

IN THE SUPREME COURT OF FLORIDA

JOSEPH T. SPILLANE,  
Petitioner,  
v.  
STATE OF FLORIDA,  
Respondent.

CASE NO. 66,293

**FILED**  
SID J. WHITE  
JAN 11 1968  
CLERK, SUPREME COURT  
By *[Signature]*  
Chief Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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Mastro v. State,  
448 So.2d 626 (Fla. 2nd DCA 1984

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Broward County, Florida and the Appellant in the District Court of Appeal, Fourth District. Respondent was the Prosecution and Appellee in the lower courts.

In the brief the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's statement of the case and facts.

POINT ON APPEAL

WHETHER, ALTHOUGH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL SUB JUDICE ACKNOWLEDGES CONFLICT WITH A DECISION OF THE SECOND DISTRICT COURT OF APPEAL, ON THE QUESTION OF WHETHER VEHICULAR HOMICIDE IS A LESSER INCLUDED OFFENSE OF D.W.I. MANSLAUGHTER, THIS COURT SHOULD EXERCISE ITS DISCRETION REGARDING WHETHER OR NOT TO ACCEPT JURISDICTION?

## ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL SUB JUDICE ACKNOWLEDGES CONFLICT WITH A DECISION OF THE SECOND DISTRICT COURT OF APPEAL, ON THE QUESTION OF WHETHER VEHICULAR HOMICIDE IS A LESSER INCLUDED OFFENSE OF D.W.I. MANSLAUGHTER, AND THIS COURT SHOULD EXERCISE ITS DISCRETION REGARDING WHETHER OR NOT TO ACCEPT JURISDICTION.

The Respondent submits that the decision below is based on sound legal reasoning, and precedent of this Court, pursuant to the Schedule of Lesser Included Offenses promulgated by the Florida Standard Jury Instructions In Criminal Cases (1981 ed.). Therefore, although said opinion states that it recognizes it to be in conflict with Mastro v. State, 448 So.2d 626 (Fla. 2nd DCA 1984), this Court should exercise its discretion in the determination of whether or not to accept jurisdiction. The Court in Mastro, supra, held, in essence, that the schedule of lesser included offenses was not binding, and further that vehicular homicide could not be a Category I lesser included offense of D.W.I. Manslaughter. The Fourth District Court of Appeal held, and correctly so, that "...vehicular homicide is a lesser included offense of D.W.I. manslaughter...". (Slip op.)(A 1).

The opinion below followed the clear mandate of this Court in the Florida Standard Jury Instructions in Criminal Cases, and the Respondent respectfully requests that this Court exercise its discretion in the determination of whether or not to accept jurisdiction of the case.

CONCLUSION

Based upon the foregoing argument and authorities cited therein, the Respondent respectfully requests that this Honorable Court exercise its discretion in the determination of whether or not to accept jurisdiction of the cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been mailed to DOUGLAS N. DUNCAN, ESQUIRE, Foley, Colton & Duncan, P.A., 406 North Dixie Highway, West Palm Beach, Florida 33401-4298.



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Of Counsel