IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FREDERICK VAN HUBBARD,

Respondent.

CASE NO. 94,116

PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 159089

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4580

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

OTHER

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 or larger.

SUMMARY OF ARGUMENT

Respondent Hubbard[1] — who at 1 AM drove drunk, speeded, and failed to take any evasive action as he smashed into the victim — wishes to compound the victim's tragedy by requiring a re-trial (ISSUES I & II),[2] by creating an element of a crime that simply appears nowhere in the statute (ISSUE I), and by unreasonably rewarding his trial counsel's tactical decision to put Hubbard's character at issue by not allowing the State to measuredly and reasonably respond and qualify it (ISSUE II).

ARGUMENT

ISSUE I: DID RESPONDENT MEET HIS APPELLATE BURDEN OF ESTABLISHING THAT THE TRIAL COURT WAS UNREASONABLE IN USING THE STANDARD JURY INSTRUCTION ON CAUSATION FOR DUI MANSLAUGHTER, WHICH TRACKED THE LANGUAGE OF THE STATUTE, WHICH WAS APPROVED BY THIS COURT BEFORE AND AFTER THE TRIAL, AND WHICH CITED TO THE VERY CASE ON WHICH THE DCA BASES ITS REVERSAL?

A. Nature of jury instructions -- Hubbard's "ISSUE TWO." (AB 11, 17-26)

Hubbard argues that "the jury was never given [the] opportunity to apply a 'deviation or lack of care' standard" (AB 17).[3] Therefore,

---

[1]Party designations, references, and emphasis will be as in the Petitioner's Initial Brief. "IB" will reference the State's Initial Brief, and "AB," Hubbard's Answer Brief, followed by any applicable page number(s).

[2]Regarding Hubbard's renumbering Issue II as his "FIRST ISSUE," the State agrees with any implication that its Issue II, in addition to its Issue I, is extremely important, thereby meriting this Honorable Court's review. However, the State will address Hubbard's "FIRST ISSUE" (AB 13-16) under Issue II infra, and his SECOND, THIRD, FOURTH "ISSUES," and "INTRODUCTION" (AB 12, 17-37) under ISSUE I. See Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984) ("answer briefs should be prepared in the same manner as the initial brief so that the issues before the Court are joined").

[3]This blanket assertion is incorrect. The jury was instructed on (VIII 833-34), and found Hubbard guilty of (I 93, VIII 862), Vehicular Homicide, which requires more than simple negligence.

at issue here[4] is whether the standard jury instruction erroneously omits explicit reference to "negligence." Couching the issue in terms of legislative intent, did the use of "causes" in Chapter 86-296, Laws of Fla., add negligence as an element[5] to DUI Manslaughter?

Contrary to Hubbard's inference that the State contends that the "new 1998 standard jury instruction regarding DUI manslaughter contains all of the language that should ever be used by a trial court" (AB 32), the State has argued that Hubbard on appeal bears a heavy burden in the face of the compounded (1) prerequisite of showing that "any error 'has resulted in a miscarriage of justice'" (IB 24-25, Issue I Section E), (2) heavily favored use of the standard jury instructions (See IB 10-12, Issue I Section B1); and (3) standard instruction's prima facie reflection of legislative intent here, as it essentially used the legislature's words. (See IB 13-15, Issue I Section B3) Thus, it is telling that Hubbard addresses **NONE** of the **SEVEN** cases that the State cites or discusses at IB 14-15.

After the verdict, the trial court dismissed the Vehicular Homicide (I 98), perhaps on double jeopardy grounds.

[4]Hubbard "concedes ... evidence ... sufficient to sustain a finding ... [regarding] ... lack of care" (AB 17).

[5]Hubbard's later interjection of an affirmative defense (AB 32) is misplaced because it erroneously suggests that the burden of disproving an element is on the defense. See Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) (distinguishing State's burden of proving **elements** from "long-accepted rule ... that it was constitutionally permissible to provide that various **affirmative defenses** were to be proved by the defendant").

The State contests as unpreserved any claim that negligence is an affirmative defense. See, e.g., Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996), and other authorities at note 13 infra. The debate in the trial court was whether the causation **element** requires negligence as such. (See, e.g., VI 455-58)

In contrast to the strong preference for instructions that implement legislative intent by using the words enacted by that branch of government (See IB 15-17, Issue I Section B4),[6] Hubbard's Answer Brief utterly fails to discuss the language of the statute itself. The hard and cold fact is that the statute, enacted by the legislature as a body, rather than a committee or spokesperson, failed to even mention "negligence."

If Hubbard is arguing that the statute, as written, is unconstitutional because it does not define "causes," such an argument would be unpreserved,[7] and, in any event, since the statute would be constitutional even without a **causation** element,[8] it clearly is constitutional without a **negligence** element or definition.[9]

---

[6]Ignoring the plain words of the statute as its polestar of statutory interpretation would put the judiciary "at sea," Brogan v. U.S., __U.S.__, 118 S.Ct. 805, 811, 139 L.Ed.2d 830 (1998). Accord Baker v. State, 636 So.2d 1342, 1343 (Fla. 1994) ("proper remedy for a harsh law will not be found through construction or interpretation; it rests only in amendment or repeal").

[7]See, e.g., Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996), and other authorities at note 13 infra.

[8]See Baker v. State, 377 So.2d 17 (Fla. 1979). See also Armenia v. State, 497 So.2d 638, 639 (Fla. 1986) ("Nothing has occurred since Baker which would warrant receding from that case").

[9]See State v. Mitro, 700 So.2d 643, 645 (Fla. 1997) (absence of definition and potentially better legislative drafting do not render statute unconstitutional); L.B. v. State, 700 So.2d 370 (Fla. 1997) (upholding the statutory language of "common pocketknife"); Bell v. State, 289 So.2d 388, 390 (Fla. 1973) ("To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited").

On the other hand, a reasonable interpretation of the statute, as Magaw v. State, 537 So.2d 564 (Fla. 1989), appears to discern,[10] is that the statute's "causes" language already incorporated concerns over the harshness of strict liability. Therefore, the statute and the standard instruction already cover situations where the fatal collision was "inevitable" (AB 18) or where a drunk defendant who, while lawfully sitting at a traffic light, is rear-ended by the decedent (AB 19-20,28-29,35). In such cases, the defendant's operation of the motor vehicle would not have "caused or contributed to the cause of the death of (victim)," and, where the evidence, as viewed in the light most favorable to a guilty verdict,[11] showed **only** inevitability or the lawfully stopped and rear-ended drunk driver, the State's case would be subject to a motion for judgment of acquittal.

Put colloquially, when a layperson, such as a juror, is asked "who caused the accident" or "who caused the death," the layperson does not engage in legalistic but-for causation analysis, in which Hubbard digresses (at AB 20, 30), but, instead, instinctively determines who is responsible for the death. Accord New Merriam-Webster Dictionary 129-30 (1989 ed.) ("cause" not defined in terms of negligence). Already embodied in the common understanding of "cause" is Hubbard's concern (AB 36) for assessment of responsibility. Thus, the standard instruction properly addresses the common-sense understanding of causation, and the jurors were

---

[10]Magaw's discussion of "cause" was dictum, as it did not matter to the resolution of its dispositive issue, which was the applicability of the statute. See, e.g., Time Ins. Co., Inc. v. Burger, 712 So.2d 389, 392 (Fla. 1998) ("obiter dictum" where "specific issue" was not before the Court).

[11]See, e.g., Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1980).

told to use their common sense in evaluating the evidence (VIII 837).

The standard instruction also addresses Hubbard's concern for contributing causes. (See AB 21-22,22-25) Every traffic accident can be dissected into dozens of contributing causes. **The key**, however, **is whether the DEFENDANT** (here, driving drunk, speeding, failing to brake, ... and encountering a stationary motorist in the dark), **caused** the victim's death? This is precisely what the trial court instructed the jury.

Here unlike Campbell v. State, 577 So.2d 932 (Fla. 1991) (discussed at AB 31), there was no need to amplify the standard instruction, especially with an incorrect one. Just as Fenelon v. State, 594 So.2d 292 (Fla. 1992), curtailed jury instructions but allowed a prosecutor to argue to the jury a perspective of the evidence, here defense counsel can argue, without a jury instruction, that the defendant did not cause the accident because it was inevitable or because the victim was "invisible" (AB 22), regardless of how the defendant was driving. See Coney v. State, 653 So.2d 1009, 1012, 1012 n. 3 (Fla. 1995) ("error for the judge to comment on" evidence). See also Donaldson v. State, 23 Fla. L. Weekly S245 (Fla. April 30, 1998) ("trial court 'is required to give only the "catch-all" instruction on mitigating evidence and nothing more'"); Parker v. State, 641 So.2d 369, 376 (Fla. 1994) (covered by the standard instructions).

Indeed, defense counsel did argue, without explicitly referencing "negligence," that the State did not prove causation (VII 785-89, VIII 818-20), even in his opening statement (IV 142-43,

162-63)[12] Thus, **like the standard jury instruction, as viewed from a juror's common sense, defense counsel's opening statement could aptly summarize the DUI Manslaughter case in terms of causation, without referencing "negligence."**

B. Examining the Conflict Cases in Light of Magaw -- Hubbard's "ISSUE THREE." (AB 11, 27-30)

In response to this "issue," the State briefly adds to its discussions of Magaw in the preceding section as well as in its Initial Brief (IB 6, 12-13, 17-20)

Concerning Hubbard's interpretation of Magaw that is at odds with this Court's citation of Magaw in support of the standard instruction, it is interesting that Hubbard states later that the trial court "did not have the benefit of the new standard jury instructions which addressed DUI manslaughter" (AB 34. See also AB 30) The new instruction concerning causation is virtually identical to the one in existence at the time of the trial. A fortiori, even though DCA cases such as Foster v. State, 603 So.2d 1312 (Fla. 1st DCA 1992), had been in the public domain for about six years, the new instructions, continued to cite to Magaw as support for the **causation** language, without incorporating any reference to **negligence** as such. See also Bankers Multiple Line Ins. Co. v. Farish, 464 So.2d 530, 533 n. 3 (Fla. 1985) (cited at IB 20; judicial

---

[12]Prior to the opening statements, the trial court expressly authorized defense counsel to argue negligence to the jury in opening (IV 109-110), and, subsequent to opening statements, the trial court was still considering its precise language of the jury instruction (See V 221-32).

Because defense counsel's proposed jury instruction (I 90A) included reference to negligence ("deviation or lack of care"), the State has not argued waiver of the jury instruction issue. (Also, see I 81-82, 90A, VII 739-40)

opinions should not be mistaken for mandates to instruct on their discussions of the law).

C. The Trial Court's Supplementation of the Standard Jury Instruction -- Hubbard's "ISSUE FOUR." (AB 11, 31-37)[13]

Hubbard **summarily concludes** that the trial court's supplemental instruction (discussed more fully at IB 21-24) was "mis-matched" (AB 31), but he fails to descend to any specifics whatsoever,[14] and, indeed, he fails to even quote or paraphrase the trial court's supplemental instruction.

Concerning the content of the supplemental instructions, Hubbard concludes that it was "lifted from prior First District Court opinions" (AB 34). Hubbard overlooks the several authorities from this Court cited at IB 23-24. Moreover, he overlooks the portion of the Magaw stating that "the statute does not say that the operator of the vehicle must be the **sole cause** of the fatal accident," 537 So.2d at 567, which is the gravamen of the trial court's supplemental instruction.

---

[13]Hubbard (at AB 37) mentions due process. However, such a claim appears unpreserved. See §924.051, Fla. Stat. (preservation requires trial be informed "sufficiently precise" ground); Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions "procedurally barred because defense counsel failed to object with the requisite specificity in the trial court"); Archer v. State, 613 So.2d 446, 447-48 (Fla. 1993)("specific argument ..."); Hill v. State, 549 So. 2d 179, 181-82 (Fla. 1989) ("constitutional argument grounded on due process ... not presented to the trial court ... procedurally bars appellant"). Arguendo, on the merits of due process, the State briefly responds: Because the instructions adequately covered the elements, there was no deprivation of due process.

[14]Accordingly, Hubbard's attempt (AB 33-34) at distinguishing Williams v. State, 437 So.2d 133 (Fla. 1983) (cited at IB 8, 10) fails to specify how the trial court supposedly went "far beyond the standard instructions" (AB 34) in a way that harmed him.

Indeed, except for the omission of the negligence language, the trial court's supplemental instructions regarding causation substantially comport with much of the instruction that Hubbard requested, (Compare I 90A with VIII 830-31, IB 21 & Appendix E) and, as such, Hubbard cannot complain on appeal about this language, which benefitted him. If nothing else, the addition of this language renders any supposed error in using the standard instruction non-prejudicial and harmless (Compare discussion of supplemental instruction at IB 21-22 with non-prejudicial or harmless error standard at IB 25).

Moreover, contrary to Hubbard's assertion (at AB 17: "**never** given that opportunity to apply ..."), the jury was instructed on, and found Hubbard guilty of, Vehicular Homicide (VIII 833-34, I 93, VIII 862), which requires a higher level of negligence than even Respondent's proposed additional (erroneous) element for DUI Manslaughter. Therefore, any supposed technical error in the instruction was non-prejudicial and harmless beyond ALL doubt.

D. Hubbard's "INTRODUCTION TO ARGUMENT: CLOSE CASE ANALYSIS" (AB 12)[15]

The State leaves this discussion until last because it submits that it is irrelevant to the issue presented through the certified conflict. **IF** negligence is an element of DUI Manslaughter, regardless of whether this is a "close case," Hubbard was entitled to an instruction on it upon his request.

---

[15]Interestingly, when defense counsel argued his motion for judgment of acquittal to the trial court, he admitted that the DUI Manslaughter is "**just not the close case** as the vehicular homicide" VI 575-76) and that "this is a **classic DUI manslaughter case**" (VI 584). (Compare AB 27-28, 38: this case, unique).

Whatever appears on the roadway and however it got there, the legislature intends that a fully sober, non-speeding, attentive, and oriented person be able to perceive and react to it. Here, **at about 1 AM**, (V 269) Hubbard was

- **drunk**, i.e., his blood alcohol measured 0.155% and 0.156% (V 400), "almost twice the legal limit" (V 401);[16]
- **speeding** at more than 55-60 MPH. (V 275, 299) in a 45 MPH zone (VI 433, V 270, 274);[17]
- **grossly inattentive**, as he failed to brake or take any evasive action (V 266, 276, 283, VI 517-18);[18] and,
- **disoriented**, as Hubbard mistakenly thought the victim's vehicle pulled in front of him (V 367, VI 499).

Hubbard did not react to Mr. Pura's plight. Instead, Hubbard clearly **caused** Mr. Pura's death.[19] This was not a "close" case.

Moreover, contrary to Hubbard's argument that the facts of this case are unique, Hubbard discusses other cases where motorists are

---

[16]An FDLE toxicologist estimated Appellant's blood alcohol level at the time of the crash as .142% to .18% (VI 408-409). There was substantial additional evidence that Hubbard was impaired. (See IV 183-84, V 254-55, V 368, V 385, V 388).

[17]Hubbard was traveling **over** 55 mph as he approached the victim's vehicle, yet at impact, he was traveling **at** 55 mph. This disparity may have been due to the physics of a slight incline in the road (See V 295-96, VI 432), resulting in Hubbard's vehicle slowing.

[18]According to forensic engineer James D. Anderson, swerving left into the median would have been Hubbard's "easiest and quickest" option (VI 534-35). A defense expert's testimony concerning the median as a safe place for the victim also applies to Hubbard: If Hubbard "had gone to the median, he would not have been involved in this accident" (VII 697).

[19]Mr. Pura, the victim, had no alcohol in his system, and the "drug screen of his urine and his blood were negative for any drugs of abuse." (V 330)

confronted with situations where others have "left [their] vehicle[s] in the roadway" (AB 23-25). Whether the "object" is a little toddler who "wandered off," a driver too drunk to crank the ignition of a stalled car, or an innocent motorist with a flat tire or stranded because another drunk driver disabled his vehicle (Mr. Pura, here), the oncoming driver (Hubbard, here) bears the responsibility to not be driving under-the-influence, not be driving with an unlawful alcohol level, not be speeding, not be grossly inattentive, and not be disoriented.[20]

In contrast to any hair-splitting over exact distances (See AB 6-7, 18), a key feature of the trial was the undisputed ability Mr. Cummings to stop in time to avoid the victim. Cummings, traveling in the same direction and on the same road and at the same time as Hubbard, was able to see the victim and stop in plenty of time before the victim's Mazda. (V 269-84, VII 628) Instead of slowing, stopping, or veering, Hubbard "flew by" (V 299, 275) Mr. Cummings and then crashed into the victim. Instead of being sober, as was Mr. Cummings, and traveling at about the speed limit, as was Mr. Cummings (V 274, 300, 301), Hubbard was drunk and speeding.[21]

One thing is certain of driving: The driver must expect, and be able to react to, the unexpected. A significant attribute of the

---

[20]See Petroleum Carrier Corp. v. Robbins, 52 So.2d 666, 667 (Fla. 1951) ("Certainly, a driver cannot have done his utmost to avoid disaster when an obstruction looms ahead if he has not applied his brakes to the extent that his tires leave marks on the pavement. And certainly he could not have been traveling at a rate of speed which would enable him 'to stop or control his car within the range of his vision.'").

[21]Hubbard discusses (AB 18) Mrs. Cummings' testimony, but he ignores the evidence that she was not driving, resulting in her inattentiveness to the roadway. (VII 620, 627)

under-the-influence driver is a "greatly increased" reaction time (V 393). Hubbard's drunken, non-reacting, disoriented condition (For effects of alcohol, see V 393-94) **represents the archetype of what the legislature and the standard jury instruction intend to cover**.

ISSUE II: WHERE DEFENSE COUNSEL HAD ASKED A WITNESS ON CROSS-EXAMINATION, "YOU DID LEARN EARLY ON IN THE CASE, DID YOU NOT, THAT MR. HUBBARD WAS DRIVING WITH A VALID DRIVER'S LICENSE THAT NIGHT?," DID THE TRIAL COURT REVERSIBLY ERR BY ALLOWING THE PROSECUTOR ON REDIRECT EXAMINATION TO ASK THIS WITNESS IF APPELLANT'S DRIVER'S LICENSE HAD EVER BEEN SUSPENDED?

Hubbard's record included Robbery, Battery on Law Enforcement, Resisting Officer with Violence, Obstructing Crime Investigation, DUI, Trespass, Petty Theft, Indecent Exposure, Possession of Marijuana, Possession of Drug Paraphernalia, Worthless Check, Display Gun/Weapon, Simple Battery. (I 104, 106. See habitualization at I 22-34, 101) Hubbard's extensive criminal history has two implications for the issue.

First, on the one hand, the hypertechnical accuracy of the defense evidence is not the sole test of admissibility, contrary to Hubbard's sole attempted justification for his trial counsel's question (AB 16). Otherwise, the prosecution could have wholesale introduced evidence of Hubbard's extensive criminal history without any justification other than its accuracy.

Second, although the State has not disputed that Hubbard had a valid driver's license at the instant of the accident, defense counsel's question, without the prosecutor's response, nevertheless was alone displayed to the jury as representing Hubbard's general character. It thereby created the false impression that Hubbard was a law-abiding citizen, allowing the State clarify and qualify it.

See Ehrhardt, Florida Evidence §404.5 ("prosecution may offer character evidence to rebut the accused's evidence"); §90.404(1)(a), Fla. Stat. (cited at IB 32). Thus, the "opened door" principle applies where the "opening" evidence created a false inference ("innuendo"), allowing the prosecution to introduce clarifying information. In McCrae v. State, 395 So.2d 1145, 1151-52 (Fla. 1980) (discussed at length IB 31-32), the defense's evidence may have been technically correct. In Blair v. State, 406 So.2d 1103, 1106 (Fla. 1981) (discussed at IB 30-31), the defense introduced evidence that on its face appeared to be technically accurate.

Hubbard also argues (AB 15-16) that the "opened-door" principle applies only to responding to evidence from the defendant's own mouth while testifying. Hubbard fails to provide a logical rationale for such a limitation, which would ignore the basic logic of the "opened-door" principle to clarify, qualify, correct, or complete the opened matter, regardless of how the matter was initially introduced. Hubbard's limitation is irrelevant to the inquiry. Accordingly, Johnson v. State, 608 So.2d 4, 9 (Fla. 1992) (cited at IB 30), pertained to prosecution redirect of "Smith," not the defendant. The reliance of Knight v. State, 23 Fla. L. Weekly S587 (Fla. Nov. 12, 1998) (IB 29-30) upon "the defense open[ing] the door" did not depend upon the defendant testifying. Pierre v. State, 597 So.2d 853, 855 (Fla. 3d DCA 1992) (IB 31), concerned, in part, the testimony of Adriana Delva, not the defendant.

Thus, Holton v. State, 573 So.2d 284, 287-88 (Fla. 1990) (discussed at IB 33-34), concerned a prosecutor's inquiry in

response to defense counsel's question of a non-defendant witness on the same general topic, even though the defense evidence was not necessarily false.

The Answer Brief fails to mount any developed justification for **DEFENSE COUNSEL**'s actions (See AB 13-16), but, instead, attempts to shift the blame to the State. According to Hubbard, the State is not only responsible for asking only proper questions in its examinations but also for preventing the defense from asking any improper question. The State respectfully submits that the principle of a party "opening the door" to otherwise inadmissible evidence does not depend upon the opposing party attempting to keep the "door closed." See, e.g., McCrae (no State objection); Blair (no State objection). See also Terry v. State, 668 So.2d 954, 962 (Fla. 1996)(evidence that defendant was "suspect in other armed robberies"; "[m]ost importantly, a party may not invite error and then be heard to complain of that error on appeal"); White v. State, 446 So.2d 1031, 1036 (Fla. 1984) ("cannot at trial create the very situation of which he now complains and expect this Court to remand for resentencing on that basis").

Moreover, just as **DEFENSE COUNSEL**'s license question essentially introduced evidence that Respondent had not done or not failed to do something in the recent past that otherwise would have resulted in a driver's license suspension, the prosecutor's question indicated that at some point in the past Hubbard did or failed to do something in the past that resulted in a driver's license suspension. As far as the jury knew, the suspension may have been years in the past for a relatively innocuous reason (See IB 33), thereby also rendering any

prejudice speculative, de minimis, and no more prejudicial than the harm inflicted by defense counsel's question. Furthermore, any supposed prejudice could have been cured by a limiting instruction, which defense counsel did not request (See VI 497, VII 730).

Old Chief v. U.S., _U.S._, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) (AB 13-14), reveals the DCA's error, not the trial court's. In Old Chief, unlike here, the defense went out of its way to limit as much as possible evidence exposing the defendant's prior record to the trier of fact. Moreover, the core of Old Chief's reasoning was that the prosecution should not be allowed to elicit the details of prior criminal behavior when a stipulated general label for that prior behavior will satisfy the legitimate probative needs of the party. Here, the trial court did not allow the prosecution to elicit any of the details of the content or scope of Hubbard's extensive criminal history.

In Bozeman v. State, 698 So.2d 629 (Fla. 4th DCA 1997) (AB 15), unlike here, **the prosecution first introduced** the import of the "'special management' division," which had the explicit and extreme negative denotation of housing the "worse behaved inmates in the Broward County jail system," "maladjusted," and "violent." Bozeman allegedly battered while in the special management division. In contrast, here, defense counsel was the first to elicit evidence of Hubbard's license, and the State's response was extremely narrow, very low-key, and relatively innocuous, thereby rendering the trial court's ruling most reasonable.[22] The DCA erred.

---

[22] Compare Johnson v. State, 608 So.2d 4, 10 (Fla. 1992) (cited at IB 28 n 7) with Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

CONCLUSION

In addition to the CONCLUSION of its Initial Brief, the State also disputes Hubbard's "CONCLUSION" (AB 38) that he has "consistently maintained" his position regarding the jury instructions. To the contrary, **Hubbard initially endorsed as an option the standard jury instruction that he now claims is so deficient.** (See I 81)

The Pura family was victimized by drunk driver 1, then by drunk driver 2 (Hubbard), and then by the DCA's reversal. Therefore, the State pleads that this Honorable Court review both issues and quash the DCA's decision (IB Appendix A) on both grounds.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS, FLA BAR #325791
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS

STEPHEN R. WHITE, FLA BAR #159089
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4580
COUNSEL FOR PETITIONER
[AGO# L98-1-11816]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS has been furnished by U.S. Mail to Robert R. Kimmel, Esq., Law Offices of Kimmel & Batson, Chartered, 715 N. Baylen St., Pensacola, FL 32501, this 11th day of January, 1999.

_____
Stephen R. White
Attorney for the State of Florida

[D:\supremecourt\121699\94116b.wpd --- 12/21/99,3:27 pm]