IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

STATE OF FLORIDA,
Plaintiffs,
v.

CASE NO. 06-4016-CFMA

HENRY DICKENS
CHARLES ENFINGER
[redacted]
RAYMOND HAUCK
[redacted]
KRISTIN SCHMIDT
JOSEPH WALSH II
Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' REQUEST FOR INSTRUCTION ON "FORESEEABILITY" REQUIREMENT

It is axiomatic that a defendant has a fundamental right to have the jury properly instructed on his theory of defense if there is any evidence to support that theory. Miller v. State, 712 So.2d 451 (Fla. 2nd DCA 1998). Here, a portion of the Defendants' theory of defense is that the death of Martin Lee Anderson was unforeseeable under the circumstances of the case, and the Defendants could therefore not be found culpably negligent in the death.

The amended information alleges the Defendants' liability through a theory of culpable negligence. While the word "willfully" was added to the amended information, the State made it clear at the recent pre-trial hearing that "willfully" is surplusage as it relates to the manslaughter charge, and was included in relation to the State's request for non-homicide lesser included offenses.

The Defendants have presented a proposed jury instruction regarding "aggravated

manslaughter of a child" which tracts the manslaughter instruction regarding culpable negligence, except that the Defendants have suggested that the additional language of "and foreseeable" be included in the second paragraph under paragraph 4(b) of the requested instruction. The pertinent sentence is "The culpably negligent behavior of the Defendants may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in substantial and foreseeable risk of death to Martin Lee Anderson." The Defendants are simply asking to include the two underlined words in the pattern instruction.

Florida cases demonstrate that foreseeability is required in a culpable negligence manslaughter case. In State v. Rushing, 532 So.2d 1338 (Fla. 4th DCA 188), the facts giving rise to the manslaughter prosecution were as follows:

> The defendant and the deceased victim were talking in a bar, the latter evincing unhappiness, depression, and a desire to "blow her brains out." Obligingly, the defendant took the victim out to the parking lot and gave her a .45 caliber pistol produced from his automobile. . . . She pulled the gun up to her head and pulled the trigger.

The defendant was charged with manslaughter under a culpable negligence theory. The trial court granted the defendant's motion to dismiss on the ground that the decedent's act in pulling the trigger was an intervening, superseding act. The appellate court reversed, holding that under the circumstances the decedent's act was foreseeable. The court stated:

> If an intervening cause is foreseeable, it cannot insulate a defendant from all liability. Rupp v. Bryant, 417 So.2d 658 (Fla. 1982). In Loranger v. State Department of Transportation, 448 So.2d 1036, 1037 (Fla. 4th DCA 1983), this court quoted Cole v. Leach, 405 So.2d 449, 450 (Fla. 4th DCA 1981:
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> > One whose negligence causes injury to another is liable for all of the consequences that naturally and proximately flow from

> such injury, Cone v. Intercounty Telephone and Telegraph Company, 40 So.2d 148 (Fla. 1949), including injury from an intervening cause when such intervening cause is itself a **reasonably foreseeable consequence** of the tortfeasor's conduct, Gibson v. Avis Rent-A-Car Systems, Inc., 386 So2d 520 (Fla. 1980), the question of whether the intervening cause was reasonably foreseeable being one for the trier of fact. Avis Rent-A-Car Systems, Inc., supra.
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> See also Padgett v. West Florida Electrical Cooperative, Inc., 417 So.2d 764, 768 (Fla. 1st DCA 1982).
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> In the case at bar, we are of the firm opinion that it cannot be said as a matter of law that the deceased victim's actions were not **foreseeable.** See State v. Marti, 290 N.W.2d 570 (Iowa 1980); Persampieri v. Commonwealth, 343 Mass. 19, 175 N.E.2d 1115 (1979).
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> The victim had said she wanted to blow her brains out. The defendant immediately furnished her with a loaded pistol and stood and watched her do just that. The defendant, of course, claims that he thought the victim was joking, but as a matter of law it cannot be said that it was **unforeseeable** that the victim would do that very thing which she had already announced she would. As a consequence, under the facts sub judice, the question of foreseeability is for the jury.

532 So.2d at 1339-40 (emphasis supplied). It can be seen that the court freely imported civil negligence concepts of foreseeability into this manslaughter case.

Another such case is State v. Morris, 740 So.2d 554 (Fla. 1st DCA 1998). The pertinent facts, as stated by the court, were:

> The undisputed facts in the instant case are these. Morris left Selma, Alabama, with C.S., then fifteen, on a trip to Florida. Morris was driving a car owned by C.S.'s father. Morris, during the drive, consumed beer to the point of intoxication. Morris, swerving in and out of his lane, told C.S. that C.S. had to drive. C.S. protested because he had no driver's license. Morris knew C.S. had neither daytime nor night driving experience. C.S. nevertheless agreed to drive because he knew Morris was drunk and he did not want to be stranded on the road late at night (it was approximately 1:00 A.M.). The road was a dark two-lane rural highway. C.S., asleep at the wheel, crossed the center lane, and struck and

> killed James Acree. C.S. entered a guilty plea to driving without a license, and causing a death through negligence; he was sentenced to juvenile community control.

740 So.2d at 555. The trial court granted the defendant's motion to dismiss, but the appellate court reversed, explaining:

> The trial court concluded that the cause of the instant fatality was "that the driver of the car fell asleep," "not so much that the [unlicensed] person was driving, but that he fell asleep." Morris however, like M.C.J. [in M.C.J. v. State, 444 So.2d 1001 (Fla. 1st DCA 1984)], although he could not have foreseen the specific circumstance causing death----that C.S. would fall asleep at the wheel----nevertheless **reasonably should have foreseen** that the same general type of harm----a deadly auto accident----might unfold from ordering a reluctant, unlicensed juvenile behind the wheel of a car, in the wee hours of the morning, on a dark, two-lane highway, with a drunk passenger unable to supervise in any way. The harm that occurred----a deadly auto accident----"was **foreseeable** and within the scope of the danger created by [Morris's] negligent conduct." Id. at 1005. The trial court thus erred as a matter of law in concluding that there is no evidence that Morris set in motion a chain of events resulting in the death of James Acree. M.C.J.

740 So.2d at 555 (bracketed citation and emphasis added).

These cases support the following proposition: a reasonably foreseeable intervening circumstance/event between the culpably negligent act of the defendant and the decedent's death will not excuse the defendant in a culpable negligence manslaughter prosecution; an unforeseeable circumstance/event will excuse the defendant in a culpable negligence prosecution. There is really nothing novel in this assertion, as the pattern instruction states that "culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury." This portion of the pattern instruction

clearly speaks to the "foreseeability" issue, although not completely, without actually using the word.

There are some cases from other states that speak to the foreseeability issue and jury instruction. North Carolina is among the states that employ the term "culpable negligence" in defining manslaughter. In State v. Hall, 299 S.E.2d 680 (N.C. Ct. App. 1983), the defendant had shot and killed the decedent in a hunting accident. On appeal of his conviction the defendant contended that the jury had not been properly instructed on the issue of foreseeability. The appellate court agreed, stating:

> To hold a defendant criminally responsible for a homicide, the defendant's act must have been a proximate cause of the death. State v. Satterfield, 198 N.C. 682, 153 S.E. 155 (1930); State v. Mizelle, 13 N.C. App. 206, 185 S.E.2d 317 (1971). "Proof of culpable negligence does not establish proximate cause,: State v. De Witt, 252 N.C. 457, 458, 114 S.E.2d 100, 101 (1960), because mere proof of a negligent act does not establish its causal relation to the injury. Further, evidence of causal relation is not necessarily proof of proximate cause.
>
> So familiar is the definition of proximate cause that it can be stated, without citation, as a cause: (1) which, in a natural and continuous sequence and unbroken by any new and independent cause, produces an injury; (2) without which the injury would not have occurred; and (3) **from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed.** Thus:
>
> > [F]oreseeability is a requisite of proximate cause. We have previously pointed this out and ordered a new trial where a proper definition of proximate cause was not given in a civil action. [Citation omitted.] *It is all the more imperative that all of the necessary elements including a correct definition of proximate cause ... be given in a criminal case [Emphasis added.]*

Mizelle, 13 N.C.App. at 208, 185 S.E.2d at 318-19.

> In this case the defendant, evidently relying on the pattern jury instruction on involuntary manslaughter, N.C.P.I.-Crim 206.50, which defines proximate cause and specifically refers to foreseeability, requested that the following instruction be given: "To hold a person criminally responsible for manslaughter his act must have been a proximate cause of [the] death. Foreseeability is a requisite of proximate cause." The trial court, however, merely instructed the jury that "the State must prove that this unlawful or criminally negligent [sic] on the part of the defendant in shooting the said Mr. Futreal proximately caused the death of Mr. Futreal. No definition of proximate cause was included in the trial court's charge, and no specific reference to "foreseeability" was made when the trial court mentioned the words "proximately caused."
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> The trial court did mention the words "reasonable foresight" in defining criminal negligence, and the State, relying on State v. Gainey, 292 N.C. 627, 234 S.E.2d 610 (1977), contends that the instructions, considered contextually, were adequate. We disagree. *Gainey* is distinguishable because the trial court therein adequately defined proximate cause and gave specific instructions on foreseeability.
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> **A reference to "reasonable foresight" as an element of criminal negligence is not sufficient when no instruction of foreseeability is given with reference to proximate cause.** As we stated earlier, evidence of causal relation and proof of culpable negligence are not necessarily proof of proximate cause. State v. Satterfield.

299 S.E.2d at 683-84 (footnote omitted, bold emphasis supplied, other emphasis by the court).

In State v. Magby, 969 P2d. 965 (N.M. 1998), the defendant was charged with abuse of a child resulting in death. The decedent was a four-year-old girl who had been riding with her mother on a horse when the horse bolted, resulting in the child falling off and sustaining fatal injuries. Prior to the horse's bolting, the defendant had "playfully" removed

the horse's bridle and bit. This resulted in the mother's being unable to stop the horse when it bolted. The information charged the defendant with negligently causing the child's death. The trial court instructed the jury:

> To find that Robert Leon Magby **negligently** caused child abuse to occur, you must find that Robert Leon Magby *knew or should have known of the danger involved and acted with a* ***reckless disregard*** for the safety or health of Heather Naylor;
> ...

969 P2d at 966 (bold and regular emphasis in original). The trial court refused to give the following instruction that was requested by the defendant:

> For you to find that the Defendant acted recklessly in this case, you must find that he knew or should have known that his conduct created a substantial and **foreseeable** risk, that he disregarded that risk and that he was wholly indifferent to the consequences of his conduct and to the welfare and safety of others.

969 P2d at 967 (emphasis supplied). The appellate court held that the trial court erred in refusing to give this instruction. It directed that in the future an instruction similar to that requested by the defendant be given in such cases. It should be pointed out that the court did not focus so much on the foreseeability language included in the requested instruction, but rather on the likelihood that the requested instruction might avoid confusion by the jury.

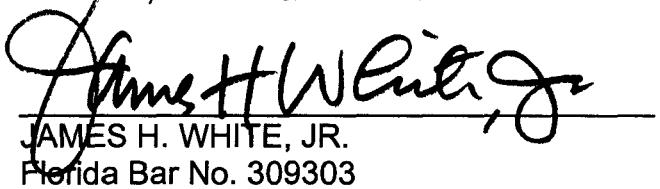
Intent to cause the death of the victim is not an element of aggravated manslaughter of a child; the necessary causation element is culpable negligence. Hankerson v. State, 831 So.2d 235 (Fla. 1st DCA 2002). Tyus v. State , 845 So.2d 318 (Fla. 1st DCA 2003) makes it clear that in a manslaughter prosecution, the State must not only establish causation in fact, but must also prove the defendant's conduct was the legal or proximate cause of death. As stated in Tyus, "The two questions that must be considered in

establishing legal causation are: (1) whether the prohibited result of the defendant's conduct is beyond the scope of any fair assessment of the danger created by the defendant's conduct and (2) whether it would be otherwise unjust, based on fairness and policy considerations, to hold the defendant criminally responsible for the prohibited result." It is apparent that "foreseeability" is solidly included within the first question posed above.

In short, the Defendants are asking for an additional two words, rather than an additional lengthy instruction, on the foreseeability issue. They should have that.

DATED this 5 day of September, 2007.

STAATS, WHITE & GRABNER



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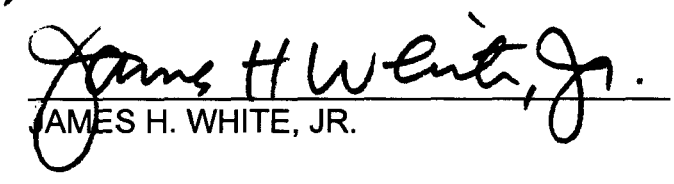
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum has been furnished by U.S. Mail, to Michael C. Sinacore, Assistant State Attorney, 800 East Kennedy Boulevard, 3rd Floor, Tampa, Florida 33602-4148; and to those persons set forth in the attached Additional Service List, this 5 day of September, 2007.



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