Reg app
2nd req 10-18-89

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

vs. Case No. 74,532

STANLEY B. ELLISON

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Stanley B. Ellison, was the defendant in the circuit court proceeding. Petitioner, the State of Florida, prosecuted him for Second Degree Murder, §782.04(2), Fla. Stat. (1987); Third Degree Murder, §782.04(4), Fla. Stat. (1987); Vehicular Homicide, §782.071, Fla. Stat. (1987); and Grand Theft - Auto, §812.014(2)(c), Fla. Stat. (1987).

References to the "Record on Appeal," which contains the pleadings filed in this cause will be designated as "R," followed by the appropriate page number. References to the transcript of the trial and sentencing proceedings will be by the symbol "Tr," followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On June 3, 1988, the Jacksonville Sheriff's Office arrested Respondent for Second Degree Murder, §782.04(2), Fla. Stat. (1987); Third Degree Murder, §782.04(4), Fla. Stat. (1987); Vehicular Homicide, §782.071, Fla. Stat. (1987); and Grand Theft - Auto, §812.014(2)(c), Fla. Stat. (1987). (R 4). The Public Defender's Office was later appointed to represent Respondent. (R 5). On October 28, 1988, the State filed an Information charging Respondent with the above-described charges. (R 34). The trial court later conducted a trial on the four charges in the Information. The trial produced the following relevant facts:

On May 24, 1988, Wanda Bright took her 1986 gray Pontiac Grand Am automobile to a local department store. (Tr 38-39). She arrived at 7:45 p.m. (Id). At around 9:10 p.m., Ms. Bright left the store and discovered that her car was gone. (Tr 41). She immediately reported the stolen car to the police. (Id).

The next day, Officer Ardis Williams saw the gray Pontiac Grand Am on the Haines Street Expressway. (Tr 51). Williams was monitoring southbound traffick as he was sitting in the median facing northward. (Tr 51-52). The speed limit was between 35 and 45 m.p.h. (Tr 52,73). The Haines Street Expressway is a limited access road with no stop signs. (Tr 75). Williams saw the gray Pontiac Grand Am approach him at a very high rate of

speed. (Tr 52). There were 2 occupants in the car. (Id). Respondent, 16-years-old, was driving the car. (Tr 202). According to radar, the car was going 67 m.p.h. (Tr 54). Williams also testified he was visually able to determine that the car was going above the speed limit. (Tr 55). Williams estimated the car was going 60 - 65 m.p.h. (Tr 55).

Officer Williams put on his blue lights and pursued the car. (Tr 75). As Williams pursued the car, no other cars pulled over. (Id). The car traveled down the Haines Street Expressway and turned on to the exit ramp to the Mathews Bridge over the St. Johns River. (Tr 56). The car changed lanes seven (7) times before it got to the top of the bridge, according to Williams. (Tr 57). There was no testimony on how Respondent made these lane changes. (Id). When Williams arrived at the top of the bridge, he turned on his siren. (Tr 58). The speed limit on the Mathews Bridge is 45 m.p.h. (Tr 80).

As Respondent went down the Mathews Bridge, he was going about 60 - 65 m.p.h., according to Williams' estimate. (Tr 59). A tollbooth facility was at the bottom of the bridge. (Tr 60). In front of the tollbooths is an asphalt area on the side of the road. (Tr 58). There were 4 open tollbooths and one tollbooth was closed. (Tr 61-62) The closed tollbooth had a rubber orange cone in front of it. (Tr 65). The indicator light on the top of

the tollbooth was red. (Tr 92). As Appellant reached the tollbooth area, he was going 60 - 65 m.p.h. (Tr 62). Williams testified he saw Respondent run over the orange cone; he left the tollbooth area at about 60 - 65 m.p.h. (Tr 63).

Respondent's car then left the tollbooth area, exited the expressway and traveled on a two-lane service road. (Tr 65). The two-lane service road is adjacent to the regular exit off the expressway. (Tr 63-64). Respondent apparently drove his car across a median (between the service road and the expressway; the expressway and service road ran parallel to each other in this area) and between a telephone pole and a stop sign onto the service road. (Tr 64-65). Officer Williams then saw Respondent drive up the service road which led to University Boulevard. (Tr 65). He estimated Respondent was going about 60 - 70 m.p.h. at this time. (Id). Williams then lost sight of Respondent. (Tr 65-66).

At the time Respondent drove onto University Boulevard, Richard Lesnik was heading south on University Boulevard. He was in a Cadillac and he testified it was a clear day. (Tr 142). As he traveled over the University Boulevard overpass to the Arlington Expressway (which begins after the tollbooth from the Mathews Bridge), he saw the Pontiac Grand Am leave the entrance ramp to University Boulevard. (Tr 143). (See, State's Exhibits 12 and

13, photographs of the area described above.) The Grand Am was traveling "way above the speed limit," according to Lesnik. (Tr 143). Lesnik testified the speed limit in this area was 30 - 35 m.p.h. (Id). He estimated the Grand Am was travelling 60 - 70 m.p.h. (Id). Mr. Lesnik was a passenger in the Cadillac and he did not have speedometer in front of him to measure the speed of his car in order to estimate the speed of Respondent's car. (Tr 150).

As Respondent left the exit ramp onto University Boulevard, the rear end of his car was swaying and swerving. (Id). The Cadillac then pulled over and the Grand Am passed it. (Id). The Grand Am was "fishtailing" as it came off the exit ramp. (Tr 150, 159-60). Respondent then lost control of the car and veered into the oncoming lane; the car never came back into its designated lane. (Tr 144, 159-60). The Grand Am then hit head-on a car driven by Ms. Shelton. An investigation after the accident revealed (a gouge mark) the point of impact was almost in the middle of the oncoming lane. (Tr 178).

Ms. Shelton was driving north on University Boulevard with her 16-month-old baby. (Tr 97). The traffic on University Boulevard was moderate at this time. (Tr 101). Ms. Shelton's baby was in a car seat which was supposedly clamped down to the seat of the automobile. (Tr 99-100). Ms. Shelton saw the gray

Grand Am swerve into her car. Mr. Deck and Schlosser were driving behind Ms. Shelton at the time of the accident. Deck was 2 - 3 car lengths behind Shelton's car. (Tr 118). Deck and Schlosser testified they saw the Grand Am coming at them at a high rate of speed with the back of the car "fishtailing" and swerving back and forth. (Tr 118). After the Grand Am hit Shelton's car, it spun around and backed into the front of Deck's car. (Tr 119). It bumped into the front fender of Deck's car, causing minimal damage. (Tr 129). At this time, Deck saw a police car, with its blue lights and siren on, approaching the area. (Tr 121, 146). Officer Williams got out of his car, and arrested Respondent. (Tr 132). Dr. Ponte, who was driving in the area also witnessed the accident. (Tr 157-158).

Ms. Shelton's child died the next day of massive hemorrhaging of the brain with a fracture of the frontal bone of the skull. (Tr 215, 226-228). The precise cause of death was the cessation of brain functioning due to swelling caused by massive head trauma. (Tr 223).

After his arrest, Respondent was interrogated at the hospital where he was treated for injuries. (Tr 181). As Respondent was a juvenile (16), the investigating detective tried unsuccessfully to contact his parents before the interrogation. (Tr 202). He admitted he was driving and stated the police "had come after him." (Tr 197).

After the completion of the State's case, Respondent moved for a judgment of acquittal on the grounds, inter alia, that Respondent's conduct was not second degree murder. (Tr 230-234). The trial court summarily denied the Motion for Judgment of Acquittal. (Tr 236). After arguments of counsel and jury instructions, the jury found Respondent guilty of second degree murder and grand theft. (Tr 313).

At the sentencing hearing, the State and defense disagreed on the appropriate guidelines sentence. The disagreement was over whether the State should count 21 points for Respondent under legal status under Rules 3.701(d)(6) and 3.988(a), Fla.R.Crim.P., because he was on "furlough status" after being committed to the Department of H.R.S. as a juvenile offender. (Tr 320). The extra 21 points changed the guidelines range from 12 - 17 years to 17 - 22 years. (Tr 324). The trial court heard arguments on the issue and decided the State could properly count the 21 points. (Tr 344). The trial court also denied the Motion for New Trial, which recapitulated, inter alia, the argument that Respondent's conduct was not second degree murder. (R 57-59; Tr 332-334). Respondent then received a sentence of 22 years imprisonment on the second degree murder conviction and a concurrent 5 year sentence on the grand theft conviction (Tr 344; R 61-65). The Public Defender's Office was appointed for appeal. (Tr 345). Respondent timely filed his Notice of Appeal and this appeal then followed. (R 75).

The First District Court of Appeal ruled the evidence was insufficient to support the second degree murder conviction and reduced the conviction to manslaughter. As to the second issue, the First District ruled that points for legal constraints could not be scored for being on a juvenile furlough.

After Petitioner filed his notice to invoke the discretionary jurisdiction of this Court, the First District withdrew its opinion and substituted an opinion in which they certified conflict with Butler v. State.

Petitioner, again, filed a notice to invoke the jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

ISSUE I.

Including points for legal status at the time of the offense in the calculation of a guidelines score is designed to punish those who are still committing criminal acts even though their liberty is already restrained due to prior criminal activity. Reading the rule as applyling to juvenile and adult, restraint enhances the uniformity which the guidelines were intended to promote. A juvenile on furlough, just as an adult on furlough, is committed to the custody of the State. The fact that the circumstances or the form of custody is in some manner modified does not affect the existence of the custodial status. As there is no logical reason not to include such points, the Court should adopt the position of the Third District Court of Appeal in Butler v. State, infra, and reverse the decision of the First District Court of Appeal.

ISSUE II

The Legislature has defined the element second degree murder. The courts of the State of Florida interpreting the element have determined that second degree murder is not a specific intent crime. The opinion of the First District in this

case, in effect, amends the statute and requires proof of an intent to harm a specific person. The opinion of the First District also reweighs the evidence and invades the province of the jury in its role of determining the facts and the intent of a defendant based on inferences derived from the facts. Such a rewriting of the statute and altering of the relationship between a jury's findings and an appellate court's review have been previously rejected as improper and this Court should reverse the decision on this ground also.

ARGUMENT

ISSUE I

SHOULD A JUVENILE LEGAL STATUS AT THE TIME OF THE OFEFNSE BE CONSIDERED AS LEGAL RESTRAINT FOR THE PURPOSE OF CALCULATING HIS ADULT GUIDELINES SENTENCE

The case law contains many cases awarding or disallowing points for legal constraint. However, these cases contain little analysis. Tollefson v. State, 525 So.2d 957, 962 (Fla. 1st DCA 1988), Gemme v. State, 508 So.2d 533 (Fla. 2d DCA 1987). Likewise in the instant case, the First District Court of Appeal's opinion says without merit that they don't believe points should be included in the guidelines scoresheet for juvenile offenses.

Thus, Petitioner asserts that this area, the inclusion of points for legal constraint pursuant to Rule 3.701, Fla.R.Crim.P., is an area that is ripe for an opinion that will clarify when such points are to be scored.

An appropriate beginning is to define what a furlough is; for adults, a furlough is defined in §945.091, Fla. Stat., as an extension of the limits of confinement. The law authorizes the Department of Corrections to grant furloughs under certain circumstances. However, the law clearly provides that the inmate is still in the custody of the Department of Corrections and failure to abide by the terms of the furlough is an escape. Price

v. State, 333 So.2d 84 (Fla. 1st DCA 1976), Op. Atty. Gen. 72-404. Thus, for an adult a furlough status is a custodial status.

A juvenile furlough status is just as custodial as an adult's. In Butler v. State, 543 So.2d 433 (Fla. 2d DCA 1989), the court quoted from Rule 10H-1.003, Florida Administrative Code, which defines a juvenile furlough as:

> The release of a child, pursuant to an executed conditional agreement, from a treatment program of the department to supervision in the community. See also Rule 10H-9-000, F.A.C.

Id. at 433.

When read in *paria materia* with §39.11(1)(c), Fla. Stat., which provides that juvenile commitments are to the Department of Health and Rehabilitative Services for an indefinite period, it is clear that the delinquent child on furlough is one who is committed to the custody of the department. It does not matter whether the department keeps him in a residential program or returns him to community control supervision, he is in their custody until the commitment is terminated. Section 39.11(1)(c), Fla. Stat.

Interpreting Rule 3.7001, Fla.R.Crim.P., requiring the inclusion of points for Juvenile Constraint here is consistent with other court decisions regarding the scope of the legal re-

straint category. In Gemme v. State, supra, the court held that this category applied to an adult's New York fugitive status even though the rule does not differentiate between instate and out-of-state status. Likewise, the Third District found a juvenile's community control status appropriately scoreable in Espinosa v. State, 496 So.2d 236 (Fla. 3d DCA 1986).

The entire concept of legal restraint is that it is appropriate to increase the point total of an offender who continues to commit crimes while his liberty is still restrained because of his commission of prior crimes. The rationale is one of the timing of the offenses and it is consistent with the purpose of the guidelines that the severity of the sentence should increase with the length and nature of the offender's criminal history.

This section of the rule (d)(6) should be read in *paria materia* with section (d)(5)c which provides for the scoring of juvenile convictions which occurred within 3 years of the adult offense for which he is being sentenced. This section makes it clear that juvenile offenses and offenders are computed within the guidelines scores. Further, there is no logical reason to leave out juvenile status which results from this scored prior record.

If the constraint is not scored, the First District Court has held that it is a valid reason to depart. One can readily

see the correctness of this determination for legal status is a category which has been determined to be relevant to determining the appropriate length of an offender's sentence. The reason would not generally be inherent in the offender's crimes nor would it be scored as an adult's constraint would be. In the interest of the uniformity which the guidelines were designed to promote, scoring would promote an even handedness that departure would not.

Finally, inclusion of these points would not impinge on the juvenile's protected status for the Court would have to make the determination pursuant to Chapter 29, Fla. Stat., that he was to be treated as an adult before proceeding to adult sentencing.

As furlough status is custody, it is proper that the points for legal constraint be added into the scoresheet calculation. Thus, the decision of the First District Court should be reversed.

ISSUE II

DID THE DISTRICT COURT OF APPEAL APPLY THE LAW CORRECTLY IN DETERMINING THAT A DEFENDANT CANNOT BE CONVICTED OF SECOND DEGREE MURDER UNLESS HE DIRECTS HIS MALICE OR ILL-WILL TOWARDS A SPECIFIC VICTIM

The opinion of the First District correctly states that the grade or degree of a homicidal act is dependent upon the factual circumstances and is typically one for the jury to resolve.

The court then proceeds to reweigh the evidence and purports to find, as a matter of law, the evidence was insufficient because there was no evidence that Ellison acted out of ill will toward or directed at his eventual victim. This action directly conflicts with Tibbs v. State, 397 So.2d 1120 (Fla. 1981), and State v. Law, 14 F.L.W. 387 (Fla. 1989), on the role of appellate courts in dealing with sufficiency of the evidence questions.

This decision also conflicts with established case law in other ways. It is well settled law in Florida that a person can commit a second degree murder through the instrumentality of an automobile.

In State v. Gordon, 478 So.2d 1063 (Fla. 1985), this Court upheld a second degree murder conviction stemming from an automobile accident. Moreover, this is not a new trend in Florida law. In 1957, the First District , in the case of Parrish v.

State, 97, So.2d 356 (Fla. 1st DCA 1957), upheld a second degree murder conviction of the passenger of a vehicle which forced another vehicle into a fatal collision.

This type of conviction has been recognized as valid by the Supreme Court, not only in Gordon, supra, but also in the schedule of lesser included offenses it promulgated with the standard jury instructions. In there it is found:

(Standard Jury Instructions, p. 264)

Charged Offense	Category 1	Category 2[1]
Second degree murder	Manslaughter	Vehicular manslaughter
(Depraved mind)		

Category 2 offenses are offenses which, based on the facts of a case, can be lesser included offenses. Thus, if under some facts, vehicular homicide can be a lesser included offense of second degree murder, it is obvious that some deaths that are caused by the use of an automobile can be second degree murder.

This state of the law is not unique to Florida. LaFave in his treatise on criminal law devotes a section to depraved heart

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[1] Non-applicable lesser offenses deleted.

murder. In Section 7.4, he states the following types of conduct have been held to create a very high degree of unjustifiable homicidal danger which will do for depraved heart murder:

> . . . firing a bullet into a room occupied, as the defendant knows, by several people; starting a fire at the front door of an occupied dwelling; shooting into the caboose of a passing train or into a moving automobile, necessarily occupied by human beings; throwing a beer glass at one who is carrying a lighted oil lamp; playing a game of "Russian roulette" with another person; shooting at a point near, but not aiming directly at, another person; **driving a car at very high speed along a main street**; shaking an infant so long and so vigorously that it cannot breathe; selling "pure" (i.e., undiluted) heroin.

LaFave, Criminal Law, §7.4.

In fact, most jurisdictions in the United States allow the use of a second degree murder (depraved heart) for situations involving an automobile. See 21 A.L.R. 3d 116.

In Tennessee, numerous cases have upheld such convictions. See State v. Johnson, 541 S.W. 2d 417 (Tenn. 1976)(see cases cited therein at 419). In New York, the case of People v. Gomez, 478 N.E. 2d 759 (N.Y. 1985), sets out the applicability of second degree murder to the use of an automobile. Various other states recognize the use of second degree murder for certain situations

involving automobiles. See People v. Watson, 30 Cal. 3d 190, 179 Cal. Rptr. 43, 637 P.2d 279 (1981).

In Florida, second degree murder is defined as:

> (2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although **without any premeditated design to effect the death of any particular individual**, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

In Hooker v. State, 497 So.2d 982 (Fla. 2d DCA 1986), the court set out a generally recognized standard for determining whether a defendant's actions constitute second degree murder. In Hooker, the court said:

> . . . An Act is one imminently dangerous to another and evincing a depraved mind if it is an act which (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, (2) is done from ill will, hatred, spite, or an evil intent, and (3) is of such a nature that the act itself indicates an indifference to human life.

Other descriptions of this same standard are found in Larsen v. State, 485 So.2d 1374 (Fla. 1st DCA 1981), in which this court stated:

As this court said in Hines v. State, 227 So.2d 334, 335 (Fla. 1st DCA 1966):

> "Depraved mind" within the second degree murder statute has been variously defined as importing malice in the sense of ill will, hatred, or evil intent, and as in inherent, deficiency of moral sense and rectitude. Ramsey v. State, 114 Fla. 166, 154 So. 855. It has also been stated that malice is not limited in its meaning to hatred, ill will and malevolence, but "denotes a wicked and corrupt disregard of the lives and safety of others . . . a failure to appreciate social duty." 40 Am. Jur. 2d, **Homicide**, Section 50.

Thus, the question presented is, did the Respondent commit acts imminently dangerous to others and evincing a depraved mind? The following facts in this case clearly establish Respondent's actions met this standard.

Respondent was a sixteen-year-old juvenile with a history of stealing cars (Tr 326). Respondent was speeding (Tr 54-57) in another stolen car (R 56, T 43) and knew the police were after him (Tr 197). The officer knew he had more than a speeder (Tr 55) and that the driver was trying to flee and elude him (Tr 80,81). Respondent, knowing he was being chased, sped on, cutting in and out of the traffic (Tr 57). Respondent committed yet another criminal offense when he "busted the toll booth going

through the red light and running over the cone blocking the way" (Tr 62). He tried to make a right hand turn but slid through the median between a telephone pole and stop sign (Tr 64). He continued on, recrossing the median and accelerating (Tr 65). Mr. Lesnick, traveling south on University Boulevard, saw him coming and managed to get out of the way. At this point, Respondent was fishtailing and his car was out of control (Tr 143-154, 157-159). Did Respondent get his car under control by slowing down or stopping? No. He made a conscious choice to continue his high speed recklessness, putting his choice of successfully avoiding the police ahead of the lives and safety of the other motorists. Respondent continued out of control and, as observed by Dr. Ponte, caused the wreck by driving into oncoming traffic (Tr 118-119, 143-145, 157-158).

Petitioner asserts that there is substantial controlling authority from the courts of this State which hold that the acts of the defendant are sufficient for a jury to find him guilty of second degree murder.

As far back as 1987, the First District Court, in the case of Parrish, supra, stated:

> To place a young woman alone in a car at night in mortal fear of her life by the means and under the circumstances above described (and more elaborately detailed in the testimony) and to pursue

> her through the streets of the City of Jacksonville at a speed of 60 to 70 miles an hour obviously **creates a condition imminently dangerous to her as well as to others who may be lawfully using the streets**. The court would be blind to the realities of life if it held that the events narrated could not be properly found by a jury to evince a depraved mind regardless of human life. Thus the acts of the defendant come within the statutory definition of murder in the second degree.

It should noted that the defendant was the passenger in Parrish and his vehicle was the chasing vehicle and was not even involved in the accident which resulted in the death of his ex-wife.

In Gordon v. State, 457 So.2d 1095 (Fla. 5th DCA 1985), the court found a valid second degree murder conviction, even though the evidence also supported a DWI manslaughter charge. The Florida Supreme Court answered the certified question in State v. Gordon, supra, and approved the second degree murder conviction.

In Manis v. State, 528 So.2d 1342 (Fla. 2d DCA 1988), the Second District Court of Appeal had a situation similar to the instant case. In Manis, an intoxicated individual drove his vehicle on a busy street in a manner so as to put many people in extreme jeopardy of serious injury. This erratic driving resulted in 2 deaths. In that situation the court found that the evidence was legally sufficient to support second degree murder.

Manis, supra, and Gordon, supra, establish that the First District Court of Appeal is wrong when it suggests that a specific intent to kill, or a specific intent to harm a particular person are necessary in order to obtain a second degree murder conviction. As previously stated, second degree murder is defined as:

> (2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although **without any premeditated design to effect the death of any particular individual**, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

Thus, statutorily the Legislature has rejected the First District's argument by defining second degree murder in such a manner as to preclude the necessity to prove the murderer had an intent directed towards a specific person.

Petitioner's interpretation is consistent with the holdings of the courts of this state which have interpreted this "malice" requirement. In cases such as Gentry v. State, 422 So.2d 1072 (Fla. 2d DCA 1982), and Pressley v. State, 395 So.2d 1175 (Fla. 3d DCA 1981), in which the District Courts of Appeal have held that second degree murder is a general intent crime. This Court

affirmed such holdings in Gentry v. State, 437 So.2d 1097 (Fla. 1983).

In fact, in Pressley, supra, the Third District specifically rejected Respondent's argument when it said:

> Even though appellant has no intention to hit or kill anyone, firing a gun into a crowd of people constitutes second degree murder when a person is killed as a result.

Id. at 1177. This is because "malice" has been defined as:

> not only hatred, ill will and malevolence, but denotes a wicked and corrupt disregard of the lives and safety of others, a failure to appreciate a social duty. Hines v. State, 227 So.2d 334, 336 (Fla. 1st DCA 1969); Pressley, supra, at 1176, 1177; Luke v. State, 204 So.2d 359, 362 (Fla. 1967).

This statement of the law relating to second degree murder was applied by the Second District in Hooker, supra, when it held that shooting into a trailer which the defendant had reason to believe was occupied, and killing a person was second degree murder. Thus, any argument that one must have any specific intent, and in particular the intent to kill a person, has been rejected by the Legislature and the courts. Petitioner's construction is consistent with the general definition of second degree murder and has been accepted as the appropriate

interpretation of depraved heart murder by Florida courts and the courts of other states. People v. Albright, 219 Cal. Rptr. 334, 173 Cal. App.3d 988 (Cal. App. 11th District 1986).

The First District's decision in this case holds that a defendant must have a specific victim in mind in order to commit second degree murder. This adds an element of specific intent to this crime contrary to Gentry. See also Hooker v. State, supra. Further, this requirement for a specific victim conflicts with the decision of the Second District Court in Manis, supra, which held that that manner in which one operated a motor vehicle which resulted in the death of another could be second degree murder.

Further, in ruling as a matter of law that no construction of the defendant's actions could be construed to meet the statutory requirement of malice because of this look of intent, the opinion of the First District conflicts with the conclusion of the Fourth District in Hacker v. State, 510 So.2d 304 (Fla. 4th DCA 1986), regarding the inherent dangerousness of fleeing from criminal activity and the intent it demonstrates. In Hacker, the death was caused by an individual who was driving recklessly while fleeing a robbery. In Hacker, the court held that the defendant created an inherently dangerous situation and stated that he killing was a predictable result of fleeing the scene at a high rate of speed, and such acts could even support a

first degree felony murder conviction. The court's concept is that malice or ill will can be inferred by a jury from the actions of an individual and need not be directed at any particular individual.

Further, the court's opinion dealing with the requisite intent need for conviction conflicts with cases such as Jones v. State, 192 So.2d 285 (Fla. 3d DCA 1966), which indicates that issues of intent are issues for the jury to decide, and with Lincoln v. State, 459 So.2d 1030 (Fla. 1984), in which this Court held that the manner of driving a getaway car in an attempt to avoid the police was sufficient *prima facie* evidence of intent to participate in the underlying offense so as to allow the trier of fact to properly infer an intent to commit the underlying offense.

Finally, Petitioner asserts that this Court should reject the position of the First District and adopt the position of the Fifth District found in Dellinger v. State, 495 So.2d 197 (Fla. 5th DCA 1986). In Dellinger, the court held that the issue as to whether or not the defendant has sufficient evil intent is a question for the jury. It held that in Marasa v. State, 394 So.2d 544 (Fla. 5th DCA 1981), the appellate court usurped the function of the trial court in violation of Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72

L.Ed.2d 652 (1982) rule. The First District in Larsen, supra, adopted a position which is in accord with Dellinger, supra. In Larsen, the court held that it was the jury's role to determine the grade or degree of homicide and the intent with which the homicidal act was committed because these were questions of fact dependent upon the circumstances of the case. The court should have handled this case as it did Larsen.

Thus, this case properly went to the jury on second degree murder and this Court should not allow the First District's reversal of the jury's findings to stand. Tibbs, supra.

CONCLUSION

Based on the foregoing arguments and citations of authority, Petitioner prays this Honorable Court will uphold the second degree murder conviction of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JAMES T. MILLER, Esquire, Assistant Public Defender, Office of the Public Defender, Fourth Judicial Circuit of Florida, 407 Duval County Courthouse, Jacksonville, Florida 32202 , this 2nd day of October, 1989.

EDWARD C. HILL, JR.