IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

DENNIS MANCUSO,

Respondent.

Case No. 83,572

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, and the appellant in the District Court of Appeal, Fourth District. Petitioner was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this Court.

The following symbols will be used:

"R"	Record on Appeal
"T"	Trial Transcripts
"SR"	Supplemental Record (transcript of state's exhibit 8, Respondent's taped statement)
"PB"	Petitioner's Brief

STATEMENT OF THE CASE

Respondent was charged by information with leaving the scene of an accident involving death or personal injury in violation of § 316.027, Fla. Stat. (1991) (R 18), and he proceeded to jury trial (T 1).

Before voir dire, the trial court ruled that it would not be instructing the jury that Respondent's knowledge of the *type* of accident he had been in (i.e., one involving death or personal injury) is an element of the offense (T 4-5).

After voir dire, defense counsel challenged venireperson Elena Jones for cause (T 118). The trial court denied the cause challenge (T 118). Defense counsel was then forced to use a peremptory challenge to strike her (T 119). Thereafter, defense counsel exhausted his peremptory challenges and requested an additional challenge in order to strike seated juror Cindy Lambke (T 120).

After jury selection, the prosecutor moved in limine to exclude evidence that blood samples taken from the two girls who were hit in the accident revealed that each had a blood alcohol level in excess of .10 percent and each was positive for the presence of marijuana (T 131). Defense counsel argued that such evidence was relevant to explain the girls' irrational presence in the middle of Interstate 95 at 4:00 a.m. (T 133-134). The trial court granted the state's motion (T 134).

At the charge conference, defense counsel objected to the trial court's instruction defining the elements of the offense because it lacked the requirement that Respondent knew he was in a death or injury accident, and he submitted a proposed instruction

which included this requirement (T 411-412; R 20). Defense counsel's objection was overruled and his proposed instruction was denied (T 411-412).

Respondent was found guilty (T 478). A timely motion for new trial was filed (R 35-38). On September 30, 1993, the trial court denied the motion for new trial, and proceeded to sentencing (T 502). The prosecutor recommended that adjudication of guilt be withheld,[1] and that Respondent be sentenced to probation with some jail time (T 529). Respondent scored any nonstate prison sanction (R 40). Notwithstanding the prosecutor's recommendation, Respondent was adjudicated guilty (T 539), and sentenced to 5 years probation with the special conditions that he serve 1 year in the county jail followed by by 10 months of community control II (an electronically monitored form of house arrest) and perform 400 hours community service (T 539-540; R 70-72).

Respondent appealed to the Fourth District Court of Appeal and raised the three issues in this brief and one sentencing issue.[2] The Fourth District reversed because of the jury instruction error, rejected the other two guilt issues, and certified the following question as one of great public importance:

> IN A PROSECUTION FOR VIOLATION OF SECTION 316.027, FLORIDA STATUTES (1991), MUST THE STATE SHOW THAT THE DEFENDANT KNEW OR SHOULD

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[1] The prosecutor's recommendation as to withholding adjudication stemmed from Appellant's lack of any prior record (T 480).

[2] Respondent contended that the trial court erred in sentencing him to community control as a condition of probation when he scored any non-state prison sanction under the guidelines. See State v. Davis, 630 So. 2d 1059 (Fla. 1994); State v. Mestas, 507 So. 2d 587 (Fla. 1987). The Fourth District did not reach this issue on the ground that it was moot by reversal of the conviction.

HAVE KNOWN OF THE INJURY OR DEATH; AND THE JURY BE SO INSTRUCTED?

STATEMENT OF THE FACTS

Respondent disagrees with Petitioner's rendition of the facts due to a number of significant omissions. For example, Petitioner omits the important fact that the area of Interstate 95 where the collision occurred was pitch black at 4:30 a.m. on the date in question (there is no roadway lighting on this stretch of I-95), and that the girls were wearing dark clothing (R 176, 210). In addition, Petitioner includes in its statement of the facts Corporal Borman's claim at trial that Respondent told him he hit two girls and that he (Borman) had not told Respondent about the girls (thus indicating that Respondent knew that he had hit two girls). PB at p. 5. On cross-examination, Borman continued to insist that Respondent brought up the subject of hitting two girls, notwithstanding the fact that a portion of the taped interview indicates otherwise.[3] (T 329). Petitioner omits the fact that Borman admitted that he testified at deposition as follows: Q. "Did [Respondent] at any time during the interview indicate verbally or in writing that he affirmatively knew that he had hit a person or persons?" A. "No." (T 330-331).[4] For these and other omissions Respondent will rely on the following rendition of facts from his Initial Brief which Petitioner accepted without modification or addition.

Thomas Schweig, a bus driver for Gray Line Bus Tours,

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[3] Respondent states at one one point, "You [Borman] said I hit two girls" (SR 6).

[4] Borman's prior inconsistent deposition testimony was admissible as both impeachment and substantive evidence. Holmon v. State, 603 So. 2d 111 (Fla. 4th DCA 1992); Moore v. State, 452 So. 2d 559 (Fla. 1984); § 90.801(2)(a), Fla. Stat. (1993).

testified that on December 6, 1992, at approximately 4:30 a.m., he was driving his bus (without passengers) northbound on Interstate 95 (T 163). Mr. Schweig's partner, Frank Rivera, was driving another bus (also without passengers) directly behind Mr. Schweig (T 163). Mr. Schweig testified that he and Rivera had been following a white El Camino (Respondent) for some time; the three vehicles were in the middle lane (T 163, 165).

Mr. Schweig testified that on I-95 between Northlake Boulevard and PGA Boulevard he saw Respondent's brake lights suddenly come on and his tires smoke (T 166-167). Schweig saw something come out of the back of the El Camino which he initially thought was a bag of trash, but as he got closer realized was a body cartwheeling through the air about 8 feet off the ground (T 167).

The two buses avoided colliding with Respondent's rapidly decelerating car by quickly turning into the left hand lane (the fast lane) and going around Respondent's car (T 168-169). Mr. Schweig testified that he and Rivera went up and over a freeway overpass (the Holly Road overpass) and parked their buses in the emergency lane (T 169). Schweig testified that as he was exiting his bus he saw Respondent's car approach at a very slow speed; there was steam coming out of the front of it, and the windshield was smashed; the car parked some distance ahead of the buses (T 169).

Schweig called in the emergency on his CB radio, turned on the buses' flashers, and ran back down the interstate (T 169-172). On the southside of the overpass, Schweig saw two girls, each wearing dark clothing, lying in the roadway; one girl was motionless, the other girl was concious and moaning (T 172-173). Frank Rivera was

trying to keep the girls from getting hit by approaching traffic (T 171-172). Within 10 minutes emergency personnel were on the scene (T 173). Afterwards, a trooper gave them a ride back to their buses (T 173).

On cross-examination, Mr. Schweig testified that Respondent properly maintained his position in the middle lane of traffic the entire time he followed him (T 177). Schweig said that he knew Respondent was making a panic type of stop when he saw the smoke coming from Appellant's tires and his brake lights go on (T 180). Schweig went around Respondent's car, up the overpass, then down it, and parked on the downslope (T 183). Schweig said he thought it took a couple of minutes to jog back to where Rivera and the girls were located (T 185). Schweig testified that this area of I-95 was pitch black; there is no roadway lighting between Northlake and PGA Boulevards (T 176).

Frank Rivera testified that he and Schweig were traveling about 65 m.p.h. along I-95 (T 198). Rivera said that when Schweig made a hard left turn to avoid the El Camino in the center lane in front of them he saw "two black things," which he initially thought were duffel bags, but when he passed them he saw their hair and realized they were people (T 194,200). Rivera passed the El Camino on the left and pulled over in the right emergency lane on the north side of the overpass (T 195). Rivera saw the El Camino, now in the right hand lane, traveling very slowly, 2 to 5 m.p.h. (T 205). Rivera said he could hear that the car was broken (T 205). Later he saw that the car had parked about 100 feet in front of Schweig's bus (T 207).

Rivera testified that he ran up and over the overpass to the

bodies on the other side (T 195). The first girl had no vital signs (T 195). A hundred feet further was the second girl who was moaning and concious (T 195, 208). Rivera testified that he tried to wave cars away; however, there was no lighting, and the accident area was very dark (T 196, 199). Rivera said that he almost got hit several times himself because it was so dark (T 196). Rivera also described the girl's clothing as being "very dark" (T 210).

Officer Robert Peterson of the Palm Beach Gardens Police Department testified that he was dispatched to this accident at 4:29 a.m. (T 215). The accident was located between Northlake Boulevard and PGA Boulevard south of the Holly Road overpass (T 216). Officer Peterson drove up to a person lying in the middle of the interstate and put on his blue lights to block traffic (T 217). The Trauma Hawk emergency helicopter was brought in and landed on the interstate (T 225).

Corporal Robert Borman of the Florida Highway Patrol testified that he had been a traffic homicide investigator for 13 years (T 241). He arrived at the scene of this accident at 5:28 a.m., after emergency personnel had arrived (T 242).

Corporal Borman estimated that the collision between the girls and Respondent's car occurred 788 feet south of the Holly Road overpass and 2136 feet, or approximately 4/10ths of a mile, from where Respondent's car came to rest (T 251-252). Respondent's car was a mile to a mile and a half south of PGA Boulevard (T 253). Corporal Borman concluded that Respondent applied his brakes (and skidded) after the collision (T 257).

Corporal Borman testified that there was some blood on Respondent's windshield and in the bed of the truck, and there was

hair in the left mirror (T 258). This area of the interstate, however, was dark; it is not a lighted area (T 259,288). On cross-examination, Corporal Borman admitted that the blood on the windshield was not readily apparent (T 305).

Corporal Borman testified that at approximately 11:30 a.m. that same day he learned that Respondent had gone to the Palm Beach Gardens Police Department to report the accident (T 264). Corporal Borman met Respondent there and took a sworn taped statement from him which was admitted into evidence as state's exhibit 8 (T 265; SR).

Respondent told Corporal Borman that prior to the accident he had been at the Plus 2 Lounge at Forest Hill Boulevard and Congress Avenue in West Palm Beach (and prior to that at bar called the "Dirty Duck") (SR 12). Respondent left the lounge, got on I-95 at Southern Boulevard, and was proceeding north to his Palm Beach Gardens home when he began to fall asleep[5] (SR 13-16). Respondent described the accident as follows:

> All I know is I was driving home. Uh, passed out; fell asleep. Tired. And I heard a lot of noise and that woke me up, as soon as I looked you know, through my windshield -- I'm driving over -- I just noticed the whole windshield was totaled, it was just smashed. I can't see any single thing.
>
> My car started to die and I pulled off to the side. I got out of my car and I took one look at the front of my car, like I said, the hood, it just looked like somebody had dropped something really heavy on the top of it.
>
> And I just got scared and walked all the way back home.... I don't know what -- how I hit it -- ... or if someone hit me, or --
>
> * * *
>
> Corporal Borman: I know you were in an accident and you

[5] Respondent explained that his drowsiness was caused by the airport job he recently started which required him to get up at 2:00 a.m. (SR 16).

know you were in an accident. You don't know what you hit, is that -- that's what you're telling me -- trying to tell me?

Respondent: Yes sir. That's what I'm trying -- that's why I'm here.

Corporal Borman: You didn't walk back to see what could have -- you could have hit or anything?

Respondent: I, I looked around. I didn't see nothing. Like I said, I remember, I did see a bus, a big Greyhound bus or something, and I seen the traffic, but I didn't see no other car smashed, I didn't see no people hurt, laying around or nothing, that I could have hit

That's why I said, I (unintelligible), my car was screwed up. I didn't see nobody around. I was walking home.

* * *

Corporal Borman: You realize you left the scene of an accident, and that's wrong; do you understand that?

Respondent: Yes. But, like I said, I really -- yeah, I know there was an accident, but I, I didn't know for sure that it was an accident. It could have been a dog or something. Something could have fell out of the sky, you know what I mean? It could have been a meteorite or something.

(SR 8-9, 17-18).

When asked what made him decide to come to the police station, Respondent said "because I was worried about if I hurt somebody" (SR 15). Respondent said that he remembers seeing one of the buses behind him but that he didn't know what it was doing (SR 16).

The taped interview ends with Respondent agreeing to give a blood sample[6] (SR 20-21).

Corporal Borman testified that he did not tell Respondent there were people or, more specifically, girls, involved in the

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[6] The prosecutor moved in limine to stop the tape recording before Respondent agreed to give a blood sample (T 136). Defense counsel argued that the rule of completeness required the state to play the entire tape (T 137). The trial court agreed (T 137). The state did not seek to introduce into evidence the results of the blood result.

accident (T 266). On cross-examination, Corporal Borman was asked about this portion of the taped statement:

> Respondent: Those girls didn't die, did they?
>
> Corporal Borman: Which one?
>
> Respondent: The ones that I hit.
>
> Corporal Borman: Did they die? Which one?
>
> Respondent: *You said I hit two girls.*
>
> Corporal Borman: Yes, there was two in a, in a, in a, ah, the roadway. What time you got by your watch now?

(SR 5-6). Corporal Borman insisted that he had not told Respondent that he hit two girls, as the emphasized portion of the tape indicates (T 321). Defense counsel asked Corporal Borman whether Respondent ever said that he knew he hit two people (T 329). Borman answered: "Sir he is the one that brought it [hitting people] up. I wasn't the one that brought it up, so he did say it." (T 329). Defense counsel then asked Corporal Borman whether he was asked at deposition: "Did [Respondent] at any time during the interview indicate verbally or in writing that he affirmatively knew that he had hit a person or persons?" and whether he answered "No" to that question (T 330). Borman acknowledged that he had so testified at deposition (T 330-331).

Corporal Borman testified that he detected no odor of alcohol on Respondent's breath and that his speech was normal (T 339). Borman described Respondent's demeanor as meek and quiet, and said that Appellant "was agreeable to everything" (T 329).

Borman said that Respondent's windshield was "spider-webbed" on the driver's side and that Respondent told him his field of vision was blurry (T 334-335). Borman testified that looking south

from Respondent's car one cannot see over the crest of the Holly Road overpass where the girls and debris were located (T 335). Borman also testified that pedestrian traffic is, of course, prohibited on Interstate 95 (T 340).

After Borman testified, the trial court informed the jury that counsel for each side had stipulated that Natacha Decelle was killed as a result of a collision with a vehicle driven by Respondent, and that Heather Bradshear was injured as a result of a collision with a car driven by Respondent (T 349). The state then rested (T 348-349).

Respondent testified that he lives with his mom and dad in an area of Palm Beach Gardens known as North Palm Beach Heights near Donald Ross Road (T 352). On December 5, 1992, he worked at Signature Aviation from 5:00 a.m. to 11:00 a.m. and after work he went home and slept for approximately 3 hours (T 355). At 10:00 p.m., Respondent went to a nightclub, the "Dirty Duck" (T 355). At midnight, Respondent went to the "Plus 2 Lounge" to see a band (T 357). After the Plus 2 Lounge, Respondent decided to go home (T 358). Respondent testified that he drank two beers at each nightclub (T 390-391).

Respondent got on I-95 at Southern Boulevard (T 358). Respondent proceeded north in the center lane (T 358). Respondent testified that at Blue Heron Boulevard he became tired and had trouble keeping his eyes open; to stay awake he rolled down his windows and turned up his stereo (T 359). Respondent didn't remember going over Northlake Boulevard (T 359). Respondent said there were no cars in front of him or to the side; Respondent saw lights behind him but didn't know they were buses (T 360). Defense

counsel asked Respondent about his taped statement:

> Q. And in your taped statement it states that you had passed out or were falling asleep; is that correct?
>
> A. Yes.
>
> Q. Had you passed out, literally?
>
> A. I don't know. All I know is I heard a loud noise, and everything went black and my windshield was cracked and I couldn't see nothing, and then I was in the center lane. I couldn't see out the windshield. I had to look out the side of my window. And, I knew there were cars behind me but I didn't see nothing on the side of me, and I couldn't see what was in front of me.
>
> Q. Did you see your vehicle strike anything?
>
> A. No, not a thing.
>
> Q. Did you see what caused the damage to your vehicle?
>
> A. No, I did not.

(T 361-362).

After the collision, Respondent slammed on his brakes and eventually pulled his car over (T 362). Respondent said he was shocked and scared (T 366). Respondent thought he might have hit something that fell out of the back of a truck or that someone through a rock at his windshield (T 362). Respondent didn't think he hit a car because he didn't see any (T 366). Respondent said that given the place (center lane of I-95) and time (4:00 a.m.), it never occurred to him then that he hit a person (T 366).

Respondent testified that he looked south and saw no road debris or anything he might have hit (T 360). Respondent saw a bus parked on the crest of the overpass but didn't connect it with his collision (T 365,367).

Respondent started to walk home (T 368). Respondent walked alongside I-95 to PGA Boulevard, and from PGA Boulevard to Military

Trail, and then north on Military Trail to his home (T 369). Respondent said he didn't hear or see emergency vehicles or the helicopter (T 382-383). Respondent testified that he knew there were hotels on PGA Boulevard and knew there was a police and fire station located at Burns Road and Military Trail, but that he didn't stop to report what happened because he didn't think it was an emergency (T 370, 386-387). Respondent estimated that his house was 3 1/2 miles from the accident site; Respondent said it took him about 2 hours to walk home (T 371).

Respondent went home and went to bed (T 373). He awoke at 10:30 a.m. and went to the police station (T 373). Respondent thought that was the correct procedure for insurance purposes, etc. (T 373). Respondent testified that he became worried that morning that whatever hit his car might have hit and injured someone else (T 378, 407). This was what he meant when he told Corporal Borman that the reason he came in was "because I was worried about if I hurt somebody" (SR 15). Respondent also testified that when he woke up that morning he was in a calmer and more alert state of mind and that the thought did cross his mind at that time that he might have hit someone (T 407). Respondent testified that he first learned he hit two girls when Corporal Borman told him prior to the taped statement (T 385).

On cross-examination Respondent acknowledged that he told Corporal Borman that he went through Loehmans Plaza (at PGA and I-95) and that the route he testified to was different than that described in his taped statement (T 390). Respondent explained that when he was giving his statement he was "in shock" and didn't know what he was talking about (T 389).

Respondent told the prosecutor that he might have fallen asleep--he didn't know (T 393). He just remembers everything went black (T 393). Respondent said that he might have hit his head on the windshield (T 393).

Finally, Respondent testified that in his taped statement he told Corporal Borman that his windshield was smashed and blurry, not smashed and "bloody"[7] (T 400-401).

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[7] The prosecutor's question stemmed from the following answer Respondent gave on tape:

> Uh, when I woke up, When I heard the noise, it was either the left lane or the center lane, or even the right lane. Like I said, I don't remember, 'cause I couldn't see through the windshield, that's how bad the windshield was. *It was all smashed and (unintelligible)*. The car was starting to die, and I just pulled off to the side of the road, and stopped the car and got out.

(SR 19; emphasis added). The prosecutor thought Respondent said that the windshield was smashed and "bloody."

SUMMARY OF THE ARGUMENT

POINT I

The certified question should be answered in the affirmative. The majority of states with "hit and run" statutes nearly identical to Florida's require the state to prove that the defendant actually knew of the injury or death or knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury or death. This actual or constructive knowledge of injury or death element is an implied element of the statute for the following two reasons: 1) the statute requires an affirmative course of action to be taken by the driver and it necessarily follows that one must be aware of the facts giving rise to this duty in order to perform the acts required, and, 2) leaving the scene of a death or personal injury accident is a felony, which is "as bad a word as you can give to man or thing." In addition, the presence of the word "willfully" in Florida's statute makes this interpretation all the more correct. A requirement that an offense be committed "willfully" is satisfied if a person acts knowingly with respect to the material elements of the offense.

POINT II

The trial court denied Respondent's cause challenge of venireperson Elena Jones even though Ms. Jones stated that she didn't think she could be a fair and impartial juror. Ms. Jones was disturbed by the fact that the accident in this case resulted in death. Ms. Jones had suffered the deaths of three of her closest relatives in the last three years, including her son, who, she said, "died suddenly." Ms. Jones's answers raised a reasonable doubt about her ability to render an impartial verdict

based solely on the evidence and law announced at trial. Thus, the trial court erred in denying Respondent's cause challenge of her.

POINT III

The trial court excluded evidence that the two girls Respondent hit each had a blood alcohol level in excess of .10 and was positive for the presence of marijuana. This was error because it explained the girls' irrational presence in the middle of Interstate 95 at 4:30 a.m.

ARGUMENT

POINT I

IN A PROSECUTION FOR VIOLATION OF SECTION 316.027, FLORIDA STATUTES (1991), MUST THE STATE SHOW THAT THE DEFENDANT KNEW OR SHOULD HAVE KNOWN OF THE INJURY OR DEATH; AND THE JURY BE SO INSTRUCTED?

Respondent was charged with violating section 316.027, Fla. Stat. (1991), which makes it a felony to leave the scene of an accident involving death or personal injury:

> **316.027. Accidents involving death or personal injuries**
>
> (1) The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop such vehicle at the scene of the accident, or as close thereto as possible, and shall forthwith return to, and in every event shall remain at the scene of, the accident until he has fulfilled the requirements of s.316.062.
>
> (2) Any person willfully failing to stop or to comply with the requirements of subsection (1) under such circumstances is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The Fourth District held that an element of this offense is the driver's actual or constructive knowledge of injury or death. The Fourth District certified the following question as one of great public importance:

> IN A PROSECUTION FOR VIOLATION OF SECTION 316.027, FLORIDA STATUTES (1991), MUST THE STATE SHOW THAT THE DEFENDANT KNEW OR SHOULD HAVE KNOWN OF THE INJURY OR DEATH; AND THE JURY BE SO INSTRUCTED?

This question should be answered in the affirmative.

A. The Fourth District's intrepretation of § 316.027, Fla. Stat. (1991), is the same interpretation given to nearly identical statutes in the majority of states which have considered this issue.

Section 316.027, Fla. Stat. (1991), is nearly identical to the "hit and run" statutes in a large number of states, since most such statutes, including Florida's, were modeled after § 10-104 of the Uniform Vehicle Code. See State v. Tennant, 319 S.E. 2d 395, 400 (W.Va. 1984); State v. Feintuch, 375 A.2d 1223, 1224-1225 (N.J. Super A.D. 1977) (noting that 34 states had adopted § 10-104 of the Uniform Vehicle Code). In construing a statute based on a uniform law "it is pertinent to resort to the holdings in other jurisdictions where the act is in force." 49 Fla Jur 2d, Statutes § 170 pp. 204-205. The vast majority of states with "hit and run" statutes similar to Florida's follow the California Supreme Court decision in People v. Holford, 63 Cal.2d 74, 80, 403 P.2d 423, 45 Cal.Rptr. 167 (1965), which holds:

> [C]riminal liability attaches to a driver who knowingly leaves the scene of an accident if he actually knew of the injury or if he knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person.

For example, in State v. Tennant, supra, the West Virginia Supreme Court recognized that the weight of the out of state authorities required that the West Virginia statute, which is identical to Florida's in all material respects, be read:

> ...to require the State to prove that the driver...knew of the accident and the resulting injury or death or reasonably should have known of the injury or death from the nature of the accident....Knowledge of the accident and the resulting injury are essential elements of the crime of leaving the scene of an accident that must be established by the State.

See Tennant, 319 S.E.2d at 400-401, and cases cited therein. In State v. Porras, 125 Ariz. 490, 610 P.2d 1051 (1980), the Arizona Court of Appeals also surveyed the case law and held that the majority of jurisdictions with statutes similar to Arizona's (which is also identical to Florida's in all material respects) follow the Holford decision and "require that the state prove that the defendant actually knew of the injury to another or possessed knowledge which would lead to a reasonable anticipation that such injury had occurred." Porras, 610 P.2d at 1053-1054. As previously noted, the courts in the majority of states have come to same conclusion. See State v. Miller, 308 N.W.2d 4 (Iowa 1981); State v. Corpuz, 621 P.2d 604 (Or. App. 1980); State v. Fearing, 284 S.E.2d 487 (N.C. 1981); Kimotoak v. State, 584 P.2d 25 (Alaska 1978); State v. Sidway, 431 A.2d 1237 (Vt. 1981); Kil v. Commonwealth, 407 S.E.2d 674 (Va.App. 1991); State v. Minkel, 230 N.W.2d 233 (S.D. 1975); Micinski v. State, 487 N.E.2d 150 (Ind. 1986); Comstock v. State, 573 A.2d 117 (Md. App. 1990); State v. Stafford, 678 P.2d 644 (Mont. 1984); Touchstone v. State, 155 So. 2d 349 (Ala. 1963); State v. Snell, 128 N.W.2d 823 (Neb. 1964); State v. Parish, 310 P.2d 1082 (Idaho 1957); see generally Annot., 23 A.L.R.3d 497 (1969).[8]

Although § 10-104 of the Uniform Vehicle Code and the statutes patterned after it do not expressly specify that the accused must have knowledge of injury or death, most courts have held this to

[8] Of the 19 states that have considered this issue, 16 follow Holford (Alabama, Alaska, Arizona, California, Idaho, Indiana, Iowa, Maryland, Montana, Nebraska, North Carolina, Oregon, South Dakota, Vermont, Virginia, and West Virginia), and 3 follow the minority view (Washington, Connecticut, and Illinois).

be an implicit requirement of the statute for the following two reasons: 1) the statute requires an affirmative course of action to be taken by the driver and it necessarily follows that one must be aware of the facts giving rise to this duty in order to perform the acts required,[9] and, 2) more severe criminal penalties are exacted for leaving the scene of a death or personal injury accident than for leaving the scene of a property damage accident.[10]

B. The three decisions rejecting Holford's interpretation are not persuasive authority.

Petitioner relies on the minority view held by the courts in

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[9] "It would be a manifest absurdity to expect or require the driver of a motor vehicle to perform the acts specified in the statute in the absence of knowledge that his vehicle has been involved in an accident resulting in injury to some person." State v. Fearing, 290 S.E.2d 487, 490 (N.C. 1981), quoting State v. Ray, 229 N.C. 40, 42, 47 S.E.2d 494 (1948).

[10] As stated in Kimotoak v. State, 584 P.2d 25, 32 (Alaska 1978):

> Under AS 28.35.060(c) a person may be imprisoned for up to ten years for failure to assist another who is injured as a result of an accident. Where only property damage has occurred, one who fails to provide the requisite information to those in the other vehicle is subject to significantly lesser penalties. It follows, therefore, that a person can be subject to the greater penalties provided for in subsection (c) only where it can be shown that he had knowledge of injury and it is not sufficient to show merely that he had knowledge of the accident or collision.

Section 316.027, Fla. Stat. (1991), is a third degree five year felony, while leaving the scene of an accident involving damage to an attended vehicle or property is a second degree misdemeanor, § 316.061, Fla. Stat. (1991), and leaving the scene of of an accident involving unattended property is a civil infraction. § 316.063, Fla. Stat. (1991). In 1993, the legislature increased leaving the scene of a death accident to a second degree, fifteen year felony. § 316.027(1)(b), Fla. Stat. (1993). See discussion of Staples v. United States, 62 U.S.L.W 4379 (U.S. May 23, 1994), infra.

Washington, Connecticut, and Illinois. State v. Johnson, 227 Conn. 534, 630 A.2d 1059 (Conn. 1993), is not persuasive because that court's interpretation of Connecticut's differently worded statute stemmed from a specific change in the statute made by the legislature in 1957. Johnson, 630 A.2d at 1063.

This Court should not rely on the decisions from Illinois because these decisions stemmed from a mistake made by the Illinois Supreme Court in the lead case of People v. Nunn, 396 N.E.2d 27 (1979). In Nunn, the court repudiated the extreme view that the prosecution is required to prove the defendant's actual knowledge of injury or death:

> We consider that to show a violation of section 11-401 the prosecution is required to prove that the accused had knowledge that the vehicle he was driving was involved in an accident or collision. We do not, however, hold that it is necessary for the prosecution to show also that the accused knew that injury or death resulted from the collision. To require this additional proof would impose a burden that would be unrealistically difficult to sustain and would tend to defeat the public interest [served by requiring persons to stop].

Nunn, 396 S.E.2d at 31. What the Illinois Supreme Court overlooked is the fact that the Holford decision also repudiated this extreme view:

> [T]he driver who leaves the scene of the accident seldom possesses actual knowledge of injury; by leaving the scene he forecloses any opportunity to acquire such actual knowledge. Hence a requirement of actual knowledge of injury would realistically render the statute useless. We therefore believe that criminal liability attaches to a driver who knowingly leaves the scene of an accident if he actually knew of the injury or if he knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person.

Holford, 63 Cal.2d at 80 (1965) (footnote omitted). Had the Illinois Supreme Court been made aware that the Holford decision's constructive knowledge alternative specifically addressed its concern about the unrealistic burden an actual knowledge requirement would impose, the Court probably would have adopted the Holford rule, and would not have taken the wrong turn that it did in Nunn (from which its subsequent case law has not recovered).

State v. Vela 673 P.2d 185 (Wash. 1983) is not persuasive because that decision's two rationales, reiterated by Petitioner, don't hold any water. First, the Court in Vela contended that if it were to adopt the Holford rule the following absurd reading of its statute would result:

> [A] person who leaves the scene of an accident with knowledge of property damage but without knowledge that the accident resulted in injuries or death of some person would not be guilty of either a misdemeanor or felony. He would not have committed a felony because he did not know that any person had been injured or killed. Nor would he be subject to a misdemeanor because that charge applies only in "an accident resulting *only* in damage to a vehicle...or damage to other property". (Italics ours) RCW 46.52.020(2).

The Court went on to state that it "has consistently held that statutes should receive a sensible construction to affect the legislative intent and, if possible, to avoid unjust and absurd consequences." Vela, 673 So. 2d at 188 (citations omitted). The Vela court's reading of the statute is indeed absurd; in fact, it's ridiculous, and this reading of the statute should be avoided if and when a defendant ever trys to defend against a charge of leaving the scene of a property damage accident on the ground that

he actually left the scene of a property and injury accident.[11] See Johnson v. Presbyterian Homes of Synod of Florida, Inc., 239 So. 2d 256, 263 (Fla. 1970) (no literal interpretation of the language of a statute should be given which leads to an unreasonable or ridiculous conclusion); Conascenta v. Giordano, 143 So. 2d 682, 684 (Fla. 3d DCA 1962) (where literal interpretation of statute leads to an unreasonable conclusion or purpose not designated by the legislature, it is the court's duty to interpret the statute in accordance with the clear purpose and intent of the legislature). Indeed, the Vela Court's statement that a driver who does not stop "will likely not have knowledge whether anyone was injured or killed *and is thereby guilty of at most a misdemeanor*" reveals that the court itself didn't take this rationale seriously. Vela, 673 P.2d at 188-189 (emphasis added).

Vela's other rationale--that the Holford rule encourages a driver to remain ignorant of the actual consequences of the accident and would destroy the purpose of the statute--ignores the Holford rule's constructive knowledge alternative which wisely addresses this consideration: whether the defendant actually knew of the injury or death is irrelevant if he reasonably should have anticipated injury or death from the nature of the accident. As Justice Utter (joined by Justice Pearson) stated in his specially concurring opinion in Vela:

> The rule in People v. Holford, 63 Cal.2d 74, 403 P.2d 423, 45 Cal.Rptr. 167 (1965), is

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[11] Vela's reading of the statute is akin to allowing an accused to defend against the charge of grand theft in the second degree (stealing property valued at more than $20,000, but less than $100,000) on the ground that what he stole was actually worth more than $100,000!

> the proper rule. It does not, as the majority implies, absolve a defendant who leaves the scene of an accident without knowledge of possible injury or death. The rule imposes criminal liability if a defendant should know "that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person." Holford, at 80, 45 Cal.Rptr. 167, 403 P.2d 423.
>
> To impose felony liability on a defendant should require at least knowledge that a reasonable person would anticipate the collision caused injury to a person. The more serious penalty imposed by the 1980 amendment should only be given if the defendant's mental state makes him/her more culpable. This conclusion is supported by all the courts which have considered statutes similar to RCW 46.52.020. See, e.g., State v. Minkel, 89 S.D. 144, 230 N.W.2d 233 (1975); Kimoktoak v. State, 584 P.2d 25 (Alaska 1978); State v. Corpuz, 49 Or.App. 811, 621 P.2d 604 (1980); State v. Porras, 125 Ariz. 490, 610 P.2d 1051 (Ct.App. 1980); State v. Miller, 308 N.W.2d (Iowa 1981); State v. Fearing, 304 N.C. 471, 284 S.E.2d 487 (1981).

Vela, 673 P.2d at 189 (Utter, J., specially concurring).

Vela's contention that a knowledge requirement "would practically destroy the purpose of the statute" is also rebutted by the fact (which Petitioner points out in its brief) that a number of state statutes explicitly require knowledge.[12] Obviously the legislatures in those states didn't think the purpose of their statutes would be destroyed if they explicitly included knowledge of injury or death as an element of the offense. The dire consequences of the Holford rule predicted by Vela--destruction of the statute--have certainly not come to pass or these legislatures would have amended their statutes to eliminate the knowledge of injury or death element. Likewise, if Vela were correct, one would

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[12] These states include Georgia (GA ST § 40-6-270), Michigan (M.C.L.A. § 257.617), New Mexico (NMSA § 66-7-201), New York (NY Veh & Traff Code § 600), and Rhode Island (RI ST § 31-26-1).

expect a wholesale reaction against the Holford rule by the legislatures in those states which have adopted the rule by appellate decision. However, a review of the state statutes in those states with appellate decisions adopting the Holford rule reveals that no state legislature has decided to reject the Holford rule interpretation of its statute.[13] Thus, it is not only safe to assume that the Holford rule has not destroyed the purpose of the statute but also that the rule correctly reflects legislative intent.[14] See White v. Johnson, 59 So. 2d 532, 533 (Fla. 1959) (failure of the legislature to amend a statute that has been construed by the judiciary in a particular manner may amount to a

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[13] See the statutes in the following states: Vermont (23 V.S.A s. 1128), South Dakota (SDCL 32-34-3), Iowa (s. 321.261), West Virginia (s. 17c-4-1), Arizona (A.R.S. s. 28-661), Alaska (AS s. 28.35.060), California (Vehicle Code s. 20001), Indiana (IC 9-26-1-1), Oregon (ORS 811.705), Maryland (MDTRANS s. 20-102), Nebraska (NE ST s. 60-697), Alabama (AL ST s. 32-10-1), and Idaho (I.C. s 49-1305). As explained in note 14, the North Carolina General Assembly decided to explicitly adopt the Holford rule.

[14] In this regard, it is interesting to note Justice Carlton's concurring opinion in State v. Fearing, 284 S.E.2d 487 (N.C. 1981), wherein he states: "I am in the majority solely because of our prior decisions. I wish to join Justice Huskins in urging the General Assembly *to revise G.S. 20-166 to clarify its meaning and intent*." Fearing, 284 S.E.2d at 495 (emphasis added). In 1983, the North Carolina General Assembly did as Justice Carlton suggested. The General Assembly clarified its intent and made its agreement with Fearing explicit by statutorily codifying the Holford rule! North Carolina's statute, G.S. 20-166(a), now reads:

> The driver of any vehicle who knows or reasonably should know: (1) That the vehicle which he is operating is involved in an accident or collision; and (2) That the accident or collision has resulted in injury or death to any person; shall immediately stop his vehicle at the scene of the accident or collision.

The language of this statute is taken almost verbatim from the holding in Fearing, 284 S.E.2d at 491.

legislative acceptance or approval of the construction).

C. The Fourth District correctly held that the presence of the word "willfully" in § 316.027, Fla. Stat. (1991), distinguishes Florida's statute from Washington's statute.

State v. Vela is also not persuasive authority because, as the Fourth District noted, Washington's statute omits the word "willfully," which is found in Florida's statute. "Willful" is defined as "proceeding from a concious motion of the will; voluntary; *knowingly*; deliberate." *Black's Law Dictionary* 1599 (6th ed. 1991) (emphasis added). Florida case law defines "willfully" as "intentionally, *knowingly*, and purposely." Patterson v. State, 512 So. 2d 1109, 1110 (Fla. 1st DCA 1987) (emphasis added). Petitioner argues that the term "willfully" refers only to the failure to stop at the accident scene and that it does not refer to willfully (i.e., intentionally, *knowingly*, and purposely) leaving the scene of an *injury or death accident*. PB at p. 15. In this regard, the following entry under "willful" in *Black's Law Dictionary* is especially illuminating:

> Under the Model Penal Code, a requirement that an offense be committed "willfully" is satisfied if a person acts *knowingly* with respect to the *material elements* of the offense, unless a purpose to impose further requirements appears. M.P.C. § 2.02(8).

Black's Law Dictionary 1600 (6th ed. 1991) (emphasis added). Florida courts have often been guided by the Model Penal Code and the wisdom of its authors (e.g., Judge Learned Hand).[15] The Fourth

[15] See e.g. Cruz v. State, 465 So. 2d 516, 522 (Fla. 1985); Burgess v. State, 313 So. 2d 479, 482 (Fla. 2d DCA 1975); Hill v. State, 358 So. 2d 190, 211 n.9 (Fla. 1st DCA 1978); Velazquez v. State, 561 So. 2d 347, 350 (Fla. 3d DCA 1990); G.C. v. State, 560 So. 2d 186, 191 (Fla. 3d DCA 1990), approved, State v. G.C., 572 So. 2d 1380 (Fla. 1991); Bright v. State, 555 So. 2d 1284, 1285

District's intrepretation of § 316.027 is obviously in harmony with Model Penal Code § 2.02(8). Furthermore, the correctness of the Fourth District's interpretation becomes even more apparent when one considers the rule of statutory construction which overlays this entire discussion--the rule of lenity:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; *when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.* [Emphasis added.]

§ 775.021(1), Fla. Stat. (1991).

Petitioner also argues that "willfully" does not extend to knowledge of injury or death due to the "last antecedent rule" of statutory construction. PB at 16-17. This argument, which hinges on the location of the word "willfully," ignores the structure of the statute. Section 316.027(1) sets out the directive or duty: the driver involved in an injury or death accident shall stop and remain at the scene and do certain things. Section 316.027(2) provides the criminal penalty for the driver who *willfully* (i.e., intentionally, *knowingly*, and purposely) fails to comply with subsection 1 (stopping and remaining at the scene of an injury or death accident).[16] The fallacy of Petitioner's argument (and the correctness of this Fourth District's interpretation of the statute) is demonstrated by the 1993 changes to the statute. Section 316.027, Fla. Stat. (1993), provides:

(Fla. 3d DCA 1990); Dixon v. State, 603 So. 2d 570, 571 (Fla. 5th DCA 1992); Ray v. State, 522 So. 2d 963, 967 (Fla. 3d DCA 1988); Coley v. State, 616 So. 2d 1017, 1022 (Fla. 3d DCA 1993).

[16] In short, because of the way the statute is structured, the word "willfully" could not have been placed in subsection 1.

> (1)(a) The driver of any vehicle involved in an accident resulting in *injury* of any person must immediately stop the vehicle at the scene of the accident, or as close thereto as possible, and must remain at the scene of the accident until he has fulfilled the requirements of § 316.062. Any person who *willfully violates this paragraph* is guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.
>
> (b) The driver of any vehicle involved in an accident resulting in the *death* of any person must immediately stop the vehicle at the scene of the accident, or as close thereto as possible, and must remain at the scene of the accident until he has fulfilled the requirements of § 316.062. Any person who *willfully violates this paragraph* is guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.[Emphasis added.]

As can be seen, the "willfully violates this paragraph" language in the 1993 statute makes it even clearer that "willfully" (i.e., intentionally, *knowingly*, and purposely) extends to knowledge of injury or death. Furthermore, the 1993 statute can be used to determine the meaning and intent of the previous statute. See Brown v. MRS MFG. CO., 617 So. 2d 758, 761 (Fla. 4th DCA 1993) (courts may consider subsequent legislation to determine the intended result of a previously enacted statute).

D. Even if § 316.027, Fla. Stat. (1991), did not contain the word "willfully," this would not tip Florida into the minority view.

In Florida, omitting the word "knowledge" from a criminal statute is not conclusive on the issue of whether knowledge is required. See Frank v. State, 199 So. 2d 117 (Fla. 1st DCA 1967) (although drug possession statute is silent as to knowledge requirement, it is implied element of the crime); State v. Scarborough, 170 So. 2d 458 (Fla. 2d DCA 1965) (although passing

forged prescription statute is silent as to knowledge requirement, it is implied element of crime); Cohen v. State, 125 So. 2d 560 (Fla. 1960) (statute prohibiting sale of obscene books and magazines impliedly includes element of knowledge of the obsence character of the goods).

As even Petitioner concedes, omission of words such as "knowledge and "intent" in criminal statutes do not negate this element.[17] In fact, the United States Supreme Court very recently considered this issue. In Staples v. United States, 62 U.S.L.W 4379 (U.S. May 23, 1994), the defendant was charged with violating the National Firearms Act which makes it a felony to possess a machine gun that is not registered with the Federal Government. The defendant sought to defend against the charge on the ground that

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[17] Petitioner devotes the first five pages of its argument to the following proposition: the word "knowledge" is omitted from § 316.061 (leaving the scene of a property damage accident) but knowledge of the accident is properly implied to be an element of that crime; therefore, knowledge of the accident is also an implied element of § 316.027; therefore, because knowledge of the accident is already an implied element of § 316.027, the presence of the word "willfully" in § 316.027 doesn't imply knowledge of injury or death.

Respondent thinks that the exact opposite result should be reached: the word "knowledge" is omitted from § 316.061, but knowledge of the accident is, as Petitioner concedes, an implied element of that crime; therefore, knowledge of the accident is also an implied element of 316.027; therefore, the presence of the word "willfully" in 316.027 must mean that *something* more than knowledge of the accident is required--and that something is knowledge of that material element which is the *sine qua non* of the offense: injury or death accident. See Vocelle v. Knight Bros. Paper Co., 118 So. 2d 664, 667 (Fla. 1st DCA 1960) (a statute should be so construed as to give meaning to every word and phrase in it). Indeed, Petitioner seems to concede this point when it states: "Here, intent was specifically made part of section 316.027, and not section 316.061, so that the former statute requires something more than just knowledge of the accident." PB at 14-15.

he did not know that his AR-15[18] had been converted to fire automatically (thus making the weapon a "machine gun" within the meaning of the statute and triggering the registration requirement). The defendant's proposed jury instruction, that the Government must prove beyond a reasonable doubt that he knew the gun would fire automatically, was denied; instead, the jury was charged as follows:

> The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation.[19]

Staples, 62 U.S.L.W. at 4380. The United States Supreme Court reversed, notwithstanding the fact that the statute (unlike § 316.027) is silent concerning the *mens rea* required for a violation. "[S]ilence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal." Staples, 62 U.S.L.W. at 4380. The Court stated that "...some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." Id. The Court rejected the Government's

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[18] The AR-15 is the civilian version of the military's M-16 rifle. Staples, 62 U.S.L.W. at 4380.

[19] This instruction bears a striking resemblance to Holford's constructive knowledge of injury or death alternative. Given the holding in Staples (finding that the Government must prove the defendant's actual knowledge of the nature of the weapon despite the statute's omission of any *mens rea* requirement) and the presence of the word "willfully" in § 316.027, undersigned counsel wonders whether he was too generous in conceding that § 316.027 does not require the prosecution to prove the driver's actual knowledge of injury or death.

argument that this presumption favoring *mens rea* did not apply because this was a "public welfare" or "regulatory" offense for which strict liability is imposed. Staples, 62 U.S.L.W. at 4381-4384. Most pertinent to the instant case, the Court rejected the Government's interpretation of the statute because of the penalties involved.[20] The Court noted that the punishments for public welfare offenses are "'relatively small, and conviction does no grave damage to an offender's reputation.'" Staples, 62 U.S.L.W. at 4384, quoting Morisette v. United States, 342 U.S. 246, 260, 72 S.Ct. 240, 96 L.Ed. 288 (1952). The Court then stated:

> Our characterization of the public welfare offense in Morisette hardly seems apt, however, for a crime that is a felony, as is violation of § 5861(d). After all, "felony" is, as we noted in distinguishing certain common law crimes from public welfare offenses, "'as bad a word as you can give to man or thing.'" Morisette, supra, at 260 (quoting 2 F. Pollock & F. Maitland, History of English Law 465 (2 ed. 1899).

Staples, 62 U.S.L.W. at 4384. The instant case gives this passage a special poignancy. At sentencing the prosecutor recommended that the trial court withhold adjudication of guilt (Respondent had no prior record) (T 480, 529). Notwithstanding the prosecutor's recommendation, the trial court adjudicated Respondent guilty of the felony, thus branding him with that word which is "as bad a word as you can give to man or thing." (T 539).

Finally, in reaching the conclusion that the statute required the Government to prove the defendant's actual knowledge of the characteristics of the weapon that made it subject to registration, the United States Supreme Court stated that it was doing so without

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[20] See, note 10, supra at p. 21.

resorting to the rule of lenity. Staples, 62 U.S.L.W. at 4385 n. 17. The Court stated that its rule of lenity is reserved for ambiguous statutes and that given the "background rule of the common law favoring *mens rea* and the substantial body of precedent...developed construing statutes that do not specify a mental element" the statute under review was not sufficiently ambiguous and thus it was unnecessary to resort to the rule of lenity. Id.

E. Petitioner's other cited cases do not support its position.

Petitioner claims that the decisions it cites from Texas, New Jersey, and Kansas, support its position. PB. at 22-23. This simply is not true. In Goss v. State, 582 S.W.2d 782 (Tex. Crim. App. 1979), and Brown v. State, 600 S.W.2d 834 (Tex. Crim. App. 1980), the issue was whether indictments alleging the offense of leaving the scene of an accident are defective for failing to include the element of knowledge of the accident (they are). However, the court in those two cases did not reach or even discuss the issue involved here. In Williams v. State, 600 S.W. 2d 832 (Tex. Crim. App. 1980), the court held that an indictment was not defective because it included language that the defendant "*intentionally and knowingly did then and there fail to stop...it being apparent that such treatment was necessary by reason of said injuries received.*" Id. at 833 (emphasis in original). Again, the court didn't reach or discuss the issue in this case. If anything, Williams could be read to mean that actual or constructive knowledge of injury is an element of the offense which must be alleged and proved.

State v. Feintuch, 375 A.2d 1223 (N.J. Super. A.D. 1977), and State v. Walten, 575 A.2d 529 (N.J. Super. A.D. 1990), do not support Petitioner's argument. In Feintuch, the court was construing the statute on leaving the scene of a property damage accident. In Walten, the court was considering the constitutionality and applicability of a statute which presumed a driver's knowledge of the accident if there is injury or if property damage exceeds $250. Neither of these decisions reach or discuss the issue in this case.

Next, Petitioner's quote from State v. Wall, 482 P.2d 41 (Kan. 1971), is taken out of context. PB at 23-24. The following language from Wall, suggestive of the Holford rule, can be found immediately prior to Petitioner's quote:

> We do not imply an accused must have positive knowledge of the nature or extent of injury resulting from the collision nor do we infer that a showing of knowledge of injury accident may not be made by circumstantial evidence. Direct evidence of absolute, positive, subjective knowledge may not always be obtainable.

Wall, 482 P.2d at 45. Lastly, the decisions in City of Overland Park v. Estell, 653 P.2d 819 (Kan. App. 1982), and City of Wichita v. Hull, 724 P.2d 699 (Kan. App. 1986), have nothing to do with the issue in the instant case. In Estell, the defendant remained at the scene of the accident but refused to produce ID, and was charged with leaving the scene of an accident for not complying with that requirement of the statute. The court held that a "criminal intent" instruction as to that element (failing to produce ID) was properly refused. Hull holds that Kansas' DUI statute is a strict liability offense.

F. The Fourth District correctly reversed Petitioner's conviction and remanded for new trial.

Based on the foregoing analysis, the Fourth District's intrepretation of § 316.027, Fla. Stat. (1991), is correct, and the Court correctly reversed Respondent's conviction. The trial court's rulings[21] and its jury instruction deprived Respondent of his only defense by eliminating from the jury's consideration the only contested element of the crime.[22] The trial court's rulings and instruction allowed the prosecutor to argue in closing as follows:

> Now, the law in the State of Florida is basically, number one, that Dennis Mancuso was the driver of this vehicle. We all know that. And number two, that Dennis Mancuso knew or should have known that he was involved in an accident.
>
> There is no dispute at all, even from the defendant,

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[21] The trial court ruled pretrial that it would not be instructing the jury that Respondent's knowledge of the *type* of accident he had been in (i.e., one involving death or personal injury) is an element of the offense (T 4-5). At the charge conference, defense counsel objected to the trial court's instruction defining the elements of the offense because it lacked a knowledge requirement, and he submitted a proposed instruction with an actual knowledge requirment (T 411-412; R 20). Defense counsel's objection was overruled and his proposed instruction was denied (T 411-412). After the guilty verdict was received, defense counsel filed a timely motion for new trial asserting as error the trial court's instruction defining the elements of the offense (R 35-38). The motion was denied (T 502).

[22] The Arizona Court of Appeals held that failing to instruct the jury "on the crucial element of knowledge of personal injury or knowledge from which one would reasonably anticipate personal injury to another" was fundamental error because:

> The extent of appellant's knowledge of a personal injury or of facts which would lead one to reasonably anticipate that personal injury had resulted from the collision was the chief issue of the case relating to the charge of leaving the scene of the accident.

State v. Blevins, 128 Ariz. 64, 623 P.2d 853, 857 (1981). Florida has the same fundamental error rule. See State v. Delva, 575 So. 2d 643 (Fla. 1991).

> that he was involved in some sort of accident. He even admits that. He disputes or he says, I don't know what it was, what caused the accident.
>
> *The State doesn't have to prove to you that he knew that he hit people, or that people were behind, because the duty to respond to what he has left behind is upon him, upon his knowledge of the accident.*
>
> That is where the mental state comes in. The knowledge. We don't have to prove that he had evil intent or bad intent when he committed the crime *but merely that he had knowledge of the event of the accident.*
>
> * * *
>
> *But it's irrelevant whether you know what you hit, just as long as you know you have been involved in an accident.* That is the only relevant part. Once the defendant is involved in an accident, and knows or should have known he has been in an accident, the duty [to remain] arises.

(T 441-442, 454). The Fourth District correctly held that this is not the "law in the State of Florida."

The certified question should be answered in the affirmative, and the decision under review should be affirmed.

POINT II

THE TRIAL COURT ERRED IN DECLINING TO EXCUSE MS. JONES FOR CAUSE

During voir dire, defense counsel asked the panel whether the fact that someone had died as a result of this accident would affect their ability to be a fair and impartial juror (T 98). Prospective juror Elena Jones said that fact would affect her ability to be fair and impartial (T 99). Ms. Jones explained that in the last three years her mother, husband, and son had died (T 99). Ms. Jones stated that although their deaths were not accident related, her son had "died suddenly," and the fact that she had been to three funerals in three years has had a dramatic effect on her (T 99). Ms. Jones said she was still in mourning (T 99). Defense counsel's questioning continued as follows:

> MR. SELDIN: Do you feel that to hear evidence or just to know that someone had died a result of an accident, there are other people who might be morning [sic] the loss of a loved one, that might -- you might sympathize with that person?
>
> MS. JONES: Yes, I think so.
>
> MR. SELDIN: To the detriment of Mr. Mancuso?
>
> MS. JONES: I think so.
>
> MR. SELDIN: ... Are you certain that you cannot be impartial because of the loss of your loved ones so very recently?
>
> MS. JONES: I think I might be partial because of my feelings of losing, you know, these young men prematurely, yes.
>
> MR. SELDIN: Are you certain that you would be partial against Mr. Mancuso because of it?
>
> MS. JONES: Well, right at this moment I don't -- I don't know. I'm not sure 'cause I am still dealing with the three deaths in my family.
>
> MR. SELDIN: If the Judge were to instruct you that

> sympathy plays no part in a juror's deliberation, that any feelings of sympathy for or against Mr. Mancuso, or for against the State, or for or against anybody else involved in an incident, as a witness or as a participant, one way or the other, that any sympathies for any of the parties or people, there is no place in your deliberations as a juror. Could you follow that instruction and put of your mind and not even consider it as part of the whole, if you are selected as a juror once your deliberations --
>
> MS. JONES: Yes, the Judge's decision would overrule my sympathy.

(T 99-101).

Defense counsel challenged Ms. Jones for cause on the basis of these responses[23] (T 118). The trial court denied the cause challenge on the basis of Ms. Jones last answer (T 118). Defense counsel was then forced to use a peremptory challenge to strike her (T 119). Thereafter, defense counsel exhausted his peremptory challenges and requested an additional challenge in order to strike seated juror Cindy Lambke[24] (T 120). The trial court denied the request (T 120).

It is well-settled that if there is any reasonable doubt as to a juror's possessing that state of mind which will enable her

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[23] Perhaps it should also be noted that Ms. Jones worked for the Department of Motor Vehicles as a driver's license examiner (T 25); she had been in two automobile accidents, neither one of which was she at fault, both of which resulted in her receiving whiplash type injuries, and one of which resulted in her filing a lawsuit (T 70-71); and her religious scruples forbad her from consuming alcohol or entering establishments which serve it (T 109). Finally, Ms. Jones, rather inexplicably, got up and walked out of the courtroom when defense counsel began his voir dire examination (the trial judge had a venireperson track her down) (T 76). As defense counsel stated: "That's the oddest thing I've ever seen" (T 76).

[24] Thus, this issue is preserved for appellate review. See, Trotter v. State, 576 So. 2d 691 (Fla. 1990); Dillbeck v. State, 19 Fla. L. Weekly S230 (Fla. Apr. 21, 1994); Zippo v. State, 611 So. 2d 35 (Fla. 4th DCA 1992); Diaz v. State, 608 So. 2d 888, 890 (Fla. 3d DCA 1992).

to render an impartial verdict based solely on the evidence submitted and the law announced at trial, then she should be excused. Singer v. State, 109 So. 2d 7, 22-23 (Fla. 1959); Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989). Close cases involving a challenge to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality. Chapman v, State, 593 So. 2d 605, 606 (Fla. 4th DCA 1992).

In the instant case, Ms. Jones stated that the fact that there was a death involved in this accident would affect her ability to be a fair and impartial juror (T 99). Ms. Jones had, in the last three years, lost her mother, her husband, and her son, who, she said, had "died suddenly" (T 99; emphasis added). Ms. Jones said she was still in mourning (T 99). Naturally, these three deaths had had, as she stated, a "dramatic effect" upon her (T 99). When asked whether she would sympathize with those people who are mourning the death that occurred in this accident, Ms. Jones stated: "Yes, I think so" (T 99). When asked whether this sympathy would be to the detriment of Respondent, Ms. Jones answered: "I think so" (T 99). When asked, "Are you certain that you cannot be impartial because of the loss of your loved ones so very recently?", Ms. Jones answered: "I think I might be partial because of my feelings of losing, you know, these young men prematurely, yes" (T 100; emphasis added). Clearly, these answers raise a reasonable doubt about Ms. Jones ability to be a fair and impartial juror. See Williams v. State, Case No. 92-3418 (Fla. 4th DCA June 8, 1994) (reasonable doubt created by juror's statement that he had "deep feelings in this kind of case"); White v. State, 579 So. 2d

784 (Fla. 3d DCA 1991) (statements of prospective juror that she might not be impartial since she had two children, taught Sunday school, and loved children raised reasonable doubt whether she could be fair and impartial in sale of cocaine within 1000 feet of school prosecution); Blye v. State, 566 So. 2d 877 (Fla. 3d DCA 1990) (states concedes that trial court erred in denying cause challenge of juror who stated that he was afraid he couldn't stay objective because his friends had recently been robbed, but that he would try nonetheless); Robinson v. State, 506 So. 2d 1070 (Fla. 5th DCA 1987) (trial court erred in denying cause challenge of jurors in sexual battery case who expressed doubt about their ability to be fair and impartial because of their thoughts and feelings about their own children and children in general); Montozzi v. State, 633 So. 2d 563 (Fla. 4th DCA 1994).

Although Ms. Jones also stated, "the Judge's decision would overrule my sympathy," this answer is not determinative and does not dispel the reasonable doubt created by her other answers. As this Court stated in Singer, supra:

> [A] juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence if it appears from other statements made by him or from other evidence that he is not possessed of that state of mind which would enable him to do so.

Singer, 109 So. 2d at 24. See also Hamilton, supra at 632 (trial court erred in denying cause challenge of juror despite fact that juror eventually stated that she could base verdict on evidence at trial and law as instructed by the trial court).

In Street v. State, 592 So. 2d 369 (Fla. 4th DCA 1992), rev. denied, 599 So. 2d 658 (Fla. 1992), the Fourth District held that

the trial judge erred in denying a cause challenge notwithstanding the fact that the prospective juror, when asked whether he would be able to follow the judge's instructions on the law and apply them to the facts presented in court, responded, "I am sure that I could." See also Denson v. State, 609 So. 2d 627 (Fla. 4th DCA 1992) (juror's assurance that she can be fair juror not determinative; trial court must look at all the evidence before it); Kemp v. State, 611 So. 2d 13 (Fla. 3d DCA 1992) (trial court erred in denying cause challenge of juror notwithstanding fact that she stated that she would follow the law as instructed by court); Williams, supra (despite juror's statement that "I'll be impartial because that's my character," trial court erred in denying cause challenge).

Because Ms. Jones's answers raised a reasonable doubt about her ability to render an impartial verdict based solely on the evidence and law announced at trial, the trial court reversibly erred in denying Respondent's cause challenge of her. A new trial is required.

POINT III

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT THE GIRLS' BLOOD ALCOHOL LEVEL WAS IN EXCESS OF .10 AND POSITIVE FOR THE PRESENCE OF MARIJUANA

The prosecutor moved in limine to exclude evidence that blood samples taken from the two girls after the accident revealed that each had a blood alcohol level in excess of .10 percent[25] and each was positive for the presence of marijuana (T 131). The prosecutor stated:

> Judge, after the accident, each of the two girls actually had blood drawn from them, each of the girls reached a level in excess of .10. They also had marijuana in their system. They had been apparently down here at the place, I think, Respectables, or one of the places down here after hours. They are fifteen years old, they live in Port Saint Lucie.
>
> Now, in an automobile negligence case, I can understand where, obviously, fault, causation is important. That, obviously, is relevant. But its prejudicial effect would be outweighed by the probative value. But in our case, it is not who caused the accident or did the accident, but rather, did the defendant breach a statutory duty that becomes so prejudicial that it actually outweighs, by any stretch of the imagination, any probative value towards the charge that is before the jury today.

(T 131-132).

Defense counsel countered that the issue in the case was whether Respondent knew he had been in an accident involving death or personal injury, and that Respondent's defense was that he never saw the girls (T 132-133). Defense counsel argued that the girls' alcohol and drug use was relevant to these issues because it explained the irrationality of the girls' presence in the middle of Interstate 95 in the wee hours of the morning (T 133-134).

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[25] Florida law presumes that a person's normal faculties are impaired when his or her blood alcohol level is over .08 percent. § 316.1934(2)(c), Fla. Stat. (1993).

The trial court excluded the evidence (T 134). This was error.

Evidence is relevant if it tends to prove a material fact. § 90.401, Fla. Stat. (1991). Respondent's defense at trial was that he did not see two girls in the middle of I-95 and, thus, did not know that he had been in an accident involving personal injury or death.[26] Respondent testified that given the place (center lane of I-95) and time (4:30 a.m.), it never occurred to him then[27] that he hit a person (T 366). The girls' blood alcohol level and marijuana was directly relevant to this bewildering circumstance. Without the knowledge of the girls' alcohol and marijuana use the jury was left to speculate about what the girls were doing in the middle of I-95, and their speculation would naturally begin (and probably end) with rational explanations. For example, the jury might have thought that the girls were trying to wave cars down (like Frank Rivera did later), which would have increased the girls' visibility to Respondent. Without knowing that the girls were under the influence of alcohol and drugs, it would never occur to the jury that the girls might be walking or stumbling or even falling down in the middle of I-95 at 4:30 a.m. Because the girl's alcohol and drug use explained their irrational presence in the middle of Interstate 95, the evidence was relevant, and the trial court erred in excluding it. See Warren v. State, 577 So. 2d 682 (Fla. 1st DCA 1991) (evidence that murder victim's blood contained

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[26] Rather, Respondent intended this to be his defense. See Point I.

[27] Respondent testified that the thought did cross his mind the next morning when he was calmer and more alert (T 407).

cocaine metabolites was relevant to the defendant's self-defense theory that victim appeared to be in the throes of violent cocaine withdrawal).

A new trial is required.

CONCLUSION

Based on the foregoing Argument and the authorities cited therein, Respondent respectfully requests this Honorable Court to answer the certified question in the affirmative and affirm the decision under review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Melynda Melear, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, Florida 33401 by courier this 10th day of June, 1994.

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