IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

STANLEY B. ELLISON,

Respondent.

CASE NO. 74,532

RESPONDENT'S BRIEF ON THE MERITS

APPEAL FROM THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Respondent, Stanley B. Ellison, was the Appellant below and the Defendant in the Circuit Court proceedings. Petitioner, the State of Florida, was the Appellee below and prosecuted Petitioner in the Circuit Court. Respondent will designate any references to the Record on Appeal, which contains the pleadings filed in this cause as "R.", followed by the appropriate page number. References to the trial transcript will be "T.", followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

Juvenile furlough status is not legal restraint under the Sentencing Guidelines. Rule 3.701 (d)(6), Florida Rules of Criminal Procedure, defines legal restraint as offenders on parole, probation or community control; in custody serving a sentence; escapees: fugitives who have fled to avoid prosecution or who have failed to appear for a criminal judicial proceeding or who have violated conditions of a supersedeas bond; and offenders in pre-trial intervention or diversion programs. The First District correctly decided that because juvenile furlough status is not specifically defined in Rule 3.701(d)(6) (expressio unius est exclusio alterius), the legislative intent was to exclude juvenile furlough status from Rule 3.701(d)(6). Therefore, it was error for the trial court in include points for juvenile furlough status in the guidelines scoresheet calculation.

The First District also correctly decided that, under the facts of this case, there was insufficient proof of second degree murder. There was no proof in this case that Respondent had any ill-will, hatred or malice toward the victim. Respondent unquestionably committed grossly reckless acts of driving. His actions constituted manslaughter. However, the element of ill-will or malice was not proved. There were no facts from which a jury could infer ill-will or malice. Consequently, the First District correctly decided that the conviction for second degree murder should be reduced to manslaughter.

ARGUMENT

ISSUE ONE

SHOULD JUVENILE FURLOUGH STATUS AT THE TIME OF THE OFFENSE BE CONSIDERED AS LEGAL RESTRAINT FOR THE PURPOSE OF CALCULATING HIS ADULT GUIDELINE SENTENCE.

The answer to this issue, framed by Petitioner, is an unequivocal no because the sentencing guidelines do not include juvenile legal status as legal restraint. Rule 3.701(d)(6), Fla.R.Crim.P. Consequently, the issue before this Court is not whether juvenile furlough status is similar to legal restraint as defined in Rule 3.701(d)(6), but whether a court can engage in rewriting the rule, after its adoption by the legislature, merely to decide an individual case. The function of a court is to interpret and construe statutes and rules; a court cannot rewrite a law and invade the province of the legislature. Brown v. State, 358 So.2d 16 (Fla. 1978). Only the legislature has the power to enact substantive law and judicial legislation violates the doctrine of separation of powers. Johnson v. State, 336 So.2d 93 (Fla. 1976). Justice Sunberg noted in Brcwn v. State, supra, that the Florida Constitution requires a precision of language defined by the legislature, not articulated by the courts. 358 So.2d at 20-21. Therefore, this Court cannot add an additional element to

a rule merely because it is similar to definitions specifically delineated in the rule.

A. Juvenile furlough is not included within the definition of legal restraint: expressio unius est exclusio alterius.

The First District Court of Appeal correctly decided juvenile furlough status was not legal constraint under the guidelines because it was not specifically included in Rule 3.701(d)(6). Rule 3.701(d)(6) defines legal (status) constraint as: offenders on parole, probation, or community control; in custody serving a sentence; escapees; fugitives who have fled to avoid prosecution or who have failed to appear for a criminal judicial proceeding or who have violated conditions of a supersedeas bond; and offenders in pretrial intervention or diversion programs. Juvenile furlough status is not included within the definitions of Rule 3.701(d)(6).

The First District concluded that because juvenile furlough status was not included within Rule 3.701(d)(6) and the mention of one thing implies the exclusion of another (expressio unius est exclusio alterius), juvenile furlough status is not legal status as defined in Rule 3.701(d)(6). The only way juvenile furlough status can be included within Rule 3.701(d)(6) is for this Court to re-write Rule 3.701(d)(6) to include juvenile furlough status by implication. The specific delineations of the various forms of legal status within Rule 3.701(d)(6) indicate the

legislature and the Sentencing Commission created under Section 921.001, Florida Statutes, who proposed the rule, carefully considered all forms of legal status for the guidelines. The Rule includes: parolees, probationers, persons on community control, escapees, fugitives, persons who have violated bond conditions or persons in pretrial intervention or diversion programs. This comprehensive list suggests the legislature and Sentencing Commission considered juvenile furlough status but rejected its inclusion within Rule 3.701 (d)(6). There is no committee note on Rule 3.701(d)(6). This fact suggests the Commission considered Rule 3.701(d)(6) to be clear on its face and, consequently, there was no need for comment or explanation. Rule 3.701(d)(5)(c) discusses the application of a juvenile's record to the guidelines. Therefore, the application of a juvenile record and status to the guidelines was considered by the legislature and Sentencing Commission. However, juvenile furlough status was specifically not included. Even if it is similar to the other forms of legal status defined in Rule 3.701(d)(6), its exclusion unquestionably indicates an intent not to include it within 3.701(d)(6).

B. The similarities between juvenile furlough status and adult legal constraint under Rule 3.701(d)(6).

Petitioner argues that because juvenile furlough status is similar to adult legal constraint, it should be included within Rule 3.701(d)(6). Respondent concedes that, general speaking, juvenile furlough status can be similar to some forms of legal

status. However, there was no procf below on the nature of Respondent's juvenile furlough status. See Hannah v. State, 480 So.2d 718 (Fla. 4th DCA 1986). Therefore, Petitioner's discussion of the similarities between juvenile furlough status and adult legal constraint is speculative and abstract. Respondent concedes that juvenile furlough status can be similar to some types of legal constraint defined in Rule 3.701. In Hannah v. State, supra, the Fourth District Court of Appeal refused to count juvenile furlough status as Legal restraint under Rule 3.701 because Hannah was on "absconder-inactive status" pursuant to the furlough and there was no proof this status came within the provisions of Rule 3.701. Therefore, even if this Court believes juvenile furlough status is legal constraint under Rule 3.701, this case should be remanded for a hearing to determine if Respondent's furlough status comes with Rule 3.701.

ISSUE TWO

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?

A. The issue in this case.

The question posed by Petitioner is not a correct statement of the issue before this Court. A correct phrasing of the question would be "Can a person be convicted of second degree murder if there is no proof of ill-will or malice directed toward the victim, but there is proof of the grossly careless disregard of the safety of others as evidenced by reckless driving which accidentally caused a death?" The issue could also be stated as "Is grossly careless driving during a police chase, where the accused loses control of his vehicle and strikes and kills a passenger in another car, second degree murder or manslaughter?"

Whether the malice or ill-will was directed toward a specific victim is only a part of the decision in this case, not the question decided to be determinative by the First District below. Therefore, the issue proposed by Petitioner is slanted and inaccurate. The First District Court of Appeal simply decided that under the circumstances of this case, "There [was] no view of the facts herein from which the jury could properly conclude that the instant homicide constituted second-degree murder, in that

there is no evidence that Ellison's actions were done frcm ill-will, hatred, spite or evil intent."

B. The difference between second degree murder and manslaughter.

The First District found below that the facts of this case supported manslaughter, but not second degree murder. Second degree murder consists of an act which a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, is committed from ill-will, hatred, spite or evil intent and the act itself indicates an indifference to human life. Marasa v. State, **394** So.2d **544** (Fla. 5th **DCA 1981).** Manslaughter **is** the killing of a human being by, inter alia, the culpable negligence of another without lawful justification. Section **782.07,** Florida Statutes **(1987).** Culpable negligence occurs when a person consciously follows a course of conduct showing reckless disregard of human life, or of the safety of person exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights. ~~See~~ Standard Criminal Jury Instruction on Manslaughter (October **1985);** See Marasa v. State, supra.

The significant difference between second degree murder and manslaughter is that second degree murder requires an act committed from ill-will, hatred, spite or evil intent. Consequently, this Court must decide whether the First District Court of Appeal correctly concluded that there was insufficient proof of ill-will, hatred, spite or evil intent.

C. The facts of this case do not support a second degree murder conviction because there was no proof of ill-will, hatred, spite or evil intent,

Petitioner argues that second degree murder convictions that have been upheld in cases involving the use of a car, However, Petitioner has failed to discuss the facts of these case - these cases have ample proof of willful, deliberate ccnduct motivated by ill-will, spite or hatred. For example, in State v. Johnson, 541 S.W.2d 417 (Tenn. 1976), the defendant deliberately "tailgated" the victim's car while traveling at speeds over 90 m.p.h. The defendant knew he had seriously defective brakes - defendant's car crashed into the back of the victim's car which caused it to leave the road and crash into two gas pumps. The pumps caught fire and burned to death the occupants of the car.

Petitioner also cites People v. Gomez, 478 N.E.2d 759 (N.Y.Ct.App. 1985). The facts of Gomez are much more egregious than the instant case. Gomez drove out of a gas station at approximately 40 m.p.h. He then struck and careened off a parked car and continued on, weaving from lane to lane. Gomez next

struck the side of a moving car and then accelerated to over 50 m.p.h. He then "jumped" the curb and drove along the sidewalk at a high rate of speed and struck a boy on his bicycle. An occupant of the car told Gomez to apply his brakes, but he responded, "No, I cannot brake, I cannot put the brakes on any longer. I have killed a person already."

Gomez then crossed another street and mounted the opposite sidewalk where several people were standing. He then drove up the block on the sidewalk, striking another child on a bicycle. Gomez's car dragged the body approximately 80 feet. The car then crossed another street and mounted yet another curb. Gomez sped along the sidewalk at over 50 m.p.h. nearly striking several people. Gomez then braked for the first time and the car came to rest. Gomez attempted to escape but he was apprehended.

The Gomez court upheld the conviction for second degree murder because Gomez acted recklessly, i.e., that he was aware of an consciously disregarded a substantial and unjustifiable risk and his conduct evinced a wanton indifference to human life or depravity of mind. 478 N.E.2d at 761. The Gomez opinion found that these elements were present because Gomez drove at an excessive speed (on a busy New York street, struck two cars and then drove for nearly a block on a sidewalk). (Id) After he struck and killed the first victim, Gomez continued speeding on the sidewalk in view of people and struck and killed another child on a bicycle. Gomez continued on and nearly struck other individuals. All this conduct demonstrated: 1) Gomez was consciously aware of Substantial risk cause by his conduct, and 2)

his acts evinced a depraved mind. Petitioner also cites People v. Watson, 637 P.2d 270 (Cal. 1981). The Watson court held that implied malice for seccnd degree murder exists when a person does "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." A finding of implied malice depends upon a determination that the defendant actually appreciated the risk involved, i.e., a subjective standard. In Watson, the California Supreme Court found the following factors, in combination, supported a finding of implied malice:

1. The defendant was legally intoxicated at .23% BAL;
2. had driven to a bar and must have known that he would have to drive later;
3. was presumably aware of the hazards of drunk driving;
4. drove 50 miles over the speed limit;
5. narrowly avoided a collision prior to the fatal accident by skidding to a stop; and
6. resumed his excessive speed, then later tried to brake before the fatal collision (showing the defendant was aware of his dangerous acts).

The Supreme Court in People v. Albright, 173 Cal.App.3d 883 (Cal. 1985), held that the State must prove the defendant knew his conduct posed a high probability of death to some person.

The out-of-state cases upholding second degree murder convictions in cases involving cars have required direct evidence of ill-will, hatred and spite directed to a known victim. California courts have additionally decided that the state must prove the defendant actually knew of the danger and risk posed to

other known persons. Florida cases have also upheld second degree murder cases involving cars - where there was proof of deliberate malicious acts and/or proof of extreme alcohol intoxication.

In Gordon v. State, 457 So.2d 1095 (Fla. 5th DCA), aff'd 478 So.2d 1063 (Fla. 1985), the defendant was driving with a .259% blood alcohol level. He was on a multi-lane highway at 2:00 p.m. Gordon rammed his truck into the back of a car which triggered a chain-reaction collision with a Corvette. After the accident, the driver of the Corvette got out of her car to assess the damage. Gordon pulled out of the blocked traffic lane and into the open lane; he intended to flee the accident. The driver of the Corvette stepped into the open lane and raised her arms to flag Gordon down so he would stop. Gordon continued to accelerate, he smashed into the driver and threw her body ahead of the truck. Gordon then ran over her a second time. Gordon caused several more accidents before his car came to a rest one-half of a mile away from the original accident. The Fifth District Court of Appeal affirmed the conviction for second degree murder without comment or explanation. The Florida Supreme Court affirmed the conviction by considering the certified question of whether Gordon could be convicted of both second degree murder and D.W.I. manslaughter. This Court decided Gordon could receive only one conviction for causing one death.

The Second District Court of Appeal in Manis v. State, 528 So.2d 1342 (Fla. 2d DCA 1988), affirmed a conviction for second degree murder in a case where the defendant argued such a charge was inappropriate for a vehicular homicide. However, the

Manis court did not describe the facts of that case and simply noted that the defendant's position had been rejected in Gordon v. State,, supra.

Petitioner also cites Parrish v. State, 97 So.2d 356 (Fla. 1st DCA 1957), which upheld a second degree murder. In Parrish, supra, the defendant (a passenger in a car) and his co-defendant (the driver of the car) deliberately chased down the victim and tried to strike her car, Parrish also struck her car with a bayonet. During the chase, the victim's car (attempting to elude her pursuer) struck another car which resulted in the death of the victim. This Court upheld the second degree murder conviction, inter alia, because the chase through Jacksonville at speeds of 60 to 70 m.p.h. created a condition imminently dangerous to others using the streets. However, the difference between Parrish and this case is Parrish had the requisite ill-will, spite or malice directed toward the victim. There was no such proof in this case.

The First District correctly decided that second degree murder malice or ill-will must be directed toward some person. The mere commission of an act which is imminently dangerous or shows a reckless disregard of human life is not sufficient proof of second degree murder. The difference between second degree murder and manslaughter is that second degree murder requires proof of ill-will or spite directed toward some person. See Larsen v. State, 485 So.2d 1372 (Fla. 1st DCA 1986); Dellinger v. State, 495 So.2d 197 (Fla. 5th DCA 1986); Hooker v. State, 497 So.2d 982 (Fla. 2d DCA 1986). Petitioner confuses lack of proof

of premeditated design to kill with the need to prove ill-will or spite directed toward some person. Second degree murder requires proof of some malicious act done toward some person(s) without the intent to kill that person. Therefore, Petitioner's argument that there is no need of intent toward a specific person is incorrect; there is no need to prove intent to kill a specific person, but there must be proof of a malicious act committed toward someone. There must be prcof of intent to commit a malicious act toward someone, even if there is no intent to kill. Petitioner confuses the intent to kill with the intent to commit a malicious act imminently dangerous to another. All the cases cited by Petitioner which upheld eecond degree murder convictions involve an act directed toward some person. See, e.g., Hooker v. State, supra.

Petitioner misconstrues and misrepresents Pressley v. State, 395 So.2d 1175 (Fla. 3d DCA 1981). Pressley v. State did not hold that the mere act, without intending to hit or kill anyone, of firing a gun into a crowd of people constitutes second degree murder. In Pressley, the defendant was involved in a domestic quarrel between two families. Pressley and another man, Eddie, got into an altercation. Eddie fired a gun into the ground. A third man, Henry Johnson, then tried to reconcile the two men. Pressley then got into his car and began to leave the scene. As he pulled away, Pressley and Eddie exchanged gunfire. Henry Johnson was then killed. The Third District found that Pressley's acts were imminently dangerous and his original malice toward Eddie was transferred to Henry Johnson. Pressley did

intend to kill Eddie, Consequently, Pressley is a transferred intent case - that is the intent underlying a malicious act of second degree murder will be transferred to another person if the defendant fires into a group and misses the intended victim and hits another person.

Petitioner next argues that the question of intent is a jury question and, therefore, it is inappropriate for an appellate court to rule on the issue. Generally, intent is a factual question for the jury. If there is conflicting evidence on intent, the jury must resolve the question. In this case, the First District Court of Appeal did not invade the province of the jury. It simply decided that a rational jury could not infer evil intent or ill- will from the facts of this case. The cases cited by Petitioner do not contradict this proposition because these cases all involve proof of facts from which a jury could infer the requisite intent. State v. Hacker, 510 So.2d 304 (Fla. 4th DCA 1986), is not directly applicable to this case because it involved a motion to dismiss, not proof necessary for a conviction. In Hacker, supra, the court decided the State produced a prima facie case (a much lower level of proof than proof beyond a reasonable doubt). Kacker was charged with felony murder, not seccnd degree murder. Hacker and his companion fled the scene of a robbery and later became involved in an accident which resulted in a death. The Hacker court decided the felony was not completed and, consequently, there was a prima facie case of felony murder. It did not address the issue of whether intent is a fury question.

Petitioner similarly misconstrues Lincoln v.State, 459 So.2d 1030 (Fla. 1984). The Lincoln case involved the question of whether the driving of a getaway car in an elusive manner to avoid the police created a prima facie case from which the finder of fact could properly infer complicity to commit the underlying crime. The Lincoln court decided whether there was sufficient circumstantial evidence; Justice Alderman ncted the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury and where there is substantial competent evidence to support the verdict, a judgment will not be reviewed." 459 So.2d at 1032. Therefore, Lincoln v. State, supra, is not directly applicable to this case. However, two principles of the case are relevant to this appeal: the evidence must support a reasonable inference by the jury and there must be substantial, competent evidence to support the verdict.

Petitioner overlooks these two principles and blithely argues that intent is always a jury question; Petitioner implies an appellate ccurt can never determine whether the issue of intent is supported by the evidence. The First District in this case simply decided there was not substantial, competent evidence to support a finding of the requisite malice or ill-will for second degree murder. The facts of this case demonstrate no ill-will, malice of evil intent directed toward some person. This case is similar to Marasa v. State, 394 So.2d 544 (Fla. 5th DCA 1981), and Manuel v. State, 344 So.2d 1317 (Fla. 2d DCA 1977). In Marasa, supra, the Fifth District found that there were no facts from which a jury could rationally infer malice. Marasa and others

were having a drug and liquor party in the early morning hcurs. The murder victim, after getting a drink of water, stumbled and sat down on a couch near Marasa. Someone then said "Hit her. She probably won't feel anything." - apparently referring to the fact that she was under the influence of drugs or liquor. Meanwhile, Appellant had been showing off a new gun which he thought he had emptied the cylinder of cartridges. When someone said, "Hit her.", Marasa pointed the gun in the general direction of the victim and it fired, killing her. After the gun went off, Marasa became shocked, emotionally upset and began crying.

The Marasa court then reviewed all the elements of second degree murder: Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life. 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. Marasa v. State, 394 So.2d at 545.

The Marasa court found that, although Marasa's acts supported a manslaughter conviction, there was insufficient evidence of second degree murder. Chief Judge Dauksch noted:

> "There is no question the death in this case occurred from a senseless, apparently uncaring reckless act by a person held in low repute in general society, a member of a motorcycle gang..." 394 So.2d at 546, 547.

However, there was no proof in Marasa of any animosity or ill-will between Marasa and the victim.

In Manuel v. State, 344 So.2d 1317 (Fla. 2d DCA 1977), the Second District reversed a second degree murder conviction because there was no proof of malevolence directed toward any person. Manuel was in a bar when he heard his wife had been in an argument. He got his gun and walked to the location of the argument. When Manuel arrived at the house, he asked who was messing with his wife and fired a shot into the ground. About three minutes after firing the first shot, Manuel fired another shot. Manuel fired in the general direction of a trash barrel and garbage container. Manuel could not see the trash barrel or containers because that night was extremely dark. At the time Manuel fired this shot, two boys were playing "chase", a game which rewards silence and stealth. Manuel's second shot hit a boy playing the game and killed him.

The Second District Court of Appeal reversed the second degree murder conviction because Manuel pointed his gun in a direction which one would think would not harm any person and there was a lack of substantial evidence of malevolence directed toward any person, 344 So.2d at 1320.

Petitioner asks this Court to adopt the reasoning of Dellinger v. State, 495 So.2d 197 (en banc Fla. 5th DCA 1986), which ostensibly receded from Marasa, supra. Only one judge on the en banc panel, Judge Cobb, concurring specially noted that Marasa usurped the function of the jury. However, Dellinger and Marasa are still factually distinguishable because both involved

deliberately pointing a gun at a person and pulling the trigger. Respondent submits Manuel v. State, supra, is more analogous to this case because in Dellinger and Marasa there were facts from which a jury could infer ill-will or spite.

Respondent's conduct in this case was grossly careless and evinced a disregard fcr human life. However, there was no proof below that Respondent had ill-will or spite toward his victim. This crucial fact distinguishes second degree murder from manslaughter. Respondent did not intend to hit anyone with his car; he accidentally hit someone when he lost control of his car. He did not intend to lose control of his car because this could endanger his own life. Respondent's flight from the police unquestionably was grossly careless conduct with a disregard for life, i.e., manslaughter.

CONCLUSION

This Court should uphold the First District Court of Appeal's decision on the issues of whether juvenile furlough status is legal restraint under the guidelines and the reduction of Respondent's conviction from second degree murder to manslaughter.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to Assistant Attorney General Edward C. Hill, Office of the Attorney General, Capitol Building, Tallahassee, FL **32399-1050**, this 24th day of October, A.D., **1989**.

JAMES T. MILLER
ASSISTANT PUBLIC DEFENDER