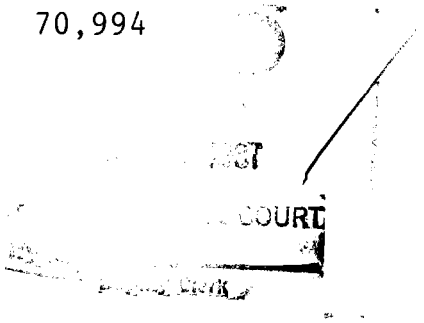
IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner,	)	
vs.	)	CASE NO. 70,994
JOHN McCLAIN, Respondent.	)	



BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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 courts.

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.

The following symbols will be used:

"R"	Record on Appeal
"PA"	Petitioner's Appendix

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was arrested on November 24, 1984. He was charged by information with manslaughter by operation of a motor vehicle while intoxicated, contrary to §316.1931(2), Florida Statutes, and with operating a motor vehicle while his driver's license was suspended or revoked, contrary to §322.34, Florida Statutes. (R 51). On April 8, 1986, a hearing was held before Judge Tyson on a motion to suppress evidence of Respondent's blood alcohol level at the time of the accident. (R 3). The motion was denied with leave to file a motion in limine at the proper time. (R 15). A hearing on Respondent's motion in limine was held on May 20, 1986 before Judge Tyson. The motion was to exclude from the jury testimony as to a small amount of cocaine which was found in Respondent's blood. (R 29). The motion in limine was granted by the trial court. (R 38).

The state appealed in the Fourth District Court of Appeal the trial court's order suppressing evidence of a small quantity of cocaine in Respondent's blood holding that its probative value was not substantially outweighed by the danger of unfair prejudice, as the principle effect was to show Respondent's bad character. (Appendix). In affirming the trial court's order, the Fourth District's decision attempted to distinguish the First District's opinion in State v. Weitz, 500 So.2d 657 (Fla. 1st DCA 1986), in which the court as the Fourth District acknowledged, had overruled a similar suppression.

In discussing Weitz, the majority opinion disagreed with the Weitz court's belief that any possible prejudice from a juror's knowledge that a defendant had ingested illegal drugs, could be dealt with through jury voir dire; direct conflict exists between the Fourth District's decision in the case sub judice and the First District's opinion in State v. Weitz as demonstrated by the dissent in McClain. (Appendix). The Fourth District Court of Appeal granted Petitioner's Motion for Certification of Conflict. On August 25, 1987, this Honorable Court accepted jurisdiction and issued its briefing schedule.

ISSUE INVOLVED

WHETHER EVIDENCE OF THE PRESENCE OF COCAINE IN A DEFENDANT'S BLOOD SAMPLE, IN AN UNQUANTIFIED AMOUNT, IS ADMISSIBLE 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 WITHIN A REASONABLE DEGREE OF SCIENTIFIC PROBABILITY?

SUMMARY OF THE ARGUMENT

Petitioner respectfully submits that the trial court was incorrect when it granted Respondent's motion in limine to exclude all evidence of the presence of cocaine in Respondent's bloodstream shortly after his arrest for manslaughter by intoxicated operation of a motor vehicle. Such testimony by the state's expert witness was relevant to the issue of Respondent's purported intoxication notwithstanding its non-definitive nature; it is corroborative of Respondent's .14 blood alcohol level which gave rise to the presumption of intoxication evidencing that Respondent was too impaired to drive. This testimony is not unduly prejudicial and its probative value is for the jury to determine.

ARGUMENT

EVIDENCE OF THE PRESENCE OF COCAINE IN A DEFENDANT'S BLOOD SAMPLE, IN AN UNQUANTIFIED AMOUNT, IS ADMISSIBLE 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 WITHIN A REASONABLE DEGREE OF SCIENTIFIC PROBABILITY.

The issue before this Honorable Court is whether evidence of the presence of cocaine in a defendant's blood sample, in an unquantified amount, is admissible 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 within a reasonable degree of scientific probability. The Fourth District Court of Appeal in State v. McClain, 508 So.2d 1259 (Fla. 4th DCA 1987), has answered this question in the negative and has held that the prejudicial effect of exposing a jury to this information is bound to outweigh its probative value, as the principle effect was to show a defendant's bad character. In its written opinion, a majority of the Fourth District acknowledged that the First District Court in State v. Weitz, 500 So.2d 657 (Fla. 1st DCA 1986), had apparently adopted a different rule than the one applied by the court in resolving the case sub judice.

Under State v. Weitz, a urinalysis report showing the presence of illegal drugs in the urine of a defendant who was charged with driving under the influence was admissible

in the prosecution of the charged crime without being linked quantitatively to impairment. The Weitz court stated that the trial court erred in granting the motion to suppress evidence of drugs in the defendant's body because the jury is entitled to consider evidence tending to prove any of the necessary material elements of an offense. The Court held:

> . . . The evidence of drugs in appellee's system does not tend to prove he was driving, nor does it tend to prove that his normal faculties were impaired. It does tend to prove that he was 'under the influence' of those drugs. This is an absolutely necessary material element of the DUI charge, of which the State must present some proof. The extent of that influence is a separate element, provable by other evidence, including the observations of the police officers and the fact that appellee caused an accident. The trial court erred in finding evidence of drugs in appellee's system inadmissible unless it could be linked quantitatively to impairment.
>
> Relevant evidence is nevertheless inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. The trial court ruled that evidence of illegal drugs in appellee's system was too prejudicial to be admissible.
>
> While it is true that knowledge that a defendant had ingested illegal drugs may prejudice some prospective jurors, it is quite another matter to say that because of such possible bias no juror in a trial for driving under the influence of alcohol or drugs may hear that the defendant had ingested drugs prior to the incident. In addition to the many constitutionally guaranteed protections afforded at trial, the defendant has an unlimited number of challenges for cause and three peremptory challenges by means of which to remove prospective jurors from a jury panel.
>
> The jury is entitled to consider evidence tending to prove any of the necessary

> material elements of an offense. The trial court erred in granting the motion to suppress evidence of drugs in appellee's body.
>
> 500 So.2d at 658, 659.

The Fourth District in its holding suppressing the evidence of cocaine in Respondent's blood has applied a different rule and thus there is direct conflict with the Weitz court decision.

Petitioner submits that the rule announced by the Fourth District in McClain, supra is inconsistent with Weitz, and should not be adopted by this Honorable Court. Petitioner maintains that evidence of a trace of illegal drugs in a defendant's system is relevant and admissible in a trial for manslaughter by operation of a motor vehicle while intoxicated as it is in a driving under the influence prosecution. In deciding this issue it is important to note that §316.1934(2), Fla. Stat. provides in pertinent part that "the results of any [breath, blood or urine] test [for alcohol, chemical substances, or controlled substances] administered in accordance with §316.1932 or s. 316.1933 and this section shall be admissible when otherwise admissible." §316.1932(2), Fla. Stat., by stipulating that "[t]he results of any [such] test...shall not be admissible as evidence in a criminal prosecution for the possession of a controlled substance," provides one exception to this general rule of admissibility. §§90.401, 90,402, and 90,403 Fla. Stat. by collectively requiring the exclusion of both irrelevant and marginally relevant but unduly prejudicial evidence, provide other such exceptions. These latter exceptions were essentially

relied upon by the judge below in excluding the proffered evidence that the defendant had controlled substances in his blood shortly after he was apprehended for driving while intoxicated causing the death of another human being in violation of §316.1931(2), largely due to the absence of definitive expert testimony as to whether or to what extent the presence of these chemicals would have impaired the defendant's normal faculties.

This ruling was clearly erroneous. The fact that a defendant charged with intoxicated operation of a motor vehicle causing the death of another human being whose blood alcohol level was found to be .14 also presumably ingested chemical intoxicants prior to the incident is admissible as relevant evidence that he may have been impaired due to the illegal drug or the synergistic effect of the cocaine and alcohol at the time of the accident, even absent evidence that such presumable ingestion directly led to such impairment. See State v. Wadsworth, 210 So.2d 4, 5-7 (Fla. 1968), wherein this Court held that although the prosecution's evidence of that defendant's apparent alcoholism did not constitute direct evidence of his alcohol intoxication at the time he killed another person with his car, such was admissible as relevant corroborative evidence of this purported intoxication. Cf. Hamilton v. State, 152 So.2d 793, 797 (Fla. 2d DCA 1963), cert. denied, 156 So.2d 385 (Fla. 1963), holding that the prosecution's evidence that that defendant had had several drinks before the incident in question was properly considered by the jury as evidence of his reckless operation of his motor vehicle even though they

simultaneoulsy acquitted him of vehicular manslaughter while intoxicated; see also People v. Miller, 98 N.W. 2d 524 (Mich. 1959), upholding the admission of that drunk driving defendant's arguably inaccurate incriminating urine test as corroborating other physical evidence of his intoxication, and indicating that consideration of such alleged inaccuracy was for the jury rather than the judge; cf. also In the Interest of P.G. and G.G., 280 So.2d 490 (Fla. 3d DCA 1973) chemical analysis is not necessary to prove juvenile defendants guilty of inhaling intoxicants); see generally State v. Rafferty, 405 So.2d 1004 (Fla. 4th DCA 1981); cf. generally Mullin v. State, 425 So.2d 219 (Fla. 2d DCA 1983).

Dr. Gene Detuskin, Medical Examiner's Office chemist, would have testified that a small, unrecordable amount of cocaine was found in Respondent's bloodstream the night of his arrest (R 30). This testimony should corroborate for the jury the .14 blood alcohol level which is above the level necessary to create the presumption of intoxication, together evidencing that Respondent was for whatever reasons too impaired to drive. It is unimportant that Dr. Detuskin's expert opinion is not definitive on the effect that the trace of cocaine found in Respondent's bloodstream had on his driving, because an expert witness giving scientific testimony does not have to express his opinions to a reasonable degree of scientific certainty to be admissible at trial. See Delap v. State, 440 So.2d 1242 (Fla. 1938), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984). See Holland v. State, 359 So.2d 28 (Fla.

3d DCA 1978), cert. denied, 367 So.2d 1124 (Fla. 1979). Such evidence is admissible, but the weight to be given is a matter to be determined by the jury. Delap, supra; Holland, supra.

In Mills v. State, 476 So.2d 172, cert. denied, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1985), the result of a neutron activation analysis gunshot residue test which showed probability that the defendant had fired a gun was admissible in his murder trial, even though the analysis did not conclusively establish whether the defendant had recently fired a gun. "The test result is admissible in evidence despite this inherent inconclusiveness. It is relevant because it shows a probability that the subject did or did not fire a gun, and its probative value is for the jury to determine." Id. at 176, 177. See Troedel v. State, 462 So.2d 392 (Fla. 1984); see also Downer v. State, 375 So.2d 840 (1979). Petitioner submits that evidence of the results of Respondent's post-arrest blood test showing the presence of a small quantity of cocaine should be admitted at his trial despite the fact that medical experts cannot quantify the amount of cocaine. This evidence is relevant to the charge of driving while intoxicated, causing the death of a human being, relevant to the issue of Respondent's intoxication. The fact that the amount is not quantified may affect the weight of the evidence but that is for the jury to decide.

Moreover, admission of this relevant evidence would not be unduly prejudicial to the defendant. Compare State v. Wadsworth, supra, holding that the admission of that defendant's apparent alcoholism did not present a Williams v. State, 110

So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959) character assassination problem. Cf. Straight v. State, 397 So.2d 903 (Fla. 1981), cert. denied, 454 U.S. 822 (1981), affirming the admissibility of several autopsy photographs which depicted the appearance of a murder victim's body after it had spent twenty days in a river, despite the gruesome nature of these photographs and despite that defendant's offer to stipulate to the only fact the photographs were relevant to prove, which was the manner of death. The foregoing cases teach that relevant evidence should not be excluded merely because it may incidentially portray the defendant in an unflattering light.

In summary, Petitioner maintains that evidence of the presence of a chemical or controlled substance, in an unquantified amount, should be admissible in a trial of manslaughter by intoxicated operation of a motor vehicle when the degree of impairment caused by the ingestion of the drug, if any, cannot be determined within a reasonable degree of scientific probability. This Court should adopt the rule of law announced in Weitz, supra, as the law of this State and remand this cause for trial with directions that the disputed evidence that Respondent had a trace of cocaine in his bloodstream shortly after his arrest be admitted.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited herein, Petitioner respectfully requests that the trial court order of suppression/motion in limine be reversed and this cause remanded for trial with directions that the disputed evidence be admitted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been furnished, by United States Mail, to MICHAEL DODDO, P.A., 113 South University Drive, Suite 209, Plantation, Florida 33324 this 14th day of September, 1987.

Marilyn Eisler
Of Counsel