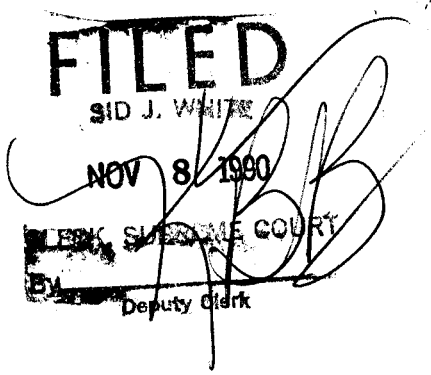
IN THE SUPREME COURT OF FLORIDA



CARL A. HAAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.: 76,767

ON REVIEW FROM A QUESTION CERIFIED
TO BE OF GREAT PUBLIC IMPORTANCE
FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF PETITIONER

STATEMENT OF THE CASE AND FACTS

Petitioner, CARL A. HAAS, was charged by information with DUI manslaughter, vehicular homicide, and driving under the influence causing serious bodily injury. (R 58-59) The case was initially tried by jury before the Honorable Ted P. Coleman, Circuit Judge. Petitioner was found guilty as charged on all counts. (R 513-515) However, a motion for new trial was granted. (R 522-529)

On April 17, 1989, the case again proceeded to jury trial before the Honorable Emerson R. Thompson, Jr., Circuit Judge. (R 1) The state's evidence showed that on the evening in question Mr. Haas was involved in an automobile accident on State Road 50 in Orange County. Prior to the accident Petitioner was driving at a normal speed and maintaining a single lane, but on the wrong side of the median strip. (R 161-162, 169-170, 173) It appeared that Petitioner had driven nearly two miles and passed six breaks in the median strip since entering State Road

50 on the wrong side before the accident occurred. Petitioner's vehicle collided head-on with an automobile driven by Jennifer Trotter. Ms. Trotter was killed and her three-year-old son was injured. (R 203-205, 306)

Examination of the physical evidence showed that Ms. Trotter had applied her brakes less than one second before impact, and that Petitioner had not applied his brakes at all. (R 255-257, 266) Although the evidence was inconsistent, some state witnesses reported smelling alcohol on Petitioner's breath and seeing beer cans at the accident scene. (R 171, 177, 199-200, 210) Sergeant Sherry Nols of the Florida Highway Patrol investigated the accident and agreed that the circumstances were consistent with a driver in Petitioner's position who was not paying attention and did not realize he was on a divided highway and thus on the wrong side of the road. (R 268) Further, because of a curve on the road, both cars involved in the accident may not have realized they would collide until very shortly before impact. (R 270)

Over several objections, including relevance, a toxicologist was permitted to testify concerning a blood sample taken from Petitioner about one hour and 20 minutes following the accident. (R 174, 281, 283-289) Ms. Christine Alt testified that the sample contained a blood alcohol level (BAL) of 0.11 percent. (R 239) She testified that the concentration of alcohol in Petitioner's blood would not change between the time the sample was taken and the time it was tested. (R 292)

However, Ms. Alt specifically said she could not tell from analyzing this sample what Petitioner's blood alcohol level would have been at the time of the accident. (R 295) More specifically, Ms. Alt said she could not testify that Petitioner's blood alcohol level was in excess of .10 at the time he was driving. (R 296) A motion to strike Ms. Alt's blood alcohol level testimony was denied. (R 302-303)

At the close of the state's case Petitioner moved for judgment of acquittal as to each of the three counts. As to the charge of vehicular homicide, Petitioner argued the evidence was insufficient to show his conduct was reckless. Petitioner contended that a reasonable construction of the evidence was that he was driving at a lawful speed, maintaining a single lane, and had simply made a negligent error by failing to realize he was on the wrong side of the road. (R 308) The motion was denied. (R 309-311)

As to the remaining two charges of DUI manslaughter and DUI causing serious bodily injury, Petitioner moved for a <u>partial</u> judgment of acquittal. Because each of these counts was charged in the alternative, proof of either one would prove the charge: that is, the State must show (1) that Petitioner was under the influence of alcohol to the extent that his normal faculties were impaired <u>or</u> (2) that Petitioner had a blood alcohol level of .10 percent or higher at the time of the accident. (R 458-459) Petitioner argued that the state had not met its burden of proving that the blood alcohol level was .10 or greater at the

time of the accident, and that this portion of the two counts, therefore, should not go to the jury. Specifically, defense counsel pointed out that the state's expert witness had said she could not tell what Petitioner's blood alcohol level was at the time of the accident. (R 311-314) Petitioner's motion was denied. (R 316-318)

During closing arguments the defense contended that the state had failed to prove what Petitioner's blood alcohol level was at the time of the accident. In rebuttal the assistant state attorney argued the following:

> It's your role in this case to decide what the facts are. . . It only makes sense his blood alcohol level had to be higher at the earlier time, and that at 11:20 his blood was going down. And we know the defendant didn't drink any alcoholic beverages after 10:00 p.m. when the crash occurred. (R 391)

During the charge conference defense counsel objected to an instruction concerning blood alcohol level (BAL), again on the ground that no evidence was introduced to show Petitioner's blood alcohol level at the time of the accident. (R 337-338) Judge Thompson noted the absence of any scientific testimony to relate the blood alcohol level introduced at trial back to the time of the accident. He admitted being "put in somewhat of a remarkable position." (R 339-340) Nevertheless, he denied Petitioner's motion and instructed the jury as requested by the state. (R 342)

Following deliberation the jury found Petitioner guilty as charged on all three counts. However, as to Counts I and III,

the jury specifically did not find that Petitioner was driving under the influence of alcohol to the extent that his normal faculties were impaired. Instead, the jurors chose an option on a special verdict form finding Petitioner guilty of these two charges, "in as much as the defendant at the time he was driving had a blood alcohol level of .10 percent or higher." (R 409-410, 581, 583) (See appendix)

In a motion for new trial Petitioner again argued that the evidence at trial was legally insufficient to prove that his blood alcohol level was .10 or greater at the time of the accident. (R 587-594) The motion was denied. (R 599)

At sentencing, Petitioner argued that the injuries suffered by Kevin Trotter in the accident should be considered moderate, not severe, in calculating the sentencing guidelines scorehseet. (R 427-233) However, the Court chose to score the injuries as severe. (R 432) Petitioner was then sentenced within the recommended guidelines range to 15 years in prison for count I, DUI Manslaughter. (R 451, 603) As to Count III Petitioner was sentenced to five years probation. (R 453, 604) No sentence was imposed, nor were any sentencing guideline points scored, for Count II, vehicular homicide, because the parties agreed that to sentence for both DUI Manslaughter and vehicular homicide would be a violation of Petitioner's double jeopardy rights. (R 419-420)

Timely notice of appeal was filed, Petitioner was adjudged insolvent, and the Office of the Public Defender was appointed for appeal. (R 607, 608, 615)

In a decision filed May 22, 1990, the Fifth District Court of Appeals affirmed Petitioner's judgements and sentences without opinion. Judge Goshorn dissented, also without opinion. Petitioner moved for rehearing and rehearing en banc.

In response to Petitioner's motion the court withdrew its prior affirmance without opinion, considered the case en banc, and substituted a written opinion. Haas v. State, 15 FLW D4218 (Fla. 5th DCA September 27, 1990). The court cited case law from several state court and rejected Petitioner's position as the "minority view." The district court noted that a similar issue was already pending before this court in Miller v. State, a review of an opinion from the Third District Court of Appeals. State v. Miller, 555 So.2d 391 (Fla. 3rd DCA 1989). At the close of its opinion in Petitioner's case, the District Court wrote:

> While the specific issue in this case may expand the certified question in Miller, nevertheless we join Miller, in certifying as a question of great public importance whether the BAL test result must be related back to the time of the offense in either an impairment or a UBAL case.

Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction on October 8, 1990. This brief follows.

SUMMARY OF ARGUMENT

Petitioner contends herein that the trial court erred in denying his motions for judgment of acquittal as to the charges of DUI manslaughter and DUI causing serious bodily injury. The jury convicted the Petitioner of these two offenses based on a specific finding (by special verdict form) that Petitioner's blood alcohol level was .10 percent or greater at the time he was driving. The only evidence offered to prove BAL was a blood test taken about 1½ hours after the accident. No evidence was introduced which related this test result back to the time of the accident. In fact the state's expert witness specifically testified that she could not say that Petitioner's BAL exceeded .10 at the time he was driving. The evidence was clearly insufficient to support the jury's verdict.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO THE CHARGES OF DUI MANSLAUGHTER AND DUI CAUSING SERIOUS BODILY INJURY.

In Counts I and III of the information, Mr. Haas was charged pursuant to Section 316.193(1) with driving under the influence of alcoholic beverages. In Count I it was charged that Petitioner's driving resulted in the death of a human being. In Count III it was charged his driving resulted in serious bodily injury to another. Both charges required that the jury find that at the time he was driving, Petitioner either (1) was under the influence of alcoholic beverages to the extent that his normal faculties were impaired or (2) had a blood alcohol level of 0.10 percent or higher. § 316.193(1)(a), (b), Fla. Stat. (1987) Petitioner's jury was presented with special verdict forms which allowed them to state which of these two conditions they found to exist.

The jury specifically did not check the option finding that "at the time he was driving [Petitioner] was under the influence of alcohol to the extent that his normal faculties were impaired." (See appendix) Rather, for both Count I and Count III the jury specifically found that "the defendant at the time he was driving had a blood alcohol level of .10 percent or higher." (R 581, 583) It is precisely this type of driving under the influence that Petitioner addressed in his motions for

judgment of acquittal. Petitioner did not argue that the jury could not legally find that he was impaired. He argued that the jury could not legally find that his blood alcohol level was, at the time he was driving, .10 percent or higher. Petitioner's motions should have been granted as to both Counts I and III because there was in fact no legally competent, sufficient evidence upon which the jury could find that Petitioner's blood alcohol level was .10 percent or greater at the time of the accident. Thus this Court must reverse Petitioner's convictions.

Petitioner's argument below and here on appeal is straightforward. The state's expert witness said that Petitioner's blood alcohol level approximately 1½ hours after the accident was .11 percent. The witness specifically stated that she could not say whether Petitioner's blood alcohol level at the time of the accident was .10 percent or greater. Thus, the state was asking the jury to speculate and make a scientific finding which an expert said was impossible. The prosecutor misled the jury by stating in closing argument that "it only makes sense his blood alcohol level had to be higher at the earlier time...". (R 391) This statement was simply false. More importantly, even if the statement were true, and even if there was some way the jury could <u>logically</u> base a decision as to Petitioner's BAL at the time he was driving on the results of later tests, it was up to the state to show how it could be done. Since the state could produce no such evidence, its case was legally insufficient and Petitioner's motion for judgement of acquittal should have been granted.

This appears to be a case of first impression in Florida. The case of State v. Miller, 555 So.2d 391 (Fla. 3rd DCA 1989), deals with a related but distinctly different issue. In Miller the state appealed from an order granting a motion to suppress the results of a blood alcohol test in a drunk driving case. The trial judge granted the motion to suppress the results of a blood alcohol test prior to trial because the state's toxicologist said he could not testify within a reasonable degree of scientific certainty what the defendant's blood alcohol level was at the time he was driving. The appellate court reversed finding the results of a blood alcohol test admissible. The Court point out that blood alcohol test results are specifically admissible pursuant to Section 316.1934(2), Florida Statutes (1987). In a paragraph that distinguishes Miller from Petitioner's case, the Third District Court wrote:

> Moreover Section 316.193(1), Florida Statutes (1987), provides that an accused may be convicted under the statute for driving under the influence if it is proven either that the person was affected by the alcohol to the extent that his normal faculties were impaired or that his blood alcohol level was .10 percent or higher. Accordingly, the state is not necessarily required to prove that an accused's BAL was greater than .10 percent at the time of driving in order to convict him of driving under the influence of alcohol. The state may prove that, based on the totality of admissible evidence, including the test result, the defendant's normal faculties were impaired.

Miller at 393. (emphasis in original) (citations omitted).

Petitioner's case is distinguished by the fact that the jury specifically found that his blood alcohol level exceeded .10 and did not rely on a finding of impairment to convict. Petitioner would concede for purposes of this argument that, because the issue of impairment was before the jury, his blood alcohol level test result was relevant and admissible. But the issue here is different. The question here is whether a BAL test result is sufficient evidence to prove beyond a reasonable doubt that Petitioner's blood alcohol level was .10 or greater at the time he was driving. Clearly, based on the testimony of the state's own expert witness, the evidence is legally insufficient to prove this element of the offenses.

In a recent case, Cox v. State, 555 So.2d 352 (Fla. 1989), this Court reaffirmed the standard of review in cases involving circumstantial evidence:

> [O]ne accused of a crime is presumed innocent until proven guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the state to carry this burden. When the state relies on purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence.

Cox at 353, quoting Davis v. State, 90 So.2d 629, 631 (Fla. 1956); McArthur v. State, 351 So.2d 972 (Fla. 1977).

The fact that Petitioner's BAL was .11 at the time his blood sample was drawn is direct evidence of the percentage of alcohol in Petitioner's blood at the time the blood was drawn. However, it is only circumstantial evidence of what his blood

alcohol level may have been at the time he was driving. Petitioner's reasonable hypothesis of innocence is obvious - that his BAL was under .10 at the time of the accident and had risen to .11 by the time of the blood test. Contrary to the prosecutor's statements during closing arguments, it is well established that, while blood alcohol level declines over time, the decline does not begin until sometime after the last drink, variously estimated at from 45 minutes to 90 minutes. People v. Mertz, 497 N.E. 2d 657, 660 (N.Y. 1986)(and cases cited therein). The state's own expert testimony establishes the reasonableness of Appellant's hypothesis of innocence. (R 295-296)

This case is a perfect example of the need for the special standard of review in circumstantial evidence cases. It is of course the job of the jury to judge the credibility of evidence and the relative weight of evidence. But in a case where the state introduces no evidence which contradicts a reasonable hypothesis of innocence, there is a reasonable possibility that the Defendant is innocent regardless of issues like credibility and weight of the evidence. In this case no evidence can contradict the reasonable possibility of Petitioner's innocence because no amount of evidence tending to show impairment can prove a particular blood alcohol level. (If such a link could be established, of course it would be the responsibility of the State to establish it.) Since the State's own expert admits that the BAL test results cannot establish

that Petitioner drove while over the legal limit either, there is no rational way the jury could reach a verdict of guilty from the evidence presented to them. Thus arises the need for a review of the legal sufficiency of evidence on appeal.

In its opinion in the instant case the District Court of Appeals characterizes Petitioner's position as "the minority view." Its opinion cites several state court cases in support of the state's position. However, some of the cases are distinguishable.

State v. Taylor, 132 N.H. 314, 566 A.2d 172 (1989), involved a defense objection to an instruction which told the jury that a .10 BAL could be considered prima facie evidence of intoxication. Defense argued the instruction should not be given unless the state could demonstrate a nexus between the test result and the Defendant's blood alcohol content at the time of driving. The court held such "relation back" evidence was not required. Taylor deals with a situation where the state was attempting to prove intoxication. Blood alcohol level was involved only in that it raised a non-conclusive presumption of guilt. The holding is applied to a UBAL statute only in dicta.

Sullivan v. State, 517 N.E.2d 1251 (Ind. App. 1988), is distinguished by its unique factual situation. The Defendant's blood alcohol level was recorded at .20 only twenty-five minutes after he quit driving. Further, the Defendant said he had not had a drink within three hours of the time he began driving. Under these circumstances there was evidence from which a jury

could reasonably conclude the Defendant's blood alcohol level had to be dropping between the time he stopped driving and the time he was tested.

Livingston v. State, 537 N.E.2d 75 (Ind. App. 1989), is also factually distinguishable. The court noted there was evidence from which the jury could conclude that the Defendant had not had a drink for two hours and twenty minutes before he began driving. Considering this testimony, there was evidence from which a jury could reasonably conclude that the Defendant's blood alcohol level had to be falling at the time of the test.

State v. Ulrich, 17 Ohio App. 3d 182, 478 N.E.2d 812 (1984), is distinguished by the different approach taken by the Ohio legislature. According to the opinion the Ohio DUI statute permits the court to accept as evidence of blood alcohol level at the time of driving, the results of a chemical test taken within two hours of the offense. Though the District Court cited State v. Ulrich in the instant case, the Court recognized the statutory difference between Ohio and Florida.

Commonwealth v. Slingerland, 358 Pa. Super. 531, 518 A.2d 266 (1986), is, again, distinguishable by its facts. There was evidence that "Slingerland had been drinking over the course of the entire evening and had not consumed a large quantity of alcohol before operating his motorcycle." Thus, there was at least arguably evidence from which the jury might conclude that Appellant's blood alcohol level was not significantly higher when tested than it would have been when Slingerland was

driving. In the instant case there was no evidence concerning Mr. Haas' drinking pattern prior to the accident.

Petitioner directs the Court's attention to Judge Cirillo's dissent in Commonwealth v. Slingerland. Though his opinion reflects the "minority view" in Pennsylvania, his reasoning is unassailable. He asks how a jury without expert testimony could determine beyond a reasonable doubt that a defendant in Slingerland's (or Haas's) position had a blood alcohol level of over .10 at the time of driving. "Obviously," he writes, "without expert testimony on the issue the only way for a jury to have determined this was to guess, and a conviction based on guess or conjecture cannot stand." Commonwealth v. Slingerland, 518 A.2d at 270, 271.

Few of the cases cited by the District Court as being in the "majority view" are actually directly on point. Those that do address the issues raised here do not provide much in the way of well-reasoned support for the State's position. See People v. Kappas, 120 Ill. App. 3rd 123, 458 N.E. 140 (1983).

Several state court decisions support Petitioner's position directly. Chapter 23, Vermont Statutes Annotated, Section 1201(a)(1), prohibits the operation of a motor vehicle on the highway by a person with a blood alcohol content of .10 percent or more. The Vermont Supreme Court has held that "proof of an offense under Section 1201(a)(1) requires the prosecution to produce evidence of the Defendant's blood alcohol content and to relate that content back to the time of the operation of the

automobile." State v. Rollins, 444 A.2d 884, 886 (Vt. 1982); State v. Dumont, 499 A.2d 787 (Vt. 1985).

In Desmond v. Superior Court, 779 P.2d 1261 (Arizona 1989), the Supreme Court of Arizona, sitting en banc, held that blood alcohol level test results could not, without testimony relating the results back to the time of driving, establish a prima facie case of violation of A.R.S. Section 28-692(b). The Arizona Statute cited is nearly identical to the Florida Statute relevant in Petitioner's case. Neither statute requires a showing of intoxication. Both prohibit driving with a blood alcohol level of .10 or greater.

In State v. Ladwig, 434 N.W.2d 594 (South Dakota 1989), the South Dakota Supreme Court threw out a conviction similar to Petitioner's because the State failed to "relate back" blood alcohol level test results to the time of driving. The Court reached this result despite the fact that the test introduced into evidence showed a blood alcohol level of 0.209 and was taken one hour and fifteen minutes after the Defendant's arrest. Surely Petitioner's innocence in the instant case is far more likely than was Mr. Ladwig's.

It is important to note that despite the statement of the Fifth District Court of Appeals that it would "join Miller, in certifying as a question of great public importance whether the BAL test result must be related back to the time of the offense...", the issue in this case is entirely different from that raised by State v. Miller, 555 So.2d 391 (Fla. 3rd DCA

1989). Miller concerns the admissibility of BAL test results. Thus, statutes such as Section 316.1934(2), which specifically allows admission of blood alcohol test results, are relevant. Mr. Haas's case concerns not admissibility but the legal sufficiency of evidence.

A second point is especially noteworthy: The requirement that BAL test results be related back to the time of driving in order to prove a prima facie case applies only when the state seeks to prove DUI by blood alcohol level alone pursuant to Section 316.193(1)(b). When a DUI conviction is based on evidence that a person is under the influence "to the extent his normal faculties are impaired," a conviction can be sustained without any evidence of blood alcohol level at all. But, as in the instant case, blood alcohol level itself is an essential element of the offense, there must be competent substantial evidence from which the jury could reasonably conclude that the defendant's BAL was 0.10 or higher at the time of driving. In this case, the Court should ask the state to explain how a jury could reasonably exclude the possibility that Petitioner's blood alcohol level was under 0.10 at the time of the accident, when the state's own expert witness testified she could not exclude this possibility. (R 295 - 296)

In summary, the evidence concerning blood alcohol level introduced at Petitioner's trial was legally insufficient to show that his blood alcohol level was 0.10 percent or greater at the time of the accident. Because the blood alcohol level

requirement was an essential element of the jury's finding of guilt of the offenses of DUI manslaughter and DUI causing serious bodily injury, the District Court erred in failing to reverse these convictions.

CONCLUSION

Based on the arguments and authorities cited herein, Petitioner respectfully requests this Court reverse the decision of the District Court of Appeals and reverse his convictions for DUI manslaughter and DUI causing serious bodily injury with instructions to discharge Petitioner as to these two counts.

Respectfully submitted,

JAMES B. GIBSON
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, FL 32114, in his basket at the Fifth District Court of Appeal and to; Carl Andrew Haas, #137211(FC103), P.O. Box 1807, Bushnell, FL 33513-0667, this 6th day of November, 1990.

Daniel J. Schafer

DANIEL J. SCHAFER

IN THE SUPREME COURT OF FLORIDA

CARL A. HAAS, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO.: 76,767

APPENDICES

A) Jury Verdict Forms

B) Copy of Opinion of the Fifth District Court of Appeal in Haas v. State, 15 FLW D2418 (Fla. 5th DCA September 27, 1990)