IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Appellant,
vs.
CARLTON ROLLE,
Appellee.

CASE NO. 72,383

APPELLANT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellant, STATE OF FLORIDA, was the prosecution, and Appellee, CARLTON ROLLE, was the defendant, in the trial proceedings held in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. The State of Florida was designated Appellee and Carlton Rolle, the Appellant, in direct appellate proceedings before the Fourth District Court of Appeal.

In this brief, the STATE OF FLORIDA and CARLTON ROLLE will be referred to as Appellant and Appellee, respectively.

Additionally, the symbol AA means Appellant's Appendix, attached to its Initial Brief herein; and "e.a." means "emphasis added." The Fourth District's opinion in this case, included as Exhibit A in Appellant's Appendix, will be referred to in its slip opinion form. "R" will refer to the Record, as constituted before the Fourth District, in this case.

STATEMENT OF THE CASE

On November 9, 1986; April 1, 1987; and May 6, 1987, Appellee was charged by information and amended information, in Palm Beach County, Florida, with the commission of felony driving under the influence. (R, 322-323); 330-331; 336-337). After a jury trial, Appellee was found guilty (R, 339), and sentenced to a one-year county jail term. (R, 3550.

Upon appeal of his conviction and sentence, the Fourth District Court of Appeal issued its opinion on April 27, 1988, reversing Appellee's conviction and sentence, and remanding the proceedings for a new trial. (AA, Exh.A). Rolle v. State, 13 FLW 1030 (Fla. 4th DCA, April 27, 1988); slip opinion, at 1-7. In its opinion, the Fourth District held §316.1934(2)(c), Fla. State. (1985), and a jury instruction given to purportedly convey the permissible inference contained in the statute, as both constitutionally invalid. Rolle, slip opinion, at 3-7). Appellant filed an emergency motion for stay relief, pending resolution of this appeal before this Court, on April 28, 1988, (AA, Exh.B), which was granted, on April 29, 1988. (AA, Exh.C). On April 28, 1988, Appellant filed its notice of appeal, to invoke this Court's appellate jurisdiction, to review a decision of the Fourth District, declaring a state statute invalid. (AA, Exh.D).

STATEMENT OF THE FACTS

This appeal arises, from the Fourth District's opinion, declaring §316.1934(2)(c), ~~Fla. Stat.~~ (1985), and jury instructions given on the impact, on the issue of Appellee's impairment, of blood alcohol test results, to be Unconstitutional. (AA, Exh.A).

The evidence at trial established that Appellee was first observed by Officer Richard Cascio, in Tequesta, Florida, at approximately 11:00 p.m. on the night of November 9, 1986, in a blue van, which was facing east, on a westbound public road, on the wrong side of the median (R, 53, 56). As the officer drove up, Appellee made a left turn, through a red light, and traveled across three lanes of traffic, and into the curb lane, before proceeding. (R, 54). Upon being stopped by Officer Cascio, Appellee's head, arms and shoulders were hanging out of the driver's window, and his speech was slurred and incomprehensible to the officer. (R, 55, 56). When Appellee got out of the van, he had to hold the door, to do so. (R, 56). Appellee's eyes were bloodshot; his breath smelled of alcoholic beverages. (R, 56,57,78). Appellee took 1-1/2 minutes, according to the officer, to "fumble" through his wallet, to try and find his driver's license. (R, 56-57). Appellee swayed, like a "figure 8", during a roadside balance test, and lost his balance after the third step, of a roadside "heel-to-toe" test. (R, 60,65,87). He did not follow directions, given

during certain of the roadside, and subsequent station house tests. (R, 64,162). During the roadside stop, Appellee recited the alphabet, more slowly than his other speech, and more slowly than other people whom Cascio had stopped, for drunken driving. (R, 66,82,85). At the station house, Appellee admitted having a few beers during the day. (R, 153). In two station house breathalyzer tests, the results were a .18 and .20 blood alcohol level, and these results were admitted into evidence. (R, 192). The breathalyzer maintenance operator, testified that Appellee had a .19 blood alcohol content level, at the time of the stop, about one hour before the breath tests were taken. (R, 157,200).

Appellee objected, at a charge conference, to the constitutionality of §316.1934(2)(c), and the jury instructions on the effect of a .10% or higher blood alcohol content level, on the issue of impairment. (R, 233,234). The court, without discussion, denied and/or overruled Appellee's objections. (R, 236).

In instructing the jury, the trial judge stated:

> If you find from the evidence that the defendant had a blood alcohol level of .10 percent or more, that evidence would be sufficient by itself to establish that the defendant was under the influence of alcohol to the extent that his normal faculties were impaired. However, such evidence may be contradicted or rebutted by other evidence.

(R, 273). Thereafter, the court instructed the jury that evidence of blood alcohol level, "may or may not reflect"

the actual level of alcohol in Appellee's blood, when he was driving; that Appellee's presumption of innocence remained, unless the State proved all elements of the offense beyond a reasonable doubt; that it was up to the jury to decide what evidence was "believable" or "reliable"; and that the jury was free to evaluate, believe or disbelieve any witnesses. (R, 273-278).

After about one hour of deliberations, the jury sent out a note, relaying the fact that there were five jurors for guilt, and one for not guilty, and asking if the jury could "view the videotape again." (R, 287). Upon the agreement of the parties, the jury reviewed the videotape,(R, 292), and the judge instructed the jury that only the jury could resolve any conflicts in evidence, urging them to listen to each other's views, and to continue to try and reach a verdict. (R, 290,291). The jury's verdict of guilty was returned, ten minutes after continuing deliberations, upon viewing the videotape. (R, 292,293).

In its ruling, the Fourth District regarded 9316.1934 (2)(c), as mandating to a juror, under Francis v. Franklin, 471 U.S. 307 (1985), that a .10% blood alcohol content compelled a finding of guilt of DUI, unless the defendant rebutted this presumption, Rolle, slip opinion, at 3,4. The court found this to be an improper shift, of the burden of persuasion, to a defendant, and concluded that a reasonable juror could have understood the subject instruction to have improperly

shifted this burden. Rolle, at 3-5. The court's analysis of the statute as Unconstitutional, stemmed from its analysis of the instruction as such. Rolle, at 3-5. The court found that both the statute and instruction Unconstitutionally "commanded" a juror to find the presumed fact of impairment, from the basic fact of a .10% or higher blood alcohol content level, in violation of Appellee's due process rights. Rolle, at 6. The court finally rejected harmless error, concluding it could not be said, beyond a reasonable doubt, that Appellee would have been convicted, absent the offending instruction. Rolle, at 6-7.

SUMMARY OF ARGUMENT

I. The Fourth District erred, in concluding that §316.1934(2)(c), ~~Fla. Stat.~~ (1985), violated Appellee's due process rights, by shifting the burden of persuasion to Appellee. The language of the statute did not relieve the State, of the burden of proof of guilt, beyond a reasonable doubt. The statute's non-limitation of other evidence, pertaining to impairment, to be presented by either State or defendant (aside from blood alcohol test results), evinces clear legislative intent to create a permissible, not mandatory inference. The statute properly served as a guide to juries, permitting consideration of scientifically reliable evidence, as circumstantial evidence of guilt of DUI-related offenses.

The Fourth District's analysis was contrary to the appropriate due process analysis of presumption statutes, which concentrates on themanner in which the statute is conveyed to a jury, by instructions. It was error to merely "bootstrap" an invalid statute, from a conclusion that the instructions were Constitutionally invalid. The case law, involving DUI presumption statutes, have taken this approach, and have approved such statutes as Constitutional, even while invalidating corresponding jury instructions. Rules of statutory construction, and the existence of other valid "prima facie" evidentiary inference statutes, demonstrate that §316.1934 (2)(c), supra, is constitutionally valid.

11. The circumstances surrounding the rendering of a guilty verdict, including a deadlocked jury, which asked to review the videotape, demonstrate that the jury's verdict could not or was not based, on a perception that the jury instructions imposed a mandatory presumption of impairment, from blood alcohol tests. The record establishes that the verdict was based on proper burden-allocation instructions, given after the allegedly offending one.

In the event this Court views the instructions as unconstitutional, a proposed revision of the jury instructions should be approved or recommended. Such a ruling should not be applied retroactively, in view of law enforcement's prior reliance on the present form of instruction, and the disastrous impact on the judicial system, if so applied.

111. In view of overwhelming evidence of the presumed fact of impairment, featuring undisputed evidence of Appellee's physical condition, any error in the jury instructions did not prejudice Appellee, to the extent of reversible error.

ARGUMENT

POINT I

FOURTH DISTRICT ERRED, IN CONCLUDING THAT §316.1934(2)(c), FLA. STAT. (1985) WAS UNCONSTITUTIONAL, AS DENIAL OF APPELLEE'S CONSTITUTIONAL RIGHTS OF DUE PROCESS, MERELY ON BASIS THAT JURY INSTRUCTION WAS CONSTITUTIONALLY INVALID.

In reversing Appellee's conviction, for felony driving under the influence (hereinafter referred to as "DUI"), the Fourth District invalidated both the "presumption of impairment" statute (§316.1934 (2)(c), Fla. Stat. (1985), and the jury instruction on the impact of blood-alcohol content ("BAC") level evidence, as Unconstitutional denials of due process. Rolle v. State, Case No. 87-2089 (Fla. 4th DCA, April 27, 1988), slip.op., at 1-7.[1] In holding this state statute invalid, the Fourth District's analysis and conclusions equated the nature and impact of the statute, with that of the jury instruction actually conveyed to the jury, to find that the statutory provision created an Unconstitutional mandatory presumption. Rolle, slip.op., supra, at 4-6. This approach and analysis, erroneously ignored the focus of Federal, Florida and other State court decisions, involving presumptions in criminal cases and corresponding due process concerns, upon the manner in which a valid presumption statute is conveyed and explained to a jury, by instruction, not upon the validity of the statute itself. Upon examination of the proper and appropriate anal-

[1] In the interest of convenience, Appellant's references to the Fourth District's opinion, will be to its slip opinion form, attached and incorporated herein as Exh. A, in the Appendix. The Rolle decision is presently reported at 13 F.L.W. 1030 (Fla. 4th DCA, April 27, 1988).

ysis, it is apparent that this Court should reverse the Fourth District's ruling, and uphold the statute providing for evidentiary inferences to be drawn from BAC levels, as a legitimate expression of legislative intent to facilitate the punishment and deterence of drunk driving on Florida roads.

The effect of §316.1934(2)(c), supra, permits evidence of a .10 BAC level to be utilized, as a factual inference of impairment, in DUI-related prosecutions. In pertinent part, this statute provides as follows:

> [316.1934](2) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent that his normal faculties were impaired ... the results of any test administered in accordance with S 316.1932 or S 316.1933 and this section shall be admissible into evidence when otherwise admissible, and the amount of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood or breath, shall give rise to the following presumptions:
>
> * * *
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> (c) If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, that fact shall be prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired. Moreover, such person who has a blood alcohol level of 0.10 percent or above is guilty of driving, or being in actual physical control of, a motor vehicle, with an unlawful

> blood alcohol level.....The foregoing provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired.

This section does not relieve the State, of its ultimate burden of proof in criminal DUI charges, or remove the presumption of innocence from a defendant. State v. Waters, 436 So.2d 66 (Fla. 1983); State v. Kahler, 232 So.2d 166 (Fla. 1970). Significantly, the statute's express language, encouraging and not limiting the introduction of additional evidence besides BAC, by the State and defendant, on the issue of impairment, demonstrates a clear legislative intention to create a permissive inference, not a mandatory presumption. §316.1934 (2)(c), supra; Salazar v. State, 505 So.2d 1287, 1291 (Ala Cr App 1986); Commonwealth v. DiFrancesco, 329 A 2d 204, 207 (Pa. 1974); State v. Cooke, 155 SE 2d 165, 170 (N Car 1967). An intention to impose a conclusive, mandatory presumption, by BAC levels alone, of .10 percent or above, is clearly not expressed in the statute, by an reasonable construction, when the subject statute provides for the State's introduction of other evidence on the issue. Under similar reasoning, this language significantly permits, and does not discourage, the presentation and consideration of defensive evidence. Moone v. State, 728 SW 2d 928, 931 (Tex App - Houston (14th Dist) 1987); Salazar, 505 So.2d, supra, at 1291.

Additionally, the statute itself, based on its express language, does not mandate that a BAC level be accepted, as conclusive,

dispositive evidence of guilt. Id. The statute merely operates as a guide to juries, via the use of scientific evidence, in their ultimate determination of whether a defendant is "impaired," and/or guilty of DUI as defined in 5316.193. County Court of Ulster County, New York v. Allen, 442 U.S. 140, 99 S.Ct 2213, 60 L.Ed.2d 777, 792 (1979). The "prima facie'' evidentiary inference, allows the trial of fact, to permissibly infer one fact from another, by use of an evidentiary tool that is probative' and circumstantial. Ulster County, supra; N.C. v. State, 478 So.2d 1142, 1146 (Fla. 1st DCA 1985); State v. Young, 217 So.2d 567 (Fla. 1968); Commonwealth v. Crum, 523 A 2d 799, 803 (Pa Super 1987). The statute, in creating this factual inference, does not shift the burden of persuation to a defendant, to bear the burden of proof of his innocence.

The Fourth District's analysis, in focusing on the jury instruction given, to invalidate the statute, Rolle, slip op., at 4, 6, followed similar ''bootstrap" analysis used by the Eleventh Circuit, in Miller v. Norvell, 775 F.2d 1572 (11th Cir. 1985). This approach is not only contrary to the aforementioned decisions herein, but violates the proper method of due process analysis adopted by the U.S. Supreme Court, in evaluating the Constitutionality of criminal presumption statutes.

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[2] Neither Appellee, nor the Fourth District in its opinion, challenged the validity of the rational connection between BAC level measurements, and the fact of impairment, or the value of BAC measurements themselves. This aspect of due process analysis is not at issue here, and has been decided adversely to Appellee's position in Florida and elsewhere. Roberts v. State, 329 So.2d 296 (Fla. 1976); State v. Hamza, 342 So.2d 80 (Fla. 1977); Hall v. State, 440 So.2d 689, 690 (Fla. 1st DCA 1983); State v. Tussier, 511 A 2d 958 (RI 1986).

The appropriate due process analysis, as outlined in the Ulster County decision, supra, demonstrates a legitimate dichotomy between the principles of presumptions, as expressed in statutes, and the manner in which the presumption device is translated, by Constitutionally acceptable jury instructions. Unquestionably, the courts have validated the use of criminal statutory inferences and presumptions, as a "staple" of the criminal justice system that aids in fact-finding. Ulster County, 60 L.Ed.2d, at 791; Barnes v. United States, 412 U.S. 837 (1973); Waters, supra; Young, supra; Kahler, supra. Such inferences are regarded as necessary procedural tools, permitting the trier of fact to determine "ultimate" facts from "basic" facts. Ulster County; Barnes, supra. In Ulster County, the Court specifically held that in considering the Constitutional validity of statutory presumptions, a reviewing court must examine the application of the actual perspective of the presumption, as given to the jury by instructions. Ulster County, 60 L.Ed.2d, at 795. The Court specifically determined that it had not, and would not, analyze such presumptions, based on review of statutes on their face. Id. The Court further reiterated the significance of jury instructions as the appropriate and dispositive inquiry, by examining the results of decisions which evaluated similar presumption statutes, and came to differing conclusions, based on the difference in the instructions given. Ulster County, 90 L.E.2d, at 792-794, n. 16.[3]

[3] In United States v. Gainey, 380 U.S. 63 (1965), and United States v. Romano, 382 U.S. 136 (1965), the subject statutory presumption concerned a similar "basic" fact presence at the location of an illegal liquor "still", as evidence of ''carrying on" a distilling business (Gainey, supra), and ''possession, custody or ... control" of such a business, in violation of Federal law. Although the same presump-

See also, McCormick, Evidence, *5347* (3rd ed.), at p. *997; 997,* n. *68.*

The significance in these distinctions is paramount. It is evident that the decisions in Sandstrom v. Montana, *442* U.S. 510 (*1979*), and Francis v. Franklin, *471* U.S. 307 (1985), involved examination of the Constitutionality of presumptions, as reflected in jury instructions. Those courts did not (as the Eleventh Circuit did in Miller, supra), invalidate the murder statutes, as similarly defective, as an ipso facto result of the invalid nature of the instructions. More significantly, in several pre- and post-Francis decisions, appellate courts examined due process challenges to statutory presumptions of BAC levels and "impairment" elements of DUI offenses, and upheld the statutory presumption, while invalidating the actual jury instructions conveying this presumption.

It is evident that the Fourth District's ruling, regarded some past decisions of this Court and other Florida District appellate courts, as "no longer viable," because they pre-date the Francis decision. Rolle, slip op., at *3.* However, an examination of several post-Francis decisions, in other states, is not only instructive,[4] but persuasively reiterates the reasoning of pre-Francis cases, upholding pre-

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tion existed in both cases, the outcome of Constitutionality in Gainey, and Unconstitutionality in Romano, largely turned on the permissive and mandatory nature of the jury instructions, defining the nature and scope of the same presumtions, respectively, in the two cases. Ulster County, at *792-793,* n. *16;* Gainey, *380* U.S., supra, at *69-70;* Romano, *382* U.S., supra, at *138-139.*

[4] There appears to be no other Florida appellate court decisions, post-Francis, that have examined the issue of DUI statutory presumptions, and jury instructions, in light of Francis.

sumptions expressed in state statutes.[5]

In a decision by the Colorado Supreme Court last year, said court examined a similar "burden-shifting" presumption challenge, to a Colorado statute which was the same as §316.1934(2)(c), except it provided that a .10 BAC level "shall be presumed" to constitute evidence of impairment.[6] Barnes v. People, 735 P 2d 869, 871 (Colo 1987). The Colorado Supreme Court concluded that this statute merely authorized a permissive inference that a criminal defendant was driving under the influence of alcohol. Barnes, supra, at 873. The Court declared that such an inference, as stated in the statute, permitted juries to be guided, by scientific criteria, in deciding whether a driver's faculties were impaired by alcohol; eliminated the need for the prosecution to call expert witnesses, to verify such accepted scientific criteria, in each case; and permitted the prosecution to submit DUI cases to the jury, and avoid directed verdicts. Id. The Barnes court relied on pre-Francis decisions in other states, as well as treatises by legal commentators, to conclude that similar statutes, including those whose language (e.g., "shall be presumed") appeared to create mandatory presumptions, had been construed to create permissive inferences. Barnes, at 871, 872, 873; 871-872, n. 3, citing, ~~inter alia~~, McCormick, Evidence, §346 (3rd ed.). Thus, the Florida statute, which uses

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[5] As will be discussed, infra, the import of these post-Francis decisions, and their affirmance of the validity of statutory presumptions of impairment in DUI cases, is that Francis did not alter pre-Francis analyses, like those in Florida cases, of such presumptions.

[6] Section 42-4-1202, 17 CRS (1973 and 1982 Supp). Barnes, supra, at 871.

"prima facie evidence" as opposed to straight "presumption" language, must similarly be considered to have created a permissive, not mandatory inference. Supra. The Barnes court, despite its conclusion upholding the statute, nevertheless invalidated the jury instruction, under Francis-type analysis. Barnes, at 873-874; 873, n. 5. Thus, a "bad" presumption instruction did not necessarily produce an automatically Unconstitutional statute, contrary to the Fourth District's rationale in this case.

Similar results have been reached, by other state appellate courts, post-Francis. In Salazar v. State, 505 So.2d 1287 (Ala Crim App 1986), an Alabama appellate panel reviewed a DUI "impaired" presumption statute, in the same form as the Colorado law in Barnes. Salazar, at 1290, 1291. The Alabama court, relying in part on other court decisions, recognized that such decisions have regarded such statutes as "non-conclusive" in nature. Salazar, at 1291. The court concluded that the Alabama law did not remove the question of impairment, as an ultimate jury issue, and that the jury was still left to determine the weight of such evidence, and the ultimate question of a person's guilt or innocence based on all evidence presented. Id. As noted earlier, the court was largely influenced by the Alabama statutory provision, exactly similar to §316.1934(2)(c), providing no limitation on the presentation of other evidence by either party on the "impairment" question, as evincing legislature intent to create a non-mandatory inference. Salazar, at 1291; ~~see also~~, Stowes v. State, 513 So.2d 86, 91 (Ala Crim App 1987). Nevertheless, the Salazar panel

held the instruction to be Unconstitutional, under Francis-type analysis. Salazar, at 1292. These cases demonstrate both the validity of state statutes creating inferences, such as §316.1934(2)(c), and the conclusion that such valid statutes need not be thrown out, merely because of invalid jury instructions which may arguably and improperly turn permissive statutory inferences into mandatory presumptions.[7]

In Commonwealth v. Crum, 523 A 2d 799, 802 (Pa Super 1987), a Pennsylvania appeals court, in reviewing the Constituionality of a state presumption of impairment statute, revived the pre-Francis analysis conducted in a prior Pennsylvania Supreme Court decision, and construed the statute as creating a permissive inference, providing a jury with one more piece of evidence, in its determination of impairment and guilt. Crum, at 802, citing Commonwealth v. DiFrancesco, 329 A 2d 204 (Pa 1974);[8] Crum, at 803. However, the instruction as to the "impairment" presumption was viewed as improper. Crum, at 803, 804.

The impact of decisions like Barnes, Salazar, Crum, and Forte v. State, 707 SW 2d 89, 93; 93, n. 8 (Tex Cr App 1986)(upholding former statute and instruction), which adopted the same conclusions and

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[7] As will be argued, infra, in Points I and II, assuming arguendo any impropriety in the jury instruction in this case, it can be corrected, without holding §316.1934(2)(c) to be Unconstitutional, by simple and prospective revisions in jury instructions.

[8] In DiFrancesco, supra, the Pennsylvania Supreme Court found the impairment presumption statute to be a permissive inference, based, inter alia, on the same provision of non-limitation of other evidences besides BAC level; the State's burden of laying a valid evidentiary foundation, to introduce the BAC test results; and the conclusion that the statute defined a particular "quantum of evidence," that could be accepted or rejected by the jury. DiFrancesco, supra, at 207, 208; 207-208, n. 3.

analysis of the pre-Francis decision discussed herein, and followed elsewhere,[9] mandates a finding of Constitutionality as to the "permissive inference" of §326.1934(2)(c), notwithstanding Francis, or its possible impact on the jury instruction given here. The Francis case should not have been interpreted by the Fourth District, as invalidating this presumption, or Florida case law, preceding Francis, which upheld the statutory presumption, e.g., Hall, supra.

The conclusions of these Federal and state appellate decisions, inescapably undermines the premise and conclusions of the Eleventh Circuit, in Miller v. Norvell, supra.[10] The Miller court invalidated the statute therein, as a direct ipso facto consequence of its ruling, holding the jury instructions Unconstitutional. Miller, 775 F.2d, at 1576. This conclusion, and the absence of any independent analysis of the statute therein from the instructions, casts compelling doubt on the application of Miller by the Fourth District. The stark contrast between Miller (which erroneously ignored differences between statutorily-created evidentiary tools, and the impact of such devices as actually given to a jury), and those decisions discussed herein, e.g. Ulster County; Barnes; Salazar, requires re-g

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[9] The decision in DiFrancesco was not an isolated incident; other state statutes were similarly upheld as Constitutional permissive inferences of impairment, in DUI-related prosections. State v. Dacey, 418 A 2d 856, 858-859 (Vt 1980); State v. Hansen, 203 NW 2d 216, 218-219 (Iowa 1972); State v. Cooke, 155 SE 2d 165, 168-170 (N Car 1967); State v. Larabee, 161 A 2d 855, 859-860 (Maine 1960).

[10] It is axiomatic that this Court is not bound, in this case, by an Eleventh Circuit opinion, invalidating a different presumption statute than the one presently at issue. See, e.g., Coombs v. State, 13 F.L.W. 142 (Fla., Feb. 18, *1988).*

versal of the Fourth District decision, as to §316.1934(2)(c).

The very creation and implementation of standard jury instructions in criminal cases, by this Court, codifies the distinction recognized in Ulster County, applied in cases like Barnes, Salazar, Fort and Crum, and ignored in Miller. If actual jury instructions were recognized, in every case and every criminal offense, as identical and verbatim in all respects, to the statutes they reflect, there would clearly be no need for standard jury instructions, or specially requested jury instructions requested by state or defense. Since statutes are clearly not read verbatim to juries, as instructions, it is apparent that a presumption presented by statute can not necessarily be equated with an actual jury instruction, in terms of Constitutionality.

A major reason for recognizing this distinction, and seeking to uphold §316.1934(2)(c), independent of any analysis of the jury instruction at issue herein, is the application of basic rules of statutory construction, in this analysis. The Fourth District's ruling, did not correctly apply such rules, to §316.1934(2)(c).

It is axiomatic that, in determining the Constitutionality of any state legislation, Florida courts must adopt a construction of a statute that is Constitutional, even if the subject law can be interpreted as Unconstitutional. Vildibill v. Johnson, 492 So.2d 1047, 1050 (Fla. 1986); State ex rel Shevin v. Metz Construction Company, 285 So. 2d 598, 600 (Fla. 1973). In fact, the Colorado courts, in upholding similar DUI presumption legislation, have been guided by this rule, in construing such statutory language as permissive inferences. Jolly

v. People, 742 P 2d 891, 897 (Colo 1987), citing Barnes. Thus, because §316.1934(2)(c) can be interpreted as Constitutional, as shown herein, this construction must be followed, even in the face of arguably Unconstitutional interpretations of the law.

This Court is also governed by the further requirement of statutory construction, to honor, defer to, and effectuate legislative intent, from the express language of the subject statute. Chu v. State, 13 F.L.W. 663 (Fla. 4th DCA, March 9, 1988)(court examined language of statute, surrounding provisions in pari materia, to determine proper scope of implied consent, in the taking of BAC tests); Lowry v. Florida Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985); Thayer v. State, 335 So.2d 815 (Fla. 1976). As noted earlier herein, the statute does not direct a jury to return a verdict against a defendant, merely on the basis of BAC test results. DiFrancesco, supra. The "non-limitation of other evidence" provision, encouraging both parties to present other evidence pertaining to "impairment," clearly demonstrate that the legislature did not intend for the State to use BAC levels, higher than .10 percent, as the sole, or potentially sole evidence of guilt in DUI offenses. Salazar; DiFrancesco; Cooke, supra. In essence, the Fourth District's ruling wrongfully treats this provision as surplusage, and thus contrary to legislative intent. Johnson v. Feder, 485 So.2d 409 (Fla. 1986); City of North Miami v. Miami Herald Publishing Company, 468 So.2d 218 (Fla. 1985).

The clear public purpose, in enacting §316.1934(2)(c), is to

facilitate prosecutions of drunk drivers, by enabling a jury to consider another piece of physical evidence -- BAC test level results -- in determining whether a driver's faculties were impaired, and whether the driver is guilty of criminal charges defined in §316 et seq, of the Florida Statutes. This expression of policy, clearly geared towards recognition, deterrence and elimination of drunk driving, as a public evil, must be considered as an integral part of the analysis of this law. Roberts, supra; State v. Webb, 398 So.2d 820 (Fla. 1981);. Orlando Sports Stadium, Inc. v. State ex rel Powell, 262 So.2d 881 (Fla. 1972). It is both absurd and unreasonable, to interpret §316.1934(2)(c), as a mandatory presumption, virtually mandating guilty verdicts in criminal DUI trials, and effectively emasculate the State's ability to enforce drunk driving laws, in light of clear intent to formulate a permissive inference. Webb, supra; Curry v. State, 12 F.L.W. 492, 493 (Fla. 2nd DCA, February 17, 1988). It is even more absurd to construe legislative intent, to invalidate the statute, merely because a jury instruction may arguably have erroneously conveyed a mandatory inference. Id.

The "permissive inference" nature of §316.1934(2)(c) is substantiated, by reference to analogous interpretations of this, and other "prima facie evidence" presumptions, contained in criminal statutes. In the context of automobile insurance litigation, the First District concluded that the permissive inference of the predecessor statute to §316.1934(2)(c)[§322.262(2)(c), ~~Fla. Stat.~~ (1981)] did not transform a conviction for DUI unlawful blood alcohol level

("UBAL"),[11] into a "DUI impairment conviction". Travelers Indemnity Company of America v. McInroy, 342 So.2d 842, 844 (Fla. 1st DCA 1977); Roberts, supra. In McInroy, supra, the insurance company apparently maintained that a conviction of the insured, for UBAL, when coupled with the subject "presumption" statute herein, was equivalent to a DUI impairment conviction, thus meeting a specified exclusion clause allowing denial of benefits. Id. The First District's conclusion that the permissive inference of the subject statute herein, was not tantamount to conviction for DUI "impairment',' upon proof and conviction for a blood alcohol level of .10 percent or higher, confirms the interpretation of the statute as permissive, not conclusive. Id.

Florida law features other statutory provisions, providing

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[11] Under §316.193(1)(a); (1)(b), Fla. Stat. (1984), conviction for DUI can be obtained under either of these two alternate theories: (1) actual physical control of vehicle, and intoxication, to the extent of impairment of normal factulties, and (2) actual physical control, and a blood alcohol level, above .10 percent. Similar challenges of "burden-shifting presumptions" and resulting alleged due process violations, have been rejected as to "UBAL" theories of DUI, on the grounds that proof of the requisite BAC level, is proof of the offense itself, not an evidentiary presumption. Forte, supra; Washington v. District of Columbia, 538 A 2d 1151, 1156 (DC App 1988); City of Mankate v. Chirpich, 392 NW 2d 34, 37 (Minn App 1986); Scherlie v. State, 689 SW 2d 294, 296 (Tex App 1st Dist 1985); Fuenning v. Superior Court in and for County of Maricopa, 680 P 2d 121, 127 (Ariz 1983)(en banc).

It would be unreasonable to interpret 5316.1934, as creating an Unconstitutional mandatory presumption, when proof of the basic fact -- .10 percent or higher BAC level -- would be sufficient to prove DUI, under the alternative ''unlawful blood alcohol level" (UBAL) provisions of 5316.193, Fla. Stat. (1984). It would be further unreasonable to conclude that the legislature, having provided for proof of DUI for the unlawful blood alcohol level alone, would intend the same thing, in creating a different, alternate theory of proof of DUI, by "impairment." Webb, supra. This construction would, in essence, mean that creation of a DUI offense, by UBAL, was a useless act, which is clearly a ludicrous conclusion.

proof of basic facts to be "prima facie" evidence of ultimate facts, in the prosecution of other criminal offenses, besides drunk driving. Under 1810.07, stealthful entry, without consent, into a structure, constitutes prima facie evidence of intent, to commit burglary . This Court has upheld this statutory inference, against a challenge of improper shifting of the burden of proof to a defendant. Waters, supra, at 70; 70, n. 4. In Waters, this Court held that defendant's presumption of innocence remained intact, even if the State maintained a prima facie case. Id. Furthermore, the Court reasoned that other circumstances could be shown to exist, by both parties, and that a defendant, aided by the presumption of innocence, could rebut or impede the State's prima facie case. Id. In State v. Young, supra, this Court rejected a similar due process challenge to the provisions of §810.022(2), Fla. Stat., which permits unexplained possession of recently stolen property to be considered as prima facie evidence of theft and larceny. This Court reasoned that this was a factual inference, not a legally mandatory presumption, which the jury was allowed to consider, as one more piece of probative circumstantial evidence, in determining guilt. Young, at 570, 571. Under §212.14(3), Fla. Stat. (1987), the Florida legislature has similarly used a "prima facie" evidentiary inference, in providing that the filing of a sales tax return, without payment, is prima facie evidence of conversion. This Court has similarly permitted evidence of flight, to constitute circumstantial evidence of guilt, rejecting challenges that this effectively directs the jury to a guilty verdict, by concluding that the

weight of such evidence remains up to the jury to decide. Bundy v. State, 471 So.2d 9, 21 (Fla. 1985). Under similar reasoning, these legitimate justifications, upholding other "prima facie" statutory inferences, are readily applicable to §316.1934.

Based on the foregoing arguments and authorities, it is apparent that the Fourth District erred, in concluding that Francis and Miller require invalidation of §316.1934(2)(c), as Unconstitutional. As shown herein, the nature of the statute, as interpreted under relevant case law and rules of statutory construction, mandate a different result -- the upholding of this section, as Constitutionally valid, not a denial of due process. Additionally, affirmance of the Fourth District's ruling would serve to frustrate the clear legislative purpose to punish and deter drunk driving, in favor of hypertechnical, semantic interpretation that would favor form over substance. Barnes; Dacey; Angosy, Limited v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968). In light of these legal and social justifications for the Constitutionality of this statute, this Court should vacate the Fourth District's ruling to the contrary.

POINT II

FOURTH DISTRICT ERRED IN CONCLUDING THAT JURY INSTRUCTIONS, INFORMING JURY OF NATURE AND CONSEQUENCES OF PROOF OF .10% BLOOD-ALCOHOL LEVEL, VIOLATED APPELLEE'S DUE PROCESS RIGHTS.

The Fourth District, relying primarily on the decision in Francis, supra, concluded that the actual jury instructions given, to the effect that proof of a .10% blood alcohol content level "would be sufficient, in and of itself" (R, 293), to establish impairment, amounted to an Unconstitutional mandatory presumption, requiring Appellee to prove his innocence. Rolle, slip opinion, at 4. According to the Fourth District's ruling, the "rebuttable" nature of this inference compounded the problem, by possibly indicating to the jury that Appellee bear the burden of persuasion, upon proof by the State of the basic fact of a .10% level. Rolle, at 405; Francis, 85 L.Ed.2d at 355, 356. Upon viewing the entirety of the instructions as a whole herein, Francis, at 354, and the clear circumstances surrounding the verdict, it is evident that the total jury charge did not violate due process, and could be upheld, consistent with the principles of Francis.

In Francis, as in Sandstrom v. Montana, supra, the United States Supreme Court's analysis of jury instructions, on the issue of whether they created a mandatory or properly permissive inference, focused upon ".. what a reasonable juror could have understood the charge as meaning." Francis, 85 L.Ed.2d, at 354; Sandstrom, 61 L.Ed.2d, at 46-47. In

analyzing the charge in Francis and Sandstrom, the court therein applied this approach, to determine that those jurors could have understood the subject instruction to have created a mandatory presumption, shifting the burden of proof to the defendants therein. Id. However, the Francis decision made it clear that not all jury instructions would be invalidated under this standard, acknowledging that the remainder of a jury charge might properly explain the appropriate burden-of-proof allocation, in a way that would not be taken by a juror, as an improper shift in the burden of proof. Francis, at 356. In sum, the appropriate inquiry, even under Francis, requires more than an isolated analysis of a particularized excerpt from a jury instruction, to include the entire charge and other components of the trial, to determine whether a resulting conviction has violated due process. Francis, supra; Cupp v. Naughten, 414 U.S. 141, 147-149 (1973).

In viewing the entire charge, it is apparent that the trial court, subsequent to the alleged y offending instruction (R, 273), persistently reiterated to the jury that the State had the burden of proving guilt, beyond a reasonable doubt; defined this standard, in detail; and clearly explained that Appellee's presumption of innocence, remained with him, unless the State met its burden of persuasion, as to all elements of the crime. (R, 274-276). The court significantly conveyed to the jury, after the challenged portion, that the "basic fact" -- that of a .10% breath test level -- "may or may not

reflect" the defendant's actual blood alcohol content level, at the time of the offense. (R, 274). The court specifically left the "believability" and "reliability" of all evidence, up to the jury. (R, 276,277,278). Thus, the jury was told, after the subject inference, not only of the State's proper allocated burden of persuasion, but that they were not even mandated to conclude the existence of the "basic fact." Cupp.

It is extremely significant that the arguably offensive instructions, preceded those which correctly allocated the burden of proof. In Francis, such correct instructions largely preceded the offending section of the instructions. Francis, at 356. The Francis court expressly acknowledged that the sequence of instructions in this regard, was of paramount importance, in determing what a reasonable juror would interpret the instructions to mean:

> A reasonable juror, however, would have sought to make sense of the conflicting [inference of impairment, vs. burden of persuasion on the State] . . . instructions not only at the initial moment of hearing them but also later in the jury room after having heard the entire charge. One would expect most of the jurors' reflection about the meaning of the instructions to occur during this subsequent deliberative [sic] stage of the process. Under these circumstances, it is certainly reasonable to expect a juror to attempt to make sense of a confusing earlier portion of the instruction by reference to a later portion of the instruction.

Francis, at 358, n.7. (e.a.). In light of this factual distinction between the nature and sequence of the instructions in Francis, from those herein, supra, it is reasonable to

conclude that those later instructions, appropriately explained any arguable indication, prior thereto, that a blood alcohol level content level of .10% compelled the defendant to persuade the jury he was not impaired. Francis; Cupp.

This conclusion is substantiated, by an even more greatly significant distinction, between this case, and Francis, that cannot be overemphasized. As just discussed, the Francis court accepted the premise that an evaluation of how a reasonable juror would interpret a jury charge, necessarily encompasses jurors' actual reflections, during deliberations. Francis, at 358, n.7. The record here, unlike the one under review in Francis, establishes, inter alia, that the jury was deadlocked, and potentially "hung," after approximately one hour of deliberations, (R, 287); that the jury, in advising the judge of these circumstances, asked to view the videotape of Appellee's station house sobriety tests (R, 287); that the judge, with the approval of both parties, advised the jurors they could continue to listen to each other's view of evidence, and try to arrive at a verdict (R, 289-291); that the jury saw the videotape, (R, 282), and reached a guilty verdict ten minutes after retiring for further deliberations. (R, 283). These circumstances could not be any clearer, in demonstrating that the jurors, in Appellee's case, could not possibly have interpreted the "impairment inference" instruction, as mandating a guilty verdict, from the blood alcohol content test results alone. Unlike Francis, this Court does have

a way of knowing that the jurors herein applied those instructions, which correctly allocated the burden of persuasion, in reaching their verdict.[12] (R, 274-278; 287-293); Francis, at 358. In this case, there is no risk, as there was in Francis and Sandstrom, that the jury might have reached its verdict, by merely relying on the blood alcohol content test results, and the absence of any evidentiary presentation by Appellee, to find him guilty. Cupp; Francis, at 356-360.

Notwithstanding that the facts and law herein, warrant a sustaining of the jury instructions, it is certainly true that a substantial number of DUI trial records, more closely resemble the mere general guilty verdict circumstances, in Francis. In the absence of the circumstances contained in Appellee's trial record, it is certainly arguable that the challenged instructions in this case, would have conveyed a mandatory inference, that would be violative of the Francis decision. In the interest of correcting this defect, in other potential cases, so as to conform to the due process requirements of Francis, Appellant respectfully suggests that this Court adopt or recommend a standard jury instruction, to be

[12] In an analogous context, this Court resolved a double jeopardy claim, by relying, in part, on an examination of the jurors' actions, questions and statements during deliberations, in pointing out a discrepancy between the charging document and the evidence, and requesting clarification, in view of their conclusions that the evidence, but for the discrepancy, warranted a guilty verdict. State v. Mars, 498 So.2d 402; 403, n.3 (Fla. 1986).

given in all future DWI felony and misdemeanor prosecutions, in the following suggested form:

> CHEMICAL TEST WHERE APPLICABLE –PERMISSIBLE INFERENCES
>
> If you find from the evidence:
>
> * * * *
>
> 3. That the defendant had a .10% or more by weight of alcohol in his blood, you may infer that the defendant was under the influence of alcoholic beverages to the extent that his/her normal faculties were impaired, but you are not compelled to do so. The defendant may, but is not required to present evidence, pertaining to any issue, concerning these charges.
>
> You should consider this evidence, along with all other competent evidence, in determining whether the State proved, beyond a reasonable doubt that the defendant was under the influence of alcoholic beverages to the extent that his/her normal faculties were impaired. It is up to you to decide whether to accept or reject any of the evidence presented.
>
> If, after considering all of the evidence, you have a reasonable doubt that the defendant was under the influence of alcoholic beverages to the extent that his/her normal faculties were impaired, you msut find the defendant not guilty, regardless of the blood alcohol test results. §316.1934(2)(c), ~~Fla. Stat.~~.

This Court could adopt any or all of this suggested instruction, or clearly adopt its own form and content of such an instruction, as an emergency rule, to apply prospectively, until the adoption of a permanent one, after consideration by the appropriate groups. e.g., Martin v. State, 497 So.2d 872, 873 (Fla. 1986) (adopting emergency rule, for competency to be executed); In re: Emergency Amendment to Florida Rules of Criminal Procedure, (Rule 3.811--Competency to be Executed), 497 So.2d

643 (Fla. 1986). This Court could alternatively choose to express its opinion, as to the proper content of any necessary revisions in the appropriate jury instructions, and consider and/or approve such instructions, as standard or otherwise, after review and input by appropriate panels, organizations and groups. e.g., Yohn v. State, 476 So.2d 123 (Fla. 1985); In re: Standard Jury Instructions in Criminal Cases, 483 So.2d 428 (Fla. 1986).

Assuming arguendo this Court agrees with the Fourth District's invalidation of the jury instructions herein, this Court should provide that such a ruling apply prospectively. Any necessary changes in the relevant jury instructions, or newly-recognized insufficiencies therein, do not constitute the type of fundamental error, that this Court has required, to be given retroactive effect. Witt v. State, 387 So.2d 922, 929 (Fla. 1980), cert. denied 449 So.2d 1067 (1980). Like the insufficiency of the standard jury instructions, as to the State's burden of proof on sanity once a defendant meets his burden of production, Yohn, supra, the present jury instructions on permissible inferences are not so fundamentally flawed, so as to constitute requisite fundamental error, for retroactive impact. Smith v. State, 13 FLW 43 (Fla. Jan. 21, 1988) (Yohn not fundamental error, requiring reversal where not preserved, when old instruction, though defective, still clearly imposed burden of proof on the State); Jackson v. State, 502 So.2d 409, 413 (Fla. 1986) (new procedure, in

Florida death penalty cases, requiring instruction to jury, on need for factual findings sufficient to permit imposition of the death penalty under Enmund v. Florida, 458 U.S. 782 (1982), to be applied prospectively; past failure to give such instruction, not reversible error); Tedder v. Video Electronics, Inc., 491 So.2d 533, 535 (Fla. 1986) (ruling, forbidding limits on "backstriking" jurors, not so fundamental, so as to permit retroactive application); State v. Neil, 457 So.2d 481, 488 (Fla. 1984) (Neil procedure, exercise of peremptory challenges upon black venireperaon, not so fundamental, as to require retroactive application).

Retroactive application of a newly announced rule in procedure, is contingent upon measuring the purpose, and impact of such a rule or procedure on the integrity of the fact-finding process; the extent of good faith reliance by various law enforcement authorities on the old standard, rule or procedure; and the impact of such a charge, on the overall administration of justice.[13] Allen v. Hardy, 478 U.S. , 106 S.Ct. ___, 92 L.Ed.2d 199, 204 (1986); Solem v. Stumes, 465 U.S. 638, 643 (1984); Stovall v. Denno, 388 U.S. 293, 297 (1967); Bundy v. State, 471 So.2d 9, 18 (Fla. 1985); Witt,

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[13] Similar considerations, plus those of public policy, the nature of the statute, and its prior application, govern the impact of a decision holding a statute constitutionally invalid, on those cases completed prior thereto. Lemon v. Kurtzman, 411 U.S. 192, 198-199, 201,208-209 (1973); Linkletter v. Walker, 381 U.S. 618, 627 (1965).

supra. Application of these criteria to any such change occasioned by a ruling favoring the Fourth District result, as to the instructions or statutes, clearly favor prospective application only. Id.

The purpose of such a change, in the continued validity of the relevant instructions (or statutes), would be to insure that the jury properly understand the State's allocated burden of proof, in DUI cases. Assuming arguendo this impacts the integrity of the fact-finding process, this alone does not warrant retroactive impact on untold numbers of jury trials and verdicts. Allen, supra; Solem; supra; Yohn, supra; Bundy, supra. There has been reliance on breathalyzer results by police officers and prosecutors in DUI-related offenses, since the advent of 8316.1934, over twenty years ago. See Laws of Florida, Chapter 67-308, Sec. 2. This device, and inference of impairment from test results, at trials, has clearly been a feature of effective law enforcement, to punish and deter drunk driving. Roberts, supra. The extent of this reliance, under these compelling circumstances clearly supports non-retroactive application, of any charge in jury instructions. Allen; Solem; Yohn; Bundy.

Perhaps most significantly, there is no way to measure the enormously destructive nature, of the impact of retroactive jury charge revisions, on the administration of justice. Id. County court, circuit courts, and appellate courts would be literally inundated with hundreds, perhaps thousands, of post-

conviction and/or collateral motions, and/appeals from such motions, by those whose trials have long since been complete. Retrials of those, who might be successful in obtaining relief, would be virtually impossible, given understandable lapses in time and memory, and unavoidable destruction of test results, including blood alcohol content levels. These perilous practical considerations, and the non-fundamental nature of the error, if any, clearly warrant relief, if any, solely on a prospective basis. Id.

Any opinion of this Court, that seeks to invalidate the instructions and/or statute, should apply only to those cases, where breathalyzer test results are taken, after this case becomes final. Bundy, at 18. All "pipeline" cases, on appeal, should be examined, based on harmless error analysis, infra. Id. Because the jury instructions actually given, were shown by the Record not to have directed a verdict against Appellee, based solely or conclusively on a presumption of impairment from breath test results, the Fourth District's ruling should be accordingly reversed.

POINT III

FOURTH DISTRICT ERRED IN CONCLUDING THAT ANY ERROR IN GIVING INSTRUCTION TO JURY, ON IMPACT AND EFFECT OF BLOOD-ALCOHOL LEVEL TEST EVIDENCE, WAS NOT HARMLESS ERROR, IN VIEW OF OTHER OVERWHELMING EVIDENCE OF APPELLEE'S IMPAIRMENT.

In its ruling, the Fourth District concluded that harmless error analysis could not be applied to the evidence at Appellee's trial, since "we cannot say beyond a reasonable doubt that the jury would have convicted Rolle absent the defective instruction given." Rolle, slip op., at 7. It is apparent, upon examination of Record evidence, besides the chemical test results which were the subject of the instruction invalidated by the Fourth District, that there was such overwhelming evidence of impairment, that any Francis/Sandstrom error must be deemed harmless.

It is well settled that a Sandstrom-related error, involving instructions that improperly shift the burden of persuasion to a defendant, is subject to harmless error analysis. Rose v. Clark, ___U.S.___, 106 S.Ct 3101, 92 L.Ed.2d 460 (1986); Bowen v. Kemp, 832 F.2d 546, 548-549 (11th Cir. 1987)(~~en~~ ~~banc~~). In order to prevail in this analysis, the State must demonstrate this, beyond a reasonable doubt, by showing overwhelming evidence of the presumed fact. Id. In this case, there was extremely overwhelming evidence of Appellee's impairment, and intoxication while driving, above and beyond the chemical test results.

Appellee was initially observed, late at night, facing the

wrong direction, on the wrong side of the median of a public road. (R, 53, 54). As the officer approached the intersection where Appellee's van was located, Appellee made a left turn, through a red light, across three lanes of traffic and into the curb lane. (R, 54). When the officer pulled Appellee over, Appellee had to hold the door, to steady himself and exit his car. (R, 56). His speech was slurred, and incomprehensible to the officer, and he was initially hanging his head, shoulders and arms, out of the driver's window. (R, 55, 56). Appellee's eyes were bloodshot, and he smelled of alcoholic beverages on his breath. (R, 56, 57, 78). Rolle took more time than necessary, to "fumble" through his wallet, and find his driver's license, when asked to produce it. (R, 56-57). Appellee swayed, like a "figure 8" during a balance test, and lost his balance while performing a roadside "heel-to-toe" test. (R, 60, 65, 87). He did not follow directions, during certain roadside and station tests. (R, 64, 162). During the roadside stop, Appellee recited the alphabet, slower than the rest of his speech, and slower than other people that the arresting officer had stopped, for DUI offenses. (R, 66, 82, 85). Appellee admitted having some beers, during the day. (R, 153).

These uncontested circumstances almost identically parallel those evidentiary facts, found in other cases to be sufficient proof of DUI under an "impairment" theory. State v. Benyei, 508 So.2d 1258, 1259 (Fla. 5th DCA 1987)(car went off the road, onto a median); State v. Macias, 481 So.2d 979, 982 (Fla. 4th DCA 1986)(erratic driving; alcohol smell on breath; bloodshot eyes; admission by defendant

he had alcoholic drinks; inability to stand, without swaying; slurred speech; failure of roadside tests); State v. Edwards, 463 So.2d 551, 554 (Fla. 5th DCA 1985)(defendant leaning against car for support; fumbling through wallet for driver's license; smell of alcohol on breath; slurred speech; unsteady balance and weaving; bloodshot eyes; poor performance, roadside tests); County of Dade v. Pedigo, 181 So.2d 720, 721 (Fla. 3rd DCA 1966)(car backed out, onto paved area); defendant leaning against car; unsteady, smell of alcohol on breath). This undisputed evidence constitutes compelling, overwhelming evidence of DUI, without reference to the test results. Id.; see also, People v. Hickox, 751 P.2d 645, 647 (Col App Div I 1987)(admission of drinking; staggering; slurred speech). Under these circumstances, it is apparent, beyond a reasonable doubt, that the jury would have convicted Rolle of DUI, without any instruction on the force and effect of the chemical breath test results. Rose, supra; Macias, supra; Edwards, supra.

Based on such evidence, appellee's conviction and sentence should stand, in light of the absence of reversible error or prejudice to Rolle, alleged to have resulted from the challenged instruction.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited therein, Appellant respectfully requests that this Honorable Court reverse the ruling of the Fourth District; uphold the Constitutionality of the subject statute and instructions herein; and remand the proceedings to the Fourth District, with instructions to reinstate Appellee's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant on the Merits has been furnished, by courier, to ALLEN J. DeWEESE, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, Ninth Floor, West Palm Beach, Florida 33401 this 18th day of *May*, 1988.

Richard G. Bartmon

Of Counsel