IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)

Petitioner,)

vs.) CASE NO. 70,994

JOHN McCLAIN,)

Respondent.)

RESPONDENT'S BRIEF

MICHAEL DODDO, P.A.
Attorney for Respondent
Suite 209
1133 S. University Drive
Plantation, Florida 33324
(305) 474-4660

Counsel for Respondent
Fla. Bar #146541

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the appellee and the defendant, respectively, in the lower court.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State, and Respondent may also be referred to as the Defendant.

The following symbols will be used:

"R" to designate the Record on Appeal

"E" to designate any exhibits introduced at the hearing.

All emphasis is added unless otherwise specified.

PROCEDURAL BACKGROUND AND STATEMENT OF CASE

The Respondent, John Charles McClain, was the Defendant below. On December 31, 1984, the Defendant was charged by information with manslaughter by operation of a motor vehicle while intoxicated contrary to F.S. 316.1931(2) (1985) and with operating a motor vehicle while his driving license was suspended or revoked contrary to F.S. 322.34 (1985). (R-51).

After extensive discovery by both Defendant and the State, a hearing was had on April 8, 1986, on Defendant's Motion To Suppress Evidence of the Defendant's blood alcohol level at the time of the accident. (R-3). Defendant's Motion was denied, with leave to file a Motion in Limine to exclude testimony relevant to an "unreportable" quantity of cocaine found in Defendant's blood during a post arrest blood test. (R-29). The trial court granted Defendant's Motion in Limine from which the State timely appealed. (R-38).

The State appealed the Order of the trial court suppressing evidence of an *unquantifiable* amount of cocaine in Defendant's blood, holding that the probative value of the evidence was substantially outweighed by its prejudicial impact, and further that, based on the lack of a *quantifiable* amount of cocaine and the inability of the State's witness to draw any inferential link between the cocaine's presence and the Defendant's driving that the introduction of any testing incident to the presence of cocaine would be inherently prejudicial relating solely to the bad character of the Defendant.

In affirming the trial court's Order, the decision of the

Fourth District Court of Appeal reported at *State v. McClain*, 508 So.2d 1259 (Fla. 4th DCA 1987) distinguished the decision of the First District in *State v. Weitz*, 500 So2d 657 (Fla. 1st DCA, 1986), a case of similar, but clearly distinguishable facts. The majority opinion drew a distinction between "unquantified" and "unquantifiable" and determined that the *Weitz* court's belief that possible prejudice could be effectively dealt with through voir dire, was unrealistic in application. The State, contending direct conflict between the Fourth District in the case *sub judice* and the First District in *State v. Weitz*, supra, moved for Certification of Conflict. The Fourth District Court of Appeal granted the State's Motion. On August 25, 1987, this Court accepted jurisdiction.

ISSUE PRESENTED

WHETHER THE PROBATIVE VALUE OF THE EVIDENCE OF THE PRESENCE OF COCAINE IN A DEFENDANT'S BLOOD SAMPLE, IN AN UNQUANTIFIABLE AMOUNT, OUTWEIGHS THE PREJUDICIAL IMPACT IN A TRIAL OF THE DEFENDANT FOR A CHARGE OF MANSLAUGHTER BY OPERATION OF A MOTOR VEHICLE WHILE INTOXICATED WHEN THE DEGREE OF IMPAIRMENT CAUSED BY THE INGESTION OF THE DRUG, IF ANY, CANNOT BE DETERMINED WITH ANY DEGREE OF SCIENTIFIC PROBABILITY?

SUMMARY OF THE ARGUMENT

It is the unequivocal position of Respondent that the trial court properly granted Respondent's Motion in Limine to exclude all reference to the presence of cocaine in Respondent's blood. The trial court, acting clearly within its mandate, weighed the probative value of a trace of cocaine, not only unquantified, but *unquantifiable* in both amount and effect against the prejudicial impact of the evidence. The trial court did not abuse its discretion when balancing the need of the State for the evidence *against* its perceived impact, it chose to exclude it. The blood alcohol level of the Respondent was known and was indeed found to be .14, well above the level necessary to create the presumption of intoxication. The need for the evidence (probative value) in *State v. Weitz*, supra, was great and thus outweighed its prejudicial impact, while in the case *sub judice*, the need was not great and its prejudicial impact was. Consequently, the apparent conflict raised by the State in the case of *State v. Weitz*, supra, is in fact no conflict at all. The case *sub judice* is clearly and importantly distinguished on its facts and the decision of the Trial Court in the case *sub judice* should not be disturbed.

In addition *Weitz* created a new approach to deal with the prejudicial impact of evidence - the use of the voir dire process. This novel approach finds no basis in the law or reason. This process delegates to the attorney the responsibility of having to deal with evidentiary matters when selecting the jury. The law is clear that the jury is the trier of the facts while the Court is

the determiner of the law. *Weitz* would change that with a new approach in dealing with prejudicially objectionable evidence. This approach is contrary to the procedures used by all Courts and that prescribed by F.S. 90.403 (1985).

ARGUMENT

THE PROBATIVE VALUE OF THE PRESENCE OF COCAINE IN A DEFENDANT'S BLOOD SAMPLE, IN AN UNQUANTIFIABLE AMOUNT, OUTWEIGHS THE PREJUDICIAL IMPACT IN A TRIAL OF THE DEFENDANT FOR A CHARGE OF MANSLAUGHTER BY OPERATION OF A MOTOR VEHICLE WHILE IN INTOXICATED WHEN THE DEGREE OF IMPAIRMENT CAUSED BY THE INGESTION OF THE DRUG, IF ANY, CANNOT BE DETERMINED WITH ANY DEGREE OF SCIENTIFIC PROBABILITY.

CASES ARE NOT IN CONFLICT

The State has chosen to closely paraphrase the issue raised by the trial court in *State v. Weitz*, supra at p. 658, and state it as the issue of the case *sub judice*. It presents an argument premised squarely on the holding in *Weitz* and observes that the case *sub judice* and *Weitz* are in substantial conflict. The opinion of the Fourth District Court, however, in its dicta, takes only limited issue with *Weitz* and instead clearly focuses on the real issue.

> "Whether the Trial Court abused its discretion in granting Appellee's Motion in Limine to exclude all evidence of the presence of cocaine in Appellee's blood when tested shortly after the vehicular accident that gave rise to these criminal proceedings." *State v. McClain*, supra, at page 1260.

Indeed the Fourth District Court, in dealing with *Weitz*, pointing out areas of dissimilarity stated at page 1261, "It is hard to say how closely parallel to this case is *State v. Weitz*." It is the Respondent's position that the results reached in both cases are not in conflict when applying existing law to the facts of each case. Simply put, in *Weitz*, the probative value of the evidence substantially outweighed its

prejudicial impact while in *McClain* the evidence did not.

The *Weitz* court, as observed by the Fourth District Court, set forth the Hornbook law on the admissibility of this type of evidence when it wrote, on page 658,

> "In order for competent evidence to be admissible, it must be relevant, and in addition, its probative value must not be substantially outweighed by the danger of unfair prejudice."

McClain mirrored *Weitz*, when it wrote at page 1261:

> "Competent evidence is admissible if relevant and if its probative value is not substantially outweighed by the danger of unfair prejudice."

In neither of the proceedings below, did any issue of *competency* of the evidence raise its head. Likewise, both cases agree that the issue of relevancy exists only to the extent that it comports with F.S. 90.403 (1985).

> "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice..."

It is in the application of F.S. 90.403 (1985) that the cases differ. *Weitz* suggests the use of voir dire to eliminate the unfair prejudice, where *McClain* follows the standard balancing test that is prescribed by Rule 90.403 (1985) and by *stare decisis*. In the case *sub judice*, both the Trial and Appellate Courts determined that the sound exercise of judicial discretion would, when balancing the scant probative value of the evidence against its obvious prejudice, compel the exclusion of the evidence.

A close and careful examination of both *Weitz* and the case *sub judice*, will quickly and clearly reveal that the factual

differences between the two cases are striking and that it was these factual differences that prompted the separate and not incompatible results in each.

In *Weitz*, the Defendant submitted to blood alcohol testing which, far from substantiating his level of impairment, tended to be at odds with his apparent intoxication. No presumption under F.S. 316.1934(2) (1985) was created. The evidence of chemical presence in *Weitz*, was in fact crucial to the proof of the crime charged and was of significant probative value. Thus, in *Weitz*, the probative value did not outweigh its prejudicial impact.

In the case *sub judice*, the Defendant had a demonstrated blood alcohol level of .14. Under the charged offense this was certainly *substantial* and *compelling evidence* of Defendant's intoxication. However, evidence of a quantity of cocaine so minute as to, by the State's own admission, defy *quantification*, could not add to any degree the proof of the crime charged. As the Fourth District Court's opinion in the case *sub judice* properly found on page 1261 that,

> "We think from what we have seen of the chemist's, deposition it was not possible for him to state any likelihood the trace amount of cocaine found in McClain's blood affected the manner of his driving. Dr. Detushkin was not merely uncertain about the effect; *he did not have any idea of whether there could have been one*. The amount of cocaine was merely a trace, so little that the mass spectrometer -- a scientific instrument used for qualitative analysis of chemicals -- did not pick it up at all."

Thus, the evidence's probative value was minimal, but its

prejudicial impact was overpowering. It is clear that the *Weitz* court was faced with a far different problem than existed in the case *sub judice*. In *Weitz*, the presence of drugs in the Defendant's system, albeit unquantified, was the only viable evidence of his physical condition. To eliminate this evidence from consideration from a jury was to minimize its probative value and tip the balance impermissibly in favor of the Defendant. But significantly and crucially, this was not the situation in the case *sub judice*. Here the lower court correctly determined that the evidence of cocaine was sought to be introduced not for its probative value, but rather to color and inflame the passions and prejudices of the jury.

The State would suggest that the *unquantified* amount of drugs central to the discussion of *Weitz* is synonymous with the *unquantifiable* amount of the case *sub judice*. It is the position of the Respondent that a wide gulf separates the two and that this difference is one of the critical defenses in the analysis of the differences between the cases. The entire line of cases cited by the State in support of the proposition that expert testimony need not be given with a reasonable degree of scientific certainty, *Delap v. State*, 440 So.2d 1242, (Fla. 1983), cert. denied 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed. 2d 860 (1984); *Holland v. State*, 359 So.2d 28 (Fla.3rd DCA 1978) cert. denied 367 So.2d 1124 (Fla. 1979); *Mills v. State*, 476 So.2d 172, (Fla. 1985) cert. denied 106 S.Ct. 1241, 89 L.Ed. 249 (1985), turn upon one critical and central point in the analysis of whether the evidence is *competent*. In arriving at

that determination the Courts found that each of the experts and each of the tests involved a degree of probability, a degree of possibility. In *Delap*, supra, a first degree murder case, one of the issues raised was whether the expert opinion can be given only if it can be expressed in terms of "reasonable medical certainty". *Delap*, citing 1905 and 1909 Supreme Court opinions stated on page 1253 that expert testimony "...is competent if the expert can show that, in his opinion, the occurrence might have or probably did cause death." This holding certainly did not establish any new precedent on what the test to determine whether evidence is competent.

In another First Degree murder case, this Court in *Mills v. State*, supra, ruled on whether the "neutron activator analysis" method for determining if someone had recently fired a gun was competent enough to allow in as evidence. The court determined that whatever inconclusiveness the test demonstrated went to the weight that a jury should give the evidence and did not affect its *competency*. Neither the *Delap* court nor the *Mills* court dealt with the issue of balancing the probative value verses the prejudicial impact that it presented in the case *sub judice*.

Neither of these holdings are in conflict with the Fourth District Court's opinion in the case *sub judice*. As a matter of fact, the methodology used by *Delap*, supra, *Holland*, supra, and *Mills*, supra, in arriving at these conclusions was the same analysis used by the Fourth District Court in the case *sub judice*. Each determined that the fact that the evidence

sought to be introduced "could" or "maybe" or a "might have" resulted in some action was none the less *competent* evidence. In the case *sub judice*, the State's own witness testified, *not* that the quantity of cocaine found in the blood of the Defendant was unquantified, i.e., unmeasured, but rather that it was *unquantifiable*, i.e., *not capable of being measured*. Unlike, *Delap*, supra, *Holland*, supra and *Mills*, supra, the State's expert could make *no* conclusion; could venture *no* opinion; and could formulate *no* hypothesis. This was no failure of testing, but rather a simple lack of data in the smallest quantity necessary to measure. Certainly questionable in the nature of competency! However, the *McClain* opinion did not involve whether this lack of scientific value rendered the evidence inadmissible, because it was not *competent*. The issue in *McClain*, repeated once again, was whether its probative value, albeit negligible, outweighed its prejudicial impact. If the amount was by the witness's own words "non-reportable" could its probative value be any greater? The court properly concluded not.

The Respondent would certainly agree that where, as in *Weitz*, intoxication by chemical or controlled substance is apparent and there is little scientific evidence to support that element, then the probative value of the scientific finding that an *unquantified* amount of a drug is present may well be found to outweigh the prejudice inherent in its introduction. But, where, as in the case *sub judice*, ample evidence exists to adequately explain and prove intoxication and the drug adduced is *unquant-*

ifiable, then clearly the probative value of the scientific evidence is minimal at best and its prejudicial impact great.

This Court must clearly delineate the factual differences between the case *sub judice* and *Weitz*. Using the balancing test in both *McClain* and *Weitz* would not change the results reached in their respective opinions. No real conflict exists. The cases are readily distinguishable and the decision in the case *sub judice* should not be disturbed.

CASES ARE IN CONFLICT

It is Respondent's position that should this Court make the determination that a conflict, in fact, exists between the case *sub judice* and *Weitz*, then the Court should, and indeed must, reject the holding of *Weitz* and adopt the holding of the case *sub judice* as the law of this State.

The basis on which *Weitz* must be rejected is a simple one. It fails to follow the established test for determining the admissibility of relevant evidence, in that it rejects the balancing of probative value and prejudicial impact in favor of a priori reliance on challenges to the jury panel as a means of avoiding the prejudice inherent in the evidence sought to be introduced.

F.S. 90.403 (1985) states that "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice..." Clearly every court must in the sound exercise of its discretion balance probative value against unfair prejudice. This court stated clearly the standard

for both trial and appellate courts in *Young v. State* , 234 So.2d 341, 348 (Fla. 1970), when in finding an abuse of discretion in the admission of a series of gruesome photographs it held:

> "Where there is an element of relevancy to support admissibility then the trial judge in the first instance and this court on appeal, must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice on the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence."

Similarly in *Demps v. State*, 395 So.2d 501, 505 (Fla. 1981), this Court concluded that evidence of a witness' homosexuality was properly excluded by the trial court and stated,

> The trial court here quite properly concluded that the inflammatory and prejudicial effect of evidence relating to Hatthaways homosexuality far outweighed its dubious relevance".

Both the trial and appellate courts in the case *sub judice* followed this mandate. They clearly met the dictates of F.S. 90.403 (1985) and concluded that the prejudicial impact of the evidence clearly outweighed its probative value.

The *Weitz* Court would eliminate the evidentiary safeguard of the balancing test and substitute in its place a procedural device that was never intended to resolve evidentiary questions, voir dire. To suggest that the Defendant must, of necessity, anticipate possible prejudice flowing from a line of testimony or a piece of physical evidence and long before the testimony is elicited or the evidence introduced, guard against its prejudicial impact by questioning prospective jurors as to their

inherent or supposed prejudice is ludicrous.

It is the jury's role to be the trier of the facts while the trial judge is the arbitrator of the evidence. It is his role to determine critical questions of admissibility. It is not a role easily abdicated, nor should it be. To burden the Defendant and lay at his feet the responsibility for guarding against prejudicial evidence is to place upon his shoulders an impermissible burden. Voir dire is calculated to obtain a fair and impartial jury. The jury may indeed be initially fair and impartial, but that fairness, that impartiality, maybe destroyed forever by the introduction of a piece of highly prejudicial evidence, whose chief purpose is not to illuminate but to inflame. The widest latitude on voir dire, the most probing examination of each jurors, will not ferret out this prejudice, because at the moment of voir dire, it may not exist. The ablest practitioner cannot anticipate the twisting's and turnings of all ofthe evidence and it is ultimately the responsibility of the Court to make the final evidentiary determination.

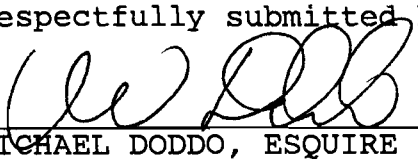
The legal principle that juries are the triers of the facts and Judges interpreters of the law is so fundamental to our system of jurisprudence that there should be no reason to state that principle here. However, *Weitz* disregards this well established principle. *Weitz*, would change the function of the jury and the roles of both judges and attorneys in dealing with the evidentiary issue, rather than follow the well reasoned procedure to determine whether evidence is admissible. The *Weitz* Court would brush prejudice aside with a simple reference to

"other procedural safeguards". Respondent does not believe that this Court takes so cavalier a view of the responsibility of the trial court.

CONCLUSION

Based upon the foregoing arguments and authorities presented, Respondent maintains that the lower court decision in the case *sub judice* should be affirmed and that to the extent that any conflict may exist with *Weitz*, this Court should follow the holding of the case *sub judice* and reject the procedure set forth by *Weitz* that deals with evidentiary questions concerned with possible prejudicial impact.

Respectfully submitted by,

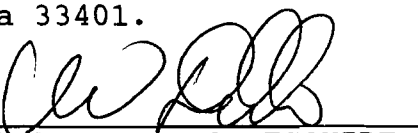


MICHAEL DODDO, ESQUIRE
Attorney for Respondent
1133 South University Drive
Suite 209
Plantation, Florida 33324
(305) 474-4660

Florida Bar Number 146541

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 2 copies of the foregoing Respondent's Brief was mailed this 8th day of October, 1987 to MARILYN EISLER, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401.



MICHAEL DODDO, ESQUIRE