IN THE SUPREME COURT OF FLORIDA

JOHHNY LEE FRAZIER,

Petitioner,

v. CASE NO. 73,082

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner, Johnny Lee Frazier, was the defendant in the trial court and the Appellant in the First District Court of Appeal. He will be referred to in this brief as "Petitioner." Respondent, the State of Florida, was the prosecuting authority in the trial court and the Appellee in the District Court of Appeal, and will be referred to as "the State.'' An Appendix, consisting of a copy of the decision of the First District Court of Appeal, the briefs filed in the lower appellate court and the staff analysis on HB 8-b (DUI bill), is being filed with this Brief.

II STATEMENT OF THE CASE

After a jury trial, Petitioner was adjudged guilty of DUI Manslaughter. Petitioner was also found in violation of probation on a 1980 sexual battery conviction. The recommended sentence under the guidelines was 17-22 years; however, the trial court sentenced Petitioner to 15 years in prison for DUI Manslaughter to be followed by 10 years in prison for the sexual battery, the latter sentence being credited with time already served. (R-11; 79; 531-532; 535-556, 112-114; 563-564, 115-126)

On appeal the First District Court of Appeal affirmed Petitioner's conviction and sentences, but certified the following question as one of great public importance:

> Whether jury instructions based on the statutory presumptions contained in §316.1934(2)(c) constitute unconstitutional mandatory rebuttable presumptions.

Petitioner filed a notice to invoke discretionary jurisdiction of this Court to review the decision below on September 20, 1988, alleging that such decision involved a question of law pending before the Court in Poore v. State, 503 So.2d 1282 (Fla. 5th DCA 1987), Supreme Court Case No. 70,397.[1] Jurisdiction was invoked pursuant to Jollie v. State, 405 So.2d 418 (Fla. 1981).

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[1] Poore was decided by the Court on September 22, 1988.

On September 23, 1988, this Court ordered Petitioner to submit his brief on the merits on or before October 18, 1988.[2]

[2]Upon further inquiry with the Clerk's Office, counsel for Petitioner was advised that a brief on jurisdiction would not be required.

III STATEMENT OF THE FACTS

Officer Edward Louis Johnson observed Petitioner on the evening of November **6,1986,** at the intersection of Broad and Bay streets, driving very slow at about **5-8** miles per hour **(R-64-66),** and entering into the section of Bay Street which is a one way going west. Because Petitioner was going the wrong way, Johnson signaled him to stop; the officer did not know if it was somebody lost. **(R-67)** Petitioner drove one more block and turned into Pearl Street which was a two-way street for about one block; from there the only proper way to drive was to turn right at Forsyth. But at the intersection of Pearl and Forsyth, Petitioner accelerated and proceeded the wrong way forward into Pearl Street. Johnson could see the smoke coming out of the tail pipe, he knew Petitioner was driving pretty fast--about **55** miles per hour. Two blocks later, Petitioner smashed into a BMW car. **(R-67-79)** Johnson saw no indication that Petitioner attempted to brake or try to avoid hitting the automobile. He saw the BMW spin and slide and end up in the sidewalk and saw Petitioner's car turn around. **A** passenger was ejected from the BMW but he did not see when this occurred because it happened too fast. Johnson drew his gun, approached Petitioner's car and ordered him out; Petitioner was not harmed, however, he could smell alcohol on him or his car. **(R-79-82)** Petitioner was arrested and put in the patrol car and subsequently was requested to take a set of four field sobriety tests, the results of which were unsatisfactory.

Petitioner's eyes were dilated, bloodshot, watery and his speech was slurred. **(R-83-100)** Petitioner admitted he had been drinking that night. **(R-92)** Petitioner was transported to the county jail around **5:00** a.m. the following morning and agreed to take an intoxilyzer breath test. **(R-100)** In Johnson's opinion Petitioner was affected by alcohol to the extent that his normal faculties were impaired. **(R-103)**

During cross-examination, Johnson stated that although there were traffic lights at the intersection where the accident occurred, the color of the lights could not be viewed by Petitioner; that at the intersection there was a tall building partially blocking the view of traffic; however, he saw car lights right before the accident; and, admitted his perception of alcohol on Petitioner was moderate and that his general body odor evidenced that he had been working. **(R-116-132)** The officer also testified that when he looked briefly into Petitioner's car, he did not see any evidence of spilled alcohol and stated that while in the back of his patrol, Petitioner never lost consciousness or fell asleep. Johnson moreover stated that he gave Petitioner the field sobriety tests after Detective Massey suggested it but stated that the suggestion was not a command and that he was going to do it anyway. **(R-132-134)** He admitted that prior to administering the tests, Petitioner complained of a heart condition and had requested twice to be allowed to use the restroom. **(R-134-135)** Although he explained the results of field sobriety tests are not evaluated on a passing grade or a good/bad end spectrum,

Petitioner's performance on the balance test fell towards the good end of the range. (R-135-139) On the nose test, the officer related that the closer an individual gets to the nose the better and admitted that on this test, Petitioner touched his upper lip but without closing his eyes (R-138-139, 143); he also admitted that the coin test was a pretty difficult task that even people in the best of circumstances could not perform. (R-141-142) Johnson explained that for the alphabet test it is assumed the person taking it is well educated and knows the alphabet and stated that although he could understand Petitioner when he recited letters, Petitioner had failed the test because he did not go through the whole alphabet (R-142). He also admitted that as to the coin test it was easier to sit in a car and drive than to perform the test. (R-144-146) He testified that at no time was Petitioner hiccuping, belching or vomiting and stated he had been notified of the death and had been at some time crying. (R-146-148)

During re-direct, Johnson went on to reiterate that as to the field tests there was no good/bad end range of performance. (R-153) But explained that if an individual does not comply with the instructions as to how to perform the tests, he fails them and related that in the nose test Petitioner had not closed his eyes and had taken his time in bringing his hand to his nose; certainly, he, the officer, had done it quicker and without missing his nose. (R-156) And, finally during re-cross, Johnson admitted that for judicial process purposes, and about the balance test, it was worse if Petitioner had

fallen, had needed support or had wobbled instead of just swayed; and, admitted that he himself had performed the nose test many times and had therefore gotten pretty good at it. (R-163-164) He also stated that although Petitioner had been informed at least twice that a person had been killed, he had not heard any response because he was outside of the car at the time. (R-164-165)

Michael Kenney was the driver of the BMW. He testified that he and Jim Wigle were returning to Jacksonville from Pensacola when the accident occurred. He was traveling down Monroe Street at approximately 25 miles per hour and had the green light when he entered the intersection. All he remembered of the collision was glass flying around, his car ending up by the back of the post office and turning to see if Mr. Wigle was okay but he was not in the car. (R-166-170) He later found him laying on the sidewalk; he was not moving. Kenney testified that he had no time to evade the collision and stated he suffered damage to his nose, a chip above his eye, a cut on the back of his head and a small injury to his foot. (R-170-171) He did not remember how Wigle got out of the automobile. (R-171) Kenney went on to testify during cross-examination that Mr. Wigle was sitting in the front passenger's seat: the front seats were bucket seats with a high back restraint and Wigle never went back to any of the rear seats. Additionally, he testified that at all times, he was wearing his seat belt and that although Wigle was also, he had no idea whether prior to the time of the collision he had

already disconnected it. He denied telling any of the officers that Mr. Wigle's seat belt was already off but merely having agreed with what they said to that effect. (R-171-182) Moreover, he related that prior to the accident he never saw any blue lights or reflections and had not heard any horns or sirens, and reiterated that he never had any time to take any evasive action. (R-182-185) As far as he knew all the safety equipment was in working order, he had not had any complaints from any of his passengers. The damage to his car -- some $30,000 -- was mainly to the right back rear of the car; there was no damage to the passenger's side of the car. (R-185-195)

Dr. Bonifacio Floro performed an autopsy of Mr. Wigle on November 7, 1987. He related that Wigle exhibited multiple injuries to his head, chest and stomach, had several lacerations to the skull, forehead and right side of the face, and his neck, backbone, arm and ribs were broken and his internal organs lacerated. (R-195-197) As to the cause of death, he testified that the broken neck and a laceration to the aorta would have been sufficient to kill him. He did not know how the victim sustained the injuries. (R-198-199)

During cross-examination, Dr. Floro opined that Mr. Wigle died at impact or upon hitting the ground and that some of the injuries and abrasions on his face and body areas were not consistent with road burns; however, he could not tell how he got the injuries, it could have been while being ejected, from hitting a fixed object like a tree or from the ground. (R-199-201) He also testified that most of the time if a

person is wearing a seat belt at the time of the impact, there will be marks to that effect on the body; however, he never found or saw such marks on Mr. Wigle. (R-201-202) The doctor opined that the fatal injuries could have been the result of or could have been caused when he was falling on the ground or from the car when he was being ejected; however, he could not tell whether the injuries happened inside or outside the car nor could he answer a hundred percent correct whether those fatal injuries would not have occurred had the victim been wearing his seat belt. A lot of that was dependant on the person's momentum and the site of the impact and whether there was any evidence of broken glass, fibers, blood or fluid found inside the person's car. And finally, asked to give an opinion as to whether Mr. Wigle would have been ejected from the car based on the hypothetical question that he was seated on the front passenger's side, and wearing a seat belt, the doctor opined that he might not have been ejected; however, he was not sure whether the outcome would have been any different because that would depend on the amount of impact, the speed. (R-203-210) The doctor explained, however, that it cannot always be determined whether a victim was wearing a seat belt and that the bottom line was that he could not say whether Wigle was wearing one at the time (R-211-212). He also testified the injuries could have occurred with or without wearing a seat belt at the time -- He simply did not know (R-213); but in his opinion the injuries were suffered as a result of Mr. Wigle being ejected from the automobile. (R-214)

Lawrence Osborne was the Chief of the Paramedics Department at the Jacksonville Sheriff's office. He testified that on November 6th, he drew a blood sample from Petitioner. (R-215-227) When doing so, Osborne got within two feet from Petitioner; he could not swear that he detected an alcoholic beverage odor on him (R-235-247), but explained further that he really did not get directly in front of him and that detecting an alcohol odor was not in his mind. He was concentrating in getting the i.v. (R-247-28)

Detective Hugh Michael Massey arrived at the scene around 12:20 a.m. After discussing the details of the accident and while talking to officer Johnson by his patrol car, he detected an alcoholic beverage odor emanating from where Petitioner was sitting. (R-251-254) A search of Petitioner's automobile revealed two Schlitz beer cans and a paper cup, the clear plastic type normally used to consume alcohol. (R-254-261) Massey testified that when he had an opportunity to observe Petitioner closely, he noticed his bloody and watery eyes and his very strong odor of alcohol; Petitioner's physical appearance was one of intoxication (R-261), and for that reason, he requested that blood samples be taken and field sobriety tests administered. (R-261-265) Moreover, Massey testified that Petitioner told him that he had had three or four Schlitz beers that evening around 9 to 9:30; the detective categorizing Petitioner's attitude during questioning as "almost sleepy." (R-273-275)

Massey admitted that prior to the administration of the field sobriety tests and other tests he informed Petitioner that a man had been killed. Petitioner started crying and "yelled that he didn't kill anybody and something like Oh, my God, don't tell me that.'' **(R-288-292)** Since Petitioner was emotional, Massey tried to calm him down and stopped the questioning and it was thereafter that he instructed Johnson to conduct the field sobriety tests. Subsequently, when he escorted Petitioner over to have the blood taken, Petitioner was still crying. **(R-292-293, 296).** Moreover, he testified that he had no recollection of any spilled alcohol when he searched Petitioner's car nor did he have any knowledge of whether the beer cans were cold or how long they had been in the automobile. **(R-293-295)** The evidence indicated the BMW jumped a curb, hit a tree and bounced off it **(R-297);** Massey's inspection **of** the BMW revealed only that the back windshield was out **(R-300)** and, that the automobile disclosed no evidence of Mr. Wigle's hair, blood or fiber clothing; however, he was unable to say how he was ejected. **(R-301-303)** Massey continued to testify that he personally inspected the BMW's front seat belts and they were both functional but had no recollection of any damage to the front passenger's seat or to the roof portion; he remembered the damage was to the right and left rear of the car and when he inspected the seat it was in an upright position. **(R-304-305)** And finally, he indicated that Mr. Kenney indicated to him he was wearing his seat belt during

the collision but Mr. Wigle had just taken his off in anticipation of arriving at his car. **(R-309)**

Constance Senkowski, a crime laboratory analyst, tested Petitioner's sample blood for alcohol content and the results revealed that Petitioner's blood had a **.24** gram alcohol content. **(R-368-380)** Moreover, she proceeded to testify as to how different levels of alcohol content affect the normal faculties of a human being and related the rate of alcohol elimination is usually .02 grams per hour; it will take ten to twelve hours to completely eliminate a **.24** content from an individual's body. **(R-381-384)** During cross-examination Senkowski acknowledged people have different levels of absorption which would change the time when alcohol begins to have an effect; admitted that she did not know either Petitioner's absorption or elimination rate **(R-385-387);** admitted that alcohol affects people differently with persons accustomed to drinking having more tolerance to its effect at a volume range up to about **.13** to **.15 (R-388-389);** testified that a person with an alcohol content of **.24** would be at a point where he would not be able to walk, would be in a stupor like comma stage; and, that based on the alcohol readings of his blood her opinion was that Petitioner would have been impaired for driving at the time the sample was taken. **(R-390-392)**

Officer Keith Wesley Knight testified that on November 7th at around **4.45** a.m., he administered a breathilyzer test to Petitioner. The results of the test showed a **.139** alcohol content. Petitioner admitted driving a vehicle although he

was not sure where, admitted drinking **8, 9** or **10** beers, and, admitted being under the influence of alcohol. **(R-396-414)** During cross-examination, Knight stated Petitioner did not appear extremely intoxicated and had complained of neck pains. **(R-414-419)** But in his opinion Petitioner was under the influence of alcohol to the extent that his normal faculties were impaired. **(R-420-422)**

The State rested and motions for judgments of acquittal were denied. **(R-423, 426-433)** During the charge conference, Petitioner objected to the jury being instructed as to the presumptions contained in section **316.1934,** Florida Statutes, on due process constitutional grounds, and requested that his jury be instructed as to the provisions of **§316.614(5),** Florida Statutes, as it related to the element of causation on the DUI charge, but the trial court ruled against him. **(R-423-425; 444-470)** The jury found Petitioner guilty of DUI manslaughter and of vehicular homicide, the lesser of the second-degree murder charge. **(R-531-532)**

IV SUMMARY OF ARGUMENT

Pursuant to Poore v. State, infra, as recently modified by this Court, Petitioner could only be ordered to serve 5 years in prison for the 1980 sexual battery for which he had originally received a true split sentence of 10 years suspended after 5.

Although the First District correctly found that Florida's statutory presumption of impairment from a .10 blood alcohol level is unconstitutional, it erred in concluding that the error was harmless because it incorrectly used "overwhelming evidence" as to the presumed element as the standard of review.

A casual relationship between a defendant's operation of a vehicle and the resulting death must be proven by the State as one of the elements of the DUI manslaughter crime, and the Petitioner was therefore entitled to have his jury instructed as to the theory of his defense as to this element of causation, particularly in a case such as this one when sufficient evidence was introduced to support the instruction.

V ARGUMENT

ISSUE I

THE DISTRICT COURT ERRED IN AFFIRMING PETITIONER'S 25-YEAR SENTENCE.

Petitioner was convicted of DUI manslaughter. Also pending against Petitioner was a violation of probation charge on a 1980 sexual battery for which he had originally received a "true split sentence'' of 10-years, suspended after 5 years. For these two offenses, Petitioner was sentenced at the same time: the sentencing guidelines recommending a sentence of 17-22 years. The trial court sentenced Petitioner to 15 years in prison for DUI manslaughter and to a consecutive 10 year term in prison for the sexual battery offense, the latter sentence credited with "actual" time already served. In affirming Petitioner's sentences, the First District Court of Appeal, relying on Poore v. State, 503 So.2d 1282 (Fla. 5th DCA 1987), held:

> In the case at bar, appellant had no right to be resentenced under the guidelines because he had no right to be sentenced a second time at all. The 10-year sentence was set in 1980 and was merely being reimposed as a result of appellant's violation of probation. The recommended guidelines sentence of 17-22 years simply did not include this offense. Rather, the 17-22 year sentence was the presumptive guidelines sentence for the DUI manslaughter case. However, because the statutory maximum for this second degree felony was 15 years, the trial court could give only the 15-year imprisonment it did. s. 775.082, Fla.Stat. (1985). This sentence did not constitute a downward departure from the guidelines. Fla.R.Crim.P. 3.701(d)(10).

13 F.L.W. at 1963.

However, this Court has recently reviewed Poore and held that when a defendant is originally given a "true split sentence" consisting of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion, upon a subsequent violation of probation:

> the sentencing judge in no instance may order incarceration that exceeds the remaining balance of the withheld or suspended portion of the original sentence. Section 948.06(1) would not apply in this latter instance because no new fact would be available for consideration by the sentencing judge. . . . The possibility of the violation already has been considered, albeit prospectively, when the judge determined the total period of incarceration and suspended a portion of that sentence, during which the defendant would be on probation. In effect, the judge has sentenced in advance for the contingency of a probation violation, and will not later be permitted to change his or her mind on that question.
>
> We stress, however, that the cumulative incarceration imposed after violation of probation always will be subject to any limitations imposed by the sentencing guidelines recommendation. We reject any suggestion that the guidelines do not limit the cumulative prison term of any split sentence upon a violation of probation. To the contrary, the guidelines manifestly are intended to apply to any incarceration imposed after their effective date, whether characterized as a resentencing or revocation of probation. . . . They must be applied to the petitioner in this instance, albeit within the context of the previously true split sentence.
>
> * * * *
>
> Accordingly, for the reasons expressed here, we agree with the district court's determina-

> tion that petitioner's sentence must be vacated. Petitioner originally was sentenced to a true split sentence totaling four-and-one-half years, with two years of the total sentence suspended. The trial court specifically provided for the contingency of a violation during the probationary period, and expressly stated that if the defendant violated the conditions of his probation "the court may revoke your probation and require you to serve the balance of said sentence." Under the rationale of Pearce [395 U.S. 711 (1969)], the trial court shall not be permitted to order petitioner's incarceration for any period exceeding either the guidelines recommendation or the remainder of the original split sentence, whichever is less.

(e.s.) Poore v. State, 13 F.L.W. 571 (Fla. 1988).

In the instant case, Petitioner's sentence on the 1980 offense does not conform to Poore. Under Poore, Petitioner could only be required to serve the remainder of his 10 year suspended sentence -- that is, 5 years with credit for any county jail time served while awaiting the disposition of the violation of probation.[3] Because that was not the disposition that Petitioner obtained, the decision of the First District Court of Appeal needs to be quashed and the cause remanded with instructions that Petitioner's sentence be corrected accordingly.

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[3] By sentencing Petitioner to 10 years in prison with credit for 1425 days, Petitioner in reality was sentenced to a term greater than the remainder inasmuch as Petitioner had already served a full term of 5 years. See, North Carolina v. Pearce, 395 U.S. 711, 719, n. 13 (1969) (credit for time served includes the time credited during service of the first prison sentence for good behavior, etc.).

ISSUE TWO

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE ERROR IN INSTRUCTING THE JURY ON THE STATUTORY PRESUMPTION OF ALCOHOL IMPAIRMENT WAS HARMLESS IN VIEW OF THE OVERWHELMING EVIDENCE AS TO THE PRESUMED ELEMENT.

The First District Court of Appeal was correct in concluding that Florida's statutory presumption of impairment from a .10 blood alcohol level is unconstitutional, but it erred in also concluding that the error in instructing Petitioner's jury accordingly was harmless. In finding the error harmless, the District Court held:

> Applying the harmless error test, we conclude that it is not necessary to reverse appellant's conviction. Evidence of the presumed element, that the defendant was under the influence of alcohol to the extent that his normal faculties were impaired, is overwhelming, and we can say beyond a reasonable doubt that the jury would have convicted Frazier absent the defective instruction given.

13 F.L.W. at 1962. Although the District Court cited this Court's decision in State v. Diguilio, 491 So.2d 1129 (Fla. 1986), for its proposition that the error was harmless, the principles enunciated in State v. Diguilio were incorrectly applied since the "harmless error test" is not whether the evidence was overwhelming or whether based on that the appellate court can say beyond a reasonable doubt that the jury would have returned a guilty verdict absent the error, but rather:

> The test must be conscientiously applied and the reasoning of the court set forth for

> the guidance of all concerned and for the benefit of further appellate review. The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id., at 1139. See also, Lee v. State, 13 F.L.W. 532 (Fla. 1988) (overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation for the jury may have reached its verdict because of the error without considering other reasons untainted by the error): Ciccarelli v. State, 13 F.L.W. 536 (Fla. 1988). And see also, Connecticut v. Johnson, 460 U.S. 73, 85-86 (1983) stating:

> An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon the evidence. If the jury may have failed to consider evidence of intent [here or impairment or nonimpairment], a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent [impairment] as overwhelming is then simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence of intent [impairment], when the jury never

> may have performed that function, would give too much weight to society's interest in punishing the guilty, and too little weight to the method by which decisions of guilt are to be made.

Below, harmless because of the other "overwhelming evidence" of impairment was the position espoused by the State in seeking affirmance if any error was found. "Overwhelming evidence" of the presumed element was the reasoning set forth by the District Court in finding the error harmless and for concluding that the jury would have convicted Petitioner absent the defective instruction. "Overwhelming evidence" is not the test when determining whether an error is harmless, however; and here, and understandably so, the State failed in its burden to demonstrate to the lower appellate court that there was no reasonable possibility that the erroneous instruction contributed to the Petitioner's conviction. After all, Petitioner's jury was told that if his blood had an alcohol content of .10 or above, the State had established, i.e., made a prima facie case, that he was under the influence to the extent that his normal faculties were impaired. Petitioner's jury was never even told that he could introduce evidence to rebut the existence of alcohol impairment from a .10 alcohol content. Obviously, with an instruction such as that other evidence of impairment became irrelevant to the jury since all it needed to find was an alcohol content of .10 or above to be satisfied that the State had proved impairment beyond a reasonable doubt.

In sum, because in this cause the District Court used the erroneous harmless test standard of review, and because in this

case a reasonable possibility exists that the unconstitutional instruction contributed to the conviction, Petitioner should be afforded a new trial.

ISSUE THREE

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO APPELLANT'S THEORY OF DEFENSE AS IT RELATED TO THE ELEMENT OF CAUSATION OF THE CRIME.

During the charge conference, Appellant requested the following jury instruction as it related to the element of DUI Manslaughter that he by reason of operating a vehicle caused the death of the victim:

> It is unlawful in the State of Florida for any person 16 years of age or older to be a passenger in the front seat of a motor vehicle unless such person is restrained by a safety belt when the vehicle is in motion.

(R-109: 463-464) The trial court denied the request, and on appeal, the First District found Petitioner's argument as to this issue without merit.

The only way the District Court could have found that Petitioner was not entitled to have his jury consider his theory of defense, of which he introduced evidence, was if it found that proof of causal relationship between the manner of operation of a defendant's motor vehicle due to intoxication and death of the victim was not necessary in order to convict a defendant of manslaughter by intoxication.[4] See, Armenia v.

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[4] A major portion of oral argument was devoted to the discussion of whether this element of causation needed to be proven: the State acknowledging the change in the statute but arguing the change was merely one of semantics thus making the principles enunciated in Armenia dispositive of this issue on appeal.

State, 497 So.2d 638 (Fla. 1986); Baker v. State, 377 So.2d 17 (Fla. 1979). But see, Magaw v. State, 523 So.2d 762 (Fla. 1st DCA 1988); and the House Staff Analysis on HB 8-B (the DUI bill), stating:

> B. Effect of Proposed Changes:
>
> This bill repeals the DWI statute altogether. There would only be one standard for courts to follow. The provisions for penalties for manslaughter and accidents with serious bodily injury would now fall under DUI. The changes are significant in two ways. First, intoxication or deprivation of full possession of normal faculties is not longer an element to be proved for a manslaughter conviction; it would be sufficient to prove that a person was under the influence of alcohol to the extent his normal faculties were impaired. Secondly, there now must be a "causal connection" between the operation of the vehicle by the offender and the resulting death. . . .
>
> * * * *
>
> IV. COMMENTS:
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> . . . This legislation requires a causal connection between the driver's conduct (the operation of a motor vehicle) and the resulting accident. Since Cannon v. State was decided in 1926 the Florida Supreme Court has consistently held the offense of DWI manslaughter to be a strict liability crime. In Baker v. State, 377 So.2d 17 (1979) the Florida Supreme Court stated "statutes which impose strict criminal liability, although not favored, are nonetheless constitutional." . . .
>
> This bill would insert the element of causation into the definitions of DUI crimes which call for increased penalties due to accidents involving serious bodily injury or death.

See, Appendix, pp. 57,60. Thus, since causation is an element of the crime of which Petitioner stands convicted, he was entitled to have the jury instructed as to his theory of

defense particularly when here, he introduced sufficient evidence to support such an instruction. See, e.g., Smith v. State, 424 So.2d 726 (Fla. 1982); Bryant v. State, 412 So.2d 347 (Fla. 1982); Palmes v. State, 397 So.2d 648 (Fla. 1981); Ambrister v. State, 462 So.2d 43 (Fla. 1st DCA 1984), rev. denied, 467 So.2d 1000 (Fla. 1985); Pope v. State, 458 So.2d 327 (Fla. 1st DCA 1983); Solomon v. State, 436 So.2d 1041 (Fla. 1st DCA 1983); Holley v. State, 423 So.2d 562 (Fla. 1st DCA 1982). See also, Mungin v. State, 458 So.2d 293 (Fla. 1st DCA 1984), rev. denied, 464 So.2d 556 (Fla. 1985); Hall v. State, 136 Fla. 644, 187 So. 392 (1939); Stevens v. State, 397 So.2d 324 (Fla. 5th DCA 1981).

The decision of the District Court as to this issue should be quashed and Petitioner afforded a new trial.

CONCLUSION

Based on the foregoing, Petitioner should be afforded a new trial, or at the very least, his sentence for the **1980** offense ordered corrected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Gary L. Printy, Assistant Attorney General, The Capitol, Tallahassee, Florida; and a copy by U.S. mail to Johnny Lee Frazier, Inmate No. **037077**, Union Correctional Institution, Post Office Box **221**, Raiford, Florida **32083**, on this 14th **day** of October, **1988**.

Maria Inés Suber
MARIA INES SUBER