLANT HER RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION BY READING INTO EVIDENCE A DEPOSITION TAKEN AND PERPETUATED BY THE DEFENSE, INSTEAD OF PERPETUATING ONE THEMSELVES OR PRESENTING THE WITNESS FOR LIVE TESTIMONY.

Although the First District Court of Appeal did not discuss this issue in its April 15, 1988 opinion, the Appellant feels that the reading of the deposition of a key witness by the State in its case in chief when the deposition was perpetuated by the Appellant violated her rights under the Sixth Amendment of the United States Constitution (as applied to the States by the Fourteenth Amendment), Section 16 of the Declaration of Rights, Florida Constitution, F.S. 90.612 (2),(3) (a) and (b), as well as the procedural safeguards inherent in Florida Rule of Criminal Procedure 3.190(j)(3).

Prior to trial, the Appellant, sought to perpetuate the testimony of Officer Scotty Sanderson. (R-433). During the hearing on the motion, Defense counsel stated that Officer Sanderson would be at the Florida Department of Law Enforcement School in Tallahassee during trial, that he did not think the State intended to call Officer Sanderson, and that he thought that he might want to call the officer. (R-433,434). Defense counsel went on to advise the Court; "The reason I phrase it like that is if the State were going to call him, I would want to have the right to cross-examine, which I won't have by taking -- that way if it's presented, it will be presented in the defense's

part of the case", with the State responding, "Yes, that's okay with me. I know the Defendant will be present. She needs to be present." (R-434). The deposition was taken with Defendant's counsel examining the witness on direct and the Prosecutor examining the witness on cross-examination. During trial, the State successfully introduced the testimony of Officer Scotty Sanderson by reading the deposition taken and perpetuated by the defense, over Appellant's objection (R-76,77,78). Additionally, the State successfully limited the defense counsel's questions on re-direct (R-80-81).

From the colloquy which occurred during the Appellant's Motion to Perpetuate, the State was on notice that Appellant did not intend to waive her right to cross examine the witness, and Appellant was left with the impression that the State would not seek to deny her that right. Had the State wanted to insure their ability to call this witness through perpetuated testimony they easily could have taken their own perpetuated deposition, asked their questions on direct and allowed the Appellant to cross-examine the witness. Thus, by not perpetuating the testimony thorough direct cross-examination of their own witness, the State was able to lead their witness and prevent Appellant from thoroughly cross-examining the witness.

As stated in Palmieri v. State, 411 So.2d 985

(Fla. 3rd DCA 1982)

There is a clear constitutional preference for in-court confrontation of witnesses. U.S.Const.amend.VI; Ohio v. Roberts, 448 U.S. 56, 65, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597, 607 (1978); Art. 1, Section 16, Fla.Const.; State v. Dolen, 390 So.2d 407 (Fla. 5th DCA 1980). The purpose of the confrontation clause is to afford an accused the fundamental right to compel a witness "to stand face to face with the jury [or trier of fact] in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Barber v. Page, 390 U.S. 719, 721, 88 S.Ct. 1318, 1320, 20 L.Ed. 2d 255, 258 (1968).

In addition, as early as 1953, the Supreme Court of the State of Florida noted:

> It is too well settled to need citation of authority that a fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, which must always be accorded to the person against whom the witness is called....

Coco v. State, 62 So.2d 892, 894-95 (Fla.1953).

Appellee in their Answer Brief before the First District court of Appeal at page 12 concedes that:

> in the instant case, the Appellant was allowed to conduct a direct examination of the witnesses but not to cross-examine him. However, this would be true of any witness called by the Appellant.

Appellee obviously has missed the point. The Appellant did not call Officer Sanderson to the stand, the Appellee did. Appellant's trial counsel merely took Officer Sanderson's perpetuated deposition in order to preserve the opportunity to call him to the stand. Certainly there is no requirement in the Florida Rules of Criminal Procedure that once a person takes a perpetuated deposition of a witness,

he is then required to read that deposition at trial, nor is there any basis under FL.R.CR.P. 3.190(j) that would allow the party who did not perpetuate the testimony to read it as substantive evidence in their part of the case.

Federal and Florida Law is replete with provisions for protecting an accused's right to confront and cross-examine the witnesses against her. Article I, Section 16 of the Constitution of the State of Florida, states; "In all criminal prosecutions the accused shall.... have the right.... to confront at trial adverse witness."
That Article traces the language of the Sixth Amendment of the United States Constitution which states in pertitent part; "In all criminal prosecutions the accused shall enjoy the right.... to be confronted with the witnesses against him."

Also, under Florida Statute 90.612 (3)(b) a party may ask a witness a leading question on cross-examination or recross-examination. Obviously, by not allowing the Appellant to cross-examine Scotty Sanderson, the Appellant was deprived of the right to ask leading questions. See Kembro v. State, 346 So.2d 1083 (Fla. 1st DCA 1977)

In addition, Florida Rule of Criminal Procedure 3.910 (j) specifically sets out certain guidelines to insure that the Defendant's right to cross-examine a witness that will be used at trial is not violated. Specifically, if the deposition is taken on the application of the State:

(a) the defendant and his attorney shall be given reasonable notice of the time and place set for the deposition.

(b) the office having custody of the defendant shall be notified of the time and place, shall produce the defendant at the examination, and keep him in the presence of the witness during the examination.

(c) a defendant not in custody may be present at the examination, but his failure to appear after notice and tender of expenses shall constitute a waiver of the right to be present.

(d) the state shall pay to the defendant's attorney and to a defendant not in custody the expenses of travel and subsistence for attendance at the examination.

(e) the state shall make available to the defendant for his examination and use at the deposition any statement of the witness being deposed that is in the possession of the state and that the state would be required to make available to the defendant if the witness were testifying at trial. Fla.R.Crim.P. 3.190 (j)(6). The rule also states that no deposition shall be used or read in the evidence when the attendance of the witnesses can be procured. Fla.R.Crim.P. 3.190(j)(6).

Here, the Appellant was not present at the deposition to perpetuate the testimony of Scotty Sanderson (R-438). The state, after being explicitly told by Appellant's trial counsel that he was not giving up his right to cross-examine the witness if the State were going to call him, has managed to "end-run" around all of the safeguards inherent in Fla.R.Crim.P. 3.190(j)(3) by reading Appellant's perpetuated testimony of Scotty Sanderson in their case in chief. Obviously, the Appellant could not have foreseen that this deposition that was taken for her benefit would be used against her later at trial. She

certainly did not take it for the convenience of the State. There is nothing in the record showing the State sent the defendant notice to attend the deposition to perpetuate this witness' deposition or that they intended to use the deposition at trial. Therefore, this deposition should not have been read. In State v. Dolen, 390 So.2d 407 (Fla.5th DCA 1980) the Fifth District Court of Appeals stated:

> It is significant to note that the rule permitting a deposition to perpetuate testimony **requires** the presence of the defendant unless the defendant who is not in custody waives his right to appear.

Id. at 408,409 (emphasis supplied). There is no evidence of waiver by the Appellant in this case.

Also, in Brown v. State, 471 So.2d 6, (Fla.1985), the Court found that although defense counsel received notice and attended the deposition, Brown himself received no such notice. While Brown was in custody and the Appellant was not at the time of the deposition, this fact is inconsequential. The Court found that the State failed to comply with the rule governing taking depositions to perpetuate testimony. This Court also found that:

> The State's failure to follow Rule 3.190(j)(3) created fundamental error by depriving Brown of his constitutional right to confront and cross-examine the witnesses against him. There is no way to correct his error and we must grant Brown a new trial.

Brown, at 7. Certainly the State's failure to comply with rules governing taking depositions to perpetuate is more flagrant in this appeal than even in Brown's. At least in

Brown, Brown's trial counsel knew that the state was perpetuating the witness's testimony for their use at trial.

In Palmiere, the State perpetuated the deposition of a witness pursuant to Florida Rule of Criminal Procedure 3.190,(j), the deposition being taken with at least the tacit understanding that it would not be used unless the State attempted and failed to procure the witness's attendance at trial. The Court found that the State had not made a diligent effort to locate the witness and the trial Court's allowing the perpetuated testimony to be read to the jury constituted a departure from the essential requirements of law and defendant's conviction was reversed. Palmiere, at 986.

The Appellant here had the tacit understanding with the State that if they intended to present testimony of Office Scotty Sanderson, they would either perpetuate his testimony themselves or have him present at trial.

In State v. Basilier, 353 So.2d 820 (Fla. 1977) the Defendant contended that it could not be said that he waived his constitutional right of confrontation, since at the time of a discovery deposition the Defendant had no idea that the deponent would die prior to the actual trial. In that case, the State was seeking to use a discovery deposition as substantive evidence against the Defendant. This Court found that it would violate his rights under the Sixth Amendment to the United States Constitution. Here,

when Appellant did not attend the perpetuated deposition of Officer Scotty Sanderson, she too had no idea that the deponent would be unavailable, in that he would neither be produced live nor his deposition perpetuated as the State indicated that it would do. Id. at 408,409. There is no evidence of waiver by the Appellant in this case.

Also, analogizing to a contract situation, when the State did not do what it said it would do, the contract was broken. Since it was broken, the state had an obligation to bring the witness live. Therefore, any stipulation by the parties that Officer Scotty Sanderson would be unavailable for trial should have been abrogated. Therefore, the State has not shown that the witness is unavailable as required by Florida Rule of Criminal Procedure 3.190 (j) (6). See Palmiere, at 986.

It is not only the inability to cross-examine and lead the witness in the deposition that one perpetuates that presents a problem for the Appellant, it is also the nature and type of inquiry that limits the Appellant's ability to properly cross-examine and confront the witness that she is perpetuating. Common sense would tell us that in perpetuating the testimony of a potential witness for oneself, the Appellant would not want to impeach the witness, or to show bias or prejudice on the part of the witness. This would certainly not be the case if one was cross-examining the witness if his testimony were being perpetuated for the

benefit of the State.

In addition, the value of Officer Scotty Sanderson's testimony cannot be understated. He testified to the following facts:

a. He was the first or second officer on the scene.
b. He talked with the Appellant.
c. He smelled a strong odor of alcohol on the Appellant.
d. He smelled alcohol even with a strong wind coming across his back and into her face.
e. He spoke with her at the hospital.
f. He had slurred speech.
g. He noticed the transfer paint, the color of it and the part of the bridge that was missing.
h. He had observed over two thousand people who were drunk in his prior police experience and in his opinion the Appellant was drunk.
i. He also testified to the chain of custody of the blood vial. (R-437-49)

It is inconceivable that the State did not realize the importance of his testimony prior to trial. They had every opportunity to perpetuate his testimony or to bring him live. The State's failure to do so resulted in a blatant disregard of the Appellant's Constitutional rights. Therefore, her conviction should be reversed, and Appellant granted a new trial.

III. THE TRIAL COURT ERRED IN ASSESSING POINTS FOR VICTIM INJURY ON APPELLANT'S SCORESHEET, SINCE APPELLANT WAS NOT CONVICTED OF CAUSING ANYONE'S DEATH.

Florida Rule of Criminal Procedure 3.701(d)(7) states, "Victim injury shall not be scored if not a factor of an offense at conviction." The committee note following the rule states in part, "Victim injury is to be scored for each victim for whom the Defendant is convicted of injuring..." (emphasis added.) As the Trial Court construed Baker, the victim need not be killed by the defendant. Indeed the sole cause of the victim's death could be his own culpable conduct, yet if the defendant was involved in the accident and was driving while intoxicated then the defendant can be convicted of DWI/Manslaughter. See Baker, 377 So.2d at 21 (Boyd, J., dissenting) (Justice Boyd's hypothetical); Armenia, 497 So.2d at 639, 640. (Boyd J. dissenting). If DWI/Manslaughter does not require proof that the Defendant injured the victim (causation), but merely that the victim was killed, then a conviction for DWI/Manslaughter does not mean that the Defendant has been convicted of injuring anyone. Thus, victim injury should not be scored.

This premise is better understood when analogized to cases concerning a conviction for leaving the scene of an accident (LSA) with death or serious bodily injury. DWI/Manslaughter and LSA with Death or Serious Bodily Injury both require the victim to have been injured (or killed) in order for a conviction to be had. In that sense, death is an

element of the offense. However, for both these offenses, the defendant need not be the cause of death. In 1984, this Court held that victim injury should not be assessed in a leaving the scene of an accident with death or personal injuries case, specifically noting that the committee note to the rule required the Defendant to have been convicted of injuring someone and that "victim injury is not an element of the offense in the sense that one must injure or kill someone to be guilty... A conviction under Section 316.027 does not necessarily mean the Defendant is guilty of injuring anyone." Motyka v. State, 457 So.2d 1114, 1115 (Fla. 1st DCA 1984); see also, Benedict v. State, 475 So.2d 1000, 1001 (Fla. 5th DCA 1985).

If the Trial Court's construction of Baker is correct, the Defendant need not cause the injury or death to be guilty of DWI/Manslaughter (the Defendant could be completely blameless, the accident could be completely the decedent's fault and the DWI/Manslaughter conviction would still stand), and therefore, victim injury is not an element of DWI/Manslaughter in the sense that one must cause the death in order to be guilty. Since the committee note requires that the Defendant be convicted of injuring someone in the sense that they caused the injury, then clearly points for victim injury should be not be assessed in a DWI/Manslaughter conviction, at least as long as causation is not an element of the offense.

Since the Appellant was precluded from arguing causation, her conviction does not establish that she has been convicted of killing or injuring anyone; she was merely found guilty of driving while intoxicated and of being involved in an accident in which a life was lost. Thus, the 21 points for victim injury should be removed from her scoresheet.

IV. THE TRIAL COURT ERRED IN SCORING APPELLANT'S 1982 CONVICTION FOR A FIRST DEGREE MISDEMEANOR AS A THIRD DEGREE FELONY.

In 1982, Defendant was convicted of attempted sale and delivery of amphetamines, in violation of Section 893.13(1)(a)(2), Florida Statutes (1981). (R-411). Amphetamines are considered a Schedule II drug. Section 893.03(2)(c), Florida Statutes (1981). Under Section 893.13(1)(a)(2), Florida Statutes (1981), sale or delivery of a scheduled II substance is a third degree felony. Under Section 774.04(4)(d), Florida Statutes (1981), if the offense attempted is a felony of the third degree, the person convicted shall be guilty of a misdemeanor of the first degree. Thus, clearly the prior offense was inaccurately scored.

## CONCLUSION

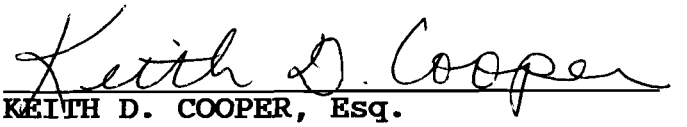
The certified question should be answered in the negative. Armenia and Baker are no longer good law and their construction of the DWI/Manslaughter statute is not in keeping with the true legislative intent, as evidenced by the recent statutory revisions. Thus, the Appellant's case should be remanded to the Trial Court with instructions that she be allowed to give evidence and argument that her intoxicated operation of the motor vehicle was not the cause of the death. Alternatively, the Appellant's case should be remanded to the trial Court for a new trial, with instructions that she be allowed to offer evidence and argument that her operation of the motor vehicle was not the cause of the death.

The Trial Court also erred in allowing the prosecutor to read into evidence, during its case in chief, a deposition perpetuated by the Appellant in violation of her Sixth Amendment right under the U.S. Constitution.

The Trial Court also erred in determining the proper sentence. The Appellant was denied her request to argue causation to the jury, thus, the victim injury should not have been assessed against her, since she had not been convicted of causing the death of the decedent. Lastly, the Trial Court improperly scored one prior conviction of the Appellant, scoring one first degree misdemeanor as a third degree felony. Based on these errors, the Appellant's sentence should be overturned and the case should be remanded for a new sentencing hearing.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Appellant's Main Brief and Appellant's Petition for Oral Argument have been furnished to SID J. WHITE, CLERK, SUPREME COURT OF FLORIDA, at the Supreme Court Building, Tallahassee, Florida 32301, by hand delivery, and that a copy of the foregoing Appellant's Main Brief and Appellant's Petition for Oral Argument has been furnished to GARY L. PRINTY Assistant Attorney General, Criminal Appeals, Department of Legal Affairs, the Capitol, Tallahassee, Florida 32301, by hand delivery on this the 13th day of June, 1988.



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