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DRUNK DRIVING: THE NEW AUTOMOBILE HOMICIDE STATUTE'S OVERLAPPING EFFECT

I. [§ 1] INTRODUCTION

The Utah State Legislature, in a 1985 Special Session, repealed the Motor Vehicle Code's negligent vehicular homicide statute[1] and amended the Criminal Code's automobile homicide statute[2] to eliminate the statutory overlap condemned by the Utah Supreme Court in *State v. Bryan.*[3] In *Bryan,* the court held that the negligent vehicular homicide statute overlapped the Criminal Code's manslaughter statute[4] because both statutes attempted to criminalize reckless conduct by drunk drivers who cause a homicide. The court reasoned that equal protection guarantees that defendants exercising the same conduct will not be subject to different penalties merely on the basis of prosecutorial choice. Based on this reasoning, the court ruled that equal protection mandated conviction for the lesser offense, negligent vehicular homicide, when a drunk driver recklessly caused someone's death.

The *Bryan* overlap is avoided by the new legislation because negligent vehicular homicide is eliminated and the new culpability requirements of automobile homicide differ from the recklessness requirement of manslaughter. However, the Legislature has created a new overlap between the Criminal Code's already existing negligent homicide statute and the newly created automobile homicide statute.

This article will review the legislative and case law history behind Utah's drunk driving homicide statutes; apply the *Bryan* analysis to the statutes of negligent homicide and automobile homicide to point out an overlap that denies a defendant's equal protection; and propose a simple solution to eliminate the existing overlap, fulfilling the Legislature's intent to severely punish drunk drivers who cause a homicide.

II. [§ 2] LEGISLATIVE AND CASE LAW BACKGROUND OF UTAH'S DRUNK DRIVING HOMICIDE STATUTES

In the 1950's, a drunk driver who caused another's death could be prosecuted under any one of several theories, including automobile

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[1]UTAH CODE ANN. § 41-6-43.10 (1978) (repealed). For purposes of this article, negligent homicide under former UTAH CODE ANN. § 41-6-43.10 will be referred to as "negligent vehicular homicide."

[2]*Id.* at § 76-5-207 (1978).

[3]709 P.2d 257 (Utah 1985).

[4]UTAH CODE ANN. § 76-5-205 (1978).

homicide,[5] involuntary manslaughter[6] or negligent vehicular homicide.[7] The severity of the drunk driver's punishment varied greatly depending under which theory he was convicted for the death of his victim.

Automobile homicide, the first statute under which the drunk driver could be charged in the 1950's, was a felony which then carried a penalty of one to ten years imprisonment.[8] To be convicted under this statute, the defendant, while under the influence of alcohol, must have caused the death of another by driving in a "reckless, negligent or careless manner."

A second statute applicable against the drunk driver was involuntary manslaughter,[9] a misdemeanor with a maximum penalty of one year imprisonment. To be convicted of involuntary manslaughter, a defendant must have, without malice, unlawfully killed another during the commission of an unlawful act not amounting to a felony. Driving while intoxicated was the "unlawful act not amounting to a felony" that subjected drunk drivers to this statute whenever they caused another's death.

Negligent vehicular homicide, a misdemeanor, was a third statute under which a drunk driver could be prosecuted for causing another's death.[10] It carried a maximum penalty of one year in prison and a one

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[5]*Id.* at § 76-30-7.4 (Supp. 1957) (current version at UTAH CODE ANN. § 76-5-207 (1978)).

[6]*Id.* at § 76-30-5 (1953) (replaced by *Id* at § 76-5-205 (1978)).

[7]*Id.* at § 41-6-43.10 (1953) (repealed).

[8]*Id.* at § 75-30-7.4 (Supp. 1957) (current version at UTAH CODE ANN. § 76-5-207 (1978)). The 1957 statute stated:

> Any person, while under the influence of intoxicating liquor or narcotic drugs, or who is under the influence of any other drug to a degree which renders him incapable of safely driving any automobile, motorcycle or other vehicle in a reckless, negligent or careless manner, or with a wanton or reckless disregard of human life or safety, shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the state penitentiary for a period of not less than one year nor more than ten years. A death under this section, is one which occurs as a proximate result of the accident within a year and a day, after the day of the accident.

[9]*Id.* at § 76-30-5 (1953) (replaced by UTAH CODE ANN. § 76-5-205 (1978)). The 1953 statute stated:

> Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
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> (1) Voluntary, upon a sudden quarrel or in the heat of passion.
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> (2) Involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection.

[10]*Id.* at § 41-6-43.10 (1953) (repealed). This statute stated:

> (a) When the death of any person ensues within one year as a

thousand dollar fine. The negligent vehicular homicide statute was applicable whenever a driver caused another's death by driving in reckless disregard for another's safety.

The availability of these statutes for drunk driving homicide prosecutions has created various statutory overlap problems that have been addressed by both the Utah Supreme Court and the Utah State Legislature.

A. [§ 2.1] STATUTORY OVERLAP BETWEEN AUTOMOBILE HOMICIDE AND INVOLUNTARY MANSLAUGHTER.

In *State v. Twitchell*,[11] a 1959 Utah Supreme Court case, the defendant was convicted of felonious automobile homicide. He appealed, contending, among other issues, that allowing the prosecutor to charge either automobile homicide or involuntary manslaughter on identical facts denied defedants equal protection of the laws. The Utah Supreme Court refused to view the two statutes as a violation of equal protection and affirmed the conviction. The court held that there was no statutory overlap because the recently adopted automobile homicide statute encompassed a new crime under Utah law, which exempted the fact situation necessary for its application from the older involuntary manslaughter statute. The statutes, therefore, were not integrated and there was no denial of equal protection.[12]

Later, in a 1961 case, *State v. Johnson*,[13] the court interpreted the intent language of the automobile homicide statute, "reckless, negligent or careless manner," to require only "simple negligence." This interpretation made the *Twitchell* holding, that the more recent of two apparently

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proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide.

(b) Any person convicted of negligent homicide shall be punished by imprisonment in the county jail for not more than one year or by fine of not less than $100 nor more than $1000, or by both such fine and imprisonment.

(c) The department shall revoke the license or permit to drive and any nonresident operating privilege of any person convicted of negligent homicide

[11]8 Utah 2d 314, 333 P.2d 1075 (1959).

[12]The court retreated from the *Twitchell* holding (that the more recent legislative action always controlled) in subsequent cases. State v. Hales, 652 P.2d 1290 (Utah 1982); State v. Clark, 632 P.2d 841 (Utah 1981) and Helmuth v. Morris, 598 P.2d 333 (Utah 1979), now propose the general rule that a defendant is entitled to be charged under the more specific of completely overlapping statutes no matter which statute is more recent.

[13]12 Utah 2d 220, 364 P.2d 1019 (1961).

overlapping statutes prevails because it creates a new offense, inapplicable to the automobile homicide and manslaughter statutes by interpreting the intent element of automobile homicide as requiring a lower culpability than the intent element of involuntary manslaughter *Johnson* is in line with the Legislature's intent to stiffen the penalty for drunk driving homicides while reducing the level of culpability that must be proven by the state.

Any controversy regarding an apparent overlap between manslaughter and automobile homicide was statutorily resolved in 1974 when the Legislature amended the automobile statute to require only proof of negligent conduct.[14] This amendment brought the language of the statute in line with the court's holding in *Johnson* by deleting the language "reckless" and "in a careless manner." This change is also in harmony with the change in punishment under the two statutes, resulting from the 1973 revision of the criminal code, which made manslaughter the greater of the two offenses.[15] After the 1973 revision, if the State can show that a drunk driver recklessly caused someone's death, the driver will be convicted of the greater offense of manslaughter, a second degree felony. If the State can only show that a drunk driver negligently caused another's death, the driver will be convicted of the lesser offense of automobile homicide, a second degree felony.

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[14]UTAH CODE ANN. § 76-5-207 (1978). The statute was amended to state:

> (1) Criminal homicide constitutes automobile homicide if the actor, while under the influence of intoxicating liquor, a controlled substance, or any drug, to a degree which renders the actor incapable of safely driving a vehicle, cause the death of another by operating a motor vehicle in a negligent manner.
>
> (2) The presumption established by section 41-6-44(b) of the Utah Motor Vehicle Act, relating to blood alcohol percentages, shall be applicable to this section and any chemical test administered on a defendant with his consent or after his arrest under this section, whether with or against his consent, shall be admissible in accordance with the rules of evidence.
>
> (3) For purposes of the automobile homicide section, a motor vehicle constitutes any self-propelled vehicle and includes, but is not limited to, any automobile, truck, van, motorcycle, train, engine, watercraft, or aircraft.
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> (4) Automobile homicide is a felony of the third degree.

[15]Interestingly, prior to the 1973 revision of the criminal code, defendants claiming that manslaughter and automobile homicide overlapped sought application of the manslaughter statute, a misdemeanor, to their case. *See* State v. Twitchell, 8 Utah 2d 314, 333 P.2d 1075 (1959). After 1973, the same defendants would want the automobile homicide statute applied because it continued to be a third degree felony whereas manslaughter became a second degree felony. *See* UTAH CODE ANN. § 76-5-207 (1978) and UTAH CODE ANN. § 76-5-205 (1978).

B. [§ 2.2] STATUTORY OVERLAP BETWEEN MANSLAUGHTER AND NEGLIGENT VEHICULAR HOMICIDE

On June 5, 1982, the defendant in *State v. Bryan,*[16] ran his truck at an excessive speed through a red light at one intersection and was attempting to run another red light at a second intersection when he collided with the victims' car. Both victims died as a result of the collision. Approximately one hour after the accident, a test showed that defendant's blood alcohol level was three times the level constituting legal intoxication.[17] The jury found that defendant acted recklessly and convicted him of two counts of manslaughter, a second degree felony. On appeal, the Utah Supreme Court reversed defendant's convictions and remanded with instructions to sentence defendant with the misdemeanor penalty of the negligent vehicular homicide statute.

The supreme court agreed with the jury's decision that the State had established beyond a reasonable doubt that defendant acted with the intent necessary for manslaughter, a second degree felony. The court, however, stated that the same intent requirement also existed for the lesser offense of negligent vehicular homicide, a misdemeanor. The court held that because the same degree of culpability could result in a conviction under either of the two statutes when a drunk driver caused a death, the two statutes created an improper statutory overlap. The manslaughter statute is violated when one "recklessly causes the death of another."[18] The negligent vehicular homicide statute is violated when a driver causes someone's death while driving a vehicle "in reckless disregard of the safety of other."[19] Citing earlier cases[20] for the proposition that the terms, "recklessly" and "reckless disregard of the safety of others," mean the same thing, the court held that the statutes overlapped.[21] In order to

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[16]*Bryan, supra* note 3.

[17]*See Id.* at 259. The Legal intoxication level at the time of defendant's trial was .10%; defendant's blood alcohol level was .30% an hour after the accident.

[18]UTAH CODE ANN. § 76-5-205(1) (a) (1978).

[19]*Id.* at § 41-6-43.10 (1978) (repealed).

[20]*See* State v. Ruben, 663 P.2d 445, 449 (Utah 1983); State v. Chavez, 605 P.2d 1226, 1227 (Utah 1979); State v. Riddle, 112 Utah 356, 363, 188 P.2d 449, 452 (1948); State v. Adamson, 101 Utah 534, 536, 125 P.2d 429, 430 (1942); and State v. Lingman, 97 Utah 180, 198, 91 P.2d 457, 466 (1939).

[21]This conclusion seems to ignore the fact that the motor vehicle code's term, "reckless disregard of the safety of others," has been given a definition different from that of the criminal code's term, "recklessness." The Utah Supreme Court has defined the motor vehicle code's term as meaning that the defendant "knew or *should have known*" that his conduct was highly dangerous to others. State v. Berchtold, 11 Utah 2d 208, 214, 357 P. 2d 183, 187 (1960) (emphasis added). *See also* State v. Park, 17 Utah 2d 90, 92, 404 P.2d 677, 678 (1965). However, the

avoid finding the statutes unconstitutional as a denial of equal protection, which guarantees that the exact same conduct is not subject to different penalties depending under which of two statutory provisions a prosecutor chooses to prosecute, the court required that the defendant's conviction be reduced from a second degree felony to a misdemeanor. Justice Stewart concluded the majority opinion by stating that if a misdemeanor conviction was inappropriate, it was the legislature's duty to change the law. The *Bryan* holding made manslaughter charges inapplicable in drunk driving homicide cases because any finding of recklessness in such a case would require conviction under the negligent vehicular homicide, statute.

III. [§ 3] THE NEW AUTOMOBILE HOMICIDE STATUTE

In response to the court's decision in *Bryan*, the Utah State Legislature, in a 1985 special session, enacted a statute designed to remedy the *Bryan* overlap.[22] The new statute repeals the negligent vehicular homicide statute applied by the court in *Bryan*, and amends the automobile homicide statute addressed in *State v. Twitchell*[23] and *State v. Park*[24]. *It states, in relevant part:*

> *(1) (a) Criminal homicide is automobile homicide, a felony of the third degree,* if the actor operates a motor vehicle while having a blood alcohol content of .08% or greater by weight, or while under the influence of alcohol or any drug, or the combined influence of alcohol and any drug, to a degree which renders the actor incapable of safely operating the vehicle, and cause the death of another by *operating the vehicle in a negligent manner.*
> (b) For the purpose of this subsection, *"negligent" means simple negligence,* the failure to exercise that degree of care which reasonable and prudent persons exercise under like or similar circumstances.

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criminal code defines "recklessness," in UTAH CODE ANN. § 76-2-103(3) (1982), as meaning that the defendant "is aware of but consciously disregards a substantial and unjustifiable risk." Under the criminal code, reckless conduct occurs only when the defendant knew his actions would entail a substantial risk, while under the motor vehicle code, reckless conduct may occur even though the defendant was unaware of the risk if he should have known it existed. The difference in the definitions of the term recklessness is supported by UTAH CODE ANN. § 76-2-101(2) (1982) which states that the criminal code's standards of criminal responsibility are not to apply to the motor vehicle code unless specifically provided by law.

[22]Motor Vehicle Homicide Amendments, H.B. No. 3 (First Special Session 1985) (to be codified at UTAH CODE ANN. § 76-5-207).

[23]8 Utah 2d 314, 333 P.2d 1075 (1959).

[24]17 Utah 2d 90, 404 P.2d 677 (1965).

> (2) (a) Criminal homicide is automobile homicide, a *felony of the second degree,* if the actor operates a motor vehicle while having a blood alcohol content of .08% or greater by weight, or while under the influence of alcohol or any drug, or the combined influence of alcohol and any drug, to a degree which renders the actor incapable of safely operating the vehicle, and causes the death of another by *operating the motor vehicle in a criminally negligent manner.*
> (b)For the purposes of this subsection, *"criminally negligent means criminal negligence as defined by Subsection 76-2-103(4).*[25]

Under this new statute, which has a two-prong approach, a drunk driver's punishment for causing another's death will be determined by his culpability. When the drunk driver's simple negligence causes another's death, he can be convicted of only a third degree felony. However, when the drunk driver's criminal negligence causes another's death, he can be convicted of a second degree felony. The automobile homicide statute clearly explains the difference in the two culpability requirements. "Simple negligence" occurs when the drunk driver fails to exercise the care of a reasonable and prudent person.[26] "Criminal negligence" occurs when the driver ought to be aware that his conduct carries with it a substantial and unjustifiable risk and the driver's failure to perceive the risk constitutes a gross deviation from the standard of care an ordinary person would exercise.[27]

The new statute, in theory, is intended to remove any need for the State to prove that a drunk driver acted with the higher culpability of recklessness[28] because both manslaughter and automobile homicide's criminal negligence prong are now second degree felonies. However, in practice, to avoid a new statutory overlap created by the new automobile homicide statute and the negligent homicide statute, the prosecutor must still charge the drunk driver with manslaughter and the State must still show that the driver acted recklessly in order to convict the drunk driver of a second degree felony.

A. [§ 3.1] STATUTORY OVERLAP CREATED BY THE NEW AUTOMOBILE HOMICIDE STATUTE

As stated above, the court in *Bryan* held that where two statutes apply

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[25]Motor Vehicle Homicide Amendments, *supra* note 22 (emphasis added).

[26]Motor Vehicle Homicide Amendments, *supra* note 22 (to be codified at UTAH CODE ANN. § 76-5-207(1) (6)).

[27]UTAH CODE ANN. § 76-2-103(4) (1978).

[28]*Id* at § 76-2-103(3) (1978) states that a person acts recklessly when he is aware that his conduct carries with it a substantial and unjustifiable risk but he consciously disregards the risk and his disregard constitutes a gross deviation from the standard of care an ordinary person would exercise.

to the same incident and allow the prosecutor to arbitrarily decide whether to charge a crime as a misdemeanor or felony, equal protection entitles the defendant to the lesser punishment provided for in the misdemeanor statute.[29]

Although the new automobile homicide statute removes the overlap problem explained in *Bryan,* involving manslaughter and negligent vehicular homicide, it creates another overlap of equal proportion, involving automobile homicide and negligent homicide. The second prong of the new automobile homicide statute requires that a driver act with criminal negligence before he can be convicted of a second degree felony for causing the death of another.[30] This is the same culpability required by the negligent homicide statute:

> (1) Criminal homicide constitutes negligent homicide if the actor, acting with *criminal negligence,* causes the death of another.
> (2) Negligent homicide is a class A misdemeanor.[31]

Therefore, any time the State establishes that a drunk driver acted with criminal negligence, under the *Bryan* rationale, the defendant should be entitled to punishment under the negligent homicide statute because equal protection requires that the lesser penalty of the overlapping statutes be imposed.[32] This new overlap puts the State in an anomalous situation, because it reduces a defendant's punishment whenever the State successfully introduces sufficient evidence to raise defendant's culpability from simple negligence to criminal negligence. Therefore, absent another legislative amendment of the automobile homicide statute, the State is better off introducing only enough evidence to prove simple negligence in those cases where there is insufficent evidence to subject the defendant to the manslaughter statute by showing that he acted recklessly.

B. [§ 3.2] REMOVING THE NEW OVERLAP

In *State v. Twitchell,*[33] the court stated that the recently enacted automobile statute created the same result as if the legislature had amended the involuntary manslaughter statute to make a drunk driving homicide exempt from the misdemeanor penalty and subject to a felony penalty.

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[29]*Bryan, supra* note 3 at 257.

[30]Motor Vehicle Homicide Amendments, *supra* note 22 (to be codified at UTAH CODE ANN. § 76-5-207 (2) (b)).

[31]UTAH CODE ANN. § 76-5-206 (1978) (emphasis added).

[32]*See* State v. Loveless, 581 P.2d 575 (Utah 1978), and State v. Shondel, 22 Utah 2d 343, 453 P.2d 146 (1969).

[33]8 Utah 2d 314, 333 P.2d 1075 (1959).

Later cases[34] have held that it is the more specific statute that controls rather than the more recent one. On the other hand, in *Bryan,* the court held that the statute with the lesser penalty controls in overlapping situations.[35] However, the language in *Twitchell* still implies that the explicit exemption of one overlapping statute from the other would adequately remove the fact situation necessary for the first statute's application from the second statute. Therefore, if the Legislature stated within the automobile homicide statute that drunk driving was exempted from the negligent homicide statute, the overlap would disappear. The State would then be free to proceed under the second prong of automobile homicide, when applicable, to show that a drunk driver caused a homicide while acting with criminal negligence without the defendant's conviction being reduced to a misdemeanor on appeal. The desired result could be achieved, for example, by amending the new automobile homicide statute to add to section 1 the following subsection:

> (8) This section exempts the conduct of a legally intoxicated driver, or a driver under the influence of alcohol or drugs to a degree which renders him incapable of safely operating the vehicle, from the negligent homicide provisions of Utah Code Ann. § 76-5-206.

Such an amendment clearly expresses the legislature's intent to increase a drunk driver's liability in accordance with his culpability. When a drunk driver causes a death and is either unaware or consciously chooses to ignore that his conduct carried with it a substantial and unjustifiable risk, he would be convicted of a second degree felony, automobile homicide or manslaughter. However, when the drunk driver merely fails to exercise the care of a reasonable and prudent person, and his conduct results in another's death, he will be convicted only of automobile homicide, a third degree felony.

IV. [§ 4] CONCLUSION

The Utah State Legislature, in a hasty attempt to remove the statutory overlap denounced by the Utah Supreme court in *Bryan,* failed to take into account the new statutory overlap created when it enacted the new automobile homicide statute. This new overlap involves the negligent homicide and the new automobile homicide statutes. It requires, to avoid violating the doctrine of equal protection, that a defendant be convicted of negligent homicide's misdemeanor penalty instead of automobile homicide's second degree felony penalty. In effect, the new overlap denies the State the opportunity to prove that a drunk driver acted with

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[34]*See* State v. Hales, 652 P.2d 1290 (Utah 1982); State v. Clark, 632 P.2d 841 (Utah 1981), and Helmuth v. Morris, 598 P.2d 333 (Utah 1979).

[35]*Byran, supra* note 3.

criminal negligence in those situations where the evidence is insufficient to prove that the drunk driver acted recklessly.

Without another amendment, which explicitly exempts drunk driving from the negligent homicide statute, the second prong of the new automobile statute is useless.

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