IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,708

JESSIE LEE MILLER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

PURSUANT TO A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

****

BRIEF OF PETITIONER

PERRY M. ADAIR
Florida Bar No. 434050
BENDER, BENDER, CHANDLER & ADAIR, P.A.
Attorneys for Petitioner
432 N. Washington Avenue
Homestead, Florida 33030
Tel: (305) 247-3614

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

The Petitioner, JESSIE LEE MILLER, files this his initial Brief in support of his position in this appeal. In this Brief, JESSIE LEE MILLER (the Defendant in the Trial Court and the Appellee in the Third District Court of Appeal) will be referred to as "PETITIONER" or "MILLER". The Respondent, STATE OF FLORIDA, will be referred to "RESPONDENT" or "STATE". References to the record will be made as the symbol "R" followed by the appropriate page number of the record (i.e. "R-1"). The transcript of the proceedings will be referred to in this Brief as "T" followed by the appropriate page number of the transcript (i.e. "T-1"). The supplemental record will be referred to in this Brief by the symbol "SR" followed by the appropriate page number from the supplemental record (i.e. SR-1). The Brief submitted by the STATE to the Third District Court of Appeal will be referred to in this Brief by the symbol "S.D.C.B." followed by the appropriate page number from the STATE's brief submitted to the Third District Court of Appeal (i.e. "S.D.C.B.-1").

STATEMENT OF THE CASE AND FACTS

The PETITIONER was arrested on May 25, 1987 at approximately 2:00 a.m. (R-1). By Uniform Traffic Citation, the PETITIONER was charged with driving while license suspended[1] or revoked, running a red light, improper equipment (no stop lights) and driving under the influence contrary to S.316.193, Fla. Sta. (1987). (SR 1-4).

At 3:20 a.m., one hour and twenty minutes after his arrest, a breath sample was obtained from the PETITIONER by use of an Indium crimper device.[2] This breath sample was subsequently analyzed by toxicologist, Eli A. Gonzalez.[3] The results of that analysis yielded a blood alcohol level (B.A.L.) at 3:20 a.m. of 0.14 percent, (SR-46) (B.A.L.).

Toxicologist Gonzalez testified under oath during his deposition that he could not testify within a reasonable degree of scientific certainty what MILLER's B.A.L. would have been at 2:00 a.m., the time that MILLER drove while allegedly impaired. (SR-38-40). Toxicologist Gonzalez further testified that the

---

1 This suspension resulted from a record keeping error by D.H.S.M.V. in Tallahassee. The suspension was lifted by the D.H.S.M.V.

2 This device captures three samples from one breath by encapsulating (crimping) the breath in three separate chambers of a metal tube.

3 The breath is analyzed in a machine known as a gas chromatograph. This machine allegedly separates chemical compounds in the breath, isolates ethanol in the breath, and measures it. The machine then converts breath alcohol to blood alcohol and gives a numerical alcohol level (B.A.L.).

aforementioned B.A.L. of 0.14 percent would not have been the PETITIONER's B.A.L. at the time the PETITIONER drove nor did that numerical result serve as basis from which Toxicologist Gonzalez could give an opinion as to the PETITIONER's B.A.L. at the time he operated his motor vehicle.[4] In fact, STATE's expert testified that it was possible that the PETITIONER's B.A.L. was lower than 0.10 percent at the time he operated his motor vehicle (SR-45).

Through discovery, the PETITIONER learned that the STATE intended to use the aforementioned B.A.L. at trial as proof of the PETITIONER's B.A.L. and/or impairment at 2:00 a.m., the time the PETITIONER operated his motor vehicle. In short, although the STATE's expert admitted it could not be done, the STATE wished to use the PETITIONER's B.A.L. at 3:20 a.m. to prove the PETITIONER's B.A.L. or impairment at 2:00 a.m.

On November 9, 1987, the PETITIONER served his Motion to Suppress Evidence of Administration and Results of Chemical Breath Test (R-11-13). In that Motion PETITIONER argued the following:

> 1. The results of the breath test were irrelevant because the numerical result of the breath test did not reflect the PETITIONER's B.A.L. at the time the alleged offense was committed.
>
> 2. That, assuming the numerical B.A.L. had some relevance, its probative value was substantially

---

[4] Relating a later B.A.L. back to the time of the operation of the motor vehicle is accomplished through a process known as retrograde extrapolation. If a person who has been drinking is "post-absorptive" at the time he or she is arrested (i.e. he or she had his or her last drink 45 to 90 minutes prior to driving), the toxicologist can calculate the B.A.L. at the time of the driving by adding to the driver's B.A.L. at the time of the later test .015 percent per hour.

outweighed by the danger of unfair prejudice, confusion and misleading the jury.

On July 11, 1988 the Trial Court entered an order granting the aforementioned Motion to Suppress, finding, inter alia, the following:

1. That because the numerical B.A.L. could not be related back to the time of the offense, the numerical B.A.L. was irrelevant to the offense charged.

2. That, if relevant, the probative value of the numerical B.A.L. was outweighed by its unfair prejudicial value and its danger of confusing or misleading the jury (R-21-25). In that same order, the Trial Court certified the question which is the subject of this appeal.

The RESPONDENT appealed the Trial Court's decision to the Third District Court of Appeal (hereinafter "District Court"). In an opinion rendered February 13, 1990, the District Court answered the certified question in the affirmative and reversed the Trial Court's ruling. The District Court certified the issue to be of great public importance and remanded the case to the Trial Court for further proceedings. In its opinion, the District Court held basically as follows:

1. Section 316.1934, Fla Stat. (1987) makes the results of a breath test admissible so long as that test is administered in accordance with the procedural requirements of s.316.1932, Fla. Stat. (1987) if the results are not otherwise rendered inadmissible. In other words, the District Court held that the results of the breath test are automatically admissible so long as proper testing procedures are followed regardless of any other considerations.

2. The time lapse between the PETITIONER's arrest and the administration of the breath went to the weight of the evidence not its admissibility.

The PETITIONER timely filed with the District Court a Motion for Rehearing and Rehearing En Banc. That Motion was denied without opinion. The PETITIONER then timely filed his Notice to Invoke the Discretionary Jurisdiction of this Court.

ISSUE ON APPEAL

CERTIFIED QUESTION

WHETHER THE NUMERICAL RESULT OF THE DEFENDANT'S BLOOD ALCOHOL TEST TAKEN ONE AND ONE-HALF (1 1/2) HOURS AFTER THE DEFENDANT'S LAST OPERATION OF A MOTOR VEHICLE IS ADMISSIBLE IN EVIDENCE WHERE THE STATE'S EXPERT WITNESS WOULD TESTIFY THAT THE NUMERICAL READING WOULD NOT BE THE DEFENDANT'S BLOOD ALCOHOL LEVEL AT THE TIME HE WAS OPERATING THE MOTOR VEHICLE, WHERE THE STATE'S EXPERT WITNESS WAS UNABLE TO TESTIFY WHAT THE DEFENDANT'S BLOOD ALCOHOL LEVEL WOULD BE AT THE TIME HE WAS OPERATING THE MOTOR VEHICLE AND HAS TESTIFIED THAT THE DEFENDANT'S BLOOD ALCOHOL LEVEL COULD HAVE BEEN LOWER THAN 0.10% AT THE TIME THE DEFENDANT OPERATED THE MOTOR VEHICLE.

I. Whether the Third District Court of Appeal erred in answering the certified question in the affirmative and in reversing the order of the Trial Court.

A. Whether the Third District Court of Appeal erred in substituting its judgment for that of the Trial Court and sub silentio ruling that Trial Court abused its discretion in determining that, if relevant, the probative value of the numerical blood alcohol level was substantially outweighed by the danger of unfair prejudice, confusion of issues and misleading the jury.

B. Whether the Third District Court of Appeal erred in ruling that Section 316.1934, Fla. Stat. (1987) makes the results of a breath automatically admissible so long as the procedures for the administration of that breath test are followed.

C. Whether the Third District Court of Appeal erred in ruling that the numerical B.A.L. was relevant and that the lapse in time between the time of the operation of the motor vehicle and the administration of the breath test; where it was admitted that the results of the breath test could not be related back to the time of the operation of the motor vehicle, went to the weight of the numerical result of the breath test and not its admissibility.

SUMMARY OF THE ARGUMENT

The District Court erred in answering the certified question in the affirmative and in reversing the Trial Court. The Trial Court exercised its discretion in granting the PETITIONER's Motion to Suppress the evidence in question and correctly ruled that the numerical result of the breath test was not relevant to the offense charged because; as the State conceded:

1. It does not represent the PETITIONER's B.A.L. at the time he drove his motor vehicle, and

2. It does not serve as a basis from which the STATE's expert could give an opinion as to what the PETITIONER's B.A.L. was at the time the PETITIONER drove his motor vehicle.

In its opinion, the District Court made a determination that the numerical result of the breath test was relevant to the offense charged and the inability of the STATE to relate the numerical result of the test to the time of the offense went to the weight of the evidence and not its admissibility. The District Court did not, however, directly address the Trial Court's alternative ruling that, if the numerical result of the breath test was relevant; absent the STATE being able to relate that numerical result back to the time of the offense, any probative value of the numerical blood alcohol result was outweighed by the unfair prejudicial affect of that piece of evidence.

Rather than addressing that issue in a straightforward fashion, which would have required a ruling that the Trial Court had abused its discretion, the District Court simply substituted

its judgment for that of the Trial Court sub silentio. The District Court completely overlooked the fact that the threshold issue of relevance is entirely separate from the issue of unfair prejudice. Clearly, the second issue assumes a threshold determination of relevance.

The District Court also committed error in construing s.316.1934 Fla. Stat. (1987) to mean that the numerical results of a breath test are automatically admissible so long as the procedural requirements for the administration of the test are followed. That statute plainly states that the results are admissible if otherwise admissible. Just as plainly, that statute does not say, as the District Court construed it to say, that the results of the breath test are automatically admissible so long as the procedural requirements are followed where the results are otherwise not rendered inadmissible.

The District Court based its conclusion on this point upon an incorrect reading of this Court's decision in Gillman v. State, 390 So.2d 62 (Fla. 1980). Gillman does not by any stretch of the imagination stand for the proposition that as long as the procedural requirements are followed, the results of a breath test are automatically admissible. In fact, in the Gillman case the results of the breath test were related back to the time of the alleged offense. The Gillman case presented this Court with an express opportunity to hold "relation back" was not necessary. This Court declined to do so.

In order for the numerical result of the breath test in this case to be admissible, it must pass muster under the Evidence Code. Simply stated, the numerical result of the breath test must be relevant, and the probative value of that evidence must not be outweighed by the danger of unfair prejudice, confusion or misleading the jury.

The test of relevance for the piece of evidence at issue could not be more straightforward. One need only examine the statute under which the PETITIONER is charged; identify its elements, and ask whether this numerical result (which the STATE admits cannot be related back to the time of the offense) is probative of any of those elements.

The statute under which the PETITIONER is charged makes it a crime to operate a motor vehicle <u>while under the influence</u> of alcohol to the extent one's normal faculties are impaired; or to operate a motor vehicle <u>with</u> a blood alcohol level of 0.01 percent or greater. (emphasis added) The crime defined by the statute is operating a motor vehicle <u>while being impaired by alcohol or while having a B.A.L. of 0.10 percent or greater</u>.

Clearly, relevant evidence is evidence tending to prove or disprove a material fact. Succinctly put, under the statute which the PETITIONER is said to have violated, the material facts to be proven by the STATE are:

1. Was the PETITIONER driving or in actual physical control of a vehicle; and

2. Was the PETITIONER under the influence of alcoholic beverages when affected to the extent that his normal faculties were impaired; or

3. Was the PETITIONER's blood alcohol level at the time he operated the vehicle 0.10 percent or higher.

Not only does the numerical result which is at issue in this case not tend to prove or disprove any of those material facts, the STATE's expert admits that the numerical result does not prove or disprove any of those facts. There is simply no getting around that the STATE's expert testified that the numerical result of B.A.L. in this case does not represent the PETITIONER's B.A.L. at the time MILLER drove nor does it serve as a basis upon which the STATE's expert could give an opinion as to the PETITIONER's B.A.L. at the time MILLER drove. Accordingly, the numerical result is not relevant.

The District Court recognized correctly that the STATE need not prove that the PETITIONER's B.A.L. was greater than 0.10 percent at the time of driving in order to convict the PETITIONER under s.316.193, Fla. Stat. (1987). Rather, the STATE may also obtain a conviction upon proving that the PETITIONER's normal faculties were impaired at the time he operated the motor vehicle.

The numerical result of B.A.L. in this case is not relevant to the issue of impairment either. In order to be relevant to the issue of impairment, the STATE would have to come forward with evidence that; at the time of the driving, the PETITIONER had a B.A.L. which was indicative of impairment. The STATE indicates

that such a level would be 0.10 percent or higher. The STATE concedes that it cannot prove any numerical result at the time the PETITIONER operated his motor vehicle whether that numerical result be indicative of impairment or not.

The District Court further committed error in ruling that the lapse in time between the time of driving and the administration of the breath test goes to the weight of the evidence of the numerical result rather than its admissibility. In short, the District Court held that although the STATE's own expert refused to give any weight to the numerical B.A.L. on the issues for which the STATE wished to introduce it, a jury of lay persons should be free to give the result whatever weight it chooses. The PETITIONER submits that it is totally improper to allow a jury of lay persons to give any weight whatsoever to a piece of scientific evidence when the STATE's expert, through whom the evidence would be admitted, concedes that he would give no weight to it on the issues for which the STATE seeks to introduce the numerical B.A.L.

The District Court's opinion implicitly endorses the position taken by the STATE in the Trial Court and the District Court that the STATE should not be penalized for its inability to relate the results of the breath test back to the time of driving when the reason it cannot do so is because it does not have the necessary information to perform the calculation due to the PETITIONER invoking his Miranda rights. In order to perform the relation back calculations (retrograde extrapolation), the STATE must know when the PETITIONER had his last drink. In this case, the PETITIONER

invoked his Miranda rights and did not provide the STATE with that information. The STATE, and the District Court in its opinion, have taken the position that the PETITIONER should be penalized for invoking his Miranda rights by having the numerical result exempted from the requirements of the Evidence Code. The PETITIONER finds such a position shocking at best.

The numerical result of the breath test in this case is not relevant. It has no weight upon the issues for which the STATE intended to introduce it. The Trial Court did not abuse its discretion in suppressing the evidence nor did STATE claim or demonstrate that the Trial Court abused its discretion. Accordingly, the Trial Court's decision should have been affirmed. This Court should quash the decision of the District Court, answer the certified question in the negative and reinstate the Trial Court's decision.

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL ERRED BY ANSWERING THE CERTIFIED QUESTION IN THE AFFIRMATIVE AND BY REVERSING THE ORDER OF THE TRIAL COURT.

A. The Third District Court of Appeal erred in substituting its judgment for that of the Trial Court and sub silentio ruling the Trial Court abused its discretion in determining that, if relevant, the probative value of the numerical blood alcohol level was substantially outweighed by the danger of unfair prejudice, confusion of issues and misleading the jury.

The Trial Court's ruling on the PETITIONER's Motion to Suppress came to the District Court clothed with a presumption of correctness. Accordingly, the District Court was obliged to interpret the evidence and all reasonable inferences and deductions capable of being drawn therefrom in the light most favorable to sustain the Trial Court's conclusion. Segal v. State, 353 So.2d 938 (Fla. 3rd DCA 1978). In the absence of a clear showing of error, the Trial Court's determination of admissibility should not have been disturbed. Buchman v. Seaboard Coastline Railroad Co.. 381 So.2d 229 (Fla. 1980).

Not only did the RESPONDENT not demonstrate in the District Court that the Trial Court had abused its discretion in suppressing the evidence, the RESPONDENT did not even argue it. The Trial Court's decision should have been affirmed on this basis alone.

While the PETITIONER feels that the District Court incorrectly substituted its judgment for the judgment of the Trial Court in ruling that the numerical result of the breath test was relevant, the District Court clearly committed error by reversing the Trial

Court's decision without addressing the Trial Court's alternative ruling that if the numerical result was relevant, its probative value was far outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury. It is not surprising that the District Court overlooked this issue because, the STATE (the Appellant in the lower court) did not argue that the Trial Court had abused its discretion by determining that if the numerical result was relevant, its probative value was outweighed by the danger of unfair prejudice.

Section 90.403, Fla. Stat. (1987) provides:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

Assuming arguendo that the result of the breath test in this case has some relevance to the offense charged, the Trial Court correctly determined that the probative value of the numerical result was far outweighed by its unfair prejudicial affect, confusion of issues and danger of misleading the jury. The STATE's expert testified that the numerical result of the breath test in this case gave him no basis from which he could testify within a reasonable degree of scientific certainty what the PETITIONER's B.A.L. might have been at the time he operated the motor vehicle (SR-35-36). Under such circumstances, the Trial Court acted within its discretion in suppressing the results of the test.

The PETITIONER submits that the controlling case on this issue is this Court's decision of State v. McClain, 525 So.2d 420 (Fla. 1988). The STATE failed to bring this case to the attention of the District Court and the District Court did not address the holding of the McClain case in its opinion in this case.

In the McClain case, the defendant was charged with vehicular manslaughter while intoxicated. An analysis of the Defendant's blood subsequent to the accident yielded a B.A.L. of 0.14 percent and a trace amount of cocaine.

The defendant in McClain moved to exclude all references to the presence of cocaine and in support of that motion introduced the testimony of a chemist from the County Medical Examiner's office. The chemist testified that the amount of cocaine that was in the defendant's blood was extremely small. Further, the chemist was unable to state whether or not the presence of the cocaine could have affected the manner of the defendant's driving. The Trial Court granted the motion to suppress on the basis that the prejudicial impact of the information substantially outweighed its relevance.

In the McClain case, this Court stated that in applying s.94.403, Fla. Stat. (1987), the Trial Court must exercise its discretion and must weigh the probative value of a given piece of evidence against its unfair prejudice. In the instant case, the STATE's expert testified, in effect, that the numerical result of the breath test had no probative value as to the issue of the PETITIONER's B.A.L. at the time he was driving. The numerical

result did not provide a basis upon which the STATE's expert could testify as to what the PETITIONER's B.A.L. might have been at the time of his driving. Since the STATE's expert could not testify what the PETITIONER's B.A.L. was at the time he was driving, the STATE's expert could not give an opinion that the PETITIONER's B.A.L. at that time indicated impairment.

The STATE's inability to provide any proof as to the PETITIONER's B.A.L. at the time he operated his motor vehicle makes the numerical B.A.L. in this case exactly like the cocaine in the McClain case. For all practical purposes, the STATE is no more able to show that the PETITIONER had even a trace of alcohol in his blood stream at the time he was driving than the STATE was able to show that the defendant had any more than a trace amount of cocaine in his system in the McClain case. Accordingly, this Court's ruling in the McClain case requires that the District Court's decision be quashed and that the Trial Court's determination on this point be reinstated.

The PETITIONER's position is also supported by the case of State v. Dumont, 499 A.2d 787 (Vt. 1985). Speaking of a numerical test result which had not been related to the defendant's time of driving, the Supreme Court of Vermont stated:

> The numerical test result itself may also have some probative value on this issue, but the possibility of jury confusion is greater. A jury might erroneously use a numerical test result which has not been related back to the time of operation as evidence of actual intoxication at the time of the offense, particularly if the jury is familiar with the .10% blood alcohol content presumption established under 23 V.S.A. S. 1204(a)(3).

Dumont, 499 A.2d at 789.

The Vermont court went on to say that the state's use of the test results should be strictly limited to whether the test demonstrates that the accused did in fact consume some intoxicating liquor. The court held that the numerical result itself should be excluded unless it is related back to the time of the operation of the motor vehicle.

B. The Third District Court of Appeal erred in ruling that Section 316.1934, Fla. Stat. (1987) makes the results of the breath test automatically admissible so long as the procedures for the administration of that breath test are followed.

In its opinion, the District Court stated that Section 316.1934(2), Fla. Stat. (1987) provides by its clear and unambiguous terms that the

> "test results administered in accordance with Sections 316.1932 or 316.1933, Florida Statutes (1987) shall be admissible where otherwise not rendered inadmissible." (Emphasis in original)

What s.316.1934(2), Fla. Stat. (1987) actually says is:

> 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 or to the extent that he was deprived of full possession of his normal faculties, the results of any test administered in accordance with s.316.1932 or s.316.1933 and this section shall be admissible when otherwise admissible ...
>
> ***

The critical language of this statute insofar as the PETITIONER's position in this appeal is "when otherwise admissible". The statute does not say, as the District Court wrote in its opinion, that the results are admissible "where otherwise not rendered inadmissible".

The adequacy of the testing procedure is not an issue in this appeal.[5] It is beyond question that the "when otherwise admissible" language in this statute clearly demonstrates that the Legislature intended the Evidence Code to be applicable to the result of a breath test. This statute does not make the results of a breath test automatically admissible as long as the test is administered in accordance with the cited statutory sections. The PETITIONER submits that the plain language of s.316.1934(2), Fla. Stat. (1987) makes compliance with ss.316.1932 and/or 316.1933, Fla. Stat. (1987) a threshold issue, which, if met, would make the results of breath test admissible if the results were otherwise admissible under the Evidence Code.

The PETITIONER has been unable to locate any authority in this State which stands from the proposition that the Florida Evidence Code is not applicable or is less applicable to the results of a breath test than to any other piece of evidence in a criminal trial. Absent some statutory exemption for the results of a breath test, in order for those results to be admitted into evidence in a criminal trial, the results must pass muster under the Florida

---

[5] By this, the PETITIONER does not mean to imply that he accepts the accuracy or the adequacy of the test administered.

Evidence Code. As was successfully argued to the Trial Court, and as will be pointed out in this Brief, the results of the breath test in this case, do not need meet the requirements of the Florida Evidence Code. As such, the results were properly suppressed before trial.

The PETITIONER further submits that the case of Gillman v. State, 373 So.2d 936 (Fla. 2nd DCA 1979), aff'd, 390 So.2d 62 (Fla. 1980) does not stand for the proposition that once a test is administered in accordance with the Florida Statutes and the H.R.S regulations, the result is automatically admissible and is automatically exempt for the threshold requirements of the Florida Evidence Code. A close examination of the Gillman decisions plainly reveals that neither the District Court's decision nor this Court's decision stand for that proposition.

This Court's holding in the Gillman case was that a person in possession of a letter from the Department of Health and Rehabilitative Services authorizing him to work in the capacity of a criminal laboratory technician is a duly licensed criminal laboratory technician for the purposes of the requirements of Section 322.261(2)(b), Fla. Stat. (1987), so that blood alcohol tests results otherwise admissible may be used in a criminal trial. That holding is not the Petitioner's paraphrasing of this Court's decision in the Gillman case but rather, is this Court's answer to the certified question in that case.

Gillman simply does not stand for the proposition (as the District Court indicated in its opinion) that non-compliance with

proper testing procedures is the only problem which may render tests inadmissible. The Petitioner challenges the Respondent to explain to this Court what the words "otherwise admissible" in both the certified question in the Gillman case and in s.316.1934(2), Fla. Stat. (1987) can mean other than the Florida Evidence Code applies to the results of breath tests.

Although the issue of relevance will be discussed in more detail in the next section of this Brief, the Gillman case is also instructive on the issue of relevance and specifically indicates that it is this Court's position that the results of the breath test must be related back to the time of the operation of a motor vehicle in order to be relevant. In the Gillman case, evidence was submitted by the state relating the defendant's B.A.L. at the time the test was taken to his B.A.L. at the time of the accident. Both the Second District Court of Appeal and this Court felt that fact so significant that it was recited in both opinion as follows:

> The accident occurred at 11:45 p.m. The blood sample was drawn at 3:45 a.m. Dr. Robert Smith, a pathologist and expert in the field of toxicology opined on the basis of the blood alcohol level in the sample that the Appellant's blood alcohol level at the time of the accident would have been approximately .18 percent. (Emphasis added)

Gillman, 373 So.2d at 936 (District Court opinion).

> A biochemist later determined that the specimens alcoholic blood content was .11 percent, .01 percent higher than the level of legal intoxication. Moreover, an expert toxicologist approximated the Respondent's alcoholic blood content to be .18 percent at the time of the accident. (Emphasis added)

Gillman, 373 So.2d at 63 (Supreme Court opinion).

Both this Court and the Second District Court of Appeal had the opportunity in the Gillman case to hold that retrograde extrapolation evidence is not necessary. Both this Court and the Second District Court of Appeal declined to do so. The PETITIONER submits that the "when otherwise admissible" language of the certified question in Gillman was inserted because the relation back evidence submitted in the Gillman case made the results of that blood test "otherwise admissible".

In the instant case, assuming that the procedural requirements for the administration of the test were followed, the STATE has conceded that it cannot make the numerical result of the breath test "otherwise admissible" by relating it back to the time MILLER was driving. Accordingly, the numerical result of the breath test is not otherwise admissible and was properly suppressed.

C. The Third District Court of Appeal erred in ruling that numerical B.A.L. was relevant to the offense charged and that the lapse in time between the time of the operation of the motor vehicle and the administration of the breath test; where it was admitted that the results of the breath test could not be related back to the time of the operation of the motor vehicle, went to the weight of the result of the breath test and not its admissibility.

Intellectual dishonesty and an "ends justifies the means" mentality have no place in the criminal law. The STATE does not take issue with the proposition that only relevant evidence is admissible at trial. In order to determine what is relevant evidence for the purpose of this case, one need only look to the statute under which the PETITIONER is charged, to wit: s.316.193, Fla. Stat. (1987). That statute states in relevant part:

(1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if such person is driving or in actual physical control of a vehicle within this state and:

(a) The person is under the influence of alcoholic beverages, any chemical substance set for in s.877.111, or any substance controlled under chapter 893, when affected to the extent that his normal faculties are impaired; or

(b) The person has a blood alcohol level of 0.10% or higher.

**

Although not specifically addressed in the District Court's opinion, the STATE also urged in the District Court that the numerical result of the breath test should be admissible even if the result was below 0.10 percent because such a result would be relevant to the presumptions under s.316.1934(2)(a) and (b), Fla. Stat.,[6] The relevant portions of these subsections are as follows:

* * *

Paragraph (2) ... The amount of alcohol in the person's blood <u>at the time alleged</u>, as shown by chemical analysis of the person's blood or breath, shall give rise to the following presumptions:

(a) If there was <u>at that time</u> 0.05% or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcoholic beverages to the extent that his normal faculties were impaired.

(b) If there was <u>at that time</u> in excess of 0.05% but less than 0.10% by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or

---

[6] Subsection (2)(c) of the statute was recently examined by this Court in the case of <u>State of Florida v. Rolle</u>, 15 FLW 103 (Fla. 1990).

> was not under the influence of alcoholic beverages to the extent that his normal faculties were impaired, but such fact may be considered with other competent evidence in determining whether that person was under the influence of alcoholic beverages to the extent that its normal faculties were impaired. (Emphasis added)

Examining paragraphs (1)(a) and (1)(b) of s.316.193, Fla. Stat., in reverse order, the relevance to paragraph 1(b) of a person's blood alcohol level at the time he or she operated a motor vehicle is clear. In order to be convicted of driving under the influence utilizing paragraph (1)(b) of the statute, the STATE must prove beyond and to the exclusion of any reasonable doubt that the person so charged had a B.A.L. of 0.10 percent or greater at the time he or she was driving.

The relevance of a person's B.A.L. to paragraph (1)(a) of the statute is somewhat less straightforward. If the STATE is going to use a person's numerical B.A.L. to show impairment under paragraph (1)(a) of the statute, then the STATE must prove that at the time the person was driving, that person had a numerical B.A.L. level that would indicate impairment. In the District Court, the STATE urged that it has been demonstrated empirically that a motorist's ability to drive safely can be adversely affected by a blood alcohol content of 0.10 percent (S.D.C.B.-13). Accordingly, the STATE indicates that in order for a blood alcohol reading to have relevance under paragraph (1)(a) of s.316.193, Fla. Stat. (dealing with impairment), it must be proven that at the time the person was driving, the person must have had a B.A.L. of 0.10 percent or above.

While the above quoted statute may make a B.A.L. of less than 0.10 percent relevant under s.316.1934, Fla. Stat., even under that statute, the STATE must demonstrate a certain numerical value at the time of the driving before this statutory section applies. The PETITIONER cannot imagine a situation where the RESPONDENT would like to avail itself of subsection (2)(a), but if it did, it would have to prove that the person accused had a blood alcohol level of 0.05 percent or less at the time of driving. The STATE's expert has admitted that the STATE cannot prove any numerical result at the time the PETITIONER was driving.

With the foregoing background, the relevance of a blood alcohol reading to the crime proscribed by s.316.193, Fla. Stat., (1987) as a whole can be examined together with the relevance of a numerical blood alcohol reading to the presumptions set forth in s.316.1934, Fla. Stat., (1987).

All relevant evidence is admissible, except as provided by law. S.90.402, Fla. Stat. (1987). Relevant evidence is evidence tending to prove or disprove a material fact. Section 90.401, Fla. Stat.

The critical issue in this case is whether the numerical result of the breath test given to the PETITIONER (which the STATE's expert concedes is neither the PETITIONER's blood alcohol content at the time the PETITIONER drove; the only relevant time period in this case, nor serves as a basis for an opinion as to what the PETITIONER's blood alcohol level was at the time the PETITIONER drove) is relevant evidence. Stated another way, the

critical issue in this case is whether such a numerical result tends to prove or disprove a material fact.

Let there be no mistake, as pertains to this case, the only material facts to be proven by the STATE to support their charge that MILLER violated s.316.193, Fla. Stat. (1987) are:

1. Whether MILLER drove or was in actual physical control of a motor vehicle within this state; and

2. Whether MILLER was under the influence of alcoholic beverages when affected to the extent that his normal faculties were impaired; or

3. Whether MILLER had a B.A.L. of 0.10 percent or higher at the time he drove.

The STATE has not argued, nor can it, given the plain language of s.316.193, Fla. Stat. (1987) that there is any other relevant time period in this case except for the time the PETITIONER was actually driving. It is not crime in this State to be impaired or to have a B.A.L. of any numerical value at any time after the driving takes place.

The identification of the material facts necessary for an analysis of relevance under s.316.1934(2), Fla. Stat. (1987) is even simpler. To avail itself of the presumptions in that statute, the STATE must simply prove what the accused's numerical B.A.L. was at the time of driving. The RESPONDENT concedes that it cannot do that in this case.

In the District Court the STATE pointed out that extrapolation evidence is not required for a conviction under s.316.193(1)(a),

Fla. Stat. (1987) The PETITIONER would be hard pressed to argue with that statement given that a conviction is possible under that statute even if the defendant refuses to take a blood alcohol test. Impairment may be proven by other evidence. As the District Court stated in its opinion,

> ... [T]he State may prove that based on the totality of admissible evidence, including the test result, the defendant's normal faculties were impaired. (Emphasis added)

The fact that the STATE may not need extrapolation evidence in order to obtain a conviction, however, has nothing to do with the issue in this appeal. The issue in this case is what must be done with the numerical result of blood alcohol test if the STATE wishes to use it as evidence in pursuit of a conviction under s.316.193, Fla. Stat. The PETITIONER submits that what must be done with that numerical result is, that by some evidence, whether extrapolation or otherwise, it must be shown that the numerical reading at the time the test was taken is probative of the accused's blood alcohol level or impairment at the time he or she was driving. In order to be relevant to the issue of impairment, the STATE must prove that at the time the driving took place, the accused had a numerical B.A.L. which is indicative of impairment. As aforestated, such a numerical level would be 0.10 percent or greater.

At oral argument the District Court inquired, and the PETITIONER would expect this Court to inquire, how it could be that an accused's B.A.L. would be lower at the time of driving than at the time of the test. This Court should be aware that the reason

that s.316.193, Fla. Stat. (1987) concerns itself with blood alcohol is because it is alcohol in the blood stream which causes impairment. Alcohol in the stomach has no effect on a person. It is alcohol that is metabolized and absorbed into the blood stream which makes a person impaired and it is this blood alcohol that is measured by the breath test given to a person charged with driving under the influence.

Accordingly, it is entirely possible for a person to consume alcohol prior to driving and then to be arrested shortly after beginning to drive. At that point, it is also entirely possible that the person's B.A.L. would not have risen to a level where a numerical reading would indicate impairment because that person has not absorbed enough (if any) alcohol to be affected. At this point the person has not violated s.316.193 Fla. Stat. (1987). By the time, however, that the person reaches the police station and takes the breath test, the person may have absorbed enough alcohol to yield a reading of 0.10 percent or higher. Looking at that set of facts, it is clearly apparent that the person's B.A.L. at the police station has nothing to do with the person's B.A.L. at the time he or she was driving. The PETITIONER submits that it is problems such as those demonstrated by this fact pattern that the Evidence Code (and the "otherwise admissible" language of s.316.1934, Fla.Stat.) is meant to deal with.

The District Court summarily dismissed this very real problem by adopting some rather emotional language from the New Jersey case of State v. Tischio, 107 N.J. 504, 527 A.2d 388 (1987). While this

rather frightening piece of out-of-state jurisprudence is examined in more detail later in the Brief, the District Court adopted the New Jersey court's reasoning and ruled that s.316.193, Fla. Stat., (1987) was not intended to "encourage a perilous race to reach one's destination whether that be home or the next bar before the blood alcohol concentration reaches the prohibited level".

The PETITIONER does not possess the "Kreskin" like ability to postulate what the Florida Statute was not intended to do. The plain language of the statute, however, reveals quite clearly what it was intended to do. The statute was intended to make it a crime for persons to drive while impaired by alcohol or to drive while having a blood alcohol level of 0.10 percent or above.

The District Court's opinion, in essence, does exactly what the STATE urged in its brief. Specifically, the District Court's opinion reads into or grafts onto s.316.193, Fla. Stat. (1987) language or a legislative intent which simply does not appear from the plain language of the statute. Section 316.193, Fla. Stat., (1987) is a penal statute, and as such it must be strictly construed. S.775.021, Fla. Stat., (1987). Jones v. State, 510 So.2d 1147 (Fla. 1st DCA 1987)

When statutory language is susceptible of differing constructions, it shall be construed most favorably to the accused. S.775.021 Fla. Stat.

It is clear from even a cursory reading of the s.316.193, Fla. Stat., (1987) that the relevant time period under that statute is the time period when the accused was driving. Simply stated, the

Legislature made it a crime to operate a motor vehicle while (at the same time as) impaired or while (at the same time as) having a B.A.L. of 0.10 percent or greater. The Legislature did not make it a crime to be impaired or to have a B.A.L. of 0.10 percent or greater at any other time.

The following language from the Brief the STATE submitted to the District Court clearly reveals that s.316.193, Fla. Stat., can be construed as the PETITIONER suggests and accordingly, pursuant to s.775.021, Fla. Stat., must be so construed. On page 13, of the STATE's Brief submitted to the District Court, the STATE recited:

> Though the literal wording of s.316.193(1), Fla. Stat., may suggest that it must be proven that a Defendant had a blood alcohol level of greater than 0.10% when he was driving or in actual physical control of his vehicle, this Court must give effect to the legislative intent. (A-13). (Emphasis added.)

Saying that s.316.193, Fla. Stat., only "suggests" that the STATE must prove that the accused had a B.A.L. of greater than 0.10 percent when he was driving is akin to saying that the devastation that occurred after the atomic bombs were dropped on Hiroshima and Nagasaki "suggests" that there were small explosions there. Paragraph (1)(b) of s.316.193, Fla. Stat., leaves no room for doubt that if the STATE would like to use a numerical breath test result to obtain a conviction under the statute, then it must prove a numerical B.A.L. of 0.10 percent or greater at the time the accused was driving. If the STATE would somehow like to use a numerical result prove impairment under s.316.193(1)(a), Fla. Stat., then the STATE must prove that an accused had a B.A.L. at the time he was driving which would indicate impairment. The STATE indicated in

its Brief that the empirical data shows that such a level would be 0.10 percent or greater.

The District Court apparently adopted the STATE's position in regards to the construction of s.316.193, Fla. Stat., (1987). The STATE argued that by because the Legislature intended to rely upon a breath or blood test administered subsequent to the time an accused drove (because, as the STATE pointed out, it would be rather difficult to administer a test while an accused is driving), then if the Legislature had meant for the STATE to have to relate the numerical result of the test back to the time of driving, it would have said so in the statute. In this State, the Evidence Code is not written into every criminal statute, but hopefully, the Evidence Code is followed and enforced in every criminal trial.

The PETITIONER submits that the Legislature said exactly what it meant! Whether for better or worse, the Legislature passed a statute which, under certain circumstances, places the STATE in a position where the numerical results of a breath test are inadmissible under the Evidence Code. Specifically, the Legislature promulgated a statute, to prove a crime under which, the STATE must prove the accused's B.A.L. at the time the accused drove.

The Legislature was not concerned or failed to appreciate that in certain cases, the STATE might be without the evidence it needs to relate a B.A.L. (obtained from a test given after the time of driving) back to the time of driving. Other states' legislatures addressed these cases and have drafted their statutes in a fashion

whereby it is a crime to have a given B.A.L. at any point within a prescribed period of time after the accused has driven. N.D. Cent. Code s.39-08-01 (1987),[7] Minn. Stat. Ann. s.169.121 (West 1986 & West Supp. 1989),[8] Colo. Rev. Stat. s.42-4-1202 (1984 & Supp. 1988),[9] Utah Code Ann. s.41-6-44 (1988),[10] Alaska Stat.

---

[7] A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:

a) That person has a blood alcohol concentration of at least ten one hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving.

***

[8] Subdivision 1. Crime. It is a misdeamenor for any person to drive, operate or be in physical control of any motor vehicle within this state or upon the ice of any boundary water of this state:

***

(e) When the person's alcohol concentration as measured within two hours of the time of drving is 0.10 or more;

***

[9] Driving under the influence - Driving while impaired - Driving with excessive alcoholic content - Tests - penalties - Useful public service program - Alcohol and drug driving safety programs.

***

(1.5)(a) It is a misdemeanor for any person to drive any vehicle in this state when the amount of alcohol, as shows by analysis of the person's blood or breath, in such person's blood is 0.10 or more grams of alcohol per hundred milliliters of blood or 0.10 or more grams of alcohol per two hundred ten liters of breath at the time of driving or within two hours after driving if the evidence establishes beyond the reasonable doubt that such person did not consume any alcohol between the time of driving and the time of testing.

s.28.35.030,[11] This Court in examining the legislature's wording of s.316.1934(2)(c), Fla. Stat., took notice that the Legislature is aware of the meaning of the language it drafts into statutes. In that portion of the case of State v. Rolle, 15 F.L.W. 102 (Fla. 1990) where this Court discusses the Legislature's use of language, this Court stated:

***

[10] DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUG OR WITH A SPECIFIED OR UNSAFE BLOOD ALCOHOL CONCENTRATION - MEASUREMENT OF BLOOD OR BREATH ALCOHOL - CRIMINAL PUNISHMENT - ARREST WITHOUT WARRANT - PENALTIES - SUSPENSION OR REVOCATION OF LICENSE.

(1)(a) It is unlawful and punishable as provided in this section for any person to operate or be in actual physical control of a vehicle within this state given a person has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control, or if a person is under the influence of alcohol or any drug or the combined influence of alcohol or any drug to a degree which renders the persons incapable of safely operating a motor vehicle.

***

[11] Operating a vehicle, aircraft or watercraft while intoxicated.

(a) A person commits the crime of driving while intoxicated if the person operates or drives a motor vehicle or operates an aircraft or watercraft.

***

(2) When, as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.10 percent or more by weight of alcohol in the person's blood or 100 milligrams or more of alcohol per 100 milliliters of blood, or when there 0.10 grams or more of alcohol per 210 liters of the person's breath; or

***

> The Legislature clearly understood the language of presumptions but chose to use different language in paragraph (c) ("shall be prima facie evidence"). That difference is crucial.
>
> State v. Rolle, at 104.

Just as clearly, when the Florida Legislature drafted s.316.193, Fla. Stat., (1987) it chose different language from that used in the statutes of North Dakota, Minnesota, Colorado, Utah and Alaska. In fact, to date the Florida Legislature has not reworded that portion of s.316.193, Fla. Stat., (1987) which is being examined herein.

Possibly the most shocking portion of the District Court's opinion in this case is that portion which appears to sympathize with the RESPONDENT's alleged plight that the reason it cannot relate to the PETITIONER's B.A.L. back to the time of driving is that the PETITIONER invoked his Miranda rights when he was arrested and did not give the STATE the information it needed to relate the numerical reading back to the time of driving. As pointed out in an earlier footnote, in order for the STATE's expert to perform retrograde extrapolation, the expert needs to know when, in relation to the accused's driving, the accused had his last drink. In the instant case, the PETITIONER did not provide that information (S.D.C.B.-15) (SR-35).

The application of the District Court's opinion will have the effect of penalizing the PETITIONER (and other defendants) by excusing an evidentiary defect in the STATE's case because the PETITIONER exercised his Miranda rights. As the PETITIONER urged to the Trial Court and the District Court, such a proposition is

dangerous at best and is one that should not be endorsed by this Court.

The STATE's argument on this issue (which was apparently adopted by the District Court), borders on an argument for reversing the burden of proof in a criminal trial. The RESPONDENT argued, and the District Court apparently accepted the proposition that since the PETITIONER is the one who did not provide the toxicologist with the information he needed to employ retrograde extrapolation, then the PETITIONER should not be heard to complain that the RESPONDENT cannot relate the blood alcohol level back to the time of driving. The only valid portion of this argument is that it contains an implied concession on the part of the STATE that retrograde extrapolation is necessary to give the numerical result of the breath test any relevance whatsoever.

As mentioned earlier, the District Court adopted the case State v. Tischio, 107 N.J. 504, 527 A.2d 388 (1987). The PETITIONER submits that this Court should examine in detail both the result and the logic used by the Supreme Court of New Jersey in the Tischio case before making that case a part of Florida jurisprudence.

The relevant time period and the relevant B.A.L. for the crime proscribed by s.316.193, Fla. Stat., is the accused's B.A.L. at the time the accused drove. The New Jersey court, in analyzing the New Jersey D.U.I. statute, stated that "it is the blood alcohol level at the time of the breathalyzer test that constitutes the essential

evidence of the offense." Tischio 527 A.2d at 389. (Emphasis added).

The entire Tischio opinion is based upon that ruling. It is the PETITIONER's opinion that the court in Tischio has engaged in the judicial amendment of a criminal statute, which is absolutely inappropriate. If the New Jersey Legislature had intended to make it a crime to have a given B.A.L. during a prescribed period after the accused stops driving, then it could (as could the Florida Legislature) have drafted a statute such as those that exist in North Dakota, Minnesota, Colorado, Utah and Alaska.

In the Tischio opinion, the court sets forth the relevant part of the New Jersey statute at issue as follows:

> A person who operates a motor vehicle while under the influence of intoxicating liquor ... or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the Defendant's blood ... shall be subject [to penalties.]
>
> Tischio, 527 A.2d at 390.

In a startling pronouncement, the New Jersey Supreme Court recites that "[a] moment's reflection indicates that the statute is not unambiguous and that it cannot be applied literally." Tischio, 527 A.2d at 390.

Such a pronouncement is, in the opinion of the PETITIONER, intellectually dishonest. The New Jersey Legislature made it a crime to drive a motor vehicle with a B.A.L. of 0.10 percent or more. It defies reason to make a pronouncement that the legislature did not intend the driving and the 0.10 percent B.A.L. to take place at the same time.

While it is true that a B.A.L. determined by a breath test can never automatically coincide with the time of the accused's actual operation of a motor vehicle, expert testimony using retrograde extrapolation can relate the reading back to the time of driving. In the instant case, however, that cannot be done because the STATE's expert witness does not have the information he needs to perform the retrograde extrapolation. This Court should not adopt a policy whereby an accused is penalized for invoking his Miranda rights by forfeiting the protection of the Evidence Code. If the STATE would like to eliminate this retrograde extrapolation problem, all that it needs to do is contact the Legislature and have it adopt a statute which makes it a crime to have a given B.A.L. at any time within a prescribed period after a person drives thereby rendering retrograde extrapolation unnecessary.

The Tischio court, in an effort to reach a given result with a problematic statute, simply thumbs its nose at the Evidence Code. In the case of persons charged with driving under the influence in New Jersey, the New Jersey Supreme Court has impliedly held that those persons are not entitled to have their evidence measured by the same standard as other criminal defendants. This position is clearly apparent when the Tischio case makes the following comment:

> The other [interpretation of the statutory offense proscribed by the New Jersey statute at issue] is that some evidentiary process - not discernable on the face of the statute - must be invoked to relate breathalyzer test results to the time when the defendant was actually driving.
>
> Tischio, 527 A.2d at 391. (Emphasis added).

In this State, the Evidence Code is not written into every criminal statute, but hopefully, the Evidence Code is followed and enforced in every criminal trial.

Next, in what appears to be inconsistent piece of reasoning, the Tischio court ruled that the breathalyzer test must be administered within a "reasonable time" after the defendant was actually driving his vehicle. The use of this "reasonable time" language severely undercuts the position in the New Jersey court because it reveals that the court was concerned about the reading having relevance to the B.A.L. of the accused at the time of driving.

In what has become all too common in opinions concerning the charge of driving under the influence (which language was adopted in part by the District Court), the New Jersey Supreme Court quotes with approval the language of the lower appellate court. The New Jersey Supreme Court stated that the interpretation of the statute which required extrapolation evidence "would allow drunk drivers - 'moving time bombs' - to escape prosecution simply because, at the time of the stop, their blood-alcohol had not yet reached the proscribed level." Tischio, 517 A.2d at 396.

The PETITIONER submits that the same statement could be made another way and would be more accurate; to wit: requiring extrapolation would allow persons accused of driving under the influence to be prosecuted at trials where only relevant evidence is used. For the New Jersey court to say that requiring extrapolation would allow persons accused of driving under the

influence to escape prosecution is, simply put, nonsense. Requiring extrapolation does not mean that (as the New Jersey court calls persons accused of driving under the influence) "moving time bombs" would escape prosecution. It might mean that in cases such as the instant case, (to put it in language that the New Jersey court can understand) "moving time bombs" could not be "disarmed" by numerical reading but they still could be disarmed and prosecuted using other evidence such as erratic driving, slurred speech, blood shot eyes, and other objective findings which would be related to the jury through the testimony the arresting officer and video tapes (which are routinely taken in Dade County).

Possibly the most revealing part of the inconsistency of the New Jersey's court reasoning appears near the end of its opinion where the court states:

> In addition, defendant argues that under our interpretation of [the statute], a person who has a few drinks at a neighborhood bar, drives home safely, and watches television for one hour can still be convicted if, while watching television, his blood alcohol level exceeds .10%. This assertion is farfetched inasmuch as a driver cannot be detained for the purpose of testing unless the arresting officer has probable cause to believe that the person was driving under the influence of alcohol.
>
> Tischio, 517 A.2d at 396-97.

In a previous part of the opinion, the New Jersey court stated a contrary position that anyone who has consumed enough alcohol to reach a 0.10 percent B.A.L. at some future point in time has committed a crime:

> Those who drive after drinking enough alcohol to ultimately result in a blood-alcohol concentration of .10% or greater are a menace to themselves and to all

> others who use the roadways of this State. There is no rational reason why prosecution of these individuals must depend upon the entirely fortuitous circumstance of the time they were apprehended by the police.
>
> Tischio, 517 A.2d at 396.

Certainly, these contradictory positions demonstrate the intellectual dishonesty of the Tischio opinion. The opinion makes it clear that the New Jersey court would affirm the conviction of the gentleman watching his television after driving home safely.

This Court must realize that the instant case is a very unusual case in that it contains facts whereby it could be demonstrated before trial that retrograde extrapolation was not possible and that the STATE could not relate the PETITIONER's B.A.L. at the time of the test to the time the PETITIONER was driving. The PETITIONER does not request a ruling which would prohibit the admission of the results of all breath tests. In this case, the PETITIONER only seeks for this Court to uphold the ruling of the Trial Court on the particular facts of this case. To do otherwise eviscerates the Evidence Code and destroys the purpose for which the Evidence Code was enacted.

The PETITIONER will not go on at length to discuss and distinguish the various cases cited in the STATE's Brief in the District Court representing other states' views on this issue. Suffice it to say that some of the cases are from jurisdictions with DUI statutes different from Florida's D.U.I. statute and others are opinions of courts which have chosen to ignore the plain language of their statutes. None of the cases cited in the District Court's opinion support reversal of the Trial Court's

determination that if the numerical result was relevant, its probative value was outweighed by unfair prejudice, confusion of issues and misleading the jury.

In its opinion District Court held that the delay between the time of the PETITIONER's arrest and the administration of the breath test went to the weight of the numerical result of the breath test and not its admissibility. In short, the District Court is of the opinion that the jury, without having the benefit of any testimony which would allow them to relate the numerical result in this case back to the time the PETITIONER was driving, should be free to give this piece of scientific evidence whatever weight it may choose.

The District Court apparently agreed with the STATE's position that notwithstanding the fact that the STATE's own expert was not willing to give any weight to the numerical result of the blood alcohol test as it pertains to the PETITIONER's B.A.L. at the time he was driving, the non-expert jury should be allowed to do so. On this issue, the District Court cites with approval the case of Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121 (1983). The PETITIONER submits that the Fuenning case actually supports the PETITIONER's position. That portion of the Fuenning case quoted in the STATE's brief submitted to the District Court is as follows:

> [T]he defendant may offer expert testimony to show that for one reason or another the test results of .10% or higher do not prove beyond a reasonable doubt that the level as the time of driving was in excess of that proscribed. At the same time, the state may introduce evidence to explain the methodology and corroborate or establish the accuracy of the particular test as an indicator of alcohol level at the critical time. The

> question of whether the results establish that the prosecution has met its burden of proving the defendant guilty beyond a reasonable doubt is for the jury.

Fuenning, 680 P.2s at 129-30. (Emphasis added). (S.D.C.B.-22).

In the instant case, the PETITIONER demonstrated to the satisfaction of the trial court (before trial) that the STATE was not going to be able to introduce any evidence to corroborate or establish the accuracy of the particular test as an indication of the alcohol level at the "critical time"; to wit, the time the PETITIONER was driving. The holding in the Fuenning case indicates that if the STATE had conceded that it was unable to produce such evidence, the Arizona Supreme Court might have ruled otherwise.

In addition, it appears that in the State of Arizona there exists statutory authority (containing language substantially unlike the when otherwise admissible language of s.316.1934, Fla. Stat. (1987) which makes the results of a breath test admissible so long as:

1. The test is performed on an approved device.

2. The operator of the test has a valid permit.

3. The accused has been observed for a statutory period.

4. The operational checklist for the breath testing device has been followed.

5. The breath testing device was operating properly and maintenance records were kept.

> A.R.S. s.28-692.03(a)(b). Desmond v. Superior Court, 779 P.2d. 1269 (Ariz. 1989)

The PETITIONER submits that it is absolutely shocking that the District Court would establish a precedent in this case which would support the proposition that it is acceptable for a non-expert lay jury to freely speculate on a piece of scientific evidence as it relates to an issue in the case when the STATE's own expert concedes that he, as an expert, could not use of the same piece of evidence to give an opinion as to the critical fact in issue (in this case that fact being the PETITIONER's B.A.L. at the time he was driving).

The PETITIONER's position on this issue is supported by several cases. In the case of State v. Dumont, 499 A.2d 787 (Vt. 1985), the defendant was charged with driving under the influence. An analysis of the defendant's breath by way of a test given one hour and ten minutes following the stop yielded a result of .13 percent. The state offered no evidence as to what the defendant's blood alcohol content was at the time he was operating the vehicle. (In the instant case, the STATE has conceded that it cannot do so). The Supreme Court of Vermont held that "relation back" testimony was necessary to establish the defendant's blood alcohol content at the time he actually operated the motor vehicle.

While ruling that the test was admissible to establish the fact that the defendant had consumed some amount of intoxicating liquor, the court ruled that the numerical result should be excluded unless it could be related back to the time of the operation of the vehicle.

In the case of State vs. Ladwig, 434 N.W.2d 594 (S.D. 1989), the court had before it the appeal of a driver convicted of driving while intoxicated. In that case, the result of the breath test administered to the defendant one hour and fifteen minutes after he was placed under arrest yielded B.A.L.'s of 0.209 percent and 0.208 percent.

During the trial of the case, and subsequent to the state's chemist's testimony, the defendant's attorney moved to dismiss the charges on the basis that the state failed to introduce sufficient evidence to establish that the defendant had been driving with a blood alcohol content of 0.10 percent or more. The state had only produced evidence of the defendant's B.A.L. at the time the blood sample was drawn. The state made no attempt to extrapolate or relate that result back to the time the defendant was driving. The Supreme Court of the South Dakota reversed the defendant's conviction because the state had not provided the jury with any evidence necessary to extrapolate the test results.

In the instant case, it was demonstrated prior to trial that the STATE could not provide such information and therefore it cannot be said that the Trial Court abused its discretion in suppressing the evidence.

Much the same rational was followed by the Court of Appeals of Texas in the case of McCafferty v. State, 748 S.W.2d 489 (Tex. App.-Houston [1st Dist.] 1988). In that case, the defendant had been in an automobile accident at approximately 2:30 a.m. The defendant was administered a breath test at 4:45 a.m.

At trial, the state's expert witness did not explain absorption and metabolization rates of intoxication. The expert did not in any way connect the breath test results at 4:45 a.m. to the defendant's condition when driving t 2:30 a.m. Given those facts, the court ruled the evidence was insufficient to support the defendant's conviction.

Again, in the instant case, it was demonstrated pre-trial that the result of the PETITIONER's breath test could not be related back to the time of the PETITIONER's driving. Therefore, the results were properly suppressed.

CONCLUSION

Based on the foregoing, the Third District Court of Appeal should have answered the certified question in the negative. Further, the ruling of the Trial Court as to the admissibility of this evidence should have been affirmed. The PETITIONER submits that the Third District Court of Appeal committed error in this case, and the decision of the Third District Court of Appeal should be quashed, the certified questions should be answered in the negative, and the decision of the Trial Court should be reinstated.

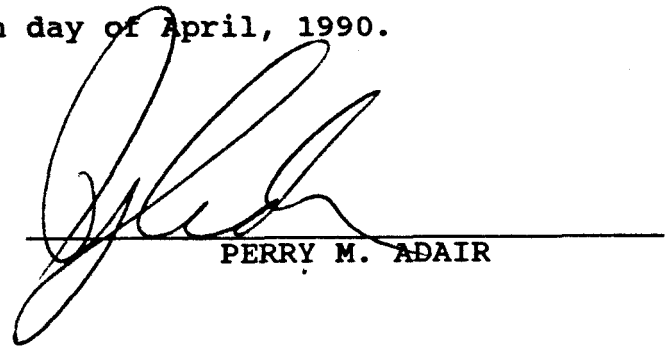
Respectfully submitted,

BENDER, BENDER, CHANDLER & ADAIR, P.A.
Attorneys for Petitioner
432 N. Washington Avenue
Homestead, Florida 33030
(305) 247-3614

By: _____
JERRY M. ADAIR
FLORIDA BAR NO. 434050

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to PATRICIA ASH, Assistant Attorney General, Department of Legal Affairs, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 16th day of April, 1990.



PERRY M. ADAIR