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IN THE SUPREME COURT OF FLORIDA

TIMOTHY ANDERSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC18-1059

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

# ANSWER BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

*PAGE#*

TABLE OF CONTENTS..... i

TABLE OF CITATIONS..... 2

PRELIMINARY STATEMENT..... 3

STATEMENT OF THE CASE AND FACTS..... 4

SUMMARY OF ARGUMENT..... 6

ARGUMENT..... 7

I. WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFESNE OF RECKLESS DRIVING; THE FIRST DISTRICT COURT CERTIFIED CONFLICT WITH THE DECISION IN FIRST DISTRICT'S OPINION IN Piggot v. State, 140 So. 3d 666 (Fla. 4th DCA 2014); WHETHER THE COURT MISAPPLIED THIS COURT'S DECISION IN STATE V. VON DECK, 607 SO. 2D 1388 (FLA. 1992)? ..... 5-10

CONCLUSION..... 20

CERTIFICATE OF SERVICE..... 21

CERTIFICATE OF COMPLIANCE..... 21

**TABLE OF CITATIONS**

*CASES* *PAGE#*

*Anderson v. State, 247 So. 3d 680 (Fla. 1st DCA 2018)* .7,13,14

*Ball v. U.S.* 470 U.S. 856 (1985) .....18

*Bordenkircher v. Hayes*, 434 U.S. 357 (1978) .....19

Khianthalat v. State, 947 So. 2d 359 (Fla. 2008). .....7,11

*Piggott v. State*, 140 SO. 3D 666 (FLA. 4TH DCA 2014).....8,11,12,16

*Rice v. State*, 333 S.W. 3d 140 (Tex. Crim. App. 2011). .13,14

*State v. Bloom*, 497 So. 2d 2 (Fla. 1986) .....18

*State v. Knighton*, 235 So. 3d 312 (Fla. 2018) .....8

*State v. Paul*, 934 So. 2d 1167 (Fla. 2006) .....8

*State v. Weller*, 590 So. 2d 923 (Fla. 1991). .....8

*Sanders v. State*, 944 So. 2d 203 (Fla. 1991). .....8

*State v. Von Deck*, 607 So. 2d 1388. .....8,11,13,14,16

*Williams v. State*, 957 So. 2d 595 (Fla. 2007) .....17

*U.S. v. Batchelder*, 442 U.S. 114 (1979) .....18

*U.S. v. Bass*, 404 U.S. 336 (1971). .....18

*OTHER AUTHORITIES*

See. Fla. Std. Jury Instr. (Crim.) 8.2 .....15

## PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Anderson, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"IB" will designate Initial Brief. That symbol is followed by the appropriate page number. A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement and Case and Facts in the Petitioners Initial Brief as being generally supported by the record with the following correction and additions.

Petitioner was charged by information with Aggravated Assault with a Deadly Weapon. The information specifically read, Petitioner "On or about July 18, 2014, did unlawfully and intentionally make an assault upon [the victim] with a motor vehicle, a deadly weapon without intent to kill, contrary to Section 784.021(1)(a)."

At trial, the victim, Anastasia Ward testified that Petitioner was the father of her children. (R. 28). The victim was at a nightclub with two friends, Christa Hughes and Yakita Paramore. As she was leaving the nightclub she saw Petitioner drive by and she "decided to leave to avoid drama." (R. 30). Petitioner followed the victim, and as she made a turn Petitioner hit the back of her car. (R. 32). The victim testified she sped up and Petitioner drove fast and very close to her car, making her jump the median. Petitioner hit the victim's car with his car "a couple times." (R. 32). The victim testified that she did a U-turn and felt her Petitioner bump her car again. She then crashed in the parking lot and jumped out of the car. (R. 35). The victim's friends called 911.

Officer Braxton testified that he observed Petitioner's truck run a traffic light. The officer turned on his emergency lights to initiate a traffic stop, and the vehicle sped up, and did a U-turn in the middle of the road. The officer did not give further chase due to department policy. (R. 81).

At the charge conference, both the State and Petitioner stipulated to removing the category one lesser included charge of improper exhibition of a weapon. (R. 96). Petitioner requested the jury be instructed on reckless driving. The State objected, stating "just because there's evidence of a crime within an act doesn't mean that – and its not alleged by the State doesn't mean that we get the lesser of other crimes not charged."

Defense counsel responded, "Respectfully, that's the definition of a lesser included, Judge. It's a crime that's within the act alleged."

State: "Then I guess I'd ask that we put fleeing and eluding and some of the other crimes."

Defense counsel: "That ship has sailed, Judge. They had the chance. They elected not to charge that.

State: "But we also didn't charge reckless driving which is not a lesser included offense of the crime as charged. We're just including other offenses at this point that haven't been charged by the State and are not lesser included offenses of the crime as charged."

The Judge declined to include reckless driving as a permissive lesser included because it was not alleged by the State. (R. 97-98).

The jury was instructed on assault and aggravated assault with a deadly weapon. The jury convicted Petitioner on aggravated assault with a deadly weapon.

## SUMMARY OF ARGUMENT

Petitioner argues that that he was entitled to reckless driving as a lesser included offense of aggravated battery with a deadly weapon because the deadly weapon was a motor vehicle. Petitioner's argument must fail because longstanding precedent from the Florida Supreme Court holds that all elements of a crime on a permissive lesser included charge must be alleged in a charging document. In the instant case, the element of driving was not alleged. To permit reckless driving as a permissive lesser included would permit pleading by inference and will set forth bad policy. Pleading by inference will force the State to prove crimes they did not charge, as well as put defendant's in a position to defend crimes they have not been properly noticed for.

## ARGUMENT

**I. WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFESNE OF RECKLESS DRIVING; THE FIRST DISTRICT COURT CERTIFIED CONFLICT WITH THE DECISION IN FIRST DISTRICT'S OPINION IN PIGGOT V. STATE, 140 SO. 3D 666 (FLA. 4TH DCA 2014); WHETHER THE COURT MISAPPLIED THIS COURT'S DECISION IN STATE V. VON DECK, 607 SO. 2D 1388 (FLA. 1992)?**

### *Standard of Review*

Because this issue involves a question of law based on undisputed facts, the standard of review is de novo. *Anderson v. State*, 247 So. 3d 680 (Fla. 1st DCA 2018), citing *Khianthalat v. State*, 947 So. 2d 359 (Fla. 2008).

### *Argument*

At issue is whether a defendant is entitled to an instruction on reckless driving when he is charged with aggravated assault with a deadly weapon, and the deadly weapon was a vehicle. State contends that a defendant is not entitled to a jury instruction on reckless driving when charged with aggravated assault with a vehicle and the element of driving is not alleged.

The law on lesser included offenses is well established. Lesser included offenses fall into two categories: necessary and permissive. Necessarily lesser included offenses are those offenses in which the statutory elements of the lesser included offense are always subsumed within those of the charged offense. A permissive lesser included offense exists when 'the two offenses appear to be separate [on the face of the statutes],

but the facts alleged in the accusatory pleadings are such that the lesser [included] offense cannot help but be perpetrated once the greater offense has been.'" *State v. Knighton*, 235 So. 3d 312 (Fla. 2018), citing *State v. Paul*, 934 So. 2d 1167 (Fla. 2006); *State v. Weller*, 590 So. 2d 923 (Fla. 1991).

To establish that a defendant is entitled to an instruction on a permissive lesser included, a two-prong test must be met. "[T]he indictment or information must allege all the statutory elements of the permissive lesser included offense; and there must be some evidence adduced at trial establishing all of these elements." *State v. Knighton*, 235 So. 3d 312 (Fla. 2018) quoting *Sanders v. State*, 944 So. 2d 203 (Fla. 1991). An element of a lesser included may not established by inference but must be specifically alleged in a charging document. *State v. Von Deck*, 607 So. 2d 1388.

The facts of the instant case support the trial court's denial of Petitioner's request for the jury instruction of reckless driving. Petitioner was not charged with reckless driving and all elements of reckless driving were not alleged in the information.

Adopting the analysis suggested by Petitioner and under Piggott will set forth bad policy. The facts of the instant case clearly demonstrate this. If this Court adopts Petitioner's reasoning and permits the element of "driving" to

be inferred so that reckless driving is a lesser included jury instruction, it places the State in a position to prove a crime it did not charge. Furthermore, if this court adopts Petitioner's reasoning under the facts of this case, the State could request a jury instruction on fleeing and eluding a police officer. Evidence adduced at trial support the crime of fleeing and eluding. If this Court permits pleading by inference, not only will the State be placed in a position to prove crimes it did not charge, but defendant's will be placed in a position to defend against crimes they were not noticed on. This would be a clear violation of due process.

**Whether reckless driving is a permissive lesser included offense to aggravated assault motor vehicle.**

The First District Court of Appeals correctly found that the element of "driving" cannot be inferred in a charging document and certified conflict with *Piggot v. State*, 140 So. 3d 666 (Fla. 4th DCA 2014).

In the instant case, the Petitioner was convicted of aggravated assault with a deadly weapon after Petitioner followed his girlfriend in his truck, drove erratically and hit his girlfriend's vehicle several times. The victim in this case was leaving a nightclub with her friends when she saw Petitioner, her boyfriend at the time, in his truck. Petitioner followed the victim, drove very close behind her, despite her attempts to evade Petitioner.

Petitioner made several turns to follow the victim, caused her to "jump the median," hit her vehicle with his vehicle multiple times, and caused her to crash her vehicle in an attempt to get away from Petitioner. The information charging Petitioner stated that he "did unlawfully and intentionally make an assault upon [his girlfriend] with a motor vehicle, a deadly weapon without intent to kill, contrary to Section 784.021 (1)(a), Florida Statutes." Petitioner's defense at trial was that he did not intentionally strike his girlfriend's vehicle, but instead, argued his conduct amounted to driving recklessly. Petitioner requested a lesser included offense of reckless driving. The trial court denied the request. See *Anderson v. State, 247 So. 3d 680*) (Fla. 1st DCA, 2018).

The First DCA relied on the precedent set by this Court and stated in its opinion that "it is not enough that there was undisputed evidence at trial that Anderson was driving his truck at the time of the assault. The first step in the analysis asks only whether the charging document alleges all the statutory elements of the lessor offense, without consideration of the evidence presented at trial." The court held that the element of driving may not be inferred from the charging document simply because driving "might be the most common manner in which an assault with a motor vehicle occurs." Id. At 3.

The First DCA properly construed the law as set forth by this Court in *Von Deck* and *Khianthalat*. This Court's decision in both *Von Deck* and *Khianthalat* hold that elements of a crime must be specifically alleged in a charging document and may not be inferred. *See State v. Von Deck*, 607 So. 2d 1388 (Fla. 1992) and *Khianthalat v. State*, 974 So. 2d 359 (Fla. 2008). The policy set forth by these cases do not permit pleading by inference, thereby ensuring that defendants are afforded due process through proper notice of charges, and the State is not put in a position to prove crimes they did not charge.

The Fourth DCA in *Piggott v. State*, 140 SO. 3D 666 (FLA. 4TH DCA 2014), has held to the contrary, however to adopt the Fourth District's ruling in *Piggot* flies in the face of well-established case law and sets bad policy. In *Piggott* the defendant was convicted of aggravated battery with a deadly weapon. The charging document in *Piggot* alleged that the defendant "did unlawfully and intentionally touch or strike [the victim] against his will with a deadly weapon, to wit: a Kia Sephia four-door automobile." Id. At 668. The victim testified that he saw "the defendant drive up in a car, exit the car, and take a hedge trimmer from his next-door neighbor's driveway. When the victim approached the defendant, the defendant jumped back into the car's driver's seat. The victim ran up next to the car's passenger side mirror, and the defendant begin driving away. The defendant's car swerved and

struck the victim's hip, sending him to the ground. According to the victim, the defendant then 'took off, down the street. Almost plowed straight into a van." Id. At 668. *Piggott* requested a jury instruction for the lesser included offense of reckless driving, which the trial court denied.

The Fourth DCA held that the trial court erred and that reckless driving is a permissive lesser included offense of aggravated battery with a deadly weapon, stating "the facts alleged in the information are such that the lesser included offense of reckless driving cannot help but be perpetrated once the greater offense of aggravated battery with a deadly weapon has been committed when the alleged deadly weapon is an automobile." Id. At 669. The Fourth DCA found that "the State's information alleged all of the statutory elements of the permissive lesser included offense of reckless driving." Id at 669.

Petitioner relies heavily on *Piggot's* erroneous holding that a defendant must be driving to commit the crime of aggravated assault with a vehicle. To assume that a defendant is driving a vehicle when it is utilized as a deadly weapon will permit an inference of an element when determining what permissive lesser included offenses a jury should be instructed on. The standard under which a permissive lesser included is permitted is that an element **must be alleged**. Essential elements of a crime should not be inferred. Petitioner argues that inference should be permitted because a

defendant would "typically" be driving when committing an assault with vehicle. (I.B. 12). Simply because an act is "typically" done, does not negate the requirement that it be alleged in a charging document.

It is possible for a defendant to commit an assault with a vehicle without driving. The First District noted that it rejected Petitioner's argument that a defendant must be driving to commit the crime of aggravated assault, citing to *Rice v. State*, 333 S.W. 3d 140 (Tex. Crim. App. 2011). "In an analogous case, Texas' highest court for criminal cases identified several other ways in which aggravated assault with a deadly weapon by use of a motor vehicle could occur, such as by 'locking the victim in a hot car, slamming the victim's head against the car from, rigging the car's gas tank to explode, placing the car in neutral and allowing it to run into the victim or a building, suffocating the victim in the trunk, or running the car in an enclosed area to cause carbon monoxide poisoning.'" *Anderson v. State*, 247 So. 3d 680 (Fla. 1st DCA 2018) quoting *Rice v. State*, 333 S.W. 3d 140 (Tex. Crim. App. 2011).

This Court has already clearly held that an element may not be inferred. See *State v. Von Deck* 607 So. 2d 1388 (Fla. 1992). In Von Deck, the defendant was charged with attempted premeditated murder of a law enforcement officer by shooting him with a firearm. The information did not allege that the defendant created a well-

founded fear that violence would be imminently inflicted. The State argued for the jury instruction of aggravated assault, arguing that the element of "putting in fear" could be inferred. The court found that while in some cases a shooting is likely to create a well-founded fear, it is not true in all cases. "it is possible to commit an attempted murder without also committing aggravated assault." Id. At 1389.

Similarly, it is true that in some cases, a defendant may be driving when he commits an aggravated assault with a vehicle, it is not true in all cases. It is possible to commit an aggravated assault with a vehicle without reckless driving. See *Rice v. State*, 333 S.W. 3d 140 (Tex. Crim. App. 2011). The First District properly relied on *Von Deck* in their opinion in *Anderson*.

**Whether reckless driving is a necessary lesser included offense to aggravated assault motor vehicle.**

Petitioner argues because his weapon of choice was a vehicle, that he is not afforded the same due process as a person who wielded a hand-held weapon. (I.B. 8). To support this argument Petitioner notes that improper exhibition of weapon is a necessary lesser included of aggravated assault with a deadly weapon, and that it "may be possible to conceive of a situation in which a motor vehicle as a deadly weapon could be 'improperly exhibited,' but exhibiting a weapon would usually mean the accused was holding the weapon, or about to pick it up." (I.B. 6).

First and foremost, Petitioner was entitled to a lesser included instruction on improper exhibition, however Petitioner chose not to have the jury instructed on it. Furthermore, pursuant to Fla. Stat. 790.10, any "person **having** or carrying any dirk, sword, sword cane, firearm, electric weapon or device, or other weapon shall, in the presence of one or more persons, exhibit the same in a rude, careless, angry, or threatening manner, not in necessary self-defense, the person so offending shall be guilty of a misdemeanor of the first degree." A weapon under this provision is not limited to a hand-held weapon as Petitioner argues, and encompasses any object, including a vehicle, used as a weapon. Like any weapon, a vehicle used as a weapon, is under the control of a defendant and "used or threatened to be used in a way likely to cause death or great bodily harm." See. Fla. Std. Jury Instr. (Crim.) 8.2. It is possible to wield a vehicle in a manner that it is improperly exhibited as a deadly weapon. However, regardless of whether improper exhibition fits neatly as a lesser included offense of aggravated assault[1], due process does not require us to abandon long standing legal principles and permit the inference of the element of "driving" in a charging document for a lesser included simply because the weapon of choice is a vehicle. Simply because Petitioner does not feel that the necessary lesser included

[1] However, even if this Court were to find that improper exhibition of a weapon is not an appropriate lesser included offense when the weapon is a vehicle, then improper exhibition should be considered a permissive lesser included, not make reckless driving a necessary lesser included.

offense of improper exhibition of a weapon best fits his crime, does not entitle him to choose the crime he is charged with. Petitioner is entitled to any necessary lesser included jury instructions; however, he specifically waived this instruction at trial. Due process does not require or permit that he waive one jury instruction and get to choose another jury instruction that better fits his version of the facts. Reckless driving cannot be a necessary lesser included offense because the crime of reckless driving is not committed in every aggravated battery. It is not even committed in every aggravated battery with a motor vehicle.

**Adopting the analysis under Piggott will set forth bad policy**

To adopt the analysis under *Piggott* and permit pleadings by inference will establish bad policy. A defendant is entitled to notice of the charges brought against him by the State. To permit pleading by inference would deny a defendant his right to proper notice and would allow the State to insist on jury instructions on lesser included crimes that the State has not properly given notice on.

*Von Deck* provides perhaps one of the best examples of this Court upholding a defendant's due process and notice rights. The State in *Von Deck* requested a jury instruction of a lesser included offense, arguing that an element can be established by inference. Von Deck was not provided notice of the requested charge because it was not alleged in the information. To uphold his conviction

on lesser included offense that he was not provided notice on would have been a clear violation of due process.

Petitioner's argument in this case, and the analysis under *Piggott*, would permit not only defendants, but the State also, to request jury instructions when the defendant was not put on notice of a crime. We can see in the instant case how the policy that Petitioner asks this Court to adopt could violate his own due process rights. At the Charge conference, when reckless driving was requested, the State argued that if reckless driving is permitted even though it is not alleged in the information, then fleeing and eluding could also be read to the jury since there was evidence educed at trial to support this crime. "If an offense meets the criteria for an instruction and verdict choice as either a necessarily or permissive lesser included offense, the State may insist on its inclusion, even over defense objection." *Williams v. State*, 957 So. 2d 595 (Fla. 2007) citing *State v. Johnson*, 601 So. 2d 219, 220 (Fla. 1992). It was apparent in the instant case that trial counsel did not want the jury instructed on any charge supported by the facts, he only wanted the charge that **best fit his version** of the facts.

If jury instructions on lesser included offenses are permitted to be plead by inference, it will create a two-fold problem. First, the State will be put in a position to prove a crime it did

not charge. Second, a defendant will be required to defend against crimes for which he was not provided notice.

Petitioner relies on the dissent in *Anderson* when making his argument that the majority opinion permits "gamesmanship." *Anderson*, at 685. However, it has long been held that it is the State's ability to choose what charges to bring against a defendant. The Supreme Court of the United States has held "the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case." Ball v. U.S. 470 U.S. 856 (1985), citing U.S. v. Batchelder, 442 U.S. 114 (1979); U.S. v. Bass, 404 U.S. 336 (1971). This Honorable Court in State v. Bloom, 497 So. 2d 2 (Fla. 1986), has similarly held that the State has prosecutorial discretion when deciding charges.

> The decision of whether or not to prosecute in any given instance must be left to the discretion of the prosecutor. This discretion has been curbed by the judiciary only in those instances where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights.

Id. At 3, quoting *U.S. v. Smith*, 523 F.2d 771, 782 (5th Cir. 1975).

It is the State's burden to prove those charges beyond a reasonable doubt. "So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his

discretion." *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Furthermore, "it is well settled that due process requires the state to prove every element of a crime beyond a reasonable doubt." *Warmington v. State*, 149 So. 3d 648 (Fla. 2014), quoting *Jackson v. State*, 575 So. 2d 181 (Fla. 1991). See also Wilhelm v. State, 568 So. 2d 1 (Fla. 1990).

The State's discretion to choose what charges to bring forth is not "gamesmanship" as suggested. It is the right of the State to choose what charges to bring, so long as there is probable cause to support the charges, and the decision is not based on an "unjustifiable standard" like "race or religion." *Bordenkircher*, at 669. If this court creates policy that a defendant is entitled to a jury instruction when it is not alleged in the information, or always subsumed under the charged crime, it undercuts the State's ability to choose what charges to bring forth against a defendant.

Because the element of "driving" cannot be inferred in a charging document, and not all aggravated assaults with a motor vehicle are committed by driving the vehicle, this Honorable Court should affirm the First District Court of Appeals in *Anderson*.

## CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court find that reckless driving is not a necessary or permissive lesser-included of aggravated assault with a deadly weapon, when the weapon is a vehicle and the element of driving is not alleged in the charging document. Therefore, this court should affirm Petitioner's judgment and sentence.

**CERTIFICATE OF SERVICE**

I certify that a copy hereof has been furnished to the following by email on April 1, 2019 to Kathleen Stover, Esq. at Kathleen.stover@flpd2.com.

**CERTIFICATE OF COMPLIANCE**

I certify that this brief was computer generated using Courier New 12-point font.

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