IN THE SUPREME COURT OF FLORIDA

JOHNNY LEE FRAZIER,

Petitioner,

v. CASE NO. 73,082

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Johnny Lee Frazier was the defendant in the trial court and the appellant in the First District Court of Appeal and will be referred to herein as Frazier or Petitioner. The State of Florida was the prosecution in the trial court and the appellee in the First District Court of Appeal and will be referred to herein as the State.

STATEMENT OF THE CASE

The State accepts the statement of the case set forth in the Petitioner's Brief on the Merits.

STATEMENT OF THE FACTS

The State will rely on the statement of facts set forth in the corrected opinion of the District Court of Appeal issued September 29, 1988. A copy of which is included as Respondent's Appendix A. The corrected opinion notes that it was the victim's failure to wear a seatbelt and not the defendant's lack of a seatbelt which formed the basis for the defendant's requested jury instruction.

SUMMARY OF ARGUMENT

ISSUE I: There is no error in the sentencing order and the trial court and this Court should not revisit the holding of the District Court of Appeal on the sentencing issue. The sentencing did not form a basis for the certified question.

ISSUE 11: The First District Court of Appeal incorrectly found that the Florida statutory presumption of impairment from a .10 blood alcohol level is unconstitutional for two reasons. The first reason is that the cases relied upon from the United States Supreme Court and the Eleventh Circuit Court of Appeal dealt with an inference used to establish a criminal defendant's mental state. Here the inference is employed to establish the defendant's physical condition and mental state of mind is not at issue. The second reason is the statute employs the .10 standard is a separate criminal offense in and of itself. The Legislature is free to create an offense of driving with a .10 blood alcohol level just as they are free to prohibit driving over a given speed limit. In any event, this issue is currently pending before this Court in another case and even if this Court holds the presumption to be constitutional error, the District Court has already concluded the error is harmless under the standards set forth by this Court. Further judicial labor involving one panel of judges second-guessing the lower tribunal is

unnecessary and inconsistent with this Court's limited jurisdiction.

ISSUE 111: There has been no change in the law requiring the state to establish a causal relationship between the defendant's operation of a vehicle and the resulting death in the prosecution of a DUI manslaughter offense. An instruction on the theory of defense presented by Frazier would be a departure from the essential requirements of law as an overruling of Supreme Court precedent by a lower tribunal. The Legislature has not fashioned a causal element of DUI manslaughter in the most recent amendment to 316.193, Fla.Stat.

ARGUMENT

ISSUE I

THE DISTRICT COURT DID NOT ERR IN AFFIRMING PETITIONER'S TWENTY-FIVE YEAR SENTENCE.

Frazier argues that there is some difference between a sentence of ten years with credit for time served and a sentence imposing only the remaining five years with no credit for time served. This is a distinction without a difference. In Poore v. State, 13 F.L.W. 571 (Fla. 1988) the Court dealt with the situation involving a youthful offender. Johnny Frazier does not qualify for treatment under the youthful offender program and the law has no provision for generous treatment of adults who commit sexual battery and then manslaughter while on probation.

In Washington v. State, 284 So.2d 236 (Fla. 2d DCA 1973), then District Court Judge Stephen Grimes approved an interpretation of 8948.06, Fla.Stat., which allowed the trial court judge to open up an original sentence for reconsideration upon a revocation of probation. In Washington the defendant had pled guilty to aggravated assault and received four years probation condition on spending one year in jail. After serving one year in jail Washington violated his probation and was sentenced to three years in prison. The rationale of the Washington decision was later adopted by the Florida Supreme Court in State v. Jones, 327 So.2d 18 (Fla. 1976) in an opinion written by

Justice Overton. In Jones the court held that the time spent in jail and the split sentence is only limited by the maximum jail sentence which could be imposed under general law. The court specifically found that there was no legislative intent to require initial imposition of the total sentence in order to increase the amount of jail time imposed after the revocation of probation. The only limitation on the imposition of additional jail time after revocation of probation in a split sentence situation was that the defendant must be given credit for time spent in jail pursuant to the split sentence probation order regardless of how it was originally imposed. The court concluded that:

> We hold (1) the trial court may place a defendant on probation and include, as a condition, incarceration for a specific period of time within the maximum sentence allowed; (2) the trial court may revoke, revise, or modify for cause the probation and incarceration provision at any time during the period that said order is enforced and impose any sentence which might have been originally imposed; (3) upon revocation, a defendant must be given credit for any period of time spent in jail pursuant to a split sentence probation order.

Any fair reading of a sentencing order imposed by the trial court in this case is consistent with the decision in State v. Jones which was the law in effect at the time of sentencing and the only rational interpretation of the applicable sentencing criteria.

There is no indication in the record that Johnny Frazier ever elected guidelines sentencing for the **1987** revocation of probation sentence imposed on the **1980** sexual battery. Moreover, unlike our youthful offender in Poore, Johnny Frazier did commit a very substantial violation of criminal law, a second degree felony punishable by **15** years in prison. Under State v. Jones the trial court was free to revisit the **1980** ten year sentence and impose a life sentence for that sexual battery. Of course Frazier would be eligible for parole absent election of the sentencing guidelines.

The State asks that this Court either affirm the sentence imposed or order a remand to the trial court for imposition of any sentence within that provided by general law for a life felony of sexual battery with the option of electing guidelines sentencing or dismiss the Petition for Writ of Certiorari as improvidently granted as there is no conflict with State v. Jones as was done in Buenoano v. State, 504 So.2d **762** (Fla. **1987).**

ISSUE II

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE JURY INSTRUCTION ON IMPAIRMENT IS UNCONSTITUTIONAL.

The State of Florida disagrees that the First District Court of Appeal was correct in concluding that Florida's statutory presumption of impairment from a .10 blood alcohol level was unconstitutional but does agree that the district court below applied the correct test of harmless error as stated in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The State would note that the author of the opinion below is the same district court judge who had certified the question in State v. Lee, 13 F.L.W. 532 (Fla. Sept. 1, 1988). Specifically, this Court's unanimous opinion in Lee noted that "It is apparent that the district court below was able to adequately apply the test as evidenced by its conclusion that it could not say that the error did not affect the verdict." Id. at 533-534. Thus, it is a unanimous conclusion of this Court that Judge Zehmer understands and can apply the DiGuilio test. The opinion below applied the DiGuilio test and concluded that any error in the instruction was harmless given the facts in this case. Conflict jurisdiction of this Court does not exist merely to substitute the legal conclusions of seven judges for that of a three-judge district court panel. The limited nature of this Court's jurisdiction precludes the arrogant assertion of this Court's power to review harmless error determinations in every instance. There is no point in the district

court making harmless error determinations in the first instance if they are merely to be second-guessed by this tribunal on'every occasion.

The larger issue presented is the District Court of Appeal's reliance upon Rolle v. State, 13 F.L.W. 1030 (Fla. 4th DCA May 6, 1988) as a basis for overruling the prior decision of the First District in Hall v. State, 440 So.2d 689 (Fla. 1st DCA 1983). Rolle is currently pending in this Court as State v. Rolle, Case No. 72,383.

In Hall, supra, the First District Court of Appeal had held that the jury instruction at issue did not unconstitutionally shift the burden of proof to the defendant to prove his innocence because there was a rational connection between the fact proven and the ultimate fact presumed. The court applied the same test in County Court of Ulster v. Allen, 442 U.S. 140, 156 (1970). There is nothing in Francis v. Franklin, 471 U.S. 307 (1985), and Miller v. Norvell, 775 F.2d 1572 (11th Cir. 1985), which compels a different result than originally found in Hall. Francis and Miller involved mandatory rebuttal presumptions of mental state of mind in crimes where the state of mind was the critical element. In Francis it was the intent to kill and Miller the intent to defraud. The offense of driving under the influence does not involve any evidence of intent. Proof of the blood alcohol level of .10 or higher is merely one way of proving a violation of the statute. A violation

of 316.193, Fla.Stat. (1986), may be proven where there is evidence the defendant is under the influence of alcohol and no blood test has been taken such as red eyes, slurred speech, erratic operation of vehicle or by the simple presentation of a blood alcohol level .10. The statute allows proof of the offense of driving under the influence by alternative methods. See Washinqton v. District of Columbia, 538 Atlantic 2d 1151 (D.C.App. 1988). A .10 blood alcohol evidence was proven in this case and constitutes a per se violation of §316.193. Just as the Legislature is free to prohibit the operation of a vehicle over 65 miles an hour on the highways or the possession of contraband, it is free to punish the operation of a motor vehicle with a blood alcohol level of .10 or higher. The State will also rely on the arguments advanced by the State in the Rolle case.

ISSUE III

THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY AS TO FRAZIER'S THEORY OF DEFENSE AS IT IMPERMISSIBLY ATTEMPTED TO INJECT THE ELEMENT OF CAUSATION INTO THE TRIAL.

Frazier argues that the only way the District Court could have found that he was not entitled to have his jury consider the seatbelt defense was the strict liability nature of DUI manslaughter. See Armenia v. State, 497 So.2d 638 (Fla. 1986). The State agrees that this is one theory for denying the requested instruction but would also note that the evidence presented at trial during the testimony of the medical examiner did not establish that the seatbelts in any way contributed to the death of Mr. Wigle. (R 200-213).

However, there is considerable debate in the circuit court and district courts regarding the issue of causation in the DUI manslaughter offense in light of the amendments to 8316.193 and the First District's opinion in McGaw v. State, 523 So.2d 762 (Fla. 1st DCA 1988). State v. Bowen, 13 F.L.W. 2343 (Fla. 5th DCA Oct. 20, 1988). This Court has accepted jurisdiction and briefs are filed in McGaw. McGaw v. State, Case No. 72,419. In McGaw the First District certified the question of whether this Court's holding in Armenia v. State is still valid in light of the amendments to 8316.193, Fla.Stat. (1986). The state argued in McGaw and here that the answer is yes. §316.193(3)(c), Fla.Stat. (Supp. 1986), does not differ in meaning or intent from

8316.193, Fla.Stat. (1983). Either statute requires the state to prove that a death was caused by an intoxicated person who operated a vehicle.

The rationale of Baker v. State, 377 So.2d 17 (Fla. 1979), finding a legislative intent to hold those who operate a vehicle while intoxicated to be strictly liable for any death they cause applies with equal force to the language of the amended or revised statutory scheme. The revision in no way diminishes the strict liability of the intoxicated driver for the resulting death. The repeal of 8316.193 and its reenactment as §316.193(c), was an effort by the Legislature to harmonize previously competing definitions of impairment to clarify existing law under one standard. §316.193, Fla.Stat. (1985) defined driving under the influence (DUI) as operating a vehicle when affected by alcohol or other substances "to the extent that his normal faculties are impaired" or having a blood alcohol level of .10 percent. Similarly, 8316.1931, Fla.Stat. (1985) defined driving while intoxicated (DWI) as operating a vehicle under the influence of alcohol or other substances when affected to such "extent to deprive him of full possession of his mental faculties". The different definitions for DUI and DWI resulted in needless confusion. The revision of 8316.193, in 1986, applies the single standard and eliminates the distinction between DUI and DWI. The purpose of the revision was to eliminate the offense of DWI.

The newly defined offense of DUI manslaughter set forth in §316.193(3)(c), Fla.Stat. (Supp. 1986), includes new language to'wit: "Who, by reason of such operation, causes the death of any human being." The district court in McGaw suggested that this new language imposes a causation element which did not heretofore exist by word or in court construction under the old law. In essence, the District Court concluded that the newly revised statute specifically rejects the rationale of Baker v. State, supra, and Armenia v. State, 497 So.2d 638 (Fla. 1986).

The change in the statutory definition is a distinction without a difference. The phrase "By reason of such operation causes death" is no different than "If the death of any human being is caused by the operation of a motor vehicle by a person while intoxicated", found in the now repealed 8316.1931 and the prior §860.01(2) statute. (Emphasis supplied). The state is still required to prove the defendant merely operated the vehicle while under the influence.

The Legislature elected not to include language such as "by manner of such operation" or "reckless operation" which would have required the state to prove an element beyond simple operation and impairment. For instance, the Legislature could have created an offense of vehicular homicide while under the influence which would require the state to prove the killing of a human being by the operation

of a motor vehicle by another in a reckless manner likely to cause death and stated proof of impairment may be admissible to establish recklessness. See People v. Dedman, 683 Pac.2d 763 (Colorado 1984) where the court interpreted a Colorado statute which contains the term "proximate cause". In Colorado, vehicular homicide is a strict liability offense. Likewise, in Florida the Legislature could have created an offense vehicular homicide while under the influence which would require the state to prove the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause death and stated proof of impairment may be admissible to establish recklessness. This statutory offense would preclude liability for Justice Boyd's hypothetical drunk driver at the stop light set forth in his dissenting opinion in Baker.

However, the amended law merely involved grammatical changes to the DWI manslaughter statute which made the language consistent with that applied to the drunk driver who causes only property damage or injury less than death. See §316.193(2)(a)(b), Fla.Stat. (1983), which is consistent with the State's position that 8316.193 was amended merely to harmonize the statutory scheme and create one standard of impermissible conduct, driving under the influence, in order to eliminate the DUI/DWI dichotomy on the definition of impairment.

Moreover, as recently stated by this Court in State v. Jackson, 526 So.2d 58 (Fla. 1988):

> It is axiomatic that where the Legislature had defined a crime in specific terms, the courts are without authority to define it differently. See State v. Graydon, 506 So.2d 393 (Fla. 1987). An exception is made where literal interpretation of a statute yields absurd results. See Williams v. State, 472 So.2d 1051 (Fla. 1986). Criminal statutes are to be construed strictly in favor of the accused.

Id. at 59.

Presumably, this Court was aware of these principles when the decisions in Baker and Armenia were issued and acted accordingly. The court, in Baker refused to graft an element of proximate causation into the DWI manslaughter statute where none was apparent on the face of the legislation. The court recognized in Baker that proximate causation is an element of proof for a manslaughter conviction based on culpable negligence under 8782.07, Fla.Stat. (1977), citing to Thompson v. State, 108 Fla. 370, 146 So. 201 (1953). The clearest and most precise method for the Legislature to revisit the Baker decision and overrule it would have been to adopt the proximate causation language of 8782.07 as discussed supra or actually included in the statute as did the Colorado legislature.

The phrase "By reason of such operation" when given as plain meaning precludes any consideration of the manner in

which the vehicle was operating and suggests the fact of operation per se as the basis for liability. This was the same conclusion this Court drew in Baker in rejecting Justice Boyd's hypothetical "absurd result". Even if there was a subjective intent on behalf of the Legislature to impose a causation element, the choice of words used to effectuate their intent falls short of the mark by any objective analysis and this Court is not free to invent by conjecture what the Legislature failed to do in word and deed. A legislative analysis prepared by a law clerk does not substitute for express statements of legislative intent in the wording of the statute. See Petitioner's Appendix at p. 54-61.

The pervasive campaign against drunk driving is the best evidence that the Legislature still intends to impose strict liability for driving under the influence which causes death. Therefore, §316.193(3)(c) is a rational response to a real problem. The deterrent value of a public policy of punishment for drunk driving is as valid today as it was at the time of Baker and Ingram v. Pettit, 340 So.2d 922 (Fla. 1976). See also the concurring opinions of Justice Blackman in Welch v. Wisconsin, 466 U.S. 740 (1984); Perez v. Campbell, 402 U.S. 637 (1971) and Tate v. Short, 401 U.S. 395 (1971).

Johnny Frazier is asking the State, like the indulgent parent, to hesitate to discipline the spoiled child very

much, even though that child is engaging in an act that is dangerous to others and in fact resulted in the death of a totally innocent person in this case.

Finally, the best evidence that the Legislature knows how to craft a causation element in a statute may be found in other statutes set forth in Chapter 316. For instance, 25316.192 defines reckless driving as "willful and wanton disregard" for the safety of citizens or property. Likewise, 215316.1925 punishes the failure to drive in a careful and prudent manner under the careless driving statute. See State v. Barrit, 13 F.L.W. 591 (Fla. Sept. 29, 1988). The situation here is similar to that presented when the Legislature enacted 25782.071, Fla.Stat. (1975). This Court held in McCreary v. State, 371 So.2d 1024 (Fla. 1979), that the Legislature did not intend to reduce a crime of manslaughter by culpable negligence in the operation of a motor vehicle to a third degree felony identified as vehicular homicide, but rather intended and did include a lesser included offense with a lesser standard of proof required for conviction. This Court has already given Johnny Frazier a break by prohibiting dual convictions for vehicular homicide and **DUI** manslaughter for the death of Jim Wigle. See Houser v. State, 474 So.2d 1193 (Fla. 1985). There is no need for further indulgence or lenity for the likes of Johnny Frazier. This is especially so given the fact that on retrial the legislative amendments to §775.021(4) would now allow separate convictions for **DUI** manslaughter and vehicular homicide.

CONCLUSION

The State respectfully asks this Court to reaffirm the judgment and sentence for the reasons advanced by the district court below or to adopt the arguments of the State of Florida that there was no error and there is no causation element of DUI manslaughter. However, if this Court chooses to remand the case for retrial the State is free to seek dual convictions and sentences for DUI manslaughter and vehicular homicide. The Court may choose to dismiss the Petition for Writ of Certiorari as improvidently granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Maria Ines Suber, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 3rd day of November, 1988.

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