IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,708

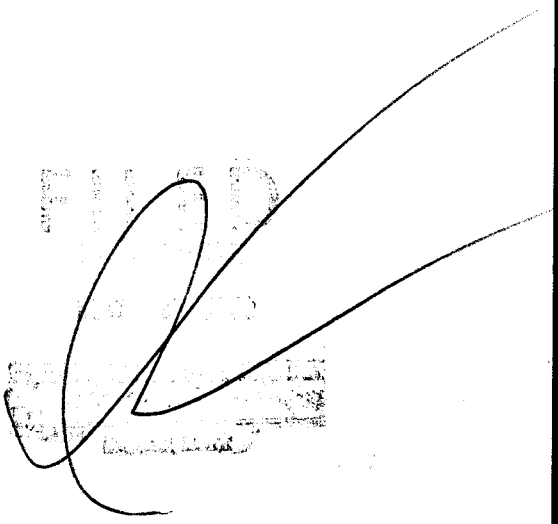
JESSIE LEE MILLER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

CERTIFIED QUESTION

****

BRIEF OF RESPONDENT

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INTRODUCTION

The Petitioner, **Jessie Lee Miller**, will be referred to as the Defendant. The Respondent, **the State of Florida**, will be referred to as the State. The symbol "R" will designate the record on appeal; the symbol "T" will designate the transcript of proceedings; and the symbol "A" will designate the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The Third District in Miller v. State, 555 So.2d 391, (Fla. 3 DCA 1989) succinctly stated the case and facts as follows.

> The defendant was charged with driving under the influence of alcohol and other driving related offenses. One hour and 20 minutes after he was stopped, he was given a chemical breath test to measure the alcohol content in his blood. The reading was 0.14 per cent. In a deposition, the state's toxicologist stated that he could not testify within a reasonable degree of scientific certainty what the defendant's blood and alcohol level (BAL) was at the time he was driving. The defendant filed a motion to suppress the results of the test, essentially alleging that the reading was irrelevant and did not prove his BAL at the exact time he was driving; thus, the prejudicial effect of the chemical test outweighed its probative value. The trial court granted the motion to suppress and certified the following question as involving an issue of great public importance:

> Whether the numerical result of the blood alcohol test taken one and one half hour after the defendant's last operation of a motor vehicle is admissible evidence where the state's expert witness would testify that the numerical reading would not be the BAL at the time the defendant was operating the vehicle, where that witness was unable to testify what the defendant's BAL was at the time he was operating the vehicle, and where the witness testified that the BAL could have been lower than .10% at the time the defendant operated the vehicle.

The defendant argued, and the trial court held, that the results of a blood alcohol level test will only be admissible evidence to convict a person under section 316.193, Florida Statutes (1987), for driving under the influence if the state proves the accused's actual BAL at the time he was driving, and not the level sometime thereafter. Following this reasoning, before a test result would be admissible, the state would be required to present supplementary evidence relating the test result back to the time of driving in order to prove that the BAL was .10 per cent or higher at the time of driving. This process is termed retrograde extrapolation. In order for the state to be able to extrapolate the BAL at the time of driving, numerous variables, including the period of consumption, how much was consumed, and the time of the last drink, among others must be known and assessed. However, it may be that for some reason (such as here, the defendant's invocation of his Miranda rights), the state does not know all the variables necessary to relate the test result back to the time of driving.

Id. at 392 (A.1-2).

On the State's appeal, the Third District answered the question certified in the affirmative and reversed the trial court. The Court found, that in accordance with prior decisions of this Court, a breath test is admissible as long as it was given in compliance with proper testing procedures. The Court then held that since the State may prove the charge of driving under the influence either by showing that the accused was affected by alcohol to the extent that his normal faculties were impaired or that his blood alcohol level was .10 percent or higher, the test results were admissible regardless of the ability to extrapolate it back to the time of driving. The Court reasoned that the test result, along with other admissible evidence, was relevant to prove impairment, subject to an attack against the accuracy of the test and other relevant evidence to place impairment in doubt. Id at 393 (A.3-4).

As to the certified question, the Third District held, based on a proper interpretation of the statutes involved and the clear weight of authority on the issue, that it is not necessary to relate the blood alcohol level test results back to the time of driving in order for the result to be admissible and for the presumption to apply. Instead, the Court held that any lapse in time in the administration of the test or the failure to extrapolate the result back to the time of driving goes to the weight of the evidence and not its admissibility. The Court

realizing that this issue is one of first impression in Florida, then certified the exact same question to this Court. Id. 393-394 (A.4-5).

The Petitioner then sought discretionary review with this Court and this review then followed.

QUESTION PRESENTED

WHETHER THE NUMERICAL RESULT OF THE DEFENDANT'S BLOOD ALCOHOL TEST TAKEN ONE AND ONE-HALF HOURS (1 1/2) 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 .10% AT THE TIME THE DEFENDANT OPERATED THE MOTOR VEHICLE.

SUMMARY OF THE ARGUMENT

The trial court suppressed the result of the defendant's breath test, administered one hour and twenty minutes after he was stopped for driving under the influence, because the toxicologist would not have been able to testify with certainty regarding the defendant's blood alcohol level at the time he was driving. In the absence of this extrapolation evidence, the trial court excluded the breath test results as being irrelevant and prejudicial and certified a question to the Third District Court of Appeal. That Court reversed holding that a breath test is relevant and admissible regardless of the ability to extrapolate the results back to the time the defendant was driving since said test result is relevant to the impairment offense as well as blood alcohol level offense. The Court also held that even without extrapolation the test result was admissible and the presumptions were applicable, subject to any relevant evidence contesting the accuracy of the test results. The State submits that the Third District decision is correct and requires affirmance.

First, section 316.1934(2), Florida Statutes (1987), states that test results shall be admissible so long as proper procedures are followed. As the testing procedures were not at issue, the result was admissible regardless of its value. The value would only be relevant with regard to any presumption

which may attach. Afterall, the state is not required to prove a blood alcohol value greater than .10% in order to convict one of driving under the influence.

Extrapolation evidence which depends upon information held exclusively by an accused, is neither required by statute nor contemplated by the legislature. Though the wording of the statute may suggest that it must be proven that a defendant had a blood alcohol level greater than .10% when he was driving and not sometime thereafter, this Court must give effect to the legislative intent to avoid absurd results. The legislature did not intend for extrapolation evidence to be used as a prerequisite to admission of evidence for if it had, it would not have promulgated rules which require waiting periods for the administration of the tests. Moreover, it is obvious that a breath test cannot be administered while a defendant is driving. Any delay in administering a breath test would therefore apply to its weight, not to its admissibility. Accordingly, extrapolation evidence is not required for admissibility and the Third District's decision should be affirmed.

ARGUMENT

THE NUMERICAL RESULT OF THE DEFENDANT'S BLOOD ALCOHOL TEST TAKEN ONCE AND ONE-HALF HOURS (1 1/2) 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 .10% AT THE TIME THE DEFENDANT OPERATED THE MOTOR VEHICLE.

The concise question in this case is whether a breath test result is admissible against a defendant charged with driving under the influence of alcohol pursuant to section 316.193, Florida Statutes (1987) where the breath test was taken after the defendant was driving and where the state cannot prove exactly what the defendant's blood alcohol level was at the time he was driving. The defendant argued, and the trial court concluded, that the law requires the state to prove an accused's actual blood alcohol level at the time he was driving and not the level some time thereafter. The defendant and the trial court would additionally require the state to present evidence of an accused's blood alcohol level at the time he was physically driving through the process of retrograde extrapolation before the breath test results would be admissible. The trial court concluded that without

extrapolation evidence the breath test results would be irrelevant and prejudicial to the defendant, and therefore inadmissible. The Third District correctly rejected this conclusion since the breath test results are admissible for the jury to weigh and consider as they, the finders of fact, determine.

I. The trial court's order of suppression directly contravenes section 316.1934(2), Florida Statutes (1987).

> **Section 316.1934(2) provides:**
>
> (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 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 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:
>
> (emphasis added)

Through its clear and unambiguous terms, the statute says that the results of tests administered in accordance with sections 316.1932 or 316.1933 shall be admissible when otherwise

admissible. Sections 316.1932 and 316.1933 outline procedures for administering breath, blood, and urine tests. It is this noncompliance with statutory and regulatory requirements, i.e. HRS rules, which would render test results otherwise inadmissible. State v. Bender, 382 So.2d 697 (Fla. 1980); Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979) aff'd, 390 So.2d 62 (Fla. 1980). In the instant case, the testing procedure is not at issue. Therefore, the test results are admissible.

The fact that the trial court excluded the results because of the toxicologist's inability to extrapolate or even because of the toxicologist's potential testimony that the defendant's blood alcohol level may have been below .10% is irrelevant to the question of admissibility. Under subsections 316.1934(2)(a) and (2)(b), the results would have been admissible even if they were below .10%. Therefore, the toxicologist's testimony could only have affected any possible presumptions raised by the test results and not its admissibility.

II. Extrapolation evidence is not required for a conviction under Section 316.193(1), Florida Statutes (1987).

The defendant was charged under Section 316.193, Florida Statutes (1987) which provides in pertinent part:

316.193 Driving under the influence; penalties. -

(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 forth 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 percent or higher.

(Emphasis added).

Subparagraphs (1)(a) and (1)(b) are separated by the disjuctive term "or." This section therefore describes one offense of driving under the influence which can be committed by either or both of two methods; driving or being in actual physical possession of a vehicle while under the influence of either alcohol or chemical substances to the extent that normal faculties are impaired or by driving with a blood alcohol level or 0.10% or above. Layman v. State, 455 So.2d 607 (Fla. 5th DCA) rev. denied, 459 So.2d 1040 (1984).

The reason that the driving under the influence statute has two ways in which it can be committed is because it has been demonstrated empirically, that a motorist's ability to drive safely is adversely affected by a blood-alcohol content of 0.10%

even though some individuals, for example hard core alcoholics, may not exhibit symptoms of intoxication at that level. See, State v. Knoll, 718 P.2d 589, 592 (Idaho App. 1986). Therefore, by statute, the state is not required to prove that an accused's blood alcohol level is greater than 0.10% in order to convict one of driving under the influence of alcohol. Moreover, there is no statutory authority, administrative rule, or case law in Florida which requires the breath test results obtained some time after a defendant's arrest to be related back to the time that the defendant was actually driving.

Though the literal wording of section 316.193(1) may suggest that it must be proven that a defendant had a blood alcohol level 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. Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986); Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985). "Where the wording of a statute taken literally conflicts with the plain legislative intent, the wording must yield to the legislative purpose." State v. Greco, 479 So.2d 786 (Fla. 2d DCA 1985). Statutes must be construed so as to avoid results. State v. Nunez, 368 So.2d 422 (Fla. 3d DCA 1979).

In enacting section 316.193(1)(b), the "per se" portion of the driving under the influence statute, the legislature clearly

intended to rely upon breath or blood test results taken at a time subsequent to driving. See, Section 316.1934, Florida Statute (1987). It would be absurd to suggest that a breath or blood test could be administered while a defendant was still driving. Under the trial court's interpretation, a breath testing device must be shoved into an accused's mouth the moment he is stopped for driving under the influence. Instead, it is apparent that the Florida Legistature intended testing to be done when the DUI statutes are read in conjunction with the administrative rules enacted pursuant to them. For example, Rule 10D-42.24(1)(f), Florida Administrative Code, requires a minimum observation period of twenty minutes before a breath test can be administered and before some equipment, such as an indium crimper device, warms up. Had the legislature intended an additional foundation of evidence, it would have expressly stated such a foundation. Afterall, statutes are not passed in a vacuum, and absurd or unreasonable results are presumed not to have been intended.

Extrapolation, which is what the trial court below required for the breath test result to be admissible, is the process whereby a qualified expert, usually the toxicologist, may render an opinion as to a person's blood alcohol content at the time the defendant was driving when the blood alcohol test was conducted some time after the stop. An accurate extrapolation can be affected by numerous variables. In order to make a

reliable calculation, an expert would need to know the time of consumption, how much consumed, and the time of the last drink, among other variables. As cases from other jurisdictions have noted, while blood alcohol content declines over time, the decline does not begin until sometime after the last drink which has been estimated anywhere from 45 minutes to 90 minutes. Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121 (1983); State v. Sutliff, 97 Idaho 523, 547 P.2d 1128 (1976); People v. Kappas, 120 Ill.App.3d 123, 458 N.E.2d 140 (1983); McCormick, Evidence §205, at 615 [3d Ed.]; Fitgerald & Hume, Simple Chemical Test for Intoxication: A Challenge to Admissibility, 66 Mass.L.Rev. 23 (1981). This is evidence which is in the exclusive possession of the defendant! Indeed, in the instant case, the toxicologist could not render an opinion regarding the defendant's exact blood alcohol level at the precise time he was driving because the defendant invoked his Miranda rights and did not tell the toxicologist the required information. (T.41).

The Third District, realizing that this was an issue of fast impression in Florida, looked to other jurisdictions that have considered this issue to determine that extrapolation is not required by the statute. The Supreme Court of New Jersey addressed a similar issue in State v. Tischio, 107 N.J. 504, 527 A.2d 388 (1987). The Tischio court was called upon to determine whether a blood alcohol level of at least 0.10%, determined solely by a breathalyzer test that is administered

within a "reasonable time" after a defendant's arrest for drunk driving, satisfied their statute, N.J.S.A. §39:4-50(a), or whether extrapolation evidence was required to establish the statutory offense.[1] The defendant in Tischio was tested one hour after he was arrested for DUI and again nine minutes later. Both breath test results yielded a blood alcohol level of 0.11%. As the Tischio court succinctly stated:

> Although the statute [N.J.S.A. §39:4-50(a)] does not refer to the time of testing, it is obvious that a breathalyzer test cannot be administered while a defendant is driving his motor vehicle. Thus, the blood alcohol level determined by a breathalyzer test can never automatically coincide with the time of the defendant's actual operation of his motor vehicle, as suggested by the literal language of the statute. This raises at least two possible interpretations of the statutory offense. One is that a .10% blood-alcohol level determined by a breathalyzer test made within a reasonable time of defendant's operation alone satisfied the statute. The other is that some evidentiary process - not discernible on the face of the statute - must be invoked to relate breathalyzer test results to the time when the defendant was actually driving. The question is which interpretation comports with the true meaning of the statute.

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[1] N.J.S.A. §39:4-50(a) provides in pertinent part:

> 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.].

427 A.2d at 391 (Footnote omitted).

The Supreme Court of New Jersey then proceeded to analyze the legislative intent behind the statute. Like New Jersey, and every other state, the primary purpose behind Florida's drunk driving statutes, sections 316.193, 316.1932, 316.1933, and 316.1934 which contain portions that direct law enforcement to use only approved scientific techniques in testing for alcohol, is to address the problem of drunk drivers on public roadways who cause senseless havoc and destruction. State v. Bender, supra, 382 So.2d at 699.[2] Tischio, supra, 517 A.2d at 392. An examination of the overall scheme of the New Jersey and Florida drunk driving laws reflect the legislative intent to rely exclusively on breath test results whenever possible. Tischio, supra. at 394; See, State v. Hoch, 500 So.2d 597 (Fla. 3d DCA 1986).

The point of such legislation is to stop drivers from drinking a quantity of alcohol that could, at any time they are behind the wheel, give them a blood alcohol level of .10% or higher. People can drink that quantity of alcohol, but they are then prohibited from driving regardless of actual impairment. The essence of the crime is operation of a motor vehicle after

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[2] Bender specifically applies to former sections 322.261 and 322.262 which have since been repealed and renumbered as sections 316.1932 and 316.1934, respectively.

drinking enough to produce the reading condemned by the statute, if the test is given a reasonable time after the defendant was apprehended driving. Otherwise, people could drink a large quantity of alcohol, get in their cars, and become "moving time bombs." Tischio at 396. "The law was not intended to encourage a perilous race to reach one's destination, whether it be home or the next bar, before the blood alcohol concentration reaches the prohibited level." Id. Such an interpretation would surely lead to absurd and dangerous results.

In concluding that a defendant may be convicted under N.J.S.A. §39:4-50(a) when a breath test, administered within a "reasonable time" after the defendant was actually driving, reveals a blood alcohol level of at least 0.10%, the Supreme Court of New Jersey held that extrapolation evidence was not probative of the statutory offense. The state submits that as Florida's drunk driving law is similar to New Jersey's, this Court should follow Tischio and hold that extrapolation evidence is not necessary for a conviction under section 316.193, Florida Statutes (1987).

Many jurisdictions have made it a criminal offense to drive or operate a motor vehicle when that person's blood alcohol level reaches or exceeds a certain legislatively determined level. Some of these jurisdictions have made driving with a proscribed blood alcohol level a separate and distinct offense

from driving under the influence while others, like Florida, have made their driving under the influence statutes provable in two ways. Either way, the state has not found any jurisdiction, with the exception of Vermont, that required extrapolation or relation back testimony for admission of breath test results taken after the accused was driving. See, e.g., Simon v. State, 182 Ga.App. 210, 355 S.E.2d 120 (1987) (extrapolation not required when test administered 40 minutes after arrest); State v. Knoll, 110 Idaho 678, 718 P.2d 589 (Idaho App. 1986) (extrapolation not required; 47 minutes delay); Commonwealth v. Speights, 353 Pa. Super. 258, 509 A.2d 1263 (1986) (extrapolation not required; 2 hours and 45 minutes delay in testing was jury question); Commonwealth v. Slingerland, 358 Pa. Super. 531, 518 A.2d 266 (1986) (extrapolation not required; one and one-half hour delay); People v. Kappas, 120 Ill.App.3d 123, 458 N.E.2d 140 (Ct. App. 1983) (extrapolation not required; 38 minutes delay is question for jury going to weight of the breathalyzer results and nor admissibility); State v. Keller, 36 Wash.App. 110, 672 P.2d 412 (Ct. App. 1983) (extrapolation not required; hour delay in testing); But see State v. Rollins, 141 Vt. 105, 444 A.2d 884 (1982); State v. Dumont, 146 Vt. 252, 499 A.2d 787 (1985).

Some states have enacted statutes providing legislatively designated time periods such as two, three or four hours within which conducted tests are accorded per se effect. See, e.g.,

Erickson v. Municipality of Anchorage, 662 P.2d 963 (Alaska App. 1983) (extrapolation not required where 30 minute delay within four hour statutory limit); Minn. Stat. Ann. Section 169.121 Subd. 2 (Supp. 1983); State v. Ulrich, 17 Ohio App.3d 182, 478 N.E.2d 812 (Ct. App. 1984) (extrapolation not required absent clear statutory language requiring need for expert testimony as 37 minute test delay within the two hour statutory limit). Other jurisdictions, such as North Carolina, have left the question of timeliness to the trier of fact. See, State v. Mack, 81 N.C. App. 578, 345 S.E.2d 223 (1986) (extrapolation not required where one hour delay is within a "relevant time" after driving). Though Florida does not yet have a statutorily permissible time limit, the state urges this Court to follow the overwhelming majority of jurisdictions that do not require extrapolation evidence to admit blood alcohol test results which are taken within a reasonable time after an accused is actually driving. Though the record does not reflect the cause of the instant one hour and twenty minutes delay in testing, the state would submit that this delay was not exceptional and was therefore reasonable.

III. The delay in testing goes to the weight of the evidence and not is admissibility.

It is a general rule that any fact relevant to prove a fact in issue is admissible unless its admissibility is precluded by

some specific rule of exclusion. Breath test results are admissible in a prosecution charging driving under the influence of alcohol as that evidence would be relevant and would tend to prove the ultimate issue of impairment. Sections 90.401 and 90.402, Florida Statutes (1987); Sections 316.1932, 316.1933, 316.1934, Florida Statutes (1987). Certainly, if refusal to submit to a breath test is admissible pursuant to section 316.1932(1)(b), (2)(c), Florida Statutes (1987) in a prosecution for driving under the influence, then the result of a breath test, provided it was taken pursuant to rules and regulations governing the administration of such a test, should be admissible as relevant evidence. State v. Bender, supra; Gillman v. State, supra. Any presumptions raised are rebuttable and the defendant may attack the reliability of the testing procedures and argue it to the jury. Bender, supra; See Rolle v. State, 528 So.2d 1208 (Fla. 4th DCA 1988). These principles are no less applicable to a case where an accused's breath test was administered some time after his actual driving. The lapse of time between the operation of the motor vehicle and the administration of the breath test would not bar the admission of the breath test result; rather, it would simply affect the weight ascribed to the evidence by the finder of fact.

The Arizona Supreme Court put this issue in a nutshell when it announced, in Fuenning v. Superior Court of the State of Arizona. 139 Ariz. 590; 680 P.2d 121 (1983):

> "The essence of this argument is the difficulty of proof that the defendant had the prescribed BAC at the time he drove or controlled the motor vehicle when the chemical test is administered some time after and is subject to the unavoidable problems discussed above. . . . Obviously, since it is the person's BAC at the time of driving or controlling the vehicle which determines whether the statute has been violated, results of a test administered after a significant period of time has elapsed or which are subject to other factors creating scientific inaccuracy may leave a reasonable doubt of guilt. These are evidentiary problems which are for the fact finder.
>
> The defendant may offer expert testimony to show that for one reason or another the test results of a 10% or higher do not prove beyond a reasonable doubt that the level at 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 indication 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....

This analysis is also applicable in Florida especially where the state does not have to prove a specific blood alcohol level in order to prove impairment.

In conclusion, the trial court in the instant case erroneously suppressed the breath test results on the basis that the state could not, through extrapolation, show exactly what

the defendant's blood alcohol level was at the time he was driving. For all of the above stated reasons, the least of which is that common sense would dictate that a blood alcohol test could not always be administered immediately, the hour and twenty minutes delay in testing in the instant case was not unreasonable. Nothing is stopping the defendant from arguing to the jury that his test result was inconclusive. As such, any delay in testing merely affects the weight of the evidence and not its admissibility. The trial court erred in suppressing the breath test results in the instant case. This Court is therefore urged to agree with the Third District and answer the certified question in the affirmative.

CONCLUSION

Based on the foregoing points and authorities, the State respectfully urges this Court to answer the question in the affirmative and to affirm the instant decision of the Third District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **PERRY M. ADAIR**, Attorney for Petitioner, 432 North Washington Avenue, Homestead, Florida 33030 on this 4 day of May, 1990.

MICHAEL J. NEIMAND
Assistant Attorney General

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