IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO.: 94,116

FREDERICK VAN HUBBARD,

Respondent.
_________________________________/

RESPONDENT'S INITIAL BRIEF ON THE MERITS

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ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST
JUDICIAL CIRCUIT, IN AND FOR SANTA ROSA COUNTY, FLORIDA
AND FROM THE FIRST DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this Brief as Petitioner, the prosecution, or the State. Respondent, Frederick Van Hubbard, the Appellant in the First District Court of Appeal and the Defendant in the trial court, will be referenced in this Brief as Respondent, the Defendant, the Defense, Appellant, or Hubbard.

All references to the Record on Appeal (including all transcripts) will be designated by the giving (in Roman numerals) of the volume number in which the reference appears, followed after a colon by the page number. Thus, the first page of Dr. Richard Smith's testimony would be designated as:

(VII:665).

Many of the transcript pages have two separate numbers, which may be confusing. Our citations will always refer to the higher of the two page numbers.

We apologize for any confusion created in the Record, with regard to numberings and confusing indexes. We made one trip to meet in person and had three telephone conferences with the assigned Deputy Clerk of the Circuit Court and previously filed a Motion in the District Court (which was granted) to correct and supplement the record. In addition, part of the confusion, with

regard to numbering, resulted directly from the fact that three separate court reporters were involved in reporting the jury trial, and two of those court reporters were out-of-town during the correction of the Record and, thus, unavailable to correct or modify their index.

USE OF APPENDIX

Respondent has included an Appendix of significant portions of the Record, transcript and key Appellate cases. As required, it contains an index. For ease of reference, all pages in the Appendix have been consecutively re-numbered in the lower right-hand corner, and references to portions of the Appendix will be designated by the page number followed by the abbreviation "Appx.". Thus, the reference to Defendant's Requested Special Jury Instruction would be designated as:

(12-Appx.).

STATEMENT OF THE CASE AND FACTS

INTRODUCTION

Respondent Frederick Van Hubbard stands convicted of DUI manslaughter (under § 316.193(3)(c)3, Fla.Stat. (1995)), vehicular homicide and DUI with property damage.

Respondent had been charged with the above crimes by Information filed in the Circuit Court in and for Santa Rosa County, Florida, alleging he was a driver in a June 8, 1996 collision, which killed Dionisio Pura (I:1). A jury trial was held on the charges on April 21 through 24, 1997.

The jury returned a verdict of guilty as charged at the conclusion of the trial (I:93). He was sentenced on May 29, 1997 to serve a 17 year prison sentence (I:98). This appeal timely followed.

TRIAL (WITNESSES CALLED)

There were 21 witnesses called to testify in the trial. The Respondent's girlfriend (Lisa Rothrock) was called to testify to Mr. Hubbard's consumption of alcohol earlier in the evening. Three witnesses (a nurse, an EMT and a Life Flight worker) were called to testify regarding their medical treatment and observations of the Respondent. The State presented a toxicologist, who analyzed the blood taken from the Respondent and rendered opinions as to the effects of the alcohol.

The defense offered testimony from Respondent's mother and

sister as to their observations of him immediately after the accident.

In that the Respondent, for purposes of this appeal, concedes the issue of proof of the alcohol element of DUI manslaughter, the witnesses described above will not be otherwise discussed herein.

A passenger in the decedent's automobile, Mr. Dante Abundo, was called to testify. Four Florida Highway Patrol troopers testified. A volunteer fireman testified to his observations of the crash scene. A FDLE crime scene/crime lab analyst testified as to observations of the vehicles.

The State called a medical examiner regarding the cause of death (which is not in dispute here).

The State presented testimony from two accident reconstruction experts. The first was David Kelly, the homicide investigator from the Florida Highway Patrol (VI:428). The second was James Anderson, a Pensacola engineer (VI:509).

The defense also called two accident reconstruction experts: Tom Verge, a retired Florida Highway Patrol homicide investigator (VII:629), and Dr. Richard C. Smith, a physics professor from the University of West Florida (21-Appx.) (VII:665).

The State called an eyewitness, Burton Cummings, the driver of a vehicle which was not impacted in the accidents (V:267). The defense called Mr. Cummings' wife (Tracy Cummings) as an additional eyewitness (VII:617).

TRIAL (DRIVER'S LICENSE EVIDENCE)

The Respondent did not testify. The Respondent cross-examined the homicide investigator and solicited, without objection, testimony that the Respondent had a valid driver's license at the time of this accident (48-Appx.) (VI:492-493). The State at this time advised the trial court that it intended to have the officer testify that the Respondent's driver's license had been suspended in previous years. The defense objected. The trial court ruled that the defense had sufficiently "opened the door" to allow the State to make this inquiry (48-Appx.) (VI:495-497).

TRIAL (JOA MOTION [VEHICULAR HOMICIDE])

At the conclusion of the State's case, Respondent moved for judgment of acquittal on the vehicular homicide Count (VI:575). Respondent argued that the "bad driving" (see CRASH DETAILS, next section) of Respondent amounted to negligent driving at worst, and not the reckless driving required for vehicular homicide. The trial court denied the motion, finding that this driving, taken in conjunction with the evidence of unlawful blood alcohol and/or impairment, was sufficient to make a prima facie case of recklessness to prove vehicular homicide (VI:591).

TRIAL (CRASH DETAILS)

This trial focused on the action of three drivers of three different pick-up trucks, all of which were travelling west (V:270) on Highway 98 in northwest Florida, east of Gulf Breeze, Pensacola.

Highway 98 is a four lane highway, with a grass median dividing two east-bound and two west-bound lanes (IV:167; V:435).

At approximately 1:00 a.m., the early morning hours of June 8, 1996, Dionisio Pura (the victim) was standing on this highway, in the fast (inside) lane of the two west-bound lanes of traffic (IV:199). He was standing next to or in front of his disabled black Mazda pick-up truck (IV:199).

Three to five minutes earlier, Mr. Pura, while driving his truck, had been rear-ended by a hit-and-run driver (IV:197). The hit-and-run vehicle (a blue Chevrolet pick-up truck) was driven by Mr. James Holder, who is not technically a party to this appeal. (The respective experts disagreed as to whether Mr. Pura may have contributed to this "first" collision by pulling into traffic without allowing the Holder vehicle sufficient time to pass by before pulling out from a side street (VII:636).) The collision from behind by the Holder truck caused the Pura vehicle to move from the outside (slow) lane to the inside (fast) lane where it sat, immobile, facing west (IV:196-197).

After this first collision, Mr. Holder fled the scene but was eventually arrested and charged with DUI manslaughter, vehicular homicide and leaving the scene of an accident with serious injuries.

The first collision had rendered the Pura vehicle without power (by dislodging a battery cable) (V:265; VI:479).

Accordingly, it would not re-start, and there were no lights visible on the black pick-up truck at any time thereafter (IV-198).

Passenger Dante Abundo, who had been riding in Mr. Pura's vehicle, testified that as he walked away from the truck after the first collision, he was not able to see any reflectors on the back of the truck (V:218).

There was no lighting at this section of the highway (V:265). It was an overcast night (VI:476) without moonlight.

Mr. Pura was wearing black pants and black shoes with black shoe strings (VI:476; V:362). He was of Filipino national origin, and was dark skinned.

Mr. Burton Cummings was the driver of another vehicle at the scene who saw the final collision (V:276). He testified he saw the disabled Pura truck and saw the Hubbard truck strike it from behind. He testified that he never saw Mr. Pura standing in the roadway (V:316). (The reconstructions by each of the experts and by the investigating trooper all agreed Pura was standing in the road at impact; the different theories placed him in different locations on the roadway.) He (Cummings) also testified that a person standing where Mr. Pura was located, if he had looked eastward (in the direction of the oncoming Hubbard vehicle), would have a clear view (V:315). He said the approaching headlights were visible at least a mile to the east (V:315).

The Hubbard vehicle (a red pick-up truck) approached this

scene and struck the Pura vehicle while traveling 55 mph (the speedometer cable locked upon impact) (VI:516).

The State established, by blood sample and extrapolation, that the Respondent's blood alcohol at the time of impact was in the range of 0.14 to 0.18 (VI:408-409). The State established that the Respondent was traveling 55 mph in a 45 mph zone. The State's evidence indicated that the Respondent failed to apply his brakes or to take other evasive action to avoid colliding with the Pura vehicle (V:276).

In addition, eyewitness Cummings testified that he was in the slow or outside lane, as Mr. Hubbard approached the Pura vehicle in the fast or inside lane (V:275). Mr. Cummings testified that he (Cummings) was able to see the Pura vehicle in front of him far enough in advance to be able to slow his vehicle down and stop completely before reaching the site of the fatal crash, while Mr. Hubbard did not (V:276). At trial, he testified he saw the vehicle from 300 feet (V:273); the day after the accident, he had told the trooper he saw it at 150 feet (VI:467); and at deposition, he testified he saw it at 180 feet (II:322 and VII:635).

The State argued that if Mr. Cummings, a sober driver, was able to avoid striking the Pura vehicle, that Mr. Hubbard should have been able to avoid the Pura vehicle as well, and that his blood alcohol and/or impairment prevented him from doing so (VI:483). The State expert stated that, in his opinion, Mr.

Cummings saw the vehicle at 300 feet and that, therefore, Mr. Hubbard (Respondent) should have seen it at 300 feet and been able to stop, especially if he had been travelling at 45 mph (VI:518).

The defense experts noted: (1) Mrs. Cummings' post-crash statement that her husband was traveling at 40 mph (VII:623) and (2) Mr. Cummings' post-crash statement that he saw the vehicle at 150 feet, and they then opined that this described an accident that no driver in Mr. Hubbard's position could have avoided (VII:641 and 683). Dr. Smith described in particular his opinion (based on traffic studies) that the darkness factors made it impossible for the vast majority of drivers to see Mr. Pura or his vehicle in time to avoid the collision, even if Mr. Cummings, driving below the speed limit, did in fact see the car earlier (21-Appx.) (VII:680-686 and 698). Dr. Smith testified that in this dark situation, for many unimpaired drivers, the first sighting would be at 60 feet (21-Appx.) (VII:712).

As to the above facts, Respondent concedes (see Argument) that even if the jury had been properly instructed as to causation, that the above described evidence would have been sufficient to make a prima facie case for DUI manslaughter.

JURY INSTRUCTIONS

Prior to trial and again during trial, the trial court was made aware of the complicated causation issues in this particular case.

First, the same judge presided over the proceedings for both the Respondent and for James Holder, the driver of the first vehicle to strike Mr. Pura's black Mazda truck (I:3; III:464).

Second, Respondent, by a letter/memorandum to the trial court and opposing counsel a week before trial, specifically set forth a number of the factors directly leading to the fatal collision, which the defense hoped to bring before the jury during the trial (I:119). This letter was further discussed during the trial in proceedings outside the presence of the jury (IV:102).

Third, the State conceded, in formal proceedings before the court, that the first collision had created a set of circumstances which was likely to kill Mr. Pura even if a sober driver had come along:

> "He [Holder] left, left a vehicle sitting in the road which was a clear potentially fatal hazard to anyone in that vehicle or any oncoming motorist (III:469) . . . [h]e struck them and left them stranded there, immobilized with no power and no lights. Dazed (III:470). . . . [i]t is certainly foreseeable that Mr. Holder left a disabled, dark vehicle on an unlit highway. Two lane highway with -- I am not sure if it is 40 or 50 miles an hour, but in any event it is well traveled with reasonably high speeds. Very foreseeable that another motorist would come along -- sober or intoxicated -- and strike a vehicle (III;471). . . . [i]t was an extremely foreseeable fatality that occurred once he left them in the road like that (III:474).

The State filed a "Proposed Jury Instruction" which sought (V:223) to adopt the language from Naumowicz v. State, 562 So.2d

710 (Fla. 1st DCA 1990) (17-Appx.). The defense objected and in the attachment to the objection, crafted a proposed jury instruction using the language from the Supreme Court opinion in Magaw v. State, 537 So.2d 564 (Fla. 1989)(12-Appx.; 13-Appx.) (I:90).

The trial court struggled at some lengths with this duty to properly instruct the jury as to causation:

> "The Court: The State doesn't have to prove that he was the sole, direct, and only cause of the accident, but that the deviation of standard of care or lack of care on his part that contributed to the accident, is the basic standard." (IV:109)

> "The Court: And so I'm still in the process of deciding whether to go just with the standard and allow you all to argue outside of what it means, or to come up with -- what the standard instruction means, or to come up with a more elaborate definition of cause or contributed to." (IV:110)

> "The Court: But given the unique facts of this case, I think some clear explanation of 'cause or contributed' is necessary. And, again, I'm just not satisfied with either one of them, myself." (IV:110)

> "The Court: But see, that's where I have a problem with the language, that he caused it. And that's where we get sloppy with the causation. Was it the direct and the sole cause or was it a cause?" (VI:458)

> "The Court: My understanding in reading the case laws to date is, we need to make it clear that the State does not have to prove that Mr. Hubbard's conduct was the sole cause or the primary cause of the accident, but that the jury needs to determine whether or not there

was any negligence." (V:226)

The trial court advised counsel prior to opening statement that they could rely on the court eventually giving some form of the "deviation of standard of care or lack of care" when the final decision was made on the actual jury instructions (IV:109, line 23).

The final form of jury instructions did not contain the Magaw language (9-Appx.) (VIII:829-830). The instructions contained no requirement that there be proof of improper operation of the vehicle, nor did they allow the jury an option of acquittal if the collision was inevitable given the unusual facts of the case (VIII:829-830).

The instructions read:

> "Now, as to the first charge in count one, D.U.I. manslaughter, 'Before you can find the Defendant guilty of driving under the influence manslaughter, the State must prove the following three elements beyond a reasonable doubt: One, Frederick Van Hubbard operated a vehicle. Two, that Frederick Van Hubbard by reason of such operation caused or contributed to the cause of the death of Dionisio Pura. Three, at the time of such operation Frederick Van Hubbard was under the influence of alcoholic beverages to the extent that his normal faculties were impaired or had a blood level of 0.08 percent or higher.'
>
> The conduct of the decedent, Dionisio Pura, or a third party either individually or in combination do not bear on the issue of causation unless that conduct was the sole direct cause of the fatal accident. If you find the conduct of the decedent or a third party either individually or in combination

> was the sole direct cause of the fatal accident, you should find Mr. Hubbard not guilty of the charge of D.U.I. manslaughter.
>
> If, however, you find the conduct of the decedent or a third party either individually or in combination was not the sole direct cause but that Mr. Hubbard by his operation of a vehicle caused or was a contributing cause of the death of Mr. Pura, causation has been proved by the State. If the State has proven the other elements beyond a reasonable doubt, then you should find Mr. Hubbard guilty of D.U.I. manslaughter."

We adopt that portion of the Petitioner's Statement of the Case and Facts describing the DCA finding of certified conflict with Melvin v. State, 677 So.2d 1317 (Fla. 4th DCA 1996).

SUMMARY OF ARGUMENT

ISSUE ONE:

The non-testifying Respondent was unduly prejudiced by admission of evidence of wrongdoing or "prior bad acts", in this close case.

ISSUE TWO:

Respondent was denied a fair trial by jury instructions which failed to fully advise the jury of the causation issues under the law and the unique facts of this close case. Specifically, the instructions required conviction even upon "good" operation of a vehicle.

ISSUE THREE:

The First District (Hubbard v. State, 23 Fla.L.Weekly D2247 (Fla. 1st DCA September 28, 1998)) should prevail over the Fourth District (Melvin v. State, 677 So.2d 1317 (Fla. 4th DCA 1996)), because it more closely follows the holding of Magaw v. State, 537 So.2d 564 (Fla. 1989).

ISSUE FOUR:

The State's reliance on standard jury instructions is not dispositive. The trial court's supplemental use of a customized instruction from the State confused the issue, and did not explain the Magaw standard. This particular case required a special instruction as requested by the Defense.

ARGUMENT

INTRODUCTION TO ARGUMENT: CLOSE CASE ANALYSIS

Respondent respectfully suggests that the peculiar and unique facts of this particular case warrant the placing of this appeal into that category of "close cases" such that errors by the trial court in either of the two primary issues raised on appeal could easily have been sufficient to tip the scales enough so that the Respondent was unable to obtain a fair trial in this cause.

The First District had previously held (in Parker v. State, 590 So.2d 1027 (Fla. 1st DCA 1991)) that the issue of whether a case was a "close case" is appropriate on Appellate review. Parker cited to Bouchard v. State, 556 So.2d 1215 (Fla. 2d DCA 1990), which in turn cited to Rosso v. State, 505 So.2d 611 (Fla. 3d DCA 1987) from the Third District.

I. **FIRST ISSUE: "BAD ACTS" EVIDENCE**

As the defense argued (48-Appx.) outside the presence of the jury, the prejudicial effect of the testimony regarding the Respondent having previously had his license suspended was to suggest to the jury the possibility that the Respondent had previously been convicted of DUI-related charges, which were not properly before the jury (especially since the Respondent did not testify) (VI:495-496).

The defense made objections based on both § 90.610, Fla.Stat. (1995) (at VI:493) and under § 90.403, Fla.Stat. (1995) (at VI:494). The trial court additionally recognized (VI:494) the potential § 90.404(2), Fla.Stat. (1995) ("Williams Rule") issue as well.

Impeachment by unrelated prior offenses has recently been addressed (and condemned) by the United States Supreme Court in the case of Old Chief v. United States, 117 S.Ct. 644 (1997).

In the Old Chief case, the defendant was charged with the federal offense of possessing a firearm with a prior felony conviction. Prior to or during the course of the trial, the defendant offered to stipulate to having been previously convicted, rather than allowing all of the details of the prior conviction to be placed before the jury. The defendant had argued that the "probative value would substantially outweigh the danger of unfair prejudice" (under the federal equivalent of our 90.403 provision).

The prosecution refused to accept the stipulation, and the full record of judgment of conviction was presented to the jury. The defendant was convicted of the charged offense. The United States Supreme Court overturned this conviction.

Justice Suter, writing for the Court, quoted from the prior opinion of United States v. Moccia, 681 F.2d 61 (C.A. 1 1982):

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt."

In our case, allowing the prosecution to plant in the jury's mind the suggestion that a defendant had prior DUIs which resulted in the suspension of his license, years prior to the incident in question, violated all accepted interpretations of § 90.403, Fla.Stat. (1995), relating to unfair prejudice.

The State had not objected to the question, when asked, as to whether the Respondent had a valid driver's license at the time of the instant collision. The State did argue against the relevance of the testimony at sidebar, as the prosecutor argued in favor of the proffered prior bad acts evidence. This relevance argument, even if valid, fails to overcome the prejudicial effect prohibitions of § 90.403, Fla.Stat. (1995).

Argued in the alternative, if the Respondent having a valid driver's license at the time of the accident was an irrelevant fact, why would admission of that irrelevant fact then make

relevant his prior bad acts on occasions unconnected with the night in question?

The State argued that the defense question had "opened the door" to the inquiry as to prior driving record.

A recent Florida District Court opinion which analyzes both the issues of "propensity" evidence, as well as the "opening the door" concept, is the case of Bozeman v. State, 698 So.2d 629 (Fla. 4th DCA 1997).

In Bozeman, the Court gave five or six different examples (from other Appellate decisions, including two First District opinions) of where the defendant had sufficiently "opened the door" to rigorous cross-examination on otherwise inadmissible collateral matters by (for example): testifying that "he had never hit any woman", that he "had never hurt anyone", that he had "never pointed a gun at anybody", and that he "had never done any drug deals in this life" (at p. 631).

In each case, it was the misleading suggestion in the defendant's testimony which created the opportunity for the prosecution to cross-examine him on one or another boasts. Citing Brown v. State, 579 So.2d 898 (Fla. 4th DCA 1991); Allred v. State, 642 So.2d 650 (Fla. 1st DCA 1994); Ashcraft v. State, 465 So.2d 1374 (Fla. 2d DCA 1985); Fletcher v. State, 619 So.2d 333 (Fla. 1st DCA 1993).

After giving all of these examples, the Bozeman Court

distinguished their case from the examples with this analysis:

> "In this case, the innocuous question posed by defense counsel to Wimberly was hardly the type of deceptive conduct by a defendant that opens the door to evidence of prior bad acts. . . . The offensive testimony was not responsive to any misleading statement made by the defendant during his direct examination."

In our case, it was a truthful point of fact that the Respondent had a valid driver's license at the time of the accident. Eliciting this truthful testimony from a homicide investigator is vastly different from a defendant volunteering arguably untruthful information, which then subjects him to cross-examination on that issue.

II. **SECOND ISSUE: JURY INSTRUCTIONS ON CAUSATION**

As previously indicated, the Respondent concedes a number of issues in this case.

First, the Respondent concedes that the jury received enough evidence to find the Respondent violated the alcohol prong of the DUI manslaughter charge.

Second, Respondent concedes that whether or not the Respondent indeed showed a "deviation or lack of care" in his driving is a factual issue for the jury. The Respondent further concedes that, in this case, there was evidence presented to a jury sufficient (although controverted and contested) to sustain a finding by them that he had indeed shown a lack of care in his driving and that that lack of care had actually contributed to Mr. Pura's death.

Unfortunately, the jury was never given that opportunity to apply a "deviation or lack of care" standard. Under the instructions as given, there was no demand on the jury to analyze the vehicle operation to determine whether it was "good" operation or "bad operation", or to determine whether the death was otherwise inevitable. That is why the jury instructions are misleading, especially in a close case such as the instant one. There were facts sufficient for this jury to find that Mr. Pura's death was the tragic result of a string of circumstances and that Mr. Hubbard's driving "contributed" to the final result in the same way that a sober, non-speeding driver would have "contributed" to the

final fatal result. But these instructions did not allow them to reach this issue.

The heart of Respondent's argument regarding jury instructions is as follows:

1. With these jury instructions, even good, proper "operation" of a vehicle by an alcohol-consuming driver would necessarily result in a conviction for DUI manslaughter.

2. With these jury instructions, even an inevitable fatal collision would result in a DUI manslaughter conviction, if the driver had consumed enough alcohol.

The facts were vigorously contested on many points. Respondent presented sufficient evidence whereby a jury could have logically found that the Cummings' vehicle (having just pulled onto the highway) was traveling well under the speed limit and that this (not his sobriety) is the reason Mr. Cummings was able to slow down in time. The jury could easily have found that the vast majority of drivers traveling at 45 mph in Mr. Hubbard's lane (whether alcohol-impaired or not) would not have been able to avoid collision with the Pura vehicle. There was evidence presented that Mr. Cummings' unimpaired wife, sitting next to him in his car, was unable to see the Pura vehicle until it was only one car length away (VII:624). Mr. Cummings' own testimony immediately after the accident to the homicide investigator indicated that he was 150 feet away from the Pura vehicle before he saw it, and all the

experts indicated this was insufficient time for a vehicle traveling 45 mph to stop without striking the Pura vehicle.

True, the jury did not have to accept any of these propositions or believe any of this evidence. However, given these jury instructions, even if they did believe every element of this proof, they would have been required to find Mr. Hubbard guilty because he was "operating" his vehicle at that place and time and formed one "link in the chain" of the fatal crash.

The Respondent recognizes that the trial court struggled at some lengths to try and balance the competing interests, and in attempting to utilize the standard jury instructions so far as the Court was able, given the peculiar facts of the case. The court recognized early the need for an instruction regarding deviation or lack of care. However, the final instructions did not contain one.

The history of how § 316.193(3)(c)3 came to its present wording shows the Legislature, responding to a perceived "gap" in the law, has moved toward a requirement that there be some substantial causal connection between the alcohol and the collision that results in death.

For example, under the old law before the Legislature modified it, a defendant with an illegal blood alcohol might be stopped lawfully at a red light, be rear-ended by a negligent driver and subsequently be charged with DUI manslaughter if the negligent rear-ending driver died as a result of the accident.

This is the result that the Legislature sought to avoid.

Applying those hypothetical facts, again, to our jury instructions, it would be simple for the prosecution to argue that the "operation of the vehicle" by the driver with the illegal blood alcohol had placed his vehicle at the stop light, and that had the vehicle not been at the stop light, the negligent rear-ending driver would not have had a car to smash into. Therefore, the DUI driver stopped at the stop light and his "operation of his vehicle" constitutes a "but for" cause of the death of the rear-ending driver. That DUI driver would be guilty of DUI manslaughter if the jury applied the jury instruction utilized in our case.

In our case, the State submitted jury instructions tracking the Naumowicz v. State, 562 So.2d 710 (Fla. 1st DCA 1990), decision. The defense (Respondent) suggested a customized jury instruction using the Supreme Court decision of Magaw v. State, 537 So.2d 564 (Fla. 1989), as a guide.

The Supreme Court in Magaw went to some lengths to explore the Legislative intent behind the changes to § 316.193, which produced the current Statute. The Magaw opinion quoted the "staff analysis prepared by the House of Representatives Committee on Criminal Justice", which in turn stated:

> "There now must be a 'causal connection' between the operation of a vehicle by the offender and the resulting death".

The two most critical sentences (for our purposes in this

appeal) of Magaw are found at the final page of the opinion (567):

> "The Statute requires only that the operation of a vehicle should have caused the accident. Therefore, any deviation or lack of care on the part of a driver under the influence to which the fatal accident can be attributed will suffice." (Emphasis supplied.)

Foster v. State, 603 So.2d 1312 (Fla. 1st DCA 1992) recognized that an essential element of DUI manslaughter is "that the defendant's negligence was a cause of the death of another" (at p. 1315 and at p. 1316). This language also was omitted from the jury instructions in this case.

Neither the Foster customized jury instructions, nor the Naumowicz customized jury instructions, appropriately address the issues raised in the instant case, with its unique and highly fact-specific details and issues.

Indeed, this is not surprising, since both Foster and Naumowicz were customized to fit specific facts unique to each of those cases.

In our case, the jury was charged with language taken directly from Naumowicz. This resulted in several difficulties, both legal and grammatical.

First of all, the Naumowicz trial court had struggled with much simpler facts, in that there were only two possible causes of the death of Ms. Naumowicz's passengers (Ms. Naumowicz's drunken driving or the drunken driving of Christopher Work in another

vehicle), in a two car collision.

In Naumowicz, one drunk driver ran a stop sign and crashed into another drunk driver who was traveling 20 miles over the speed limit on a street at right angles to that upon Ms. Naumowicz had been traveling.

In the instant case, even the State's homicide investigator and retained accident reconstruction expert both admitted that there were at least a dozen contributing factors to the death of Dionisio Pura, factors which were unrelated to the Respondent or any of his actions. There was no suggestion in Naumowicz of the multiplicity of factors which affected the jury's deliberations in the instant case. As a result, using the "sole cause" language from Naumowicz to discuss the multiple factors in this case resulted in unnecessary confusion.

How could language such as "the conduct of the decedent Dionisio Pura or a third party either individually or in combination" possibly address the dozen other significant factors (all of which were recognized by the trial court) and inform the jury that they were free to consider all these factors? The State's insistence on a Naumowicz instruction forced a round peg into a square hole.

Returning back to our suggested scenario where a sober driver was in Mr. Hubbard's lane at the same time and place, that sober driver would never be able to say that all of these other factors,

taken together, were "the sole direct cause" of the death. That sober driver's collision with the disabled Pura vehicle (and the subsequent striking of pedestrian Pura) would always be a link in the chain or a "but for" element of the "direct causes" of the death, and thus, by definition, the other factors could never be the "sole direct cause" of the death.

All of the factual details which made "pedestrian" Pura and his vehicle invisible are set forth in the "Statement of the Case and Facts". We would like next to briefly focus on the major contributions of Mr. Holder and Mr. Pura to the second accident and the third (fatal) accident (which we define as the collision of a vehicle with Mr. Pura standing in the roadway).

All of the expert witnesses, as well as the investigating trooper (who was tendered as an accident reconstruction expert), conceded that Mr. Pura contributed to his death by continuing to stand in the roadway, in the dark, after the first crash. If he had stepped into the median, this would have been a property damage case, instead of a homicide. There was also competent expert witness testimony indicating that the decedent contributed to the cause of the first accident. Based upon the evidence and distances, and the testimony of eyewitnesses, Trooper Verge and Professor Smith testified that Mr. Pura likely violated the right of way of Mr. Holder and thus contributed to that accident.

The prosecution must concede Mr. Holder was a major

contributing cause to the accident, since he was charged with DUI manslaughter.

Respondent's suggestion to the trial court (and here) that the death of Mr. Pura could be attributed to Mr. Holder and Mr. Pura is not without legal precedent. In Barrington v. State, 199 So. 320 (Fla. 1940), an intoxicated driver left his vehicle in the dark, at night, on a bridge, without lights. When another vehicle struck the Barrington vehicle, killing the driver of the moving vehicle, the Supreme Court upheld Barrington's conviction for manslaughter, finding that:

> "[He] placed it in such a position on the highway that it became a menace to moving traffic. It is our view that in this factual situation, death was caused by the operation of the car of the defendant . . . [a]n unwary traveler paid with her life in a collision directly caused by the improper placing of the vehicle by a driver while inebriated."

(At pp. 322, 323.)

The evidence in the instant case also tended to show that the Pura truck could have been pushed out of the way after the first collision by Mr. Pura and his passenger (VI:489). They elected not to do so.

A more recent incarnation of Barrington is found in the First District case of Werhan v. State, 673 So.2d 550 (Fla. 1st DCA 1996), where another drunken driver left his vehicle in the roadway, without lights, on a roadway that "was completely dark" (at p. 551). Mr. Werhan was convicted of manslaughter after a

tractor-trailer driver struck this vehicle in the roadway and died as a result.

Werhan is, we respectfully submit, particularly appropriate for an analysis of the issues in the instant case for two separate reasons.

First, Mr. Werhan's culpable negligence rose to a sufficient level (according to the trial court and the District Court) that he was held accountable for manslaughter and vehicular homicide, for, in essence, the same actions as Mr. Holder in our case. Mr. Werhan's conviction emphasizes the degree of culpability which Mr. Holder should have had for causing Mr. Pura's death. This, in turn, emphasizes the extreme importance of allowing the jury a reasonable opportunity to evaluate Mr. Holder's actions as a significant cause in fact of Mr. Pura's death.

The second importance of Werhan to our considerations relates to the emphasis the Appellate Court (and apparently, the jury as well) placed on what we will here call "collateral" causes of the death in that cause. Specifically, there are at least eight different references in the Werhan opinion to "no lights", "dark" or "lights off" to emphasize the high degree of negligence exercised by Mr. Werhan in leaving his vehicle at that place and time.

The jury in the instant cause should have had the opportunity to consider the significant impact of all of the "darkness" factors

in Mr. Hubbard's case, in deciding whether or not the accident was inevitable versus the result of Mr. Hubbard having a "deviation or lack of care".

Another important comparison of Werhan to our case is this: Mr. Werhan is in prison for doing exactly what Mr. Pura did in our case. In fact, Mr. Pura not only left his vehicle in the road as did Mr. Werhan, he stayed in the road himself, where no driver would expect to find a pedestrian.

We ask that this Court revisit the reliance on this Naumowicz language and grant future trial courts an alternative appropriate jury instruction, simply because this jury instruction does not fairly take into account the Legislature's directive that causation be a factor.

Perhaps language along the lines of the following would be simpler and more helpful to a jury: "if you find that the death would not have occurred without the Respondent's deviation or lack of care in his driving (Magaw), then you must find him guilty".

III. **THIRD ISSUE: MAGAW AND HUBBARD V. MELVIN**

The State's Brief at p. 7 states: "the DCA has added negligence as an element of DUI manslaughter, not the Legislature".

This ignores the plain language of Magaw v. State, 537 So.2d 564 (Fla. 1989). In the first full page of the opinion (p. 565), the Court began its analysis by a historical review of the 1977 statute and the 1979 Baker v. State, 377 So.2d 17 (Fla. 1979) opinion, pointing out that in the past "Decisions . . . have consistently held that negligence and proximate causation are not elements of the [DUI manslaughter] crime". The court then directly discussed the Legislative intent by reviewing a staff analysis and floor discussions of the Bill.

The Magaw opinion continued this negligence analysis all the way through to the last page of the opinion (p. 567) where the Supreme Court pointedly noted that a different Senate Bill (proposed in the same session of the Legislature which passed the DUI manslaughter section under review) was introduced in the Legislature and failed to pass. The Magaw opinion described that proposed Legislation (Senate Bill 1218) as a Bill which "specified that negligence and proximate cause were not elements of manslaughter".

For the State to continue to pointedly emphasize the misleading "causation" language, while ignoring all of the Magaw discussions of "negligence" and "lack of care", is inappropriate.

One important distinction that should be pointed out between the two cases before the Court on conflict certiorari (our case and the Melvin v. State, 677 So.2d 1317 (Fla. 4th DCA 1996) case) is the vast discrepancy between the facts of the two cases. Indeed, one might (after reading the facts of our case) confidently predict that such a bizarre string of circumstances, all together at the same place and time, will rarely, if ever, be repeated in the Appellate Courts. While the Melvin Court summarized the factual circumstances of that fatal crash in three sentences (one paragraph), a full discussion of all of the contributing circumstances to Mr. Pura's death (in our case) would, we feel, require pages.

Moreover, we respectfully dispute the Fourth District's interpretation of Magaw in a more fundamental sense. The Melvin opinion essentially rewrites Magaw.

Melvin avoids the harder questions with an overly simplistic approach to defining "causation". Melvin specifically ignores the difficult. While the Magaw discussion of "deviation or lack of care on the part of a driver" language is quoted in the Melvin opinion, it is buried in a larger quote from the Magaw opinion, and is not thereafter constructively discussed or addressed.

The Melvin panel has fallen into the trap of mistaking "but for" causation for the two-prong actual cause and deviation/lack of care analysis which Magaw requires.

The "intoxicated driver stopped at a stoplight" scenario is simple, straight-forward and powerful enough to have been adopted three times: first, by Justice Boyd in Baker; second, by the House of Representatives Committee on Criminal Justice Staff; and third, by this Court in the actual Magaw opinion.

The Melvin panel completely ignored that factual scenario in its analysis of Mr. Melvin's facts. That scenario is noticeably absent from the Petitioner's Brief as well.

There is no way that the intoxicated driver at the stoplight could effectively argue against a prosecutor that he was not at least a part of the "but for" causation of the death of the driver who struck him from behind. Under Melvin, with no additional explanation to the jury, that driver would be guilty, and the Legislative intent and the holding of Magaw would both be circumvented.

Look, for example, at this sentence from the Melvin opinion, found at p. 1318: "Similarly, if the death was the result of factors beyond Melvin's control, he would not be guilty". This analysis is logically incorrect, when applied to the standard jury instructions in a case like the stop light driver.

Factually, given the instructions in our case, the jury would not be able to acquit, even if (as in our case) there was overwhelming evidence proving that the death was the result of factors beyond Mr. Hubbard's control.

The conclusory suggestion by the Melvin panel that: "for example, based on the standard instruction, if the jury concluded that someone else had caused the death, perhaps another driver, Melvin would be found not guilty" is simply not logical. Such language ("someone else had caused the death") will never require the jury to make the close analysis as to whether a non-negligent, unimpaired driver in the same set of circumstances would have been equally as likely to have "caused" (in a "but-for" causation analysis) the death as the defendant being tried. That is the only analysis which would have applied in Mr. Hubbard's case.

We can apply a simpler analysis in contrasting Magaw and Melvin. Following Melvin returns DUI manslaughter to the strict liability analysis followed in Florida from the time of Cannon v. State, 91 F. 214, 107 So.2d 360 (Fla. 1926) until Magaw.

To so hold would require that this Court find that the 1998 amendments to the standard jury instructions actually repealed and reversed Magaw, for Magaw held that strict liability was no longer to be the law.

The 1998 standard jury instruction modifications were not available to the trial court in the instant cause. Under appropriate facts, they can and should be supplemented by a trial court upon timely request by the Defendant.

IV. **FOURTH ISSUE: STATE'S RELIANCE ON STANDARD JURY INSTRUCTIONS NOT DISPOSITIVE**

A summary of the State's argument on appeal to this Court would seem to be:

1. the trial court utilized the standard jury instruction when it charged the jury;
2. the standard jury instructions are favored and a request for special jury instructions is disfavored;
3. therefore, the trial court jury charge should be upheld.

The argument would be fine, except that it omits any reference to the fact that the trial court supplemented (at the State's request) the "standard jury instructions" with mis-matched, customized, non-standard jury instructions from prior Appellate decisions.

A significant portion of the State's Brief emphasizes the appropriateness of using standard jury instructions. The Respondent does not argue with the use of standard jury instructions. However, in this case, the debate does not end with this point.

The State's Brief to this Court omits any reference to the well-established line of cases holding that:

> "A defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instruction."

Smith v. State, 424 So.2d 726 (at 732) (Fla. 1982); Campbell v.

State, 577 So.2d 932 (Fla. 1991); and Motley v. State, 155 Fla. 545, 20 So.2d 798 (Fla. 1945).

In Campbell, the trial court relied on the standard jury instructions and denied the special requested instruction by the defendant (which the defendant, in turn, had taken directly from the controlling Appellate opinion). Also in Campbell, the defense had not objected to the standard jury instructions, but simply requested the special instruction as a supplement to the standard jury instruction. The Supreme Court reversed the conviction.

Indeed, as recently as 1997, this Court has confirmed that:

> " . . . a trial judge in a criminal case is not constrained to give only those instructions that are contained in the Florida Standard Jury Instructions."

James v. State, 695 So.2d 1229 (Fla. 1997), citing Cruse v. State, 588 So.2d 983 (Fla. 1991).

Most importantly, this well-established rule of law negates the suggestion by the State that the new 1998 standard jury instruction regarding DUI manslaughter contains all of the language that should ever be used by a trial court when DUI manslaughter is the charge before the jury.

In the Smith case, the Supreme Court upheld a trial court's decision not to include a jury instruction [on the defense of withdrawal], which had been requested by the defense. The court made plain (at p. 732) that it was doing so only because there had

been no evidence presented on that issue. The Supreme Court dictate was clear: "If there is any evidence of withdrawal, an instruction should be given" [emphasis supplied].

No reasonable suggestion could be made in our case that there was not evidence presented to the trier of fact on the disputed issues of causation and negligence. Thus, these issues should have been fully charged to the jury.

The State has cited to State v. Bryan, 290 So.2d 482 (Fla. 1974) in support of its proposition that standard jury instructions must be used. However, the case held exactly the opposite. Justice Dekle noted parenthetically that is was "preferable to use the standard instructions", but then went on to uphold a customized, non-standard jury instruction given by the trial court. The key to Justice Dekle was that "it was a balanced charge, urging neither acquittal nor conviction" and that " . . . the charge given in the instant case was not erroneous".

The State cites Williams v. State, 437 So.2d 133 (Fla. 1983), for the proposition that standard jury instructions are "heavily favored" (Initial Brief at p. 10). We cannot find the "heavily favored" language in the Williams opinion. However, there is other language in the Williams opinion which is helpful and appropriate for an analysis of the case sub judice.

In Williams, the trial court utilized standard jury instructions applicable to a capital murder case. The defendant

argued that:

> "The standard jury instructions are flexible guidelines and not inflexible rules and that the trial court still should have given the "old" circumstantial evidence instruction since circumstantial evidence was so prominent in this case."

The Supreme Court rejected this argument, pointing out that those [1981] standard jury instruction modifications (<u>In Re: Standard Jury Instructions in Criminal Cases</u>, 431 So.2d 594 (Fla. 1981), at 595) had specifically authorized a trial court to continue to utilize the old circumstantial evidence instruction if it was felt to be "necessary under the peculiar facts of a specific case". We concede that if we ended the analysis (and this analogy of <u>Williams</u> to Mr. Hubbard) at this point, the <u>Williams</u> case would be particularly harmful to our argument. However, if we complete the analysis, we note the striking differences between our case and the <u>Williams</u> case:

1. In our case, the court went far beyond the standard jury instructions, and supplemented those instructions with customized (non-standard) instructions lifted from prior First District opinions.
2. The trial court acknowledged throughout, from prior to the beginning of the trial and up to the eve of the final ruling on jury instructions, a need to instruct the jury with an appropriate "negligence" standard.

3. The trial court, in our case, did not have the benefit of the new standard jury instructions which addressed DUI manslaughter, and which were issued well after the trial and on the eve of the oral arguments in the District Court of Appeal.

There is nothing in the recent opinion of this Court adopting new jury instructions (Standard Jury Instructions in Criminal Cases (97-2), 23 Fla.L.Weekly S417 (Fla. July 16, 1998)), which expressly forbids a trial court from supplementing DUI manslaughter jury instructions with this important language at the heart of the Magaw opinion. That essence is the portion relating to "deviation or lack of care on the part of the driver". Neither did the opinion forbid the use of special jury instructions in all future cases, for all time.

The State's argument collapses under its inaccurate and incomplete summary of the Legislative intent involved. At p. 20 of their Brief, the State suggests that the Legislature hoped to minimize the type of driving that causes the death of any human being. The Brief never jumps the hurdle of explaining how the Legislature and the Supreme Court opinion in Magaw clearly (as previously noted) exempted "driving" where an intoxicated driver placed his vehicle at a red light and thus "caused or contributed to" the death of the driver who hit him from behind (Magaw, p. 567).

This same page of the State's Brief (p. 20) then begins an analogy to premeditated murder jury instructions. We welcome the analogy for this reason: the analogy supports our appeal. Allow us to explain.

The State points out that the premeditated murder standard jury instructions require proof that the victim's death was "caused" by the criminal "act" of the Defendant. This artificially limited reference is correct (see p. 95, Fla.Std.Jury Instr. (Crim.), "Murder -- First Degree"). However, the premeditated murder standard jury instructions supplement this by giving the jury clear and unambiguous guidance on exactly the type of issue we have raised in this appeal (negligence), without any trauma to a full enforcement of the Florida homicide Statutes.

The first degree murder jury is told (p. 93, Fla.Std.Jury Instr. (Crim.)) that "the killing of a human being is excusable . . . when the killing occurs by accident and misfortune".

Such supplemental, explanatory instructions to a jury in our case (or, indeed, in any DUI manslaughter case) would not allow intoxicated drivers to commit highway homicide without responsibility. Rather, it would simply take the extra necessary step in allowing jurors to separate the two categories of intoxicated drivers.

Respondent Hubbard additionally requests that this Court be mindful of the realities which dominate a case like this <u>at the</u>

trial level.

To be more specific, given the cultural environment regarding any alcohol/driving offense, there is a very real danger (which frequently becomes reality) that a jury will ignore the finer points of the law with regard to criminal liability. A jury may punish the accused for the act of drinking and driving, even when there is no shown connection between the drinking and the ultimate result. When that ultimate result is the death of a fellow human being, the danger (of jury emotion clouding their application of the law) is multiplied tenfold.

Against such a backdrop, when the scales (as a result of the emotional factors) can be heavily weighted against the defendant, it is especially critical that jurors be given clear, specific instructions on the applicable law.

We return to the Motley opinion, now 53 years old (but still cited), for an appropriate statement of this fundamental tenet of law: "We will not dispose of this case under the harmless error statute. There is much at stake and the right of trial by jury contemplates trial by due course of law." [Emphasis supplied.]

CONCLUSION

While it is tempting to counsel to want to be professionally involved in contributing to a significant Supreme Court clarification of the law, the simple truth remains: Mr. Hubbard's case was indeed a unique, highly fact-specific case which warranted special jury instructions if ever a case warranted special jury instructions.

Indeed, Mr. Hubbard has consistently maintained this position through the trial court proceedings, through the District Court of Appeal process, and cannot abandon it at this stage. We respectfully submit that this Court should, at a minimum, affirm the DCA reversal as applied to this rare fact pattern, without a major rewriting of the DUI manslaughter jury instructions.

However, we do argue in good faith that the exceptional circumstances in Mr. Hubbard's case have highlighted this deficiency in the jury instructions. This conflict case can thus be used to clear up an unnecessarily ambiguous jury instruction.

Specifically, we request that this Court:

1. uphold the District Court of Appeal's reversal and remand;
2. specifically uphold both grounds for reversal; and
3. provide clear, helpful guidelines to future trial courts for use in future DUI manslaughter cases with similar causation issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Initial Brief on the Merits has been furnished to Robert A. Butterworth, Jr., Attorney General, The Capitol, Tallahassee, FL 32399, attorney for Petitioner, by overnight delivery, on this the 15th day of December, 1998.

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO.: 94,116

FREDERICK VAN HUBBARD,

Respondent.
________________________________/

APPENDIX

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ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST
JUDICIAL CIRCUIT, IN AND FOR SANTA ROSA COUNTY, FLORIDA
AND FROM THE FIRST DISTRICT COURT OF APPEAL

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