IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner
Cross-Respondent,

V.

TODD E. DUMAS,

Respondent,
Cross-Petitioner,

Case No. 89,769

* * *

RESPONDENT, CROSS-PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

On August 4, 1994, the relevant date of the charges alleged in this case, the appellant Todd Eric Dumas was 21 years old. (R-5-743) Dumas had just graduated from the University of Miami, and was living at home with his mother and working as a waiter in an Orlando area Olive Garden restaurant while waiting to begin graduate studies in the doctorate program in Pharmacy at Mercer University's School of Pharmacy in Atlanta, Georgia. (R-7-1326) Dumas had never been arrested or convicted of any crime, and had never had any trouble with the law. (R-7-1308, 1327) He was a good student, respected by his teachers and peers, a good son, loved and admired by his mother, family, and friends, and a model citizen who followed the rules, respected the law, and dreamed of making a positive difference in his community as he pursued his education and professional career. (Id.) At just past midnight, on August 4, 1994, along a pitch black and isolated stretch of Interstate 4, Dumas was involved in what even the State's own traffic homicide investigator admitted during the trial was a tragic accident. (Tr-5-608)

Dumas accidently struck a pedestrian named James Vaughn, Jr. Vaughn was intoxicated and, according to the evidence at trial, had a blood alcohol level of .18 at the time he collided with Dumas' car. (Tr-3-380, 381, 386, 390) He was walking the wrong way along a totally unlit portion of I-4 (Tr-1-89, 90; Tr-4-543; Tr-5-674, 680, 684), and was nervous and anxious as he walked along the side of I-4, trying to find out where he was, and talking on his cellular phone to

operators at the American Automobile Association (AAA) so he could expedite the arrival of a tow truck to pull his late model Corvette out of a ditch full of water he had just run his car into. (Tr-3-407, 408; Tr-3-415) In the Corvette was a would-be paramour Vaughn, a married man, had "picked-up" at a local bar earlier in the evening. (Tr-4-450: Tr-5-875) Vaughn had good reason to be agitated, anxious, and disoriented as he walked, drunk, up the side of I-4 in the dark talking on his cellular phone.

Despite the paucity of any real evidence, and Vaughn's condition and own actions notwithstanding, Dumas was charged in a three count amended information with DUI Manslaughter (Fla. Stat. 316.193-count one), Leaving The Scene Of An Accident Resulting In Death (Fla. Stat. 316.027(1)(b)-count two) and Vehicular Homicide (Fla. Stat. 782.071-count three). **(R-5-754** to **756)** Dumas was convicted of vehicular homicide and leaving the scene of an accident resulting in death, He was acquitted of the DUI manslaughter charge. (R-7-1264 to 1266; Tr-7-966) Dumas was sentenced to five years in prison, to be followed by five years on probation. **(R-2-277** to **284;** R-7-1352 to 1356)

On direct appeal, the court of appeals rejected various challenges to Dumas' convictions, finding that there was sufficient evidence, and ignoring several legal challenges to the manner in which the trial was conducted and the sentence imposed. However, the court of appeals did reverse Dumas' conviction for leaving the scene of an accident with death, finding that the jury had been improperly instructed on the knowledge element of this offense. Dumas *v.* State,

21 Fla. L. Wkly D2455, D2456 (Fla. 5th DCA Nov. 16, 1996). In so doing, the court of appeals allowed Dumas' conviction on a lesser charge of leaving the scene of an accident resulting in bodily injury to stand, and remanded the case to the trial court to give the State the option of accepting the conviction on the lesser charge, or taking Dumas to trial on the more serious charge again. Id. Finding that this issue was one of first impression, the court of appeals also certified this issue as one of great public importance. Id. The specific question certified was as follows:

> UNDER THIS COURT'S RULING IN STATE V. ***MANCUSO,*** 652 SO.2d 370 (FLA. 1995), REQUIRING THAT THE JURY BE CHARGED REGARDING THE KNOWLEDGE REQUIRED PRIOR TO CONVICTING A DEFENDANT OF LEAVING THE SCENE OF AN ACCIDENT WITH INJURY OR DEATH, DID THE 1993 AMENDMENTS TO FLORIDA STATUTE 36.027, WHICH DIVIDED THE OFFENSE OF LEAVING THE SCENE OF AN ACCIDENT INTO TWO FELONIES, ONE A SECOND DEGREE FELONY IF A DEATH WAS INVOLVED, AND THE OTHER A THIRD DEGREE FELONY IF AN INJURY WAS INVOLVED, THEN REQUIRE THAT THE JURY BE CHARGED REGARDING THE ***MANCUSO*** KNOWLEDGE REQUIREMENT BASED ON THE ACTUAL OFFENSE CHARGED, TO WIT: DEATH IF SO CHARGED OR INJURY IF SO CHARGED?

Dumas v. State, 22 Fla. L. Wkly. D184 (Fla. 5th DCA January 3, 1997) (on rehearing).

This court has jurisdiction under Art. 5, § 3(b)(4), Fla. Const.

FACTS

A Body Is Found

According to the evidence at the trial, during the early morning rush hour of August 4, 1994, Nelson Turnbelt, a lawn maintenance worker on his way to

work, saw an object that looked like a dummy on the side of 1-4. (Tr-1-55 to 57) Although it was broad daylight, Turnbelt could not tell what the object was from the road, so he stopped his truck along the side of 1-4 and went to investigate. (Tr-1-59, 61) When he walked over to the object, which was some 38 feet from the road (Tr-4-484), he saw that it was a human body, and called for the police. (Tr-1-58) Turnbelt was present when the police first arrived (Tr-1-165 to 166), followed by the fire department, an ambulance and the Medical Examiner, and he watched as a small army of emergency personnel walked through the accident scene. (Tr-1-61 to 63)

The Investigation -- Be It As It Was

Orlando Police officers Cheri Saez and Ann Payne were the first to arrive, and after looking at the body, they called for assistance and began to try and protect the accident scene. (Tr-1-168) However, before they could cordon off the area, another police officer drove right through the accident scene. (Tr-4-469) According to the evidence at trial, there were other serious problems at the accident scene. Other than the location of the body and the location of certain skid marks the police guessed were involved in this accident based on the debris at the scene (Tr-4-478 to 479, 481), no measurements were taken of the location of the debris and other physical evidence at the scene. (Tr-2-270, 273 to 289; Tr-4-483, 490, 499 to 500, ,574, 576, 614) This, despite the fact that the State's lead investigator and reconstructionist, Detective Lydia Bass, testified that much of her opinion and her conclusions were based on the location of the debris and physical evidence at the scene. (Tr-4-477 to 478, 490 to 493) According to the

Orlando Police Crime Scene Technician sent to the accident scene, Jose Martinez (Tr-2-228 to 229), all he did was photograph the scene and different items of potential evidence before collecting it. (Tr-2-231 to 233) Martinez did not document what he was photographing, the location within the accident scene of what he was photographing, and he took absolutely no measurements at all. (Tr-2-234, 270 to 271) Also, Martinez testified that a key piece of evidence supposedly relied on by Bass in reaching her conclusions about the location of the accident, one of Vaughn's shoes (Tr-4-490), was moved and then returned to the "approximate" original area before anyone was able to photograph its actual location at the accident scene. **(R-2-278** to 279)

Bass admitted that because of the lack of accurate measurements from the accident scene, she was forced to rely on photographs taken at the accident scene in reaching her opinion and conclusions (Tr-4-577 to **579),** even though **she** conceded that "photographs do lie", and depending on factors such as angle, lighting, and distance, can distort the size of individual items of evidence and their location within the accident scene. **(Tr-4-581,** 582, 612) With no witnesses, no accurate measurements, poor evidence documentation at the accident scene, and a compromised accident scene, Bass was reduced to giving a "guesstimation" of something as critical as the defendant's speed at the time of the accident based on the crush damage to the vehicle (Tr-4-532), and testifying about "the general area of impact" as opposed to the "point of impact". (Tr-4-499 to 500)

Dr. Merle Reyes, an assistant Medical Examiner, also went to the accident scene and testified for the State. (Tr-3-345 to 371) Dr. Reyes testified about Vaughn's injuries (Tr-3-348 to 359), the fact that Vaughn was intoxicated at the time of the accident, with a blood alcohol level of .18 (T-3-381, 386, 390), and she conceded that blood with such a high content of alcohol in it will smell of alcohol when exposed to air. (Tr-3-390 to 391) Dr. Reyes also confirmed that Vaughn died almost instantly after impact. (Tr-3-382) Then, although Dr. Reyes admitted that she was not an accident reconstructionist, and had no real training in accident reconstruction (Tr-3-372 to 373), and that she had not done any real analysis of the physical evidence and debris at the accident scene, Dr. Reyes gratuitously opined that, like the police, she believed the accident occurred on the grass because of the fact that there was dirt and grass, as opposed to gravel and tar, in Vaughn's wounds. (Tr-3-361)

The evidence at trial did show that one thing the police had no trouble with was finding Dumas. Bass testified that based on items found at the accident scene, specifically chips of red paint and a metal "H" that looked like the hood ornament from a Honda automobile, the police put out a bulletin to other law enforcement agencies to look for a red Honda with possible front end damage. (Tr-4-473 to 474) They were contacted almost immediately by the Florida Highway Patrol and informed of the fact that Dumas had gone through the Florida Turnpike earlier that morning, and "they had his wallet." (Tr-4-474) They also had his identifying information, because Dumas had given it to Florida Turnpike

Toll supervisor Denise Smith after telling her and toll booth operator Anival Medina that he had jus been in an accident on I-4. (Tr-1-126 to 127,129; Tr-1-144 to 146, 153, 157)

Bass got Dumas' name and address from the Florida Highway Patrol (Tr-3-398 to 400), and Orlando Police motorcycle officers Carl Smith and Jeffery Hunter were sent to his house. (Tr-1-192; Tr-2-221 to 222) Smith testified that the officers arrived at Dumas' house at about 9:00 a.m. (Tr-2-217) Smith and Hunter testified that when they arrived at Dumas' house, they heard what sounded like someone moaning or crying as they approached the front door. (Tr-1-192; Tr-2-222 to 223, 225) They knocked on the door and Dumas answered. According to Smith and Hunter, Dumas had on boxer shorts and a T-shirt, his hair was ruffled, and he looked like he had just woken up. (Tr-2-211; Tr-2-225) They asked Dumas if he owned a red Honda, and he immediately told them yes, that it was messed up, was in his garage, and Dumas offered to show it to the police officers. (Tr-2-194 to 195, 213; Tr-2-223, 226) Both Smith and Hunter testified that Dumas cooperated fully with them (Tr-2-195, 211 to **212;** Tr-2-226), and he repeatedly asked the officers "what was going on?" (Tr-2-214)

The Events Leading Up To The Accident

After Dumas was arrested, the police were able to interview almost everyone who had been with him and with Vaughn the previous evening. According to the evidence at trial, Dumas and a co-worker from the Olive Garden named Deborah Anderson arrived at a bar called Phineas Phoggs at about 7:00

to 7:30 p.m. (Tr-4-437) Anderson had just moved to the Orlando area, and still did not have her car, so Dumas agreed to give her a ride.[1] (Tr-2-306; Tr-4-445) Dumas and Anderson met approximately ten other co-workers from the Olive Garden at Phineas Phoggs, and after drinking "nickel beer"[2] at Phineas Phoggs for about thirty minutes, the group walked to another bar called Chillers. (Tr-3-310 to 311, 316 to 317; Tr-4-440, 446 to 447, 448 to 449) No one kept track of how much anyone in the group was drinking, so, other than testifying that Dumas was at Phineas Phoggs and Chillers, and apparently drank at least one beer at Phineas Phoggs and some type of frozen drink at Chillers, no one knew how much Dumas drank. (Tr-2-312, 319, 322; Tr-4-447) However, when the group changed locations, witnesses testified that Dumas did not appear to be intoxicated at all. (Tr-2-320, 322; Tr-4-448)

At Chillers, Dumas and Anderson became separated, and Anderson met Vaughn. (Tr-4-450) Vaughn bought Anderson several drinks, and according to Anderson was trying to pick her up. (Tr-4-440 to 441, 450) Apparently he succeeded, and they left Chillers together in Vaughn's late model Corvette. (Tr-4-442 to 443, 450 to 451) As Vaughn drove along 1-4, he lost control of his Corvette, and drove the car into a ditch full of water. (Tr-4-442 to 444, 451 to

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[1]The evidence at trial was clear that Dumas and Anderson were not romantically involved. Anderson testified that at the time she was seeing another Olive Garden co-worker named Antonio Velez. (Tr-4-456)

[2]"Nickel Beer" was described as a watered down cheap beer, drunk from miniature souvenir beer mugs. (Tr-2-316 to 317; Tr-4-448; Def. Ex. 5)

452) Anderson saw Vaughn get out of the Corvette, stepping in the water in the ditch (Tr-4-452), and make several calls on his cellular phone, one of which was to AAA for a tow truck. (Id.) Anderson also saw Vaughn walk up the grass embankment by the ditch to the asphalt road along 1-4, and then walk east bound over a bridge that crossed a small creek next to the ditch and along the west bound lanes of 1-4. (Tr-4-453) She never saw him again. (Tr-4-442 to 444, 454) After waiting a while, Anderson hitched a ride home. She tried to call Vaughn to find out why he had left her in the Corvette and had not returned, but a woman answered the phone and told Anderson she was Vaughn's wife. (Tr-454 to 456)

The Accident

Apparently, within a few minutes after Anderson left Chillers with Vaughn, Dumas also left. He was seen driving his red Honda on 1-4 by Robert Apperson, who was driving to his parents hotel in south Orlando when he was passed by Dumas on 1-4 near the Kaley overpass. (Tr-1-71 to 73, **84)** According to Apperson, when Dumas passed him on 1-4, Dumas was traveling faster than Apperson, who estimated that he, Apperson, was traveling about the ***55*** to 60 miles per hour, Dumas had his head lights on, and he passed Apperson in a smooth controlled fashion, passing on the left and returning to the center lane after he passed Apperson. (Tr-1-73, ***85)*** Apperson testified that after Dumas passed him, he lost sight of the red Honda for several minutes. **(Tr-1-76, *85)*** As Apperson approached the Florida Turnpike exit on I-4, he testified that he saw

a car getting back on **1-4** from the emergency lane on the side of **I-4,** just on the edge of **1-4.** (Tr-1-77, 86) There was no lighting in the area, and there was very little traffic, so the road was very dark. (Tr-1-89, 90) The car Apperson saw in the distance getting back on **1-4** drove in a smooth normal manner, and Apperson did not see it jerking or tail spinning. (Tr-1-87) When he came up to the car, Apperson testified that he realized it was the same red Honda that had passed him earlier by the Kaley overpass. (Tr-1-76, ***85)*** The red Honda drove onto **1-4,** and was perpendicular to the flow of traffic when Apperson came up to it. (Tr-1-78 to 79, 88) Apperson testified that he saw the red Honda move from the left side of the west bound lanes on **1-4** to the far right lane, and as he passed the red Honda, he saw that the car had severe front end damage. (Tr-1-80, 91) Apperson identified Dumas as the driver of the red Honda. (Tr-1-82) Apperson went on to testify that he thought the red Honda had hit a guard rail, and looked around, but it was very dark, and he saw nothing suspicious. (Tr-1-89, 90, 91) He then saw the Red Honda get off **1-4** and go on to the Florida Turnpike off-ramp. (Tr-1-80, 91) The following day, when Apperson and his father saw a local news report about the accident, Apperson's father called the police. (Tr-1-82 to 83)

After Vaughn called AAA for a tow truck to get his Corvette out of the ditch, both the police and fire departments were notified by AAA of a possible accident involving his car, and a tow truck was also dispatched to the area. Bill Stanley of the Orange County Fire Department, Linette Smith of the Orlando

Police Department, and Greg Andes, a tow truck driver, each testified that, like Apperson, they drove right by the location of the Dumas-Vaughn accident, they looked for any sign of an accident, and none saw Vaughn's body down the grass embankment along the side of I-4, even though each drove right passed it. (Tr-5-672 to 675; Tr-5-676 to 680; Tr-5-681 to 684) They also all testified that that area of I-4 where the accident happened is pitch black at night, and there is no artificial lighting. (Tr-5-674; Tr-5-680; Tr-5-684) Officer Linette Smith testified that even though she was using her police car spot light as she slowly drove along the edge of I-4 looking for the accident, she still saw nothing. (Tr-5-578)

Dumas Does The Best He Can Under The Circumstances

The evidence at trial established that the first place a person could go from the scene of this accident to report the accident or try to get help was the Florida Turnpike (Tr-2-209; Tr-4-545 to 546), and one of the duties of the toll booth operators on the Florida Turnpike is to report accidents that are reported to them. (Tr-1-108, 115 to 116; Tr-1-154 to 155) According to the evidence at trial, the first toll collector Dumas came to on the Florida Turnpike was David Springer. (Tr-1-97) Springer testified that his toll booth was one minute from the 1-4 entrance, near where the accident happened, and when Dumas pulled up to his toll booth he appeared to be "out of it" and in need of medical attention. (Tr-1-99, 100, 106, 114) Springer thought that Dumas was either intoxicated, on drugs, or in shock, although Springer felt he was probably intoxicated. (Tr-1-118 to 119) According to Springer, Dumas tried to pay the toll and apparently thought he was

getting off the turnpike; he had blood and glass all over him, had slurred speech, and smelled of alcohol.[3] (Id.) Rather than give Dumas a toll card, Springer asked Dumas to pull to the side, which Dumas did, and Springer continued handing out toll cards. While Springer was continuing to hand out toll cards, Dumas left. (Tr-1-100 to 1001, 109) Springer also testified that although Dumas appeared disoriented, he cooperated with Springer fully, was respectful, and did not give Springer any problems. (Tr-1-106) After Dumas left, Springer testified that, as is his duty as a toll collector (Tr-1-108, 115 to 116), he reported his contact with Dumas to the Florida Highway Patrol. (Tr-1-103, 113 to 114)

The next person Dumas saw on the Florida Turnpike was toll collector Anival Medina. (Tr-1-124) Medina testified that when Dumas pulled up to his toll both he could not find his toll ticket, so Medina called his supervisor, Denise Smith. (Tr-1-124 to 125) Medina could see that Dumas had been in an accident, and he testified that Dumas told him he had been in an accident on **1-4,** which he reported to his supervisor when she arrived. (Tr-1-126 to 127, 129, 131) Medina also testified that he did not smell any alcohol, that Dumas' speech was fine, and he did not appear to be intoxicated. (Tr-1-131, 132, 139) Like Springer, Medina testified that Dumas cooperated fully, was respectful, and did everything he was asked to do. (Tr-1-134, 139)

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[3] As stated above, the assistant Medical Examiner admitted that blood with a high blood alcohol content gives off the odor of alcohol when exposed to air (Tr-3-390 to 391), and Vaughn had a blood alcohol content of .18 (Tr-3-380 to 381, 386, 390) The evidence at trial also established that the blood on the wind shield outside of Dumas' car was Vaughn's blood. (Tr-2-293 to 294)

The last person to see Dumas on the Florida Turnpike was Toll Supervisor Denise Smith. (Tr-1-142) She testified that Medina called her because Dumas did not have a toll ticket and had been in some type of accident. (Tr-1-144) Smith went to Medina's toll booth and asked Dumas to park his car near the booth and go with her to her office. Smith testified that Dumas parked his car without difficulty, and had no problem walking to her office. (Tr-1-158) Although she did smell the odor of alcohol on Dumas, Smith testified that Dumas appeared stable, did not slur his speech, and did not appear to be intoxicated. (Tr-1-158) Like Springer and Medina, Smith testified that Dumas cooperated completely and, although he appeared anxious, "like someone who had just been in an accident" (Id.), Dumas did everything that he was asked to do. (Tr-1-156) She asked Dumas if he needed her to call a State trooper, and according to Smith Dumas said no. (Tr-1-145) However, Smith also testified that while filling out her paper work for a lost ticket, Dumas told her that ". . . he wanted to take care of what he needed to take care of. . ." and ". . . ***he'd do anything he needed to do.***" (Tr-1-146) In fact, according to Smith, Dumas gave her his drivers license, name, address, license plate number (Tr-1-146, **147,** 148,, 151, 156, 157, 160), he never told her not to call the Florida State Troopers (Tr-156), and only left after she obtained all the information she needed and was free to leave. (Tr-1-160) Smith also testified that she did call the Florida State Troopers. (Tr-1-146, 151, **156,** 162) The dispatcher for the Florida State Highway Patrol on duty that morning, Norman Gore, testified that he did receive a report of a red Honda

involved in and accident, spoke to Smith, who gave him all the information on Dumas, and after getting additional information about Dumas from his computer, Gore dispatched a Florida State Trooper. (Tr-5-663 to 667) However, according to Smith, no State Trooper ever came. (Tr-1-156, 162)

Dumas apparently went home, and although he customarily parks his car in the garage to his house, according to his mother, Constance Dumas, he left the damaged Honda parked outside in the driveway. (Tr-5-850) Mrs. Dumas testified that she saw the car in the driveway when she woke up at about 3:30 in the morning to go to the bathroom, and when she went to put it in the garage she saw that the front end had been badly damaged. (Tr-5-851, 859) She woke Dumas up and began screaming at him asking him what had happened. According to Mrs. Dumas, Dumas did not seem to be aware of what was happening, and told her something about a toll booth, which led her to believe that he had hit a toll booth. (Tr-5-851 to 852, 860, 861, 864) Mrs. Dumas testified that she never thought that Dumas had been involved in an accident with a human being, and was sure that he would have went to her for help if he thought he was in trouble. (Id.) Mrs. Dumas called Debbie Anderson, whom she knew had been with Dumas earlier the previous evening, and Anderson told her she did not know anything about Dumas' accident. (Tr-5-854) Mrs. Dumas testified that she then listened to the radio to see if there were any reports of any accidents. (*Id.*)

According to the evidence at trial, the only other person who spoke to Dumas after the accident was Tina Harbold, another worker at the Olive Garden

where Dumas worked. (Tr-2-302) Harbold testified that she did not go to Phineas Phoggs or Chillers with the others because she had been out of town, and had returned late the evening of August 3, 1994. (*Id.*) At about 1:10 a.m., Harbold testified that Dumas called and wanted to speak to her roommate, Bella Gauthier, another worker at the Olive Garden where Dumas worked. Harbold told Dumas that Gauthier was not there, and Dumas began to talk to her, asking her about her trip. (Tr-2-303 to 304). Dumas told Harbold he had been in an accident, but other than mentioning some tickets, he did not sound upset or worried, and did not sound like someone who had just been in a fatality accident. (Tr-2-305, 307 to 308)

The Experts

As stated earlier, the State's expert reconstructionist was Detective Lydia Bass. Aside from the skid marks and debris discussed above, Bass also relied heavily on the damage to Dumas' red Honda to form her opinion. (Tr-4-500 to 503, 525 to 532) Over the strenuous objection of defense counsel (Tr-4-504, 510 to 519, 535, 538 to 539; R-2-201 to 202), Bass was allowed to testify about the basis of her opinions using the red Honda itself, outside the courtroom at a jury viewing of the red Honda. (Tr-4-535) While defense counsel were prohibited from objecting by the trial court (Tr-4-537 to 538), Bass testified at the jury view of the red Honda that based on the damage to the vehicle, Bass "guesstimated" that Dumas was probably driving somewhere between 60 to **75** miles per hour at the time of the accident, and in her opinion was driving 60 to ***65*** miles per hour.

(Tr-4-532, Tr-5-599 to 600) Bass conceded that accident reconstruction is not a precise science (Tr-4-583), and that most experts in reconstruction believe that taking accurate measurements of evidence at the accident scene and proper evidence documentation is critical if the reconstructionist is going to be able to accurately determine what happened during the accident. (Tr-4-577 to 579, 583) Bass testified that she did not feel that she needed these critical measurements in this case because she had photographs of the accident scene and the evidence (Tr-4-483), although see admitted that photographs sometimes distort the truth and can be misleading. (Tr-4-581, 582, 612) Notwithstanding all the problems with the evidence and accident scene, according to Bass, the "area of impact" for this accident was a couple of feet into the grass along the side of I-4. (Tr-4-588) Bass also testified about the "perception-reaction time" of most human beings, the time it takes for a person to see something, perceive it, and react to it (Tr-4-549), and admitted that sometimes in an accident things happen so fast, a person does not even see what he hit. (Tr-4-550) She also admitted that, it is a generally accepted fact that when a person is in shock, they become disoriented. (*Id.*)

Bass' testimony regarding victims of shock was corroborated by Dr. Robert Kirkland, a board certified Psychiatrist and Neurologist called by the defense. (Tr-5-693 to 697) Dr. Kirkland testified that he reviewed the accident reports in the Dumas case, the depositions of all the witnesses that observed Dumas immediately after the accident, and photographs of the damaged red Honda. (Tr-5-698 to 699)

Based on his review of these documents and photographs, Dr. Kirkland felt that he could render an opinion about Dumas' behavior after the accident, and testified that he felt Dumas was almost certainly in shock, and probably suffered some type of brain concussion. (Tr-5-700 to 703) Dr. Kirkland testified that while intoxication could have also caused Dumas' behavior, based on his review, Dr. Kirkland believed that Dumas' behavior, confusion, disorientation, and memory loss, were more consistent with someone who was in shock. (Tr-5-703 to 705, 709)

The defense also called engineer and reconstructionist James Clark. (Tr-5-711 to 719) Clark testified that he reviewed all the investigative reports, autopsy reports, examined the red Honda, and went to the area of the accident scene during the day and at night. (Tr-5-719 to 721) Clark then testified that, with the information he had, he applied physics, mathematics, and accident reconstruction engineering principles to reach his opinions and conclusions. (Tr-5-728 to 729) According to Clark's trial testimony, Vaughn collided with Dumas' car somewhere on the hard asphalt surface, Dumas was driving at about ***55*** miles per hour, and the faster Dumas was driving over 55 miles per hour, the further out on the asphalt the point of impact moved. (Tr-5-734, 740, 743) Clark based his opinion on not only the vehicle damage, but the construction of the vehicle, Vaughn's center of mass, and generally accepted principles of mass and motion. (Id.) Clark also testified that given the facts of this accident, Dumas could not have seen what he hit, and **as** is the case in fifty percent of vehicle-pedestrian accidents,

Dumas had no time to see Vaughn, perceive what he was seeing, and react. (Tr-5-780 to 781, 785) Clark testified that during the accident, at the moment of impact, Dumas was being pulled back in his seat by the force of the impact, and the windshield and shards of glass from the broken windshield and sun roof were moving towards him and flying into his face. (Tr-5-792, 820) Also, according to Clark, a layman would not have been able to tell what had been hit by simply looking at the damage to the red Honda. (Tr-5-791) Like Bass (Tr-4-531, Tr-5-870), Clark believed that Vaughn was probably trapped on the hood of the Honda for about 2 1/2 seconds after impact, traveling about 200 feet on the car before being thrown off the car to the right, on to the grass and down the embankment. (Tr-5-795) Also like Bass (Tr-4-561), Clark testified that men tend to pull right when they unexpectedly hit something while driving. (Tr-5-738) However, unlike Bass, Clark emphasized the critical importance of accurate measurements at the accident scene (Tr-5-800), and contradicted most of her testimony on the reliability of debris and dispersal patterns at the accident scene for accurately determining the point of impact, citing numerous studies on the subject. (Tr-5-799 to 800, 803, 804, 807, 809, 812)

SUMMARY OF THE ARGUMENT

I. Incorrectly instructing a jury on an essential element of an offense is fundamental error and requires reversal. Here, the trial court improperly instructed the jury on the essential element of knowledge, and the State's burden

of proof regarding this critical element. Dumas was charged with leaving the scene of an accident ***with death,*** a second degree felony. A separate provision of this same statute makes it a third degree felony to leave the scene of an accident resulting in injury only. Dumas was not charged at any time under that section. Over the repeated objection of defense counsel, the trial court gave the following instruction to the jury on the knowledge element of the offense of leaving the scene of an accident with death: "Before you can find the defendant guilty of leaving the scene of an accident involving death the state must prove . . . ***Todd Eric Dumas knew or should have known that the death of or serious injury to James Vaughn resulted from the collision.***" This instruction gave the State "two bites of the apple" regarding this charge, obfuscated the jury's verdict, and was clearly incorrect.

The court of appeals recognized this error, and reversed Dumas' conviction for the second degree felony of leaving the scene of an accident resulting in death. It then remanded the case to the trial court, and gave the State the option of accepting a conviction to the third degree felony of leaving the scene of an accident resulting in serious injury. The court of appeals also certified this issue as one of great public importance. The court of appeals was correct to reverse Dumas' conviction on this charge. It was wrong to allow any portion of this conviction to stand. The certified question should be answered in the affirmative.

11. For over half a century now, the Florida Supreme Court has prohibited the taking of testimony at a jury view. The Florida statute dealing

with jury views also prohibits anyone from speaking to the jurors in any fashion. Here, the trial court allowed a jury view of the damaged red Honda over defense counsel's objections, allowed the State's lead investigator to testify at the jury view, and prohibited defense counsel from making any objections during the testimony at the jury view. Dumas was denied his right to procedural due process and a fair trial. Under Flf jury views are not followed, reversal is mandated. The court of appeals ignored this issue. In so doing, the court of appeals failed to follow the law and the rulings of this court on this issue.

III. The law is clear that penal statutes are to be strictly construed, and any ambiguity concerning a criminal statute should be resolved in favor of lenity. The law is equally clear that this "Rule of Lenity" applies to issues involving the sentencing guidelines. Dumas argued that he was being punished twice for the same offense, in violation of the Double Jeopardy Clause. Dumas' initial offense severity rating was established based on the seriousness of the offense of conviction, here, vehicular homicide and leaving the scene of an accident resulting in death. His sentenced was enhanced again by adding 60 points for "victim injury" because a death is involved. Logic dictates that a defendant cannot be convicted of vehicular homicide unless the victim dies. Death is the ***sine qua non*** of this charge. The same is true of leaving the scene of an accident resulting in death. The Florida Legislature, in establishing the "Offense Severity Ranking Chart" already considered the fact that a death is involved in these offenses, and ranked them accordingly. By adding the 60 points for "victim

injury" in this case, Dumas was punished twice for the same conduct. The trial court overruled Dumas' objections to his sentencing guidelines score, and the court of appeals affirmed the trial courts finding. Dumas must be sentenced anew after the proper guideline score is calculated without the addition of victim injury points.

IV. The trial committed error when it denied Dumas' motions for a judgment of acquittal. The court of appeals committed error when it affirmed Dumas' conviction for vehicular homicide. The State's entire case was based on circumstantial evidence. As such, under Florida law the State had to prove that the circumstantial evidence was not was also inconsistent with any reasonable hypothesis of innocence. This the State did not do.

Dumas accidently struck Vaughn on the side of **1-4.** Vaughn was intoxicated and had a blood alcohol level of .18 at the time he collided with Dumas' car. He was walking the wrong way along a totally unlit portion of **1-4,** and was nervous and anxious as he walked along the side of **1-4** talking on his cellular phone to operators at the American Automobile Association (AAA) trying to expedite the arrival of a tow truck to pull his late model Corvette out of a ditch full of water he had just run his car into.

Despite the paucity of any real evidence, and Vaughn's condition and own actions notwithstanding, Dumas was convicted of, ***inter alia***, vehicular homicide. The evidence showed that the police had no witnesses to the accident, failed to take critical measurements of the evidence at the accident scene, allowed the

accident scene to be compromised when an Orlando Police officer drove through the middle of the accident scene, and were reduced to guessing where on the side of **1-4** the accident occurred.

Based on the so called expert testimony of the lead investigator, the jury was essentially allowed to **guess** what happened on that dark, isolated stretch of **1-4** where this accident happened. Conjecture and speculation are never enough to sustain a conviction. Since the State failed to meet its heavy burden in cases such as this, the trial court should have granted Dumas' motion for a judgment of acquittal, and the court of appeals should have reversed this conviction. No reasonable jury could have found guilt based on the evidence presented at trial.

ARGUMENT

I. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN, OVER THE OBJECTION OF DEFENSE COUNSEL, IT IMPROPERLY INSTRUCTED THE JURY ON THE *MANCUSO* KNOWLEDGE REQUIREMENT FOR THE LEAVING THE SCENE OF AN ACCIDENT RESULTING IN DEATH CHARGE. THE COURT OF APPEALS ALSO COMMITTED ERROR WHEN IT REMANDED THIS CASE **FOR** THE STATE TO DECIDE IF IT WANTED TO ACCEPT A CONVICTION FOR A THIRD DEGREE FELONY OR HAVE A NEW TRIAL ON THE SECOND DEGREE FELONY. GIVEN THE ACTUAL CHARGES IN THE INFORMATION, THE IMPROPER JURY INSTRUCTIONS, AND THE JURY'S GENERAL VERDICT, DUMAS' CONVICTION ON THIS CHARGE MUST BE REVERSED IN TOTO. THIS COURT HAS JURISDICTION PURSUANT TO FLA.*R.*APP.*P.* 9.030(a)(2)(A)(v).

Failure to correctly instruct a jury on an essential element of an offense is fundamental error, and requires reversal. Jones *v.* State, 666 So.2d 995, 998

(Fla. 5th DCA 1996); ***Ward v. State, 655*** So.2d 1290, 1292 (Fla. 5th DCA); ***Cordier v. State,*** 652 So.2d 505 (Fla. 4th DCA 1995) Here, the trial court improperly instructed the jury on the essential element of knowledge, and the State's burden of proof regarding this critical element. ***State v. Mancuso, 652*** So.2d 370, 372 (Fla. 1995) The court of appeals recognized this error, and reversed Dumas' conviction for the second degree felony of leaving the scene of an accident resulting in death. It then remanded the case to the trial court, and gave the State the option of accepting a conviction to the third degree felony of leaving the scene of an accident resulting in serious injury. ***Dumas v. State,*** 21 Fla. L. Wkly D2455, D2456 (Fla. 5th DCA Nov. 16, 1996). The court of appeals also certified this issue as one of great public importance. Id. The court of appeals was correct to reverse Dumas' conviction on this charge. Given the improper jury instruction, it was wrong to allow any portion of this conviction to stand. As such, this court must reverse Dumas' conviction for leaving the scene of an accident resulting in death completely, and remand the case for a new trial on this charge. Dumas was charged in count two of the amended information with leaving the scene of an accident *with* death, a second degree felony. Fla. Stat. 316.027(1)(b). (R-4-754 to 757) This was the only charge filed against Dumas under section 316.027. Section 316.027(1)(a), a separate provision of this same statute, makes it a third degree felony to leave the scene of an accident resulting in injury only. Dumas was not charged at any time under section 316.027(1)(a).

The trial court gave the following instruction to the jury on the elements of the offense of leaving the scene of an accident with death.

> Before you can find the defendant guilty of leaving the scene of an accident involving death the state must prove the following four elements. First, Todd Eric Dumas was the driver of the vehicle involved in a collision resulting in the death of James Vaughn. Second, Todd Eric Dumas knew or should have known that he was involved in a collision. ***Third, Todd*** Eric ***Dumas knew or should have known that the death of or serious injury to James Vaughn resulted from the collision.*** And fourth, Todd Eric Dumas willfully failed to stop and remain at the scene of the collision or as close thereto as possible until he had given the following information to any police officer at the scene of the collision which were his name, address, registration number of the vehicle he's driving and, if available, upon request, license or permit to drive. . . . (Emphasis added)

(Tr-1-23; Tr-7-949 to 950) This instruction was given at the beginning of the trial and in the final charge to the jury. (Id.)

Defense counsel repeatedly objected to this instruction, arguing that it improperly instructed the jury on the knowledge issue, allowing the jury to convict Dumas of leaving the scene of an accident resulting in death if they believed Dumas knew, or should have known, that he was involved in an accident resulting in death, or if they believed that Dumas knew, or should have known, that he was involved in an accident resulting in personal injury. (Tr-1-30; Tr-6-753 to 754, 764, 765; Tr-7-894, ***895;*** R-2-197 to 198; R-7-1293 to 1294)[4] This

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[4]The original objection was apparently made immediately after voir dire and off the record, at least as the record exists at this point. However it is clear from the record that defense counsel was objecting to this instruction throughout the trial. Counsel will seek to supplement the record if the original discussion occurred after voir dire and was inadvertently not transcribed.

instruction gave the State "two bites of the apple" regarding this charge, obfuscated the jury's verdic and was clearly incorrect. This court, in ***Mancuso*** itself, referred this matter to The Supreme Court Committee on Standard Jury Instructions in Criminal Cases ". . . for consideration of an instruction consistent with our holding in this case." ***Mancuso, supra, 652*** So.2d, at 372, The Committee has now sent its recommended instruction to the Supreme Court. ***Standard*** Jury ***Instructions In Criminal Cases (95-2),*** 665 So.2d 212, 215 (Fla. **1995).** In the Committee's recommended instruction, the knowledge element clearly distinguishes between the two separate sections of the leaving the scene statute by using separate brackets for the appropriate terms related to each section of the statutes. The Committee's recommended the following language on the knowledge element: " (Defendant) knew or should **have known of the [injury to] [death of] the person.**" *Id.* This **is** exactly the language that the defense requested, and the trial court refused to give it. (Tr-6-764 to **765)**

In giving this instruction to the jury, the trial court improperly amended the charges against Dumas. See ***generally, Fla. R. Crim P.*** **3.140** (c). Also, as a consequence of this improper amendment, the trial court created a fatal variance between the leaving the scene with death charge, as the jury was instructed on it, and the proof at trial. ***Gains v. State, 652*** So.2d **458, 459** (Fla. 4th DCA 1995) (Where jury instruction for different crime from that which defendant charged and convicted read to jury, the verdict as to that crime is a nullity); ***compare, Moore v. State,*** 496 **So.2d** 255, 256 (Fla 5th DCA 1986) (Reversing

conviction where jury instructed on sale of cocaine and defendant charged with delivery of cocaine -- "a verdict which finds a person guilty of a crime with which the accused was not charged a nullity).

Finally, since the jury returned a general verdict on this charge (T-7-966; R-7-164 to 1266), this multiplicious instruction also denied Dumas of his constitutional right to a unanimous verdict. Dixon *v. State, 603* So.2d *86,* 88 (Fla. 5th DCA **1992);** ***Brown*** **v.** ***State,*** 661 So.2d 309, **311** (Fla. 1st DCA **1995);** ***Flanning v. State,*** 597 So.2d **864,** 866-67 (Fla. 3rd DCA 1992). On this record, it is impossible to tell if all the jurors believed that Dumas knew, or should have known, that he had been involved in a collision that killed someone, or if all the jurors believed that Dumas knew, or should have known, that he had been involved in an accident that injured someone, or half the jurors believed the former, and half believed the latter, or one believed something different than the other five, and so on. Given the trial court's instruction, the jury was free to convict under either theory, even though Dumas was only charged under the death section of the statute. ***See*** and ***compare, Owens v. State,*** 593 So.2d **1113,** 1115-16 (Fla. 1st DCA 1992) (Reversing conviction where defendant charged in one count with two separate sections of statute, one of which had been held to be unconstitutional, jury was charged on both sections, and general verdict returned -- ". . . such a verdict cannot stand as it cannot be determined which of the alleged offenses the jury found the defendant guilty of having committed."); ***Bashans v. State,*** **388** So.2d **1303,** 1305 (Fla. 1st DCA 1980) (Reversing

conviction -- indictment charged, in one count, both a felony of the first degree and a felony of the second degree, and general verdict returned; impossible to tell whether jury found defendant guilty of first degree felony or second degree felony); *McGahagin v. State,* 17 Fla. 666, 668 (Fla. 1880) (Reversing conviction -- indictment charged two separate offenses in one count and jury returned general verdict; no way to tell which offense jury found defendant guilty of). Given the improper instruction on this critical element of this charge, Dumas is entitled to a new trial on this charge. The State has made much of the Legislative intent behind the amendment to this statute. This argument by the State deserves short shrift. Whatever the Legislature's intent, it is clear that the Legislature may not enact a statutory charging scheme that allows an accused to be convicted and sentenced for a crime he or she was not charged with. See, ***Gains v. State,*** supra, 652 So.2d at 459; Moore *v. State, supra,* 496 So.2d at 256.

> 11. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT TOOK TESTIMONY AT THE JURY VIEW OF THE RED HONDA, AND PROHIBITED DEFENSE COUNSEL FROM MAKING ANY OBJECTIONS DURING THE TESTIMONY AT THE VIEWING. THE COURT OF APPEALS, IN AFFIRMING DUMAS' CONVICTION, IMPROPERLY IGNORED PREVIOUS DECISIONS OF THIS COURT WHICH SPECIFICALLY PROHIBITED THE TAKING OF TESTIMONY AT JURY VIEWS. THIS COURT HAS JURISDICTION PURSUANT TO *FLA.R.APP.P* 9.030(A)(2)(a)(IV).

Over half a century ago, this court held that evidence may not be taken at a jury view. *Dempsey-Vanderbilt Hotel v. Huisman,* 15 So.2d 903, 906 (Fla. 1944) Ten years later, the court confirmed this rule, holding that a jury view

is not part of the trial, and therefore no evidence or testimony should be received. ***McCollum v.*** State, **74** So.2d **74, 76-77** (Fla. **1954)** These decisions are still the law today. ***See i.e.,*** Bryan *v.* State, 591 So.2d 1110 (Fla. 2nd DCA 1992) (Failure of judge to be present at jury view in violation of statute reversible error, citing *McCollum*); Dodd *v.* State, 209 So.2d **666, 667** (Fla. 1968) (Reversing conviction in first degree murder case because trial court failed to comply with statute, citing *McCollum*)

Fla. Stat. 918.05 sets out when and how a jury view can take place.

View by jury

> When a court determines that it is proper for the jury to view a place where the offense may have been committed or other material events may have occurred, it may order the jury to be conducted in a body to the place, in custody of a proper officer. The ***court shall admonish the officer that no person, including the officer, shall be allowed to communicate with the jury about any subject connected with the trial.*** The jury shall be returned to the courtroom in accordance with the directions of the court. The judge and defendant, unless the defendant absents himself without permission of court, shall be present, and the prosecuting attorney and defense counsel may be present at the view. (Emphasis ours)

Like *Dempsey* and *McCollum,* section 918.05 specifically prohibits the taking of testimony at jury view. That is the law in Florida.

In this case, the State announced shortly before trial that it wanted a jury view of Dumas' red Honda. (R-1-21 to 28; R-6-1098) The prosecutors tried to circumvent section 918.05 by arguing that the State intended to introduce the red Honda into evidence. (R-1-21) However, the title of the State's motion, ***"State's Motion For Jury View",*** and language in the motion, "[a] ***jury view*** of the vehicle

will provide the jury with valuable and relevant information . . .", and ". . . [a] jury ***view*** of the vehicle will provide three dimensional information crucial for a full understanding of the expert's testimony", make clear that, whatever the prosecutors called it, taking the jury out of the courtroom to see the red Honda was a jury view and section 918.05 controlled.[5] The defense objected to the jury view, and to the taking of testimony at the jury view, at every turn. (R-1-22 to 24, 25 to 26, 27; Tr-3-340; Tr-4-504 to **519,** 535, 538 to **539;** R-2-199 to 202) The trial court overruled the defense's objections. (Tr-4-516 to **518)**

The trial court then moved the trial to a parking bay of a nearby court building. (Tr-4-525 to 526, **537)** At the parking bay, defense counsel were informed that because of the physical layout, no objections would be allowed during the testimony of Bass, and any objections would need to be made after the testimony in the parking bay was concluded. (Tr-4-537 to 538) As defense counsel stood by as muzzled spectators, Bass testified unhindered by any defense objections or the possibility of any such objections (Tr-4-525 to 532), and then the trial court, *sua* sponte, invited the jury to step down from their chairs and take a closer look at the red Honda if they wanted to. (Tr-4-535, 537) Again, defense counsel objected to the entire proceeding involving the jury view of the red Honda. **(R-2-199** to 202)

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[5]**If** it were this easy to circumvent the requirements of section **918.05** and the **law** setting out the very specific procedures to be followed at jury views, then both the **statute** and the case law on this subject would no longer mean anything.

There were numerous photographs of the red Honda placed in evidence at the trial. (See, *i.e.*, State's Exhibits **1, 13,** 36, **37, 38)** By allowing the jury to be taken out of the courtroom to hear testimony in front of the red Honda, the trial court allowed the damaged vehicle to become a "feature of the trial", depriving Dumas of his right to a fair trial. ***See generally, State v. Richardson,*** 621 So.2d ***752, 755*** (Fla. 5th DCA **1993)** (Unfair prejudice results from admission of evidence where evidence becomes a "feature of the trial" instead of an incident of the trial); compare, ***Taylor v. State,*** **640** So.2d 1127, **1135** (Fla. 1st **DCA** 1994) (videotape of crime scene taken by law enforcement cumulative and needlessly repetitious in that it depicted same thing shown in still photographs, and included panning shots which showed crucifix and family photographs and those details invited emotional response); ***Pottgen v. State, 589*** So.2d **390, *391* - 92** (Fla. 1st DCA **1991)** (Introduction **of** videotape showing in great detail decaying, animal-ravaged remains of victims body in prosecution for disturbing contents of grave cumulative and reversible error given highly inflammatory nature of contents of the tape and the fact that there was substantial other evidence of the undisputed identity of the body already admitted in evidence). Given the other evidence and testimony admitted in the trial here, the only purpose for viewing the red Honda itself was for "shock value" on the jurors, and to try and evoke an emotional response from the jury. Other than pointing at the windshield and hood of the red Honda from time to time, Bass spent most of her time

simply standing next to the car as she presented her testimony in the parking bay. (Tr-4-526 to **535)**

Also, by prohibiting defense counsel from making any objections during the testimony at the jury view, the trial court deprived Dumas of his right to due process and a fair trial. Art. 1, Section 16, Fla. Const. The court also muddied the waters, as far as the record on appeal is concerned, creating confusion about what and when objections were made during the testimony at the jury view.[6] These many problems, created by the procedures employed by the trial court at the jury view in this case, are exactly why Florida law strictly limits what can be done at a jury view.

The jury view of the red Honda, and the proceedings at the jury view were illegal and require that the appellant's convictions be reversed. Fla. Stat. 918.05; Dempsey-***Vanderbilt Hotel*** *v.* ***Huisman, supra; State*** *v. McCollum,* ***supra; State*** *v. Dodd,* ***supra.*** In ignoring this issue, the court of appeals failed to follow the previous decisions of this court squarely on point. *Id.* As such, this court should now follow its own decisions on this issue, and Dumas' convictions and sentence should be reversed.

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[6]See issues raised and discussed in argument IV.

III. THE TRIAL COURT IMPROPERLY OVERRULED DUMAS' OBJECTIONS TO HIS GUIDELINES SCORE AND THE ADDITION OF VICTIM INJURY POINTS BASED ON DOUBLE JEOPARDY. THIS COURT HAS JURISDICTION UNDER U.S. CONST., AMEND, V AND ART. I. § 9. FLA. CONST.

Dumas filed written objections to the calculations in his score sheet before sentencing. **(R-7-1317** to **1322)** Specifically, Dumas objected to the addition of victim injury points based on the death of the victim on double jeopardy grounds. Dumas argued that since he was charged with leaving the scene of an accident which resulted in death and vehicular homicide, the death f the victim was, of necessity, already considered in establishing the offense severity based on the nature of the charges themselves, and adding additional points to his guidelines score based on death would result in him being punished twice. The trial court overruled dumas' objection on this point, and the court of appeals ignored it completely. Both were wrong.

The law is clear, as to be beyond cavil, that penal statutes are to be strictly construed, and any ambiguity concerning a criminal statute should be resolved in favor of lenity. State *v. Crumley,* **512** S.2d **183, 184** (Fla. **1987); *First*** Fed. ***Sav. & Loan v. Dept. of Bus.*** Reg., **472** So.2d **494, 495** (Fla. 5th DCA **1987.)** See also, Fla. Stat. 775.021(1) ("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 ours) The law is equally clear that this "Rule of Lenity

applies to issues involving the sentencing guidelines. ***Flowers v. State, 586*** So.2d 1058, 1059 (Fla. 5th **DCA** 1991)

The Double Jeopardy clause of the United States Constitution, U.S. Const., Amend. **5,** and Florida Constitution, Art. 1, Section 9, forbid not only successive trials for the same offense, but also prohibit subjecting a defendant to multiple punishments for the same crime. ***Carawan v. State,*** 515 So.2d 161, 163 (Fla. 1987). Here, Dumas was punished twice for the same offense by virtue of the fact that his initial offense severity rating is established based on the seriousness of the offense of conviction, here, vehicular homicide and leaving the scene of an accident resulting in death, and then his sentence was enhanced again by adding 60 points for "victim injury" because a death is involved.

Logic dictates that a defendant cannot be convicted of vehicular homicide under Fla. Stat. 782.027(1) unless the victim dies. Death is the ***sine qua non*** of this charge. The same is true of leaving the scene of an accident resulting in death, Fla. Stat. 316.027(1)(b). If the victim does not die, different statues apply. The Florida Legislature, in establishing the Offense Severity Ranking Chart, has already considered the fact that a death is involved in these offenses, and has ranked these offenses accordingly. **See,** Fla. Stat. 921.001, *et seq.* (Purpose, intent, and methodology of Sentencing Guidelines) **By** adding the 60 points for "victim injury" in this case, **Dumas** was punished twice for the same conduct, This is an unconstitutional enhancement of his sentence. *Carawan v.* ***State, supra.*** It is also an illegal departure based on factors already taken into

account by the Sentencing guidelines. See, *State v. Sachs,* 526 So.2d 48, 50 (Fla. 1988) (Sentencing court lacks discretion to depart based on factors already considered by guidelines); compare, *Thornton v. State,* 21 Fla. L. Wkly. D1397 (Fla. 2nd DCA June 12, 1996) (Error to add victim injury points to score sheet when primary offense already enhanced because death was element of offense). As such, Dumas' Sentencing Guidelines score should have been recalculated without the "victim injury" points. Given the impact of this issue on Dumas' sentence, the court of appeals should not have ignored it.[7]

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[7]Without the 60 victim injury points, Dumas' sentence would have been significantly less.

NO VICTIM INJURY **POINTS -- ALL ELSE THE SAME**

Vehicular Homicide	F3	L7	42
Leaving Scene w/Death	F2	L5	5.4
Victim Injury			0
			47.4 (vs. 107.4)

Total points less than 52 -- State incarceration discretionary, as opposed to a minimum guideline sentence of five years.

IV. THERE **WAS** INSUFFICIENT EVIDENCE TO CONVICT **DUMAS** OF THE VEHICULAR HOMICIDE CHARGE. THE COURT OF APPEAL'S FINDING THAT THERE **WAS** SUFFICIENT EVIDENCE TO CONVICT DUMAS OF THIS CHARGE WAS ERROR AND A VIOLATION OF DUMAS' RIGHT TO DUE PROCESS OF **LAW.** THIS COURT **HAS** JURISDICTION PURSUANT TO U.S. **CONST. AMEND.** V AND ART. I. § 9. FLA. **CONST.**

"It does not follow, . . . , that every fatality, regrettable as it may be, is accompanied by and results from conduct warranting a criminal conviction. . . ." W.E.B. v. State, **553** So.2d **323,** 327 (Fla. 1st DCA 1989), ***quoting, Jackson v. State,*** 100 So.2d 839, 840 (Fla. 1st DCA 1958).

Dumas challenged the sufficiency of the State's evidence and moved for a judgment of acquittal on all charges pursuant to *Fla.R.Crim.P.* 3.380(a) at the close of the State's case (Tr-5-646 to 662), at the close of all the evidence (Tr-5-877 to 887) and after the trial, by way of written motion. (R-7-1292) Each motion was denied. (Tr-5-662; Tr-6-888; R-2-201) On appeal of a denial of a motion for a judgment of acquittal by a trial court, the appellate court must review all the evidence presented at trial, in the light most favorable to the State, and determine if the State met its burden of presenting sufficient ***competent*** evidence to meet its burden of establishing the defendant's guilt beyond a reasonable doubt and to the exclusion of every reasonable doubt. ***Hardwick v.*** State, 630 So.2d 1212, 1213 (Fla. 5th **DCA** 1994) The court of appeals found that there was sufficient evidence to convict Dumas. This fining was erroneous, at least as the vehicular homicide charge is concerned. This court should reverse Dumas' conviction for vehicular homicide,

In this case, the State had no witnesses to the accident, and its entire case was based on circumstantial evidence. In Florida, the law is clear, as to be beyond per adventure, that when the prosecutor relies on circumstantial evidence to convict the accused, the prosecutor must prove that the circumstantial evidence is not only consistent with the defendant's guilt, but that it is also inconsistent with any reasonable hypothesis of innocence. ***State v. Law,*** 559 So.2d 187, 188 (Fla. 1990); ***Jaramillo v. State,*** 417 So.2d 257 (Fla. 1982); ***State v. Smolka,*** 662 So.2d 1255, 1267 (Fla. 5th **DCA** 1995); ***Luscomb v. State,*** 660 So.2d 1099, 1102 (Fla. 5th **DCA** 1995). This burden can only be met by the presentation of ***competent,*** substantial evidence, which is inconsistent with the accused's theory of events, Id. It is not sufficient if the facts merely create a strong probability of guilt, no matter how strong that probability may appear. ***Smolka, supra; Luscomb,*** supra. Evidence based on suspicions, speculation, or conjecture is never enough to support a finding of guilt. Smolka; ***see*** also, ***Frickey v. State,*** 557 So.2d 582, ***586*** (Fla. 4th DCA 1989) (Jury cannot convict on evidence susceptible to speculation or conjecture),

To convict a defendant of vehicular homicide under Fla. Stat. 782.071, the State had to present competent evidence that the defendant killed someone as a result of the reckless operation of a motor vehicle. ***Collins v. State, 605*** So.2d 568, **569** (Fla. 5th **DCA** 1992); ***State v.*** Palmer, 451 So.2d 500, 502 (Fla. 5th **DCA** 1984). **In** order to prove reckless driving, the State must prove that the accused was driving with a willful or wanton disregard for safety. ***State v. May,***

670 So.2d 1002, 1004 (Fla. 2nd DCA 1996); ***State v. Esposito,*** 642 So.2d 25, 26 (Fla. 4th DCA 1994); ***W.E.B. v. State,*** *553* So.2d 323, 325-26 (Fla. 1st DCA 1989) Evidence of mere negligence is not enough. ***Id.*** Here, all that the evidence at trial established was, at best, mere negligence. The State failed to present sufficient competent evidence to allow a reasonable jury to find that it had met its burden under the vehicular homicide statute.

Essentially, the State's theory at trial regarding the critical recklessness component of the vehicular homicide charge was that when he hit Vaughn, Dumas was (1) intoxicated, (2) speeding, and (3) driving on the grass along the side of I-4. With regards to intoxication, the jury acquitted Dumas of the DUI Manslaughter charge (R-7-1264 to 1266; Tr-7-966), obviously rejecting the State's claim that Dumas was driving while under the influence of alcohol. Moreover, the State's evidence on this issue was piteous.

Deborah Anderson and Bella Gauthier were the only two witnesses called to testify at the trial who saw Dumas at Phineas Phoggs and Chillers, and they both testified that they had no idea how much he had to drink, and the last time they saw him that evening he did not appear to be intoxicated at all. (Tr-2-312, 319, 320, 322; Tr-4-447, 448)[8] David Springer, the first toll booth operator who

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[8]The State, both at trial and on appeal, has attempted to improperly use an allegedly prior inconsistent statement made by Anderson to the police regarding how much beer Dumas and the others in his group drank while at Chillers as substantive evidence to prove intoxication. This it cannot do. ***See, Santiago v. State, 652 So.2d 485, 486 (Fla. 5th*** *DCA 1995)* ***(Reversing denial for judgment of acquittal in sexual battery case - prior inconsistent statement not substantive evidence and therefore cannot support a finding of guilt).***

saw Dumas when he got on the Florida Turnpike after the accident, did testify that Dumas smelled of alcohol, appeared to be in need of medical attention, and was either intoxicated, on drugs, or in shock. (Tr-1-99, 100, 106, 114, 118 to 119) However, the evidence at trial also showed that Springer's toll booth was one minute from the **1-4** entrance, near where the accident happened (Tr-1-114), and according to the unrebutted testimony of Dr. Kirkland, Dumas was in shock immediately after the accident. (Tr-5-700 to 703) The evidence also showed that Vaughn's blood was on the windshield outside of Dumas' car (Tr-2-293 to 294), and according to the assistant Medical Examiner, blood with a high blood alcohol content gives off the odor of alcohol when exposed to air (Tr-3-390 to 391), and Vaughn had a blood alcohol content of .18 (Tr-3-380 to 381, 386, 390). Also, Anival Medina and Denise Smith, the Florida Turnpike toll booth operators who saw Dumas immediately after Springer, each testified that Dumas did not appear intoxicated at all. (Tr-1-131, 132, 139; Tr-1-158) Finally, the State's own lead investigator, Lydia Bass, admitted that the State was just guessing that Dumas was intoxicated based on circumstantial evidence. (Tr-4-562 to **563)** As stated earlier, under our system of law, speculation and conjecture is never enough to support a finding of guilt. ***State v.*** Smolka, ***supra,*** 662 So.2d, at 1267; Frickey ***v. State, supra, 557*** **So.2d,** at 586.

As for the second basis for the State's theory of recklessness, speed, the evidence at trial was also anemic. The only evidence the State presented on this issue was the testimony of Robert Apperson and the *"guesstimation"* of detective

Bass, Apperson testified that when Dumas passed him several minutes and some distance before the area of the accident, Dumas came up on him at a high rate of speed, and at the time he, Apperson, was driving 55 to 60 miles per hour, (Tr-1-71 to 73, 84, 85) Apperson testified that he did not see the accident. (Tr-1-75 to 76, 87 to 88) Such testimony, of a witness who sees a vehicle some time and distance before the actual accident, and does not witness the accident, has been held to be of little value in determining what the vehicle was doing at or immediately before the accident. See and compare, **Russ v.** *Iswarin,* 429 So.2d 1237, 1240 (Fla. 2nd DCA 1983) (Excluding testimony that defendant drove car in erratic manner more than one and a half miles from the scene of collision and three to four minutes before accident); Hill **v.** *Sadler,* 86 So.2d **52, 55** (Fla. 2d DCA 1966) (No abuse of discretion by trial court in excluding testimony of lay witness about speed of truck about a quarter of a mile from the scene of collision when witness did not observe truck all the way to scene of accident).

Bass testified that based on the crush damage to the red Honda, and Vaughn's injuries, she "guesstimated" that Dumas was going between 60 to 75 miles per hour, but in her opinion Dumas was going 60 to 65 miles per hour. (Tr-4-532, Tr-5-599 to 600) This testimony was initially given at the viewing of the red Honda, outside of the courtroom, and over the repeated objection of counsel. (Tr-4-504, 510 to 519, 532, 535, 538 to 539; R-2-201 to 202)[9].

[9]The record is admittedly less than clear as to defense counsel's specific and timely objection on this issue. During the testimony of Bass at the viewing of the red Honda, defense counsel were prohibited from making any objections by the trial court.

Like Apperson's speed evidence, this evidence was also of no real value. This evidence was incompetent and inadmissible given the lack of any accurate measurements and proper evidence documentation from the accident scene, and the rather unscientific basis of Bass' ***"guesstimation"***. ***Albers v. Dasho,*** 355 So.2d 150, 153-54 (4th DCA 1978), ***cert.*** denied, 361 So.2d 831 (Witness testimony about speed of vehicle incompetent -- testimony that amounts to "a guess" is not competent and should not be admitted) ***Compare,*** Brown ***v. State,*** 477 So.2d 609, 611 (Fla. 1st DCA 1985) (Error to allow experienced trooper to testify about estimated speed of vehicles at time of accident where opinion based on crush damage and distance vehicles involved in accident moved only); Nat ***Harrison Associates, Inc. v. Byrd,*** 256 So.2d 50, 53-54 (Fla. 4th DCA 1971) (Reversible error to allow opinion testimony by reconstruction expert on speed of vehicles at time of rear-end collision based only on the damage to the vehicles shown in photographs where weight of vehicles not known and considered by expert); ***Delta Rent-A-Car v. Rihl,*** 218 So.2d 469, 470-71 (Fla. 4th DCA 1969) (Error to admit accident reconstruction expert's testimony that speed of vehicle at time of accident was 50 miles per hour, where there was a complete absence of accurate measurements and of numerous other factors and physical facts which would necessarily have to be known and be taken into consideration in order to arrive

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(Tr-4-537 to 538) A pretrial motion was filed attacking this exact same type of testimony (R-6-1130 to 1134), and when defense counsel were allowed to speak, the record is clear that the defense objected to "the entire procedure" related to the showing of the red Honda, and all the evidence taken during the viewing. See, Issue II regarding the viewing of the red Honda supra.

at a scientific determination of speed of vehicle, including the weight of the vehicle, the weight of the object hit by the vehicle, the condition of the road, the coefficient of friction, the amount of energy absorbed in the collision, etc.)

More importantly, the speed Dumas is alleged to have been driving at or around the time of the accident, between 60 to 70 miles per hour, on a major interstate highway, after midnight, was not really "speeding" in the sense that other defendants in other vehicular homicide cases were speeding and the conviction was upheld. ***See, W.E.B. v. State, supra,*** *553* So.2d at 327 (defendant doing 50 to ***55*** miles per hour in **45** mile per hour zone, on two lane road, at 10:30 p.m., not really "speeding"); ***compare, i.e., Byrd v. State,*** 531 So.2d **1004** (Fla. 5th DCA 1988) (Defendant convicted -- estimated speed of 81 Miles per hour in a **45** mile per hour speed zone in heavy traffic conditions); ***Hamilton v. State,*** **439** So.2d 238 (Fla.2nd **DCA** 1983) (Defendant's conviction affirmed -- operating vehicle in residential area upwards of **50** to 60 miles per hour, in presence of children, where road posted both with 30 miles per hour speed limit sign and a "**SLOW-CHILDREN PLAYING**" sign).

Also, it should be noted that the record at trial is devoid of any testimony or evidence as to exactly what the speed limit was on **I-4** in the area of the accident. The only testimony about speed limits on **1-4** came from the defendant's investigator, Kerry Farney. He testified about the speed limits some distance before the accident scene, noting that the speed limit changes at different points along **1-4,** and changed from 50 miles per hour at one point to ***55*** miles per hour

at another point closer to the accident area. (Tr-5-688) Farney did not testify what the speed limit was on 1-4 where the accident happened.

As to where exactly the accident happened, the evidence on the point of impact was also poor, if not totally incompetent. In fact, Bass admitted that she could not determine a point of impact, and instead testified about a "general area of impact". (Tr-4-486 to 487, 499, 596 to 597) Like her *"guesstimation"* on speed, Bass' testimony on the "general area of impact" amounted to little more than a guess, based not on accurate measurements and evidence documentation, science and accepted principles of engineering, physics, and mathematics, but rather was based on tid bits and "rules of thumb" she had picked-up at accident reconstruction seminars and reading materials given at these seminars. (Tr-4-490 to **491)**

For example, Bass testified that in pedestrian-vehicle accidents a "rule of thumb" is that the first piece of evidence is usually found within **25** feet of the "area of impact". (Tr-4-490) However, the defense's engineer and reconstruction expert, James Clark, testified to several ***scientific*** studies which showed that the dispersal pattern of debris and physical items at the scene of pedestrian-vehicle accidents are extremely unreliable in determining the point of impact. (Tr-5-799 to 800, 803, 804, 807, 809, 812) This testimony went unrebutted and Bass conceded that there was no precise science about where things come to rest after

a pedestrian-vehicle accident. (Tr-4-583 to 584)[10] In addition, Bass failed to consider the fact that, as b th she and Clark testified, Vaughn's body, and presumably much of the debris and physical evidence found at the accident scene, were trapped on the hood of the red Honda around two seconds and traveled on the hood of the car for almost 200 feet before being thrown off the moving car. (Tr-4-531; Tr-5-795) This fact would have clearly moved Bass' so called "cone of evidence" some distance from the actual impact area. (Tr-4-490); Tr-5-609 to 611) Bass also testified that she based her opinion on the lack of any scuff marks on the soles of Vaughn's shoes. (Tr-491 to 492) However, Bass admitted that she did not have any analysis done on Vaughn's shoes (Tr-4551), and apparently did not consider the fact that the evidence showed that Vaughn's shoes were soaking wet, because he had to walk through the water in the ditch when he got out of his Corvette (Tr-4-452), and thus, the soles would have been slippery and less likely to have scuffed. (Tr-5-810) Bass also did not consider the fact that Vaughn's shoes were soaked from the water in the ditch when considering Vaughn's injuries, and the relation of those injuries to the "area of

[10]It should also be noted that, although no accurate measurements were taken, it is obvious from looking at the State s photographs of the items found at the accident scene (Tr-2-2333 t 236: State Exhibits 7 and 16), that the cellular phone that Bass relied on as the item of physical evidence closest to the "area of impact" (Tr-4-490 to 491), was also within 25 feet of the right hand lane of traffic on I-4, where the defense claimed the accident actually happened when Vaughn, drunk, agitated, and talking on his cellular phone as he staggered up the side of 1-4 in the dark, accidently wondered into the lane of traffic.

impact". (Tr-4-491) Apparently, neither did the assistant Medical Examiner, Dr. Reyes. (Tr-3-361)

Generally, an expert's opinion is worth no more than the facts and reasons on which it is based. ***Lefave v. Bear,*** 113 So.2d 390, 393 (Fla. 2nd DCA 1959) Here, Bass' testimony on the "area of impact" was based on minimal information, questionable science, and amounted to little more than after the fact conjecture. Under our system of law, this will not do. ***Smolka.***

Finally, as far as whether Dumas was on the road or in the grass when Vaughn was hit, even if Dumas was on the grass, this still would not have shown ***"intentional recklessness". State v. May, supra; W.E.B. v. State, supra.*** In fact, if Dumas' vehicle had became disabled, or Dumas himself became ill, or Dumas was trying to avoid some hazard on **1-4,** the emergency lane and grass area next to the traffic lanes are exactly where the law required him to drive his car too. ***See, i.e,*** Fla. Stat. 316.071 (Whenever a vehicle becomes disabled or for any reason might obstruct the flow of traffic, driver required to move the vehicle off the road); Fla. Stat. 316.194 (requiring motorist to move disabled vehicles off road) Assuming that Dumas drove his car off the main road for some reason, he could not have reasonably anticipated that Vaughn, or anyone else, would be walking at midnight, drunk, in the dark, along the side of **1-4,** talking on a cellular phone. Therefore, it cannot be said that he was driving with a willful or wanton disregard for safety. This is exactly what the State was required to prove. ***May,*** W.E.B.

Accepting the evidence in the light most favorable to the State, the facts and circumstances in this case support no more than a finding that Dumas was inattentive and possibly negligent. Not reckless. This is not enough to sustain a conviction for vehicular homicide. ***See*** and ***compare, State v. Esposito, supra,*** 642 So.2d, at 26-27 (Vehicular homicide conviction reversed -- driver of trolley bus was at most negligent, not reckless, when he struck a pedestrian in a crosswalk; driver was in control of trolley, was driving within speed limit, and was at most inattentive); *Velasquez v.* ***State,*** **561** So.2d **347, 349-50** (Fla. 3rd DCA 1990) (Reversing vehicular homicide conviction where defendant participated in drag race, and after race over, alleged victim turned car around and drove car 123 miles per hour, and was killed in collision; appellate court finding that court cannot impose criminal liability where prohibited result of defendant's conduct is beyond the scope of any fair assessment of danger created by the conduct); ***W.E.B.*** *v.* ***State, supra,*** *553* So.2d, at **324-27** (Reversing conviction **for** vehicular homicide in case involving juvenile who had been drinking, exceeded the speed limit, and drove over the center line and collided with oncoming vehicle after having driven off shoulder of road; absent evidence that juvenile was in fact impaired and driving result of impairment and not just mere negligence, recklessness not proven).

It is well established "that criminal liability does not attach when the accused is by circumstances and conditions beyond his control and against his will, placed in a position and subjected to the conditions which resulted in the death with

which he is charged". W.E.B., at 327. Here, the circumstantial evidence presented by the State at trial could have just as reasonably suggested that Vaughn, intoxicated, agitated, and distracted as he staggered up the side of **1-4** talking on his cellular phone, stepped into the lane of traffic as Dumas drove by. It could have also suggested that for some reason Dumas drove off the road into the emergency lane to avoid some hazardous situation, and accidently hit an unexpected pedestrian walking in the dark along the side of I-4. The State's circumstantial case was not, as the law requires, inconsistent with any reasonable hypothesis of Dumas' innocence, ***State v. Law, supra, 559*** **So.2d,** at 188; ***Jaramillo v. State, supra,*** **417** So.2d, at 257, and, thus, did not establish beyond a reasonable doubt and to the exclusion of every reasonable doubt that Dumas committed the offense of vehicular homicide. Therefore, the vehicular homicide conviction should have been reversed by the court of appeals.

CONCLUSION

THEREFORE, the appellant Todd Eric Dumas, respectfully requests that this court accept jurisdiction of all of the issues raised in this brief, that the certified question be answered in the affirmative, and that Dumas' conviction on the leaving the scene charge be reversed completely based on the improper jury instruction. Dumas also requests that all his convictions and sentences be reversed based on the additional grounds set out above.

RESPECTFULLY SUBMITTED, this 21st day of March of **1997.**

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CERTIFICATE OF SERVICE

I hereby certify on this date a true and correct copy of this brief has been mailed to the Honorable Robert A. Butterworth, Attorney General, **444** Seabreeze Blvd., Fifth Floor, Daytona Beach, FL, **32118,** and to **Todd** Eric Dumas, DC# **398313**, Apalachee Correctional Institution, **P.O.** Box **699,** Sneads, FL **32460-0699.**

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APPENDIX-DUMAS OPINIONS

Criminal law—Attempted second degree murder—No error in reclassifying offense from second degree to first degree felony based on use of weapon—Use of weapon is not essential element of attempted second degree murder—Fact that charging document alleged that defendant used knife does not make use of knife an essential element of attempted second degree murder

STATE OF FLORIDA. Appellant. v. DELEON FRANKLIN TINSLEY, Appellee. 5th District. Case No. 96-966. Opinion filed November 15, 1996. Appeal from the Circuit Court for Orange County. Reginald K. Whitehead, Judge. Counsel: Robert A. Butterworth, *Attorney* General. Tallahassee, and David H. Foxman, Assistant Attorney General. Daytona Beach, for Appellant. James M. Sowell, Jr., Leesburg, for Appellee.

(SHARP, W., J.) The state appeals from the trial court's order which granted Tinsley's motion filed pursuant to rule 3.800 by reducing his attempted second degree murder charge from a first degree felony to a second degree felony. The trial court reasoned that it had been improper to enhance the attempted second degree murder offense pursuant to section 775.087(1) to a first degree offense because use of a weapon was an essential element of the offense as charged. We disagree and reverse.

In this case, Tinsley pled guilty to three attempted first degree murder charges, which included one count of attempted second degree murder with a weapon, and two counts of attempted third degree murder. Based on section 775.087(1), Florida Statutes (1993), the trial court reclassified the second degree murder offense to a first degree felony.[1] The information charged that Tinsley attempted to kill the victims with a knife.

Section 775.087(1) provides:

> Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which *the use of a weapon or firearm is an essential element,* and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified .... (emphasis supplied)

Whether the attempted second degree murder charge should have been enhanced pursuant to section 775.087(1) depends on whether section 775.087(1) refers to an "essential element" set forth in an *information*, or whether it refers *to* a required and necessary element of the crime as set forth by the *particular* substantive *criminal statute*. In this case, the element of use of the knife appears solely in the information. Second degree murder can be attempted in a variety of ways other than by use of a knife or weapon. That statute *does* not require as an essential element that a knife or any other weapon be used.[2]

The proper reference in section 775.087(1) is to the substantive criminal law which defines the crime in question. In an analogous case, *Strickland v. State*, 437 So. 2d 150 (Fla. 1983), the Florida Supreme Court held that a first degree attempted murder charge was properly enhanced by section 775.087(1) to a life felony. The defendant had been charged by information with attempting to murder a victim with a shotgun. In affirming the enhancement, *the* court said: "We find the use of a firearm not to be an essential element of the crime of attempted first degree murder." 438 So. 2d at 152.

In Miller *v. State*, 460 So. 2d 373 (Fla. 1984), the court reaffirmed this interpretation of section 775.087(1). Miller had been charged with second degree murder by shooting a victim with a handgun. The jury returned a verdict of attempted second degree murder and the trial judge enhanced the crime from a second degree felony to a first degree felony, as in this case. The court upheld that reclassification, although the issue argued in that appeal was whether reclassification was proper when a defendant is convicted of a lesser included offense. However, implicit in the court's affirmance in Miller, is its holding in *Strickland*, that the "essential element of the crime" language of section 775.087(1) references the substantive criminal law, and not the allegations of the information or indictment.

REVERSED. (GOSHORN and THOMPSON, JJ., concur.)

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[1]Attempted second degree murder is a second degree felony. In this case, the trial judge originally enhanced this charge to a first degree felony pursuant to section 775.087(1).

[2]Second degree murder is defined as: "The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." § 782.04(2), Fla. Stat. (1993).

* * *

Criminal law—Leaving scene of accident—Jury instructions—Where evidence supported verdict that defendant left scene of accident involving death and also supported finding that defendant left scene of accident involving injury, but jury was instructed that it could convict defendant of second degree felony if it found that defendant left scene knowing only that an injury had occurred, the only sustainable charge was leaving the scene of an accident involving injury—Because amended statute imposes more severe penalty for leaving scene of accident involving death, defendant could *not* be convicted of that offense absent finding that he knew of death—Issue certified as one of statewide importance—On remand, state may elect to retry defendant on second degree felony of leaving scene involving death or accept conviction for third degree felony of leaving scene involving injury

TODD E. DUMAS. Appellant, v. STATE OF FLORIDA. Appellee. 5th District. Case No. 95-2842. Opinion filed November 15, 1996. Appeal from the Circuit Court for Orange County, Alice Blackwell White. Judge. Counsel: H. Manuel Hernandez, Longwood, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport. Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) We agree that the record supports the jury verdict of guilt on the charge of vehicular homicide. And while we agree that the record would support the verdict that the defendant left the scene of an accident involving death, it would also support a verdict of leaving the scene of an accident involving injury and, because of the charge given to the jury, we believe that the only sustainable charge is leaving the scene of an accident involving injury. Since this appears to be a case of first impression, we certify the issue to the supreme court as an issue of statewide importance.

The problem arises because of the amendment to section 316.027(1), Florida Statutes, made in 1993. That amendment divided what had been the offense of leaving the scene of an accident involving death or injury into two separate offenses: leaving the scene of an accident involving injury, which remained a third degree felony, and leaving the scene of an accident involving death, which became a second degree felony. In either case, under the statute as amended, the State is required to prove that the defendant "wilfully violates" the specific prohibition. However, the court instructed the jury that it could convict for the second degree felony if it found that the defendant left the scene knowing only that an injury had occurred (a requirement of the third degree felony).

The State makes a good policy argument that the evil being addressed in both sections of the statute *is* leaving the scene without rendering assistance or reporting. It contends that whether death or mere injury results should not affect one's obligation to remain at the scene. But the issue of whether the victim lives or dies, since the 1993 amendment, makes a material difference, at least at law, in the obligation to remain at the scene. Literally years of difference.

Although we are aware of no case that has addressed this issue since the amendment, we are guided by the supreme court's analysis in *State v. Mancuso*, 652 So. 2d 370 (Fla. 1995). In *Mancuso*, the defendant was charged under the statute before the amendment; that is, he was charged with leaving the scene of an accident involving death *or* injury. In fact, in *Mancuso*, one victim died and the other was seriously injured. Mancuso requested an instruction that before the jury could convict him of

the charge, it must find that hc knew that death or injury had occurred. The State apparently prevailed on an nrgumcnt similar to the one it makes here: that it was only necessary that the jury find Mancuso knew he was involved in an accident and failed to remain at the scene. This argument is based on the fact that since the law [F.S. 316.061] requires that one involved in an accident resulting only in property damage must remain at the scene for the purpose of reporting, the fact that death or injury results is only incidental. The logic of the State's argument made in *Mancuso* is the same as argued herc. The supreme court in *Mancuso* rejected this argument.

Mancuso found that in the pre-amendment crime of leaving the scene of an accident involving death or injury, proof of knowledge that a death or injury occurred was essential to obtain a conviction. Merely knowing that one left the scene of an accident involving property damage would not bc sufficient because a more severe *criminal penalty is imposed* when death or injury results. Now that the statute has been amended, the same logic applies here, a more severe penalty is imposed if a death occurs. Further, the statute involved in this case provides: "Any person who willfully violates this paragraph, [leaving the scene of an accident involving death] is guilty of a felony of the second degree. . . ." [Emphasis added.] As the court stated in *Mancuso,* one can not "willfully" do something that he is unaware has occurred. How can he "wilfully" leave the scene of an accident involving death, if he is unaware of the death?.

The court in *Mancuso* directed the Committee an Standard Jury Instructions in Criminal Cases *to* prepare an instruction consistent with the *Mancuso* holding. *The* Committee has now done so and although the new instruction relates to the amended version of section 316.027(1) and was not approved in time to be applicable to our case, it is nevertheless persuasive. The new instruction, as does the statute itself, distinguishes between the knowledge that must be proved in order to convict. It provides:

> **Before you can find** the defendant guilty of Leaving the Scene of an Accident. the State must prove *the* following four elements **beyond a reasonable** doubt: * * *
>
> **3. (Defendant) knew** or should **have known** of the (injury to] **[death of] the person.**

We believe that the bracketed portions of the instruction are to be given in the alternative depending on the charge. This is consistent with the reasoning of *Mancuso.*

We affirm the conviction for vehicular homicide but remand the case for further proceedings on the charge of leaving the scene. The State may elect to retry the defendant on the second degree charge or accept a conviction for the third degree felony. See *Smith v. State,* 340 So, 2d 1216 (Fla. 4th DCA 1976).

AFFIRMED IN PART; REVERSED IN PART and REMANDED. (PETERSON, C.J., and ANTOON, J., concur.)

* * *

Wrongful death—Neither nonprofit corporation which provided room and board to ex-convict in exchange for rent and had purpose of assisting ex-convict with reintegration nor corporation's executive director was liable for ex-convict's sexual battery and murder of child who lived next door to corporation's facility where neither defendant had right or ability to control ex-convict's conduct—Absent right or ability to control ex-convict's conduct, no special relationship existed which would give rise to legal duty on part of defendants to control that conduct

THE LIGHTHOUSE MISSION OF ORLANDO. INC., et al., Appellants, v. ESTATE OF CHRISTINE McGOWEN, etc., et al., **Appellees. 5th District.** Case No. **95-3144. Opinion filed November 15. 1996. Appeal from the** Circuit Court **for Orange County, Jeffords D. Miller, Judge. Counsel: Robert E. Bonner of Eubanks, Hilyard, Rumbley, Meier & Lengauer, P.A.,** Orlando. **for Appellants. Sharon Lee Stedman of Sharon Lee Stedman, P.A., Orlando. for Amicus Curiae Florida Defense Lawyers Association. James R. Lavigne of Lavigne & Lane, P.A., Orlando, for Appellees,**

(PER CURIAM.) The Lighthouse Mission of Orlando, Inc. ("the Mission") and Margaret Powell, its founder and executive director. timely appeal the final judgment and order denying their motion for judgment notwithstanding the verdict and new trial in favor of the Estate of Christine McGowen ("the Estate"). The judgment awarded the Estate $1.5 million following a trial in which the jury found the Mission and Powell negligent after one of the Mission's residents, an ex-convict with a history of sexual crimes, raped and murdered 11 year old McGowen, who lived next door to the Mission. While the Mission and Powell make eight arguments on appeal, only one merits discussion. They contend that the Estate failed to establish that the Mission and Powell owed a legal duty to the plaintiff, and thus, the trial court erred in failing to direct a verdict in their favor. We agree and reverse.

THE FACTS

In 1983, Elmer Leon Carroll was convicted of sexual assault upon a girl under the age of 14 and sentenced to 15 years in prison. Carroll was released from the Department of Corrections' custody after serving 7 years, having fully satisfied the term of his sentence. Carroll's release was not conditional and there were no restrictions placed on his liberty; he was a free man.

Following Carroll's release, Teleois Ministries referred him to the Mission, a nonprofit organization formed to assist transients and/or ex-convicts in functioning as contributing members of society and to prepare those individuals spiritually. physically. and psychologically for productive reintegration. Carroll was a voluntary tenant and could leave at will. He paid rent in exchange for his room and board.

Carroll resided at the Mission for several months and then left to move in with his girlfriend. He rerurncd a short time later and lived there until his arrest for McGowen's rape and murder.

Carroll was convicted of first degree murder and sexual battery on a child under the age of 12 and was sentenced to death. The Florida Supreme Court has upheld his conviction and sentence. See Carroll *v. State,* 636 So. 2d 1316 (Fla. 1993), *cert. denied,* __ U. S. __, 115 S. Ct. 447, 130 L. Ed. 2d 357 (1994).

Julie Rank, McGowen's mother and personal representative of her estate. filed a civil action for wrongful death against the Mission and Powell alleging that their negligence caused McGowen's death. The Estate alleged that because the Mission and Powell knew or should have known of Carroll's violent tendencies, they breached their duty of care to McGowen, or alternatively., they breached their duty to control Carroll's conduct.

The case was tried by jury. At the close of the Estate's case. the Mission and Powell moved for a directed verdict, arguing that the Estate had failed to establish a legal duty or right *to* control Carroll's behavior. The trial court denied their motion and the jury returned a verdict in favor of the Estate for $1.5 million. Following the trial, the Mission and Powell filed a motion for judgment in accordance with the directed verdict or new trial, which was denied.

THE LAW

Florida courts have refused to find that a party owes a duty to control the conduct of another absent a special relationship. *See* Garrison *Retirement Home Corp. v. Hancock,* 484 So. 2d 1257, 1261 (Fla. 4th DCA 1985). Implicit in the "special relationship" exception to the general rule that no duty is owed is the proposition that the party must have the right or ability to control the third party's behavior. See Palmer *v. Shearson Lehman Hutton, Inc., 622* So. 2d 1085, 1089 (Fla. 1st DCA 1993); *Garrison,* 484 So. 2d at 1261. Florida COURS have adopted section 319 of the Restatement (Second) of Torts (1964) which states:

> One who *takes charge* of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Garrison, 484 So. 2d at 1261 (emphasis added).

battery[1] and lewd and lascivious assault upon a child under the age of 16.[2] While we affirm the judgment, we reverse the sentence imposed in Count II and remand for resentencing either in accordance with Williamson's plea agreement, or if the trial court does not sentence Williamson pursuant to the agreement, to permit him to withdraw his plea. See Hooks v. *State*, 61 So. 2d 607 (Fla. 3d DCA 1993); see also *Baldwin v. Stare*, 558 So. 2d 173 (Fla. 5th DCA 1990).

Williamson also argues that it was error to impose restitution for the victim's parents' or guardian's counseling expenses. The state properly concedes error. See *Gluesenkamp v. State*, 636 So. 2d 1367, 1368 (Fla. 1st DCA 1994) ("Family members do not fall within the statutory definition of 'victim' unless the aggrieved party is deceased as a result of the offense."). *Ocasio v.* Stare, 586 So. 2d 1177 (Fla. 4th DCA 1991) (holding that mother of child victim was not entitled to recover restitution for her own personal psychological injuries. vicariously suffered as result of child's experience, because mother was not "victim" within meaning of statute providiag for restitution as child was not deceased). Accordingly, we direct the trial court to delete that portion of the special condition of probation mentioning the victim's parents' or guardian's counseling costs. In all other respects, the sentence is affirmed.

REVERSED IN PART; AFFIRMED IN PART; REMANDED. (PETERSON, C.J., and SHARP, W., J., concur.)

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[1] §§ 777.04, 794.011(2), 794.011(1), Fla. Stat. (1995).
[2] § 800.04(3), Fla. Stat. (1995).

* * *

Criminal law—Probation—Record supported finding that defendant violated condition requiring that he live and remain at liberty without violating any law—Defendant's threats to former wife and her present husband constituted violation of criminal extortion statute—Findings that defendant violated other probation conditions are vacated where conditions were imposed by the probation officer rather than by the sentencing court

BABAK PARISSAY. Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-72. Opinion filed January 3, 1997. Appeal from the Circuit Court for Orange County, Dorothy J. Russell, Judge. Counsel: James B. Gibson, Public Defender. and Brynn Newton, Assistant Public Defender. Daytona Beach. for Appellant, Robert A. Butteworth. Attorney General, Tallahassee, and David H. Foxman, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) Babak Parissay appeals an order revoking probation in which the trial court found that Parissay violated three conditions of probation. We affirm the trial court's finding that Parissay violated condition five of his probation but vacate the other findings of violation for the reason that those conditions were imposed by the probation officer rather than by the sentencing court. A probation officer may implement routine supervisory directions to carry out conditions imposed by the court, but the officer may not impose new conditions of probation. Haynes v. *State*, 440 So. 2d 661 (Fla. 1st DCA 1983).

Condition five of Parissay's probation order required that he "live and remain at liberty without violating any law...." The record supports the trial court's finding that Parissay's threats to his former wife and her present husband constituted a violation of the criminal extortion statute. See § 836.05, Fla. Stat. (1995).

AFFIRMED IN PART; VACATED IN PART. (PETERSON, C.J., THOMPSON and ANTOON, JJ., concur.)

* * *

Criminal law—Jury instructions—Leaving scene of accident involving death or injury—Where defendant is charged with leaving scene of accident involving death, jury must be charged regarding requirement that defendant have actual knowledge of death—Question certified

TODD E. DUMAS, Appellant, v. STATE OF FLORIDA. Appellee. 5th District. Case No. 95-2842. Opinion filed January 3. 1997. Appeal from the Circuit Court for Orange County, Alice Blackwell White. Judge. Counsel: W. Manuel Hernandez, Longwood, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee. and Kristen L. Davenport, Assistant Attorney General. Daytona Beach, far Appellee.

ON MOTION FOR REHEARING
[Original Opinion at 21 Fla. L. Weekly D2455b]

(HARRIS, J.) We grant Appellee's motion for clarification and amend our previous opinion to certify the following question of great public importance to the supreme court under Article V, Section 3(b)(4) of the Florida Constitution:

UNDER THIS COURT'S RULING IN STATE V. *MANCUSO*, 652 SO.2D 370 (FLA. 1995), REQUIRING THAT THE JURY BE CHARGED REGARDING THE KNOWLEDGE REQUIRED PRIOR TO CONVICTING A DEFENDANT OF LEAVING THE SCENE OF AN ACCIDENT WITH INJURY OR DEATH, DID THE 1993 AMENDMENTS TO FLORIDA STATUTE 316.027, WHICH DIVIDED THE OFFENSE OF LEAVING THE SCENE OF AN ACCIDENT INTO TWO FELONIES, ONE A SECOND DEGREE FELONY IF A DEATH WAS INVOLVED, AND THE OTHER A THIRD DEGREE FELONY IF AN INJURY WAS INVOLVED, THEN REQUIRE THAT THE JURY BE CHARGED REGARDING THE *MANCUSO* KNOWLEDGE REQUIREMENT BASED ON THE ACTUAL OFFENSE CHARGED, TO WIT: DEATH IF SO CHARGED OR INJURY IF SO CHARGED?

(PETERSON, C.J., and ANTOON, J., concur.)

* * *

Criminal law—Counsel—Self-representation—Where court concluded, after proper inquiry, that defendant was competent to represent himself at trial, there was mistrial because of a statement by one of the witnesses, and retrial was conducted shortly thereafter, retrial was not a "subsequent stage of the proceedings" within Contemplation of rule requiring that offer of counsel be renewed "at each subsequent stage of the proceedings"—Although trial court should have renewed offer of counsel prior to sentencing, failure to do so was harmless error where defendant was sentenced within guideline range and record did not support finding that defendant would have gotten lesser sentence had court appointed counsel to speak for him

PAUL HARRIS, Appellant, v. STATE OF FLORIDA. Appellee. 5th District. Case No. 96-943. Opinion tiled January 3, 1997. Appeal from the Circuit Court for Orange County, Jay Paul Cohen. Judge. Counsel: James B. Gibson, Public Defender. and M. A. Lucas, Assistant Public Defender, Daytona Beach. for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and David H. Foxman. Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) Paul Harris was convicted of several counts of aggravated stalking, burglary of a structure, criminal mischief, and grand theft. He was sentenced within the guideline range. Harris, who received consent to represent himself, now seeks reversal because the court did not renew the offer of assistance of counsel "at each subsequent stage of the proceedings." See Rule 3.111(d)(5), Florida Rules of Criminal Procedure.

The court properly conducted a *Faretta* hearing and concluded that Harris was competent to represent himself *at trial*. Although there was a mistrial because of a statement by one of the witnesses, we conclude that the retrial conducted shortly thereafter was not a "subsequent stage of the proceedings" within the contemplation of the rule. Harris had just been given the opportunity to represent himself at trial and the retrial was the repetition of the previous stage rather than a subsequent one. He gave no indication that he desired to change his mind about self-representation.

While we agree that the court should have renewed the offer of assistance of counsel prior to sentencing, we find such error to be harmless in this case. Harris was sentenced within the guideline range and, based on this record, we do not believe that he would have gotten a lesser sentence had the court appointed ten lawyers to speak for him. *Stare v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

AFFIRMED. (COBB and THOMPSON, JJ., concur.)

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