IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FREDERICK VAN HUBBARD,

Respondent.

CASE NO. 94,116

PETITIONER'S INITIAL 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

CONSTITUTIONAL, RULES, AND OTHER AUTHORITY

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 (DCA) and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of eight volumes, which will be referenced according to the respective number in the Index to the Record on Appeal, followed by any appropriate page number.

Several items are included in the Appendix to this brief. They will be designated as "Appendix," followed by the respective letters designating each in the Appendix.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

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

STATEMENT OF THE CASE AND FACTS

This case arose from an information charging Respondent with DUI Manslaughter and other crimes arising out of a traffic accident in which Dionisio Pura was killed. (I 1-2)

At a trial by jury, Respondent was convicted as charged on each count. (I 93)

At the trial, it was uncontested that Respondent was under the influence of alcohol (See, e.g., IV 140-42, VII 786-87). The results of the tests on Appellant's blood alcohol were 0.155% and 0.156% (V 400). The blood was drawn approximately one hour and fifteen minutes after the accident.(V 372)

Respondent's defense attacked proof of the causation element of the DUI Manslaughter. (See, e.g., IV 143, VII 788) The prosecutor responded, for example, by arguing that Respondent "should have slowed stopped, swerved" to avoid hitting the victim (VIII 821).

The trial court instructed the jury on the elements of DUI Manslaughter using the standard instruction. (VIII 829-30. Appendix E) At one point, defense counsel had conceded the adequacy of the standard instruction (See I 81: proposed, as an alternative to the State's proposed instruction, using the standard instructions without modification), but he later insisted upon special instructions that added negligence language (Compare I 81-82, 90A with VII 739-40).

The DCA held that the trial court erroneously

> utilized the standard instruction adopted by the Florida Supreme Court in 1992. *See Standard Jury Instructions in Criminal Cases* (92-1), 603 So.2d 1175, 1195 (Fla. 1992). Specifically, the court instructed the jury as follows:
>
> > 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 alcohol level of 0.08 percent or higher."

Hubbard v. State, 23 Fla. L. Weekly D2247, D2248 (Fla. 1st DCA Sept. 28, 1998) (Appendix A). The DCA held that negligence is an element of DUI Manslaughter, which, therefore, must be included in jury instructions:

> We reverse because the majority of courts that have considered the issue have concluded that simple negligence is an element of the crime of DUI manslaughter in Florida.
> ***
> In *Foster* [Foster v. State, 603 So. 2d 1312 (Fla. 1st DCA 1992)], this court held that under the 1986 amendment, the jury should be informed that the defendant must have "been at least negligent in the operation of the vehicle, and that such negligence has been a cause of the victim's death." 603 So.2d at 1316.

23 Fla. L. Weekly at 2247, 2248 (Appendix A).

The DCA certified conflict with Melvin v. State, 677 So.2d 1317 (Fla. 4th DCA 1996) (Appendix B):

> The Fourth District has held that the standard jury instruction for DUI manslaughter need not be broadened to specify lack of care as a distinct element of the charge. *See Melvin v. State*, 677 So. 2d 1317 (Fla. 4th DCA 1996). In so holding, the Fourth District noted that explicit in the standard jury instruction ``is a determination by the jury of causation. . . .'' 677 So. 2d at 1318.
> ***
> In hopes that the Supreme Court will soon resolve this question that has arisen repeatedly in the nine years since *Magaw*, we certify direct conflict with the Fourth District's *Melvin* decision.

23 Fla. L. Weekly at D2248 (Appendix A).

The trial court supplemented the standard instruction with the following:

> 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.

(VIII 830-31. Appendix E)

In addition to reversing the trial court on the basis of its use of the standard jury instruction, the DCA also reversed the trial court's admission of evidence that Respondent's driver's license had been suspended in the past.

The DCA held:

> Such testimony was inadmissible under section 90.403, Florida Statutes (1995), because the danger of prejudice outweighed any probative value that could have been attributed to the fact of prior license suspensions.

23 Fla. L. Weekly at D2248 (Appendix A). The State seeks review of this holding through Issue II.

Specifically, the basis for the DCA reversal was this one question and answer on the prosecutor's redirect examination:

> Q: Corporal Kelly, in the past, had the defendant ever had his driving privileges suspended?
>
> A: Yes.

(VI 497. Appendix F) Prior to this question, defense counsel, as his last question on cross examination of the same witness, had asked:

> Q: You did learn early on in the case, did you not, that Mr. Hubbard was driving with a valid driver's license that night?

A: Yes, sir.

(VI 492-93. Appendix F) The prosecutor argued, in part, to the trial court:

> ... [H]e opened the door by asking that question. It was designed to bolster his client improperly. *** He certainly knows his criminal record and knows he has a prior DUI conviction and driver's license suspension. ***

VI 495. Appendix F) Defense counsel argued, inter alia, that "prior suspensions suggest a pattern of conduct," including prior DUIs (VI 495. Appendix F)

Respondent's prior criminal history included the following, which were not revealed to the jury: 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)

In his closing arguments, the prosecutor did not reference Appellant's prior driver's license suspension or criminal history (See VII 751-80, VIII 820-27).

SUMMARY OF ARGUMENT

ISSUE I.

In this DUI Manslaughter case, the DCA added negligence as an element and then reversed the trial court for not adding it to the jury instructions. No such element appears in the DUI Manslaughter statute, and it was error for the DCA to add it. The DCA erred, not the trial court.

The DCA relied upon Magaw v. State, 537 So.2d 564 (Fla. 1989), as authority for reversing the trial court's use of the standard jury instruction on causation, but this Court expressly and repeatedly relied upon Magaw in adopting the standard instruction, which in turn tracked the elements, as the legislature defined them. Thus, the DCA's reading of Magaw to add an element of negligence to DUI Manslaughter was erroneous.

Moreover, Magaw v. State, 537 So.2d 564 (Fla. 1989), recognized that the legislature, in its discretion, has added causation to the elements of DUI Manslaughter. Magaw's passing reference to negligence was an illustration of a way that causation might be proved, not the elevation of negligence to element status.

Indeed, here, the trial court gratuitously supplemented the standard jury instruction on causation to Respondent's benefit.

ISSUE II.

The DCA also reversed the trial court's reasonable admission into evidence of the fact that Respondent's driver's license at some point in the past had been suspended. The trial court's ruling, allowing only one question by the prosecutor on the subject, was an extremely measured response to the "door opened" by defense counsel, who asked the same witness whether Respondent's drivers license was valid at the time of the accident. Defense counsel's question, and the resulting answer, suggested that Respondent was a law-abiding citizen. Given Respondent's very extensive criminal record, this was misleading

and the trial court response, extremely reasonable. Moreover, it appears that the prosecutor never again referenced this fact in front of the jury, further rendering any purported problem with it non-prejudicial and harmless.

Thus, the State respectfully submits that the tragedy that befell the victim and his family in this case should not be compounded with reversal and re-trial.

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?

On the basis of the DCA's certified conflict with Melvin, the State has sought the exercise of this Honorable Court's discretionary jurisdiction, which Fla. Const. Art. 5 § 3(b)(4) ("certified ... to be in direct conflict with a decision of another district court of appeal") and Fla. R. App. P. 9.030(a)(2)(A)(vi) ("certified to be in direct conflict with decisions of other district courts of appeal") authorize.

The State respectfully submits that the DCA erred regarding the trial court's use of the standard instruction. The DCA has added negligence as an element of DUI Manslaughter, not the legislature.

A. The trial court's decision is presumptively correct, and the non-prevailing party in the trial court must establish a palpable abuse of discretion.

This Court has held that the presumption of correctness applies to a trial court's jury instructions, See, e.g., James v. State, 695 So.2d 1229, 1236 (Fla. 1997) ("wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal"); Kearse v. State, 662 So.2d 677, 682 (Fla. 1995) ("judge's decision regarding the charge to the jury 'has historically had the presumption of correctness on appeal'").

Moreover, "it is preferable to use the standard instructions where they are appropriate," State v. Bryan, 290 So.2d 482, 484 (Fla. 1974). See Fla. R. Cr. P. 3.985; McGuire v. State, 639 So.2d 1043, 1047 (Fla. 5th DCA 1994)(not error to refuse to give special instruction expanding on the standard principal instruction; "preferable that the standard jury instruction be given if it explains the law").

Accordingly, a party seeking reversal due to a trial court denial of non-standard jury instructions bears the appellate burden of establishing "a palpable abuse of that court's discretion," Phillips v. State, 476 So.2d 194, 196 (Fla. 1985) (then-current standard instruction on alibi used; affirmed trial court use of standard instruction). Accord Williams v. State, 437 So.2d 133, 136 (Fla. 1983) ("circumstantial evidence instruction is now unnecessary because the instructions on reasonable doubt and burden of proof are sufficient to properly instruct"; "will not disturb the action of the lower court in the exercise of its

judicial discretion unless palpable abuse of this discretion is clearly shown from the record").

Given the palpable abuse of discretion standard of review, the party on appeal challenging the use of the standard instruction bears the burden of palpably establishing that "no reasonable [person] would take the view adopted by the trial court," Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). Put another way, Respondent had the burden of palpably establishing that the trial court's ruling was "innovate[d] at pleasure," Id. at 1203, quoting Cardozo, The Nature of the Judicial Process 141 (1921).

In the face of these presumptions and appellate burdens, the DCA held below that the trial court reversibly failed in "its responsibility to charge the jury correctly in each case," quoting Steele v. State, 561 So. 2d 638, 645 (Fla. 1st DCA 1990). Although the State certainly acknowledges this trial-court responsibility, See Fla. R. Cr. P. 3.985, it submits that the use of statutory language within the standard instruction more than satisfied it.

Here, where the trial court relied upon the standard jury instruction, which, in turn, tracked statutory language, the jury instruction was a "reasonable ... view," 382 So.2d at 1203, not "innovate[d] at pleasure," and "logic[al] and justif[ied]," Id., not "whim[sical] or capric[ious]." As such, the trial court's ruling merited affirmance on appeal. The State respectfully submits that the DCA erred, not the trial court. The State elaborates.

B. The DCA erred in reversing the trial court's use of the standard jury instruction on causation.

The State submits several reasons why the DCA's decision was erroneous.

1. The trial court's use of the standard instruction was reasonable.

The use of the standard jury instructions is heavily favored. See, e.g., Bryan, 290 So.2d at 484; McGuire v. State, 639 So.2d at 1047; Phillips v. State, 476 So.2d at 196; Williams v. State, 437 So.2d at 136.

Here, the trial court instructed the jury using verbatim the language of the standard instruction in effect at the time of the trial:

> Two, that Frederick Van Hubbard by reason of such operation caused or contributed to the cause of the death of Dionisio Pura.

(VIII 830, Appendix E) At the time of the trial, the standard instruction provided, in pertinent part:

	Before you can find the defendant guilty of DUI Manslaughter, the State must prove the following three elements beyond a reasonable doubt:
Elements See ***Magaw v.State*, 537 So.2d 564 (Fla.1989)**	1. (*Defendant*) operated a vehicle. 2. (***Defendant*), by reason of such operation, caused or contributed to the cause of the death of (victim).**
Give 3a and/or 3b as applicable	3. At the time of such operation (*defendant*) a. [was under the influence of [alcoholic beverages] [a chemical substance] [a controlled substance] to the extent that [his] [her] normal faculties were impaired.] b. [had a blood alcohol level of 0.10 percent[1] or higher.]

[1] Ch. 93-124, §1, Laws of Fla., substituted "0.08 percent" for "0.10 percent." This change was effective January 1, 1994. Ch. 93-124, §12, Laws of Fla. The offense date here was June 8, 1996 (I 1).

Standard Jury Instructions-Criminal Cases No. 92-1, 603 So.2d 1175, 1195 (Fla. 1992) (Appendix C).

Further, as the DCA acknowledged, 23 Fla. L. Weekly at D2248, "[v]ery recently the Supreme Court" re-adopted causation language that contained no negligence element:

> DUI MANSLAUGHTER
> F.S. 316.193(3)(c)3
> Before you can find the defendant guilty of DUI Manslaughter, the State must prove the following three elements beyond a reasonable doubt:
>
> Elements
> 1. (Defendant) *** drove or was in actual physical control of a vehicle. ***
>
> 2. *** While driving or while in actual physical control of the vehicle, (defendant)
>
> Give 2(a) or 2(b) as applicable
> a. was under the influence of [alcoholic beverages] [a chemical substance] [a controlled substance] to the extent that [his][her] normal faculties were impaired. or
> b. had a blood or breath alcohol level of 0.08 or higher.
>
> ***
> 3. ***
>
> See **Magaw v. State, 537 So.2d 564 (Fla. 1989)**
>
> **As a result, (defendant) caused or contributed to the cause of the death of (victim).**
>
> *Standard Jury Instructions in Criminal Cases (97-2)*, 23 Fla. L. Weekly S417 (Fla. July 16, 1998).

(Appendix D)

Recently, Donaldson v. State, 23 Fla. L. Weekly S245, n. 12 (Fla. April 30, 1998), reasoned and held:

> Donaldson also claims that the CCP statute and standard jury instruction are unconstitutionally vague. *** Although the claim was adequately preserved for review, we find it to be without merit. In *Standard Jury Instructions in Criminal Cases*, 665 So.2d 212, 213-214

> (Fla.1995), we specifically approved the standard jury instruction on the CCP aggravator and therefore find no error on this basis.

Here, this Court, at 603 So.2d 1195 and 23 Fla. L. Weekly S417, "specifically approved the standard jury instruction on" causation. The trial court's reliance upon it was reasonable.

As in U.S. v. Kills Ree, 691 F.2d 412, 414-15 (8th Cir. 1982), the trial court's "instructions adequately informed the jury that it was necessary for them to find that the deaths in question were caused by the conduct of ... [the defendant] in order to find him guilty."

U.S. v. Decoteau, 516 F.2d 16, 17-18 (8th Cir. 1975), upheld jury instructions very similar to those here:

> The defendant argues that under 18 U.S.C. s 1112 the Government must establish that the unlawful act in this case driving while intoxicated was the proximate cause of the accident and that the court's instructions were inadequate to convey this concept to the jury.
>
> *** [T]he district court did instruct the jury in terms of proximate cause. The court instructed the jury, in part, as follows:
>
> Before you may convict Mr. DeCoteau of involuntary manslaughter you must find that defendant did commit the crime of the operation of a motor vehicle while under the influence of intoxicating liquor and that the death of Dennis Joseph Swain resulted from the commission of this crime. ***

The trial court's use of the standard instruction was not error.

2. The standard instruction used by the trial court expressly incorporated the very case on which the DCA has misinterpreted as requiring reversal.

The standard instructions on causation, before and after the trial, expressly recognized as authority Magaw v.State, 537 So.2d 564 (Fla.1989), on which the DCA supposedly relied for authority

to reverse the trial court's use of the standard instruction: "we ... hold that the trial court erred in failing to give the *Magaw* instruction," 23 Fla. L. Weekly at D2248. Apparently, the DCA's reading of Magaw significantly differs from this Court's.[2] Certainly the trial court's reliance upon the standard instruction, which had expressly considered Magaw, was reasonable, not meriting reversal.

3. The trial court's instruction and the standard instruction on which it relied tracked the words in the statute.

Both the standard jury instruction and the trial court's instruction tracking it, in turn, tracked the language of the statute almost verbatim:

> 316.193. Driving under the influence; penalties
> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if such person is driving or in actual physical control of a vehicle within this state and:
> (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in Sec. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired; or
> (b) The person has a blood or breath alcohol level of 0.08 percent or higher.
> ***
> (3) Any person:
> (a) Who is in violation of subsection (1);
> (b) Who operates a vehicle; and
> (c) **Who, by reason of such operation, causes**:
> ***
> 3. **The death of any human being** is guilty of DUI manslaughter ***

§316.193, Fla Stat. (1995). By tracking the language of the statute, the standard instruction and the trial court's use of it

---

[2] The State discusses Magaw in greater detail infra.

were both reasonable, fully accurate statements of applicable law, and not a basis for reversal. See Florida Patient's Compensation Fund v. Tillman, 487 So.2d 1032, 1035 (Fla. 1986) ("no reversible error here, where the instruction tracked the applicable statute of limitations"); Williams v. State, 239 So.2d 583, 585 (Fla. 1970) (jury instruction concerning statutory presumption; "trial court correctly charged the jury in the language of the statute"; "jury returned for further instruction ... the Court again read the ... Statute"); Bohannon v. Thomas, 592 So.2d 1246, 1248 (Fla. 4th DCA 1992) ("[g]enerally, jury instructions which track statutory language are not erroneous").

As Florida Patient's Compensation Fund v. Tillman, 487 So.2d 1032, 1035 (Fla. 1986) (statute of limitations), held that there was "no reversible error ... where the instruction tracked the applicable statute," there was no reversible error here.

Davis v. Cain, 97 So. 305, 307 (Fla. 1923), succinctly put it: "It is not error to give a charge in the language of the statute under which the action is brought."

Dorminey v. State, 314 So.2d 134, 136 (Fla. 1975), is on point. After discussing a jury instruction claim as unpreserved, Dorminey "noted"

> that the Court in its charges properly tracked the words of the statute in point, adhered to the standard jury charges in criminal cases as approved by this Court, and in so doing committed no error.

Luke v. State, 204 So.2d 359, 363 (Fla. 4th DCA 1967), reasoned that

> [i]t seems settled that where the law involved is set forth in a statute it is usual, proper and sufficient

> to charge the offense itself and to charge the jury in the language of such statute (16 Fla.Jur., Homicide, s 160; 41 C.J.S. Homicide s 354) ***.

Vaughn v. State, 198 So.2d 858 (Fla. 1st DCA 1967), reasoned and held:

> Use of the word 'furtherance' of the conspiracy is practically synonymous with the words of the statute 'to effect the object of the conspiracy.'
> Finding no error in the instructions, the judgment appealed is affirmed.

Vaughn used the statutory language as the litmus for the validity of the instructions. Here, the statutorily specified litmus is reflected verbatim in the standard instruction, as the trial court gave it. The trial court did not err.

Indeed, the standard instruction for "FELONY DUI--SERIOUS BODILY INJURY," built upon the same statutory language as here, also required at the time of trial, and requires now, only causation, not negligence as an element: "As a result (defendant) caused serious bodily injury to (victim)," 603 So.2d at 1199; 23 Fla. L. Weekly at S417 (Appendix D).

4. The legislature did not add negligence as an element.

The third reason why the DCA was incorrect suggests the fourth and most fundamental one. Simply put, the legislature did not add negligence as an element; the DCA did. The legislature's plain words speak for themselves. See Taylor Woodrow Construction Corp. v. The Burke Co., 606 So.2d 1154, 1155 (Fla. 1992)("leading rule of statutory construction provides that the legislature's intent is found in the plain language of the statute"). See also State v. Smith, 547 So. 2d 613, 615 (Fla. 1989)(rule of lenity applied after legislative intent not ascertained from face of statute).

The statute does not mention negligence. The legislature has exercised its discretion to add causation as an element and NOT to add negligence. See, e.g., McMillan v. Penn., 477 U.S. 79, 83, 106 S.Ct. 2411, 91 L.Ed.2d 67, 75-76 (1986) (State's burden to prove elements,"dependent on how a State defines the offense that is charged in any given case") quoting Patterson v. N.Y., 432 U.S. 197, 211 (1977). See also Munoz v. State, 629 So.2d 90, 98 (Fla. 1993) ("Although the legislature may not enact a statute limiting the application of a constitutional right, it may overrule judicially established substantive principles that do not implicate established constitutional rights").

If the legislature had intended for negligence to be an element of DUI manslaughter, it would have said it. Instead, the plain words of the statute, on their face, require causation as an element, nothing more and nothing less. The DCA erred by adding the element of negligence. See, e.g., Johnson v. State, 660 So.2d 637, 647 (Fla. 1995) ("asked the trial court to rewrite the statutory description of mental mitigators, which is a violation of the separation of powers doctrine").

State v. Peckham, 56 N.W.2d 835 (Wisc. 1953), is instructive. Peckham analyzed a statute that, although named "negligent homicide," required as elements:

> [T]hat the operator of a motor vehicle was under the influence of alcoholic beverages, and that he caused the death of another while operating said motor vehicle.

The Wisconsin Supreme Court rejected the claim that negligence should be read into the statute as an explicit element, even though its name included "negligence."

5. Magaw did not interpret the statute to require negligence as an element.

Accordingly, Magaw interpreted chapter 86-296, Laws of Florida, as adding **causation**:

> In *Baker v. State*, 377 So.2d 17 (Fla.1979), this Court sustained the validity of the manslaughter by intoxication statute (then section 860.01(2), Florida Statutes (1977)) against the contention that it was unconstitutional because it did not require a causal connection between the intoxication and the resulting death. The Court observed:
>
> > That the legislature intended section 860.01(2) to have strict liability consequences is beyond peradventure. *** Decisions of this Court and of the district courts of appeal since ... [1926] have consistently held that negligence and proximate causation are not elements of the crime described in section 860.01(2). The legislature's reluctance to revisit the statute, in spite of ample opportunity, leads to the conclusion that the judicial construction of section 860.01(2) accurately reflects legislative intent.
> >
> > 377 So.2d at 19.
>
> ***
>
> We conclude that the 1986 amendment introduced **causation as an element** of the crimes proscribed by section 316.193(3). ***

537 So.2d at 565, 567.

The DCA has misinterpreted the following passage of the Magaw opinion to require negligence as an element:

> We caution, however, that the statute does not say that the operator of the vehicle must be the sole cause of the fatal accident. Moreover, the state is not required to prove that the operator's drinking caused the accident. The statute requires only that the operation of the 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**.

537 So.2d at 567. The State submits that positing negligence as a way in which proof of causation would be "**suffic[ient]**" is a far cry from requiring it as an element. Cf. Elledge v. State, 706 So.2d 1340, 1346 (Fla. 1997) ("Elledge ... claims that the trial court should have given his proposed jury instruction which addressed the nature and function of mitigating circumstances and described several non-statutory mitigators applicable in the instant case"; jury was given the standard instruction which states it should consider 'any other aspect of the defendant's character or record, and any other circumstances of the offense'"; "no error").

Thus, Melvin v. State, 677 So.2d 1317 (Fla. 4th DCA 1996), reasoned:

> We ... find no error in the court's denial of the requested instruction [on negligence]. The standard jury instruction for DUI manslaughter requires a finding that by reason of operation of the vehicle, Melvin caused or contributed to the victim's death. Explicit in this instruction is a determination by the jury of causation--Melvin had to cause the death by reason of his operation of his vehicle. Although in *Magaw* the court elaborated on the meaning of the term 'caused,' we do not construe that opinion as requiring that the standard instruction be broadened to specify lack of care as a distinct element. 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. Similarly, if the death was the result of factors beyond Melvin's control, he would be not guilty. Either of these scenarios, not involved here, would preclude a finding of causation and result in a defendant's acquittal as a defendant may be convicted only on proof of causation. ***

Analogously, in a First degree Murder case, simply because the State may prove actual premeditation by "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the

homicide was committed, and the nature and manner of the wounds inflicted" Holton v. State, 573 So.2d 284, 289 (Fla. 1990) quoting Larry v. State, 104 So.2d 352, 354 (Fla.1958), does not make any one of those modes of proof an element of the crime.

It may be that, as a practical matter, the State's proof of the under-the-influence or blood-alcohol-level of the defendant will also show that the defendant was negligent, as here, where Respondent failed to stop or other otherwise avoid the victim — in contrast to Mr. Burton Cummings, the driver who was not affected by alcohol (V 269) but who managed to easily stop in time to avoid the victim (See V 272-79).[3]

Indeed, "a defendant... under the influence of intoxicants at the time of an automobile collision ... is likely to be abnormally reckless," Taylor v. State, 46 So.2d 725, 725 (Fla. 1950). Also, see Stephens v. State, 191 So. 294, 295 (Fla. 1939) ("evidence falls short of being legally sufficient to fasten criminal negligence on the accused, unless he was at the time intoxicated"); State v. Peckham, 56 N.W.2d at 837 (it is negligent to drive a car "while under the influence of intoxicating liquor"). Conversely, negligence may be a circumstance, with others (e.g., smell of alcohol, bloodshot eyes, ...), that, as a totality, are sufficient to prove that a driver was under the influence of alcohol. However, it is

---

[3] Appellant's truck "just flew by" Mr. Cummings (V 299) while he traveled in the same direction and on the same road as Respondent. A moment later, Respondent killed the victim by "slamm[ing] right back into the rear of" the victim's vehicle (V 276).

misplaced to require negligence as an element simply because, as a practical matter, it can be proved.

Thus, the State respectfully reiterates that the DCA's reading of this Magaw passage contravenes this Court's own reading of Magaw through its repeated citations of it in support of the **standard** instruction.

Accordingly, the DCA also has overlooked the "fact that a statement of reasoning may be set forth in a judicial opinion does not mean that it is a proper jury instruction," Bankers Multiple Line Ins. Co. v. Farish, 464 So.2d 530, 533 n. 3 (Fla. 1985).

C. An analysis of the type of elements of DUI Manslaughter reveals no negligence element.

In addition to legal and public-policy principles against the DCA legislating an element of an offense, analytically the DCA has essentially confused two types of elements of crimes: (1) the characteristics of the prohibited action or inaction and (2) the causation that links the action/inaction with a third type of element, i.e., (3) the harm the legislature hopes to minimize. Here, Section 316.193, Fla. Stat., prohibits a type of driving (the action) that "causes" (causation) the "death of any human being." The DCA has legislated negligence as an additional characteristic of the prohibited action or inaction.

Accordingly, for example, the jury instructions for Premeditated Murder require that the victim's "death was **caused** by the criminal **act** of" the defendant. Fla. Std. Jury Instr. (Crim) Murder – First Degree; Standard Jury Instructions in

Criminal Cases (97-1), 697 So.2d 84, 97 (Fla. 1997). Causation and the "act" are analytically distinct. Here, the DCA merged the two types of elements. In contrast, the legislature has not required the "criminal act" to be negligent.

D. The DCA erred due to the totality of all of the instructions in this case.

The DCA did not address the additional instructions that the trial court provided:

> 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.

(VIII 830-31. Appendix E) Thus, the trial court "fleshed out" permutations of the causation element, to **Respondent's benefit**.

Analytically, the import of the trial court's instruction was to direct the jury to determine whether Respondent's operation of his motor vehicle contributed to the victim's death. If other factors constituted 100% of the cause of the victim's death, then Respondent could not have contributed to it. But, on the other hand, if the other factors did not entirely cause the death, but Respondent, "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." This language is remarkably similar to the standard jury instruction, addressed at length supra. The most significant difference between the standard instruction and the trial court's supplement to it is that the latter focused the jurors even more upon precisely what the defense wanted them to concentrate upon, i.e., the causation element.

The State has argued that the standard instruction was proper, sufficient, and lawful. If Respondent claims that the case law supporting the use of the standard instruction also renders any special instruction subject to reversal, he would be mistaken. Such a claim overlooks the very nature of discretion, which supports a variety of decisions as meriting affirmance. See, e.g., James v. State, 695 So.2d 1229 (Fla. 1997) ("trial judge in a criminal case is not constrained to give only those instructions that are contained in the Florida Standard Jury Instructions"; "trial court did not abuse its discretion in giving the State's requested instruction").[4]

Cruse v. State, 588 So.2d 983, 989 (Fla. 1991), held:

---

[4] Indeed, in order the merit affirmance, the trial court's instructions need not be perfect, See Griffin v. State, 474 So.2d 777, 779 (Fla. 1985) ("certainly best to include this sentence" from standard instruction but "we find no error here"; alternatively held that any error was not fundamental); State v. Bryan, 287 So.2d 73, 75 (Fla. 1973) ("[w]hat is important is that sufficient instructions--not necessarily academically perfect ones--be given as adequate guidance to enable a jury to arrive at a verdict based upon the law as applied to the evidence before them"), and, indeed, should be upheld even if "cumbersome," Sellars v. State, 119 So. 517 (Fla. 1929) (affirmed; "while the charge complained of is somewhat cumbersome, and is not to be commended as a model").

> The additional instruction given by the trial court was actually a second way that Cruse could have been found insane, and it was, therefore, to Cruse's advantage to have the instruction given. We find no error in giving this instruction.

Here, a finding that "the conduct of the decedent or a third party either individually or in combination was the sole direct cause of the fatal accident" provided a route for Respondent to be found "not guilty of the charge of D.U.I. manslaughter."

Peele v. State, 20 So.2d 120, 122 (Fla. 1944), reasoned and held that, when "the entire charge upon the subject [on the law of self-defense] as reflected by the record" is considered, the instructions there were not erroneous. Here, when "the entire instructions as given ... [are] considered as an entirety," the jury was told that the State must prove causation, as the statute on DUI Manslaughter required.

Moreover, the language that the trial court used is firmly grounded in the law. See, e.g., The Florida Bar v. Clement, 662 So.2d 690, 700 (Fla. 1995) ("Because Clement's misconduct was not a **direct result of** his bipolar disorder, sanctions do not violate the ADA"); Standard Havens Products, Inc. v. Benitez, 648 So.2d 1192, 1197 (Fla. 1994) ("Prior to the adoption of the comparative negligence doctrine, a plaintiff's conduct as the **sole proximate cause** of his injuries would constitute a total defense") quoting West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla.1976); §337.401, Fla. Stat. ("**solely caused by** the disturbance of the municipal right-of-way"); Peninsular Telephone Co. v. Marks, 198 So. 330, 333 (Fla. 1940) (negligence action;

upheld jury instruction, "**sole proximate cause** of the collision and the plaintiff's injuries").

Although Filmon v. State, 336 So.2d 586, 591 (Fla. 1976), concerned "manslaughter by culpable negligence," its discussion of jury instructions on the causation linking the driver's action (there, culpable negligence) with the victim's death is instructive:

> Appellant submits that the trial judge erred in failing to give the requested instruction on the premise that the jury should have considered the conduct of the driver of the vehicle in which the decedents were riding as bearing upon proximate causation. Essentially, his argument is that with the aid of such instruction the jury could have concluded that appellant's conduct was not the proximate cause of the decedents' deaths. The error in appellant's argument is that the conduct of the decedents or the decedents' driver could only be controlling if it were the **sole** proximate cause of the accident.

Essentially, this is what the trial court informed the jury, except in the context of DUI Manslaughter where the State was not required to prove any negligence, as discussed above.

E. In light of the instructions as given, any error did not result in a "miscarriage of justice."

To warrant a new trial, Respondent's appellate burden included showing that any error "has resulted in a miscarriage of justice," §59.041, Fla. Stat. ("No judgment shall be set aside or reversed, or new trial granted ... in any cause, civil or criminal, on the ground of misdirection of the jury ... unless ... the error complained of has resulted in a miscarriage of justice") cited approvingly in Amendments to Florida Rules of Appellate Procedure, In re, 609 So.2d 516, 529 (Fla. 1992);

Massey v. State, 609 So.2d 598, 600 (Fla. 1992)[5]. See also §924.051(1)(a),(3),(7), Fla. Stat. (appellant required to show "prejudicial error"); §924.051(8), Fla. Stat. (Section 924.051, which should be "strictly enforced"); §924.33, Fla. Stat. Here, in light of the jury instructions that captured the statutory and standard-instruction causation language, and then embellished that language with "sole causation" to Respondent's benefit, any technical error was non-prejudicial, harmless, and certainly not a "miscarriage of justice."

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?

The DCA held that the trial court committed reversible error by allowing the prosecutor, on redirect examination, to ask a witness whether "in the past, had the defendant ever had his

---

[5] The State must acknowledge the following language in Massey, 609 So.2d at 600:

> [T]he issue in this case is not whether Massey must show harm in order to assert the lack of notice as error but rather whether the state, by affirmatively proving no harm, can bring this technical error within the harmless error rule. ***

However, as discussed above, the trial court's tracking of the statutory language, as adopted in the standard jury instructions, sufficiently captured the element of causation, rendering any supposed technical deficiency harmless or non-prejudicial under any test. Therefore, the resolution of the instant case need not depend upon who bears the burden of establishing prejudice/harmlessness.

driving privileges suspended?" (VI 497. Appendix F) In Issue II, the State seeks discretionary review of this DCA decision.

The State respectfully submits that Issue II merits review, as the DCA has broken from a well-settled legal tradition established through numerous precedents and as it is no less important than Issue I to the just resolution of this case.

A. This Court has jurisdiction over Issue II.

As this Court held in Feller v. State, 637 So.2d 911, 914 (Fla. 1994), once it has jurisdiction over a DCA-reviewed case, it has jurisdiction over all of the issues:

> Feller raises several other issues for review by this Court. Having jurisdiction on the basis of the certified questions, we have jurisdiction over all issues. *Jacobson v. State*, 476 So.2d 1282 (Fla.1985); *Savoie v. State*, 422 So.2d 308 (Fla.1982).

Feller then reversed on two issues beyond the certified question there: "reversal is required based upon two of these issues," 637 So.2d at 915. Here, the State respectfully requests that the DCA decision be quashed on the basis of not only Issue I supra but also on the basis of the DCA reversal of the trial court's extremely measured and reasonable ruling allowing the State to respond to defense counsel's inquiry into the status of Respondent's driver's license.

B. On the merits of Issue II, the DCA erred.

On cross examination, as his last question, it is obvious that defense counsel intended to leave the jury with a positive impression of Respondent's character:

> Q: You did learn early on in the case, did you not, that Mr. Hubbard was driving with a valid driver's license that night?
> A: Yes, sir.

(VI 492-93)[6] At this juncture and prior to posing any questions to the witness on redirect examination, the prosecutor exemplarily addressed the trial court to clarify the parameters of his proper questions (VI 493, 494):

> [Defense counsel] asked him if he had a valid driver's license. *** Which I felt was an attempt to make him look like a law abiding citizen. they had asked if in the past he had his license suspended. *** But it's irrelevant. For the record he has an extensive criminal record. And to stand up and act like everything is valid, and he's a good law abiding citizen, I think is improper questioning, and once it's asked, I can't unring the bell.

The record supports the prosecutor's contention that Respondent had an "extensive criminal record": 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)

The trial court then rejected defense counsel's objection (VI 495-96) and addressed the prosecutor (VI 496-97):

> I'm not going to allow you to go into all the nature and causes of the suspensions, but I'll allow you to ask that one question, just to counter the bolstering, which I don't find to be a relevant question that [defense counsel] asked, other than to bolster his client's credibility, under the circumstance. So I'll allow that one question, but no more, as far as, to the basis of the suspensions; how many and all that other.

---

[6] This section of the record on appeal is attached to this brief as Appendix F.

After cautioning the witness and in contrast to Respondent's massive criminal record, the prosecutor asked the witness on redirect examination (VI 497):

> Q: Corporal Kelly, in the past, had the defendant ever had his driving privileges suspended?
> A: Yes.

At this point, the prosecutor moved on to other topics (See VI 497-502) In his closing arguments, the prosecutor did not reference Appellant's prior driver's license suspension (See VII 751-80, VIII 820-27).

The trial court's very measured response to Respondent's bolstering of his character in front of the jury was reasonable, not an abuse of discretion.[7] Respondent had "opened the door" to the prosecutor's very limited inquiry. See, e.g., Geralds v. State, 674 So.2d 96, 99-100 (Fla. 1996) ("Geralds opened the door to be examined or impeached with evidence that linked him to the murder"; "no abuse of discretion by the trial court in permitting the state's cross-examination"). Cf. Johnson v. State, 660 So.2d 637, 646 (Fla. 1995) (penalty phase; evidence that defendant "was loving and a good father figure to his son and to her daughter from a prior relationship" allowed State to introduce evidence of

---

[7] The abuse of discretion standard, discussed in Issue I, applies to evidentiary rulings, including those pertaining to redirect examination:

> We find no abuse of discretion in the trial court's finding Smith's answer admissible to rebut an inference created by questioning on cross-examination.

Johnson v. State, 608 So.2d 4, 10 (Fla. 1992). The trial court's ruling merits affirmance if there is any justification for it, that is, if correct for any adequate reason. See, e.g., Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it").

defendant's prior violence); Garcia v. State, 644 So.2d 59, 62-63 (Fla. 1994) ("Although the complained-of statements [of the prosecutor] were clearly improper when read out of context, these comments must be considered as a response to defense counsel's direct comments against the prosecutor, whom defense counsel had accused of using this prosecution to attain her ambitions and build a reputation for herself").

The general principle in Wuornos v. State, 644 So.2d 1012, 1018 (Fla. 1994), is instructive:

> The State itself then rebutted with a cross-examination of the same defense witness that tended to undermine that fact. Our conclusions might be different if the State had opened the door to the hearsay here, but that is not the case. Defense counsel opened the door and will not be heard to complain now.

Here, the State did not "open the door" to Appellant's driving history; defense counsel did. Appellant should "not be heard to complain now."

Very recently, Knight v. State, slip op. 87,783 (Fla. Nov. 12, 1998), upheld the use of evidence vis-a-vis a claim that it violated

> the confidentiality provision of Florida Rule of Criminal Procedure 3.211, Knight's Fifth Amendment right against self-incrimination, and his Sixth Amendment right to counsel. Knight also asserts that Dr. Miller's testimony was irrelevant and exceeded the proper scope of rebuttal.

There, the State's inquiry was proper because "the defense opened the door to" it. Knight concluded: "Therefore, we can discern no unfair prejudice to Knight from this line of questioning. Accordingly, we find no merit in this claim." Here, because Respondent "opened the door" to the his driving record, simply

asking about its status at some point in past resulted in "no unfair prejudice" to him.

Jackson v. State, 530 So.2d 269, 273 (Fla. 1988), upheld the prosecutor's explicit inquiry into the defendant's "prior criminal convictions," basing the affirmance, in part, upon the defense's introduction of testimony that he was "always" "positive influence in the lives of [his] children." Here, although Respondent's evidence did not indicate that he "always" had a valid license, his evidence inferred as much as the inference between a prior criminal history and not positively influencing children. The gravamen of Jackson, and the evidence here, is that the defense interposed a misleading innuendo, which the State was allowed to correct.

In Johnson v. State, 608 So.2d 4, 9 (Fla. 1992),

> [o]n redirect examination the prosecutor asked Smith if Johnson had talked about what his defense might be. Smith responded that Johnson 'said he could play like he was crazy, and they would send him to the crazyhouse for a few years and that would be it.'

As here, the testimony was "'admissible on redirect which tend[ed] to qualify, explain, or limit cross-examination testimony.'" Here, the redirect examination corrected the misimpression that Respondent was a law-abiding citizen.

In Blair v. State, 406 So.2d 1103, 1106 (Fla. 1981),

> [t]he defense ... moved for a mistrial because of the insinuation that defendant got his stepdaughter pregnant. The court ruled that 'the door was open' on direct examination and denied the motion for mistrial. Defendant has failed to show reversible error in this ruling.

Here, the prosecutor's single question was far less prejudicial than getting his "stepdaughter pregnant." Respondent "failed to show reversible error in this ruling."

Pierre v. State, 597 So.2d 853, 855 (Fla. 3d DCA 1992), held that "an indirect opinion" of one witness regarding another witness's credibility was permissible because "the defendant clearly opened the door for such a question by eliciting from the same witness testimony that the child victim was the kind of child who would lie to get her way." If the status of Respondent's driver's licence was inadmissible, like one witness commenting on another's credibility, Respondent opened up the matter.

McCrae v. State, 395 So.2d 1145, 1151-52 (Fla. 1980), controls. There, as here, the defense opened the door to prosecution clarification. There, more than here, the prosecutor's questions of a witness were damaging to the defendant, as, there, the prosecutor "elicit[ed] the nature of the felony to which appellant referred on direct." There, as here, the defense opened the door through its examination that could have misled the jury. There, as here, the defense's "questioning could have deluded the jury into" incorrectly underestimating the defendant's prior record.

> Consequently, the state was entitled to interrogate appellant regarding the nature of his prior felony in order to negate the delusive innuendoes of his counsel. As stated by one learned scholar:
>
> > (T)he rule limiting the inquiry to the general facts which have been stated in the direct examination must not be so construed as to defeat the real objects of the cross-examination. One of these objects is to elicit the whole truth of transactions

> which are only partly explained in the direct examination. Hence, questions which are intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross-examination. [citations omitted]

Just as the cross examination in McCrae was limited by the scope of direct examination, See §90.612, Fla. Stat., the scope of redirect examination here was limited by cross examination, See Ehrhardt, Florida Evidence §612.3 at p. 471 (1995 ed.). Here, Appellant's examination went into the "matter" (Ehrhardt) of his driving history,[8] which the State was entitled to address in its examination. Here, the prosecutor's question elicited "the whole truth of transactions which ... [were] only partly explained in the ... [defense's] examination" (McCrae). Here, the prosecutor's question "call[ed] out [a] fact[] tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony" (McCrae). Under McCrae, if the trial court erred at all, it was in limiting the prosecutor to the one question and in not allowing fuller clarification of Appellant's prior criminal history.

Consistent with the foregoing principles, after "the accused ... first offer[s] this evidence [that he is a law-abiding citizen][,] then the prosecution may offer character evidence to rebut the accused's evidence," Ehrhardt, Florida Evidence §404.5. See also §90.404(1)(a), Fla. Stat.

---

[8] The current status of one's license is the result of **past** events, such as law-abiding or law-breaking behavior.

Moreover, the question and answer failed to specify the nature or timing of the prior suspension. It could have been years and even decades prior to the trial. Gallegos v. State, 695 So.2d 1273, 1274 (Fla. 5th DCA 1997), rejected a claim based upon the possible inference from a possible prior drug problem that the defendant has "a continuing drug problem." There and here, the evidence was "not so prejudicial as to require a new trial."

Further, the suspension could have been for a reason relatively innocuous compared with DUI. For example, Appellant's license might have also been suspended decades ago because he temporarily had a physical defect or temporarily failed to submit himself for re-examination. See §322.221, Fla. Stat. Therefore, combining the speculative timing and nature of the prior suspension with the prosecutor's failure to argue it to the jury, no unfair prejudice attached under Section 90.403, Fla. Stat. The State respectfully submits that the DCA erred, not the trial court's very measured and reasonable response to the defense-initiated subject.

Holton v. State, 573 So. 2d 284, 288 (Fla. 1990), incorporates a number of the foregoing principles. There, "defense counsel opened the door to ... [a] line of questioning" that "suggested that other similar homicides had been committed prior to Holton's arrest but that none had occurred after his arrest." There, the evidence was substantially more prejudicial than here. It expressly concerned precisely the same type of crime as being tried whereas, here, the nature of the prior problem with Respondent's license was speculative. There, it concerned

homicide, whereas here the suspension may have been caused by a relatively innocuous event. There, the evidence was temporally tied to the crime being tried, whereas here the prior suspension may have been years or decades past. There and here, it was "proper for the state" to pursue a "line of questioning" to "rebut the inferences raised by the defense." Here, the trial court limited the State to only one question.

In the context of the record in this case, including the nature of any prejudice as purely speculative, the State also asserts that any purported error was not reversible because it was non-prejudicial, §59.041, Fla. Stat.; §924.051(1),(3), Fla. Stat. ("prejudicial error" required); §924.33, Fla. Stat. (no reversal unless error "injuriously affected ..."), or harmless, See Holton v. State, 573 So. 2d 284, 288-89 (Fla. 1990) (comments that defendant's mind was "twisted" and that no similar crime had been committed since defendant's arrest; held, harmless); State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

CONCLUSION

Based on the foregoing, the State respectfully submits that the decision of the District Court of Appeal reported at 23 Fla. L. Weekly D2247 (Fla. Sept. 28, 1998) (Appendix A), should be disapproved and quashed; Melvin v. State, 677 So.2d 1317 (Fla. 4th DCA 1996) (Appendix B), should be approved; the standard jury instruction regarding causation in DUI Manslaughter should be upheld; and, Respondent's judgment and sentence, upheld.

Respectfully submitted,
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
[AGO# L98-1-11816]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS and its Appendix have 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 16th day of November, 1998.

_____
Stephen R. White
Attorney for the State of Florida

[D:\supremecourt\121699\94116c.wpd --- 12/21/99,3:28 pm]

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

FREDERICK VAN HUBBARD,
Respondent.

CASE NO. 94,116

APPENDIX

RE ISSUE I

A. Hubbard v. State, 23 Fla. L. Weekly D2247 (Fla. 1st DCA Sept. 28, 1998) (the decision under discretionary review here).

B. Melvin v. State, 677 So.2d 1317 (Fla. 4th DCA 1996) (the decision with which Hubbard certified conflict).

C. Standard Jury Instructions — Criminal Cases, 603 So.2d 1175, 1195 (Fla. 1992) (in effect at time of trial).

D. Standard Jury Instructions in Criminal Cases (97-2), 23 Fla. L. Weekly S407 (Fla. July 16, 1998) (excerpts; adopted shortly before DCA decision in this case).

E. Trial transcript excerpted from VIII 829-31, where trial court instructed jury on causation element of DUI Manslaughter.

RE ISSUE II

F. Trial transcript excerpted from VI 492-98 showing end of defense's cross examination and beginning of prosecutor's redirect examination.

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F