IN THE SUPREME COURT OF FLORIDA

WILLARD C. ROBERTSON,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO.: 77,021

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner sought review based on the certified questions by the Fifth District Court of Appeal. Petitioner respectfully submits that jurisdiction also exists for this Court to review the other points of law presented in this brief.

> [O]nce we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion, consider other issues properly raised and aruged before this court.

Savoie v. State, 422 So.2d 308, 310 (Fla. 1982).

The symbol (R) refers to the record on appeal in the instant cause, Fifth DCA Case No. 89-1766, Sup. Ct. Case No. 77,021.

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STATE OF FLORIDA, Respondent.	)	

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Petitioner was charged in a two count information with DUI manslaughter in violation Section 316.193, Florida Statutes (1987) and count II, leaving the scene on an accident with injuries in violation of Section 316.062, Florida Statutes (1987). (R 349) Petitioner proceeded to jury trial on June 27 - 28, 1989, with the Honorable Jeffords D. Miller, Circuit Judge, presiding. (R 1-305)

During the trial, defense counsel objected to the mentioning of any alleged statement made by Petitioner to the investigating officer on the grounds that since he was investigating a traffic homicide any statements made by Petitioner without receiving Miranda warnings were privileged. (R 60-63) The court overruled the objection. (R 62-63) Defense counsel further objected to the investigating officer testifying that in his opinion Petitioner was the driver of the vehicle which he determined to be at fault. (R 85-86)

During the course of trial, the state announced that it was filing an amended witness list to include Wayne Duer. The state discovered during a lunch break that Duer and not Dr. Bowman, had performed the chemical analysis of Petitioner's blood. (R 125) The court held a Richardson hearing and permitted defense counsel to depose both men. (R 129-154) Although defense counsel had properly subpoenaed Dr. Bowman for a pre-trial deposition, the witness failed to appear. At the conclusion of the recess, defense counsel objected to Duer testifying because of the clear prejudice to Petitioner's case. (R 133) According to the only report received by Petitioner from the Florida Highway Patrol, the Petitioner's blood alcohol reading was .16. At the deposition of Duer, however, counsel learned for the first time that the reading varied considerably from .20 down to .163. Moreover, Duer was not validly licensed by the Department when he made the test. After the proffer of Duer's testimony, the court overruled counsel's objection and permitted Duer to testify. (R 135-152, 154) Defense counsel reiterated his objection prior to Duer testifying. (R 169-171, 173)

Defense counsel moved for a judgment of acquittal at the close of the state's case and again at the close of all the evidence, both of which were denied. (R 195, 202, 233) Counsel argued that the evidence presented was legally insufficient to prove the crime of DUI manslaughter. (R 195, 223) Moreover counsel argued that the state had failed to prove that Petitioner willfully left the scene of the accident. The uncontroverted facts were that Petitioner was found semi-conscious in a fetal

position approximately 50-100 feet from the vehicle of which he had been an occupant. (R 197)

Following deliberations, the jury returned verdicts finding Appellant guilty as charged. (R 301-303) On August 14, 1989, Petitioner appeared for sentencing. (R 306-347) In accordance with the recommended guidelines range, Petitioner was sentenced to fifteen years in prison for DUI manslaughter and a consecutive two year probationary period for leaving the scene. (R 401-403)

Petitioner timely appealed to the Fifth District Court of Appeal. Of the four issues raised on appeal, the Fifth District Court of Appeal dealt with only one, the admission of the result of Petitioner blood alcohol level test where the person who performed the chemical analysis did not possess a valid license. Finding that strict compliance with the statute was not met, the Fifth District Court of Appeal nevertheless affirmed Petitioner's convictions and certified as being a matter of great public of importance two questions to this court:

> (A) MAY A CHEMICAL ANALYSIS PERFORMED IN ACCORDANCE WITH THE APPROVED METHODS CONTEMPLATED BY SECTION 316.1933 BE CONDUCTED UNDER THE SUPERVISION OF A PERMITTEE BY INDIVIDUALS NOT POSSESSING AN HRS PERMIT?
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> (B) CAN THE STATE INTRODUCE INTO EVIDENCE TEST RESULTS OF BLOOD SAMPLES TAKEN AT THE REQUEST OF LAW ENFORCEMENT IF THE REQUIREMENTS OF SECTION 316.1933 ARE NOT SATISFIED? IF SO, UPON PROOF OF QUALIFICATION OF THE PERSON TAKING BLOOD OR CONDUCTING THE TEST, CAN THE STATE NONETHELESS RELY ON THE PROVISIONS OF SECTION 316.1933 TO PROVE A VIOLATION OF SECTION 316.193 OR MUST THE STATE INTRODUCE COMPETENT PROVE WHOLLY PROOF INDEPENDENT OF THE STATUTE?

Robertson v. State, 15 FLW D2721 (Fla. 5th DCA November 8, 1990)

Petitioner timely filed his notice to invoke discretionary jurisdiction on December 4, 1990. On December 13, 1990 this court issued its briefing schedule.

STATEMENT OF THE FACTS

On July 2, 1988 at approximately 10:00 p.m., four vehicles were involved in a fatal collision. The initial impact with one of the vehicles was head-on. The accident resulted in one fatality and seven injuries. (R83) The accident occurred on Lake Underhill Drive; a two lane, bidirectional highway with an east-west orientation. (R56,83)

Karen Deatherage, the driver and her husband, Russell were driving their Volkswagen Superbeetle in a westerly direction. (R19-21,24) Meanwhile, Peter Vincent was driving in an easterly direction and ahead of a white pick-up truck. (R19-21) At some point the truck, travelling faster than Vincent, attempted to overtake and pass Vincent. (R19-21) Vincent, who observed the oncoming traffic (Deatherage) surmised that there was not enough distance to complete the pass without incident. (R19-21) In response, he slowed his vehicle and veered to the right. (R21-24) At the same time, Ms. Deatherage steered her vehicle to the right. (R19-21) Because there was insufficient clearance to make the pass, the truck struck the Volkswagen driver's section head-on, traveled over the front fender causing the truck to rotate (counter clockwise). (R19-21) At this point it struck Vincent's car in the left rear quarter panel causing the truck to spin in the opposite direction and eventually striking the vehicle which had been traveling behind the Volkswagen, a Mazda. (R21-22) The Mazda came to rest on the

shoulder; the opposite side of the road of which it was originally traveling. (R22-23) Vincent's vehicle came to rest approximately 70-80 feet ahead of the truck. (R18,22,30)

The State presented no direct testimony concerning the identification of the driver of the truck. (R1-305) Vincent, however, testified that after all of the vehicles had come to rest, he observed in his rear view mirror three people running about the pick-up truck, picking up beer cans and putting them into an ice chest. (R22) He specifically recalled that one of the fellows had black hair, a beard, and a bloody face. (R22) Vincent estimated the distance between himself and the men to be 75-80 feet. (R22) On cross-examination, he confirmed that there were three individuals around the truck but that he only saw one with blood on his face. (R31) Vincent then observed the group approach the Mazda (occupied by the two girls) and looked at it. (R23) At this point, Vincent extricated himself from his vehicle. At the same time, the three men began walking away from the Mazda and into an open field. (R23-24)

Vincent checked on the occupants of the vehicles, flagged down a passerby, drove to a gas station, called 911, and returned to the accident scene. (R24-25) James A. Duncan of the Florida Highway Patrol arrived on the scene. With the assistance of Vincent, Duncan located Petitioner lying 50-100 feet from the scene just on the other side of the trench and over a berm, face down in foot-high grass. (R25,47) Petitioner's location was 20 feet from the road. (R51) According to Vincent

and the treating paramedic, Petitioner appeared to be unconscious. (R26) Duncan found the Petitioner to be incoherent. (R48) After the paramedics treated Petitioner, he regained consciousness and became belligerent. (R26-27) The paramedics placed Petitioner on a flatboard and removed him to the ambulance. (R48) Duncan did not recall seeing any blood on Petitioner. (R50)

Warren Peck, a traffic homicide investigator, arrived on the scene approximately an hour after the accident, at 11:10 p.m. (R54-55) Upon Peck's arrival, he assumed control over the investigation of the accident. (R56) After being at the scene and consulting with Trooper Duncan, Trooper Scott Walker (another investigator and photographer) and Trooper Hoops (another investigator), a paramedic approached him. (R58) In response, Peck visited Petitioner in the ambulance who was lying face down and his head directed to the front of the ambulance. (R58) Peck observed blood on the left side of the sheets covering Petitioner's knees and ankles. (R58) Sometime later he observed abrasions on Petitioner's left shin (slightly above his ankle). (R59) Peck observed no injuries to Petitioner's head. (R64) While in the ambulance, Peck asked several questions of Petitioner's problems, Petitioner responded "Well, I was just walking down the side of the road and got hit." [Peck revealed at trial that at that point he was investigating a traffic homicide]. (R61)

Later in the investigation and after conducting a two

hour search, the other two men were located by the authorities. Peck recalled that one fellow's knees were swelling and reddened quite badly; with an abrasion to his forehead. Peck also observed red paint on his clothing. (R70) The other fellow had a bruise on his left knee and a slight bruise on his right knee and a red bump on his forehead. (R70)

An examination of the truck involved in the accident revealed two spider-web type cracks to the windshield, one in the center and the other in the right front passenger side. (R71) The steering wheel was buckled and the steering column itself was forced up. (R71) On the edge of the steering column and along the steering wheel rim blue paint was present. (R71) Although Petitioner's left arm and elbow had some blue paint (Petitioner is a painter) it was never analyzed or compared scientifically. (R71,99) Peck observed a dent at the base of the dashboard where the steering column enters. Deposited within the dent was what appeared to be human tissue and small hairs. Peck also found tissue and blood on the exposed emergency brake pedal. R(72) The items observed however, were not collected as evidence. As such, no comparison or examination or testing of the body hairs, blood, or tissue was performed. (R99) In the center dashboard and to the right, two deep compressions were made each leaving clothing imprints. (R72) Red paint was observed at the center impression but not at the right occupant's position. Each of the three fellows had red paint on their clothing, however it was located on Petitioner's shirt whereas the other two had red paint

on their knees. (R72-73,99) Petitioner wore a shirt and shorts. (R65) The other two fellows wore pants and shirts. (R69) The vehicle identification number check revealed that Petitioner owned the pick-up truck. (R65)

Yancy Yates, an emergency medical technician recalled that Petitioner complained of rib pain. (R118) She agreed that an individual could suffer trauma to the head or body without visible signs of injury. (R121) She specifically stated that serious trauma to the head can be experienced without the appearance of blood. (R121) Cynthia Williams, with FHP, and who was not at the scene of the accident recalled seeing a bruise on Petitioner's chest but could not recall where any other lacerations were located. (R121)

As a result of the injuries sustained in the accident, Ms. Deatherage died on July 4, 1988. (R14-16,356)

SUMMARY OF THE ARGUMENT

Point I: Section 316.1933, Florida Statutes (1989) sets forth the criteria which must be followed when blood samples are taken at the request of a law enforcement officer. These requirements include that the person who does the analysis of the blood sample be certified by HRS. Absence of this certification renders such test results inadmissible. Thus, the certified questions must be answered in the negative and Petitioner's convictions reversed.

Point II: The evidence that Petitioner was the driver of the truck involved in the fatal accident is insufficient to support the verdicts because the evidence fails to exclude the presumption of Petitioner's innocence. There is no direct testimony that Petitioner is the person who drove the truck or that he left the scene of the accident. The circumstantial evidence is legally insufficient to sustain the convictions beyond a reasonable doubt. The conviction violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 9 and 16, Florida Constitution. The convictions must be reversed.

Point III: Petitioner was substantially prejudiced in his preparation of his case when the State was permitted to introduce the testimony of an unlisted witness who performed the chemical analysis of the blood specimen. By ambushing counsel in this manner, counsel was precluded from filing pretrial motions to suppress the results of the blood/alcohol test because of the

variances in the test results and because the individual who performed the tests lacked the necessary Department license.

Point IV: Because Trooper Peck was involved in a traffic investigation, any statements made by Petitioner were privileged. It was error to permit the jurors to consider the statement in their evaluation of Petitioner's credibility.

ARGUMENT

POINT I

WHERE BLOOD SAMPLES ARE TAKEN AT THE REQUEST OF A LAW ENFORCEMENT OFFICER PURSUANT TO SECTION 316.1933, FLORIDA STATUTES (1989), THE RESULTS OF THE CHEMICAL ANALYSIS OF SUCH BLOOD MAY NOT BE ADMISSIBLE INTO EVIDENCE ABSENT A SHOWING THAT THE REQUIREMENTS OF THE STATUTE HAVE BEEN MET.

Petitioner was involved in an accident which gave rise to charges of DUI manslaughter and leaving the scene of an accident. Shortly after the accident, blood samples where taken from Petitioner and were subsequently tested at the direction of an investigating police officer, based on her belief that Petitioner was the driver of the vehicle and was intoxicated. At trial, Petitioner objected to the admission of the results of the blood alcohol test on the grounds that the person who performed the test, Dr. Wayne Duer, was not certified by HRS as required by Section 316.1933(2)(b), Florida Statutes (1987). As noted by the Fifth District Court of Appeal, it is undisputed that Dr. Duer did not have the required permit from the Department of Health and Rehabilitative Services. However, the court accepted the state's argument that because Dr. Duer's work was supervised by a licensed analyst, Dr. Lynn Bowman, which was consistent with the then prevailing procedures by Florida Department of Law Enforcement, there was no error. However, the court realized the importance of the matter and certified to this Court the following questions:

> (A) MAY A CHEMICAL ANALYSIS PERFORMED IN ACCORDANCE WITH THE APPROVED METHODS CONTEMPLATED BY SECTION 316.1933 BE CONDUCTED UNDER THE SUPERVISION OF A PERMITTEE BY INDIVIDUALS NOT POSSESSING AN HRS PERMIT?
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> (B) CAN THE STATE INTRODUCE INTO EVIDENCE TEST RESULTS OF BLOOD SAMPLES TAKEN AT THE REQUEST OF LAW ENFORCEMENT IF THE REQUIREMENTS OF SECTION 316.1933 ARE NOT SATISFIED? IF SO, UPON PROOF OF QUALIFICATION OF THE PERSONS TAKING BLOOD OR CONDUCTING THE TEST, CAN THE STATE NONETHELESS RELY ON THE PROVISIONS OF SECTION 316.1933 TO PROVE A VIOLATION OF SECTION 316.193 OR MUST THE STATE INTRODUCE COMPETENT PROOF WHOLLY INDEPENDENT OF THE STATUTE?

Robertson v. State, 15 FLW D2721, 2722 (Fla. 5th DCA November 8, 1990) Petitioner asserts that the certified questions must be answered in the negative and the decision of the Fifth District Court of Appeal must be quashed and the cause remanded for a new trial.

When the State presents evidence of motor vehicle driver intoxication which includes an alcohol test method, the test results are admissible only upon compliance with the statutory provisions and administrative rules enacted thereunder. State v. Gillman, 390 So.2d 62, 63 (Fla. 1980); State v. Bender, 382 So.2d 697 (Fla. 1980).

Section 316.193(a)(b), Florida Statutes (1987) provides: "A chemical analysis of the person's blood to determine the alcoholic content thereof must have been performed substantially in accordance with methods approved by the Department of Health and Rehabilitative Services [Department] and by an individual possessing a valid permit." The Department administrative rules specify two approved testing methods to

evaluate the quantity of alcohol contained in a blood sample. It simply states that the tester is to use one of the quantitative procedures: (1) Alcohol Dehydrogenase or (2) gas chromatography and that whole blood is to be used. HRS Rules 10 D-42.028. With respect to the permit/license procedures however, the Department is very specific and diligent in assuring that the applicants satisfy their education, training and experience requirements. HRS Rules 10 D 42.030 (1) - (4). (See Appendix C) The applicant must not only satisfy the educational requirements but must analyze and quantitate blood alcohol in proficiency samples provided by the Department. HRS Rule 10 D-42.030(2) and (2)(a). Additionally, the license is only issued for a specific method to be performed in a qualified laboratory facility. The Department requires that the licenses be renewed annually. The annual submission of a written application is not a perfunctory bureaucratic exercise. It requires continued demonstration of the licensee's proficiency. The licensee is required to regularly participate in performance evaluations given by the Department. HRS Rule 10 D-42.031(1) and (2). Moreover, the qualifications for receiving a valid license to perform the blood test are more stringent and substantial than those required for the operators of breathalyzers. Compare, Rule 10 D.42-030 and 10 D-42.025

In Kujawa v. State, 405 So.2d 251 (Fla. 3d DCA 1981) the court recognized that the absence of a valid permit for a licensed medical technologist, who drew the blood from an

individual involved in DUI Manslaughter, was not a bar to the admission of test results at trial. In contrast, however, the court recognized that the opposite would hold true when considering the absence of a valid license by the person who analyzed the blood. In other words, if the individual performing the chemical analysis of the blood drawn did not possess a valid license issued by the Department, then the test results should not be admitted.

The State cannot carry its burden of demonstrating that the defendant's blood test was administered by a person possessing the statutory requirements. Wayne Duer did not possess a valid license from the Department when he performed the chemical analysis of the Petitioner's blood. In fact, according to Duer, he first started analyzing blood/alcohol content in July, 1988. (R137) Duer first analyzed Petitioner's blood in the earliest stages of his training; August 5, 1988. (R138) According to Duer he performed the examination in accordance with the methods shown to him by Dr. Lynn Bowman, and afterwards showed the results to Dr. Bowman. (R140-141) Duer admitted that while he conducted the examination, Dr. Bowman was not present. Dr. Bowman only reviewed the results.

Thus, under the mandatory provisions which must be strictly construed, the State has wholly failed to establish compliance. As to the question of prejudice, Petitioner's blood/alcohol readings were used to extrapolate and estimate Petitioner's level of consumption at the time of the accident.

According to Dr. Bowman's calculations, a blood/alcohol reading of .160, two hours after the accident would translate to being under the influence of seven - 12 ounce beers at the time of impact. (R187) There is no question that such opinion testimony from a toxicologist would persuade the jurors in their evaluations of Petitioner's state of sobriety. Moreover, the jurors were reminded by Duer, Dr. Bowman and the prosecutor that the .160 reading was the lowest reading obtained, leaving the distinct impression that Petitioner's level of consumption at impact was in fact much greater. In this case where the evidence as to Petitioner's culpability for the crime as the driver is not so overwhelming and where the test results clearly played a substantial part in the jury's deliberations, such error cannot be claimed harmless. State v. Diguilio, 491 So.2d 1129 (Fla. 1986). Additionally, it is axiomatic that criminal statutes must be construed strictly in favor of the accused. Robertson at D2721. Therefore, the first question must be answered in the negative.

With regard to the second certified question, the court is basically asking whether even if the blood samples are taken without the requirements of Section 316.1933 being satisfied, may the results still be admissible provided the state satisfies the traditional predicates for admissibility, including test reliability, the technician's qualifications and the test results' meaning. The basis for this question comes from the court's interpretation of State v. Quartararo, 522 So.2d 42 (Fla.

2d DCA) rev. denied 531 So.2d 1354 (Fla. 1988) Petitioner first asserts that Quartararo is incorrectly decided. If the state is permitted to admit into evidence the results of blood analysis where the requirements of Section 316.1933 are clearly not met, in essence the statute is rendered meaningless. Such judicial repeal of a statute is improper. Notwithstanding this argument, even if this court is to answer the second question in the affirmative, the blood tests results were still inadmissible since the state did not establish the proper predicate for admission.

In State v. Quartararo, supra, the Second District Court of Appeal read State v. Strong, 504 So.2d 758 (Fla. 1987) to hold that test results were admissible without regard to the requirements of Section 316.1933, Florida Statutes (1987), provided a proper predicate for admissibility was met. The burden is on the state, however, to establish (1) reliability of the test; (2) the qualifications of the operator; and (3) the meaning of the tests. Petitioner asserts that the qualifications of the operator, in this case Wayne Duer, have not been established. Wayne Duer is not qualified as an expert in human toxicology; the bulk of his experience is in veterinary medicine. (R 170-171) Further, with regard to the reliability of the testing procedures, although Dr. Bowman had obtained approval from HRS, he did not actually perform the test nor did he analyze the data. According to Duer, he reported the results to Dr. Bowman who was not physically present when the tests were

conducted. (R 180) Therefore, Petitioner asserts that the predicate for admission of the test results has not been met.

Petitioner also argues that State v. Quartararo misinterpreted State v. Strong. In Strong, the blood was extracted not under compulsion for investigatory purposes, but rather for medical treatment. This is an important distinction since this court in Strong implied that the failure to comply with the "protection of drivers whom the government requires to give blood samples under the implied consent law" may render inadmissible test results taken in violation of the statute. Further, the court in Quartararo, was dealing solely with the withdrawal of blood not analysis of the results. Accord State v. Lendway, 519 So.2d 725 (Fla. 1st DCA 1988), and State v. Walther, 519 So.2d 731 (Fla. 1st DCA 1988).

In summary, Petitioner asserts that both question must be answered in the negative. The Fifth District Court of Appeal by its decision provided a method by which the state could circumvent the clear language and intent of the legislature in enacting Section 316.1933, Florida Statutes (1987). Such judicial legislation is improper. Even if this court were to answer the second certified question in the affirmative, the state still failed to meet the predicate for the admissibility of the test results in that it was not shown that Dr. Duer had the requisite qualifications or that the test performed was reliable. This Court must quash the decision of the Fifth District Court of Appeal below and remand with instructions to grant Petitioner a new trial.

POINT II

THE CONVICTIONS FOR DUI MANSLAUGHTER AND LEAVING THE SCENE OF AN ACCIDENT VIOLATE THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICTS.

The trial court erred in not granting the motions for judgment of acquittal because the State's evidence was legally insufficient to support guilty verdicts; the proof fails to exclude the reasonable possibility that someone other than Petitioner was driving the pick-up truck that caused the death of Karen Deatherage and/or that Petitioner as the driver, willfully left the scene of the accident. The evidence of Petitioner's guilt is purely circumstantial consisting of a succession of inferences that require a pyramiding of assumptions in order to arrive at a conclusion necessary for conviction.

I. Leaving The Scene Of The Accident.

The facts establish that after the accident, Vincent (who was also involved in the accident but uninjured) observed three men running around the pick-up truck picking up beer cans and placing them in an ice chest. (Vincent did not identify Petitioner as one of the three men around the truck. He only identified Petitioner as the person he found lying in the grass. (R31,337)Thereafter, the group was "kind of walking around", looked into the Mazda, and then started walking towards an open field. (R22-23) There was no testimony concerning Petitioner's

subsequent actions. All that is known is that after Vincent hitched a ride from a passerby, traveled approximately 1/2 mile, called the emergency number 911, returned to the scene and shortly thereafter, Petitioner was located. Significantly, there is no evidence direct or circumstantial indicating Petitioner's activity during Vincent's absence. What is known is that Petitioner was found near the accident scene. The other men were not. According to Trooper Robert Duncan, Petitioner was located "a short distance from the scene." Duncan approximated the distance to be between 50 to 100 feet, and a mere 20 feet from the road. (R47) Duncan described Petitioner's condition as injured; and incoherent. His eyes were open but did not respond to the light -- "It was a blank stare." (R48)

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re: Winship, 397 U. S. 358, 364 (1970).

The elements the state must prove beyond a reasonable doubt that Petitioner committed the crime of leaving the scene of the accident are:

> 1) Petitioner was driving the vehicle involved in the accident which caused the death of Deatherage,
>
> 2) Petitioner knew or should have known he was involved in an accident,
>
> 3) Petitioner failed to stop and remain at the scene of the accident to give information to the driver or occupant of, or any police officer at the scene of the accident who is investigating the accident: his name,

> address, registration number of the vehicle he is driving, and if available on request his license to drive.

Section 316.066, Fla. Stat. (1987). Petitioner's conviction violates the Due Process Clause and as a matter of law the judge erred in denying the motions for judgment of acquittal because the circumstantial evidence is legally insufficient to overcome the presumption of innocence.

> Under Florida law, where there is no direct evidence of guilt and the state seeks a conviction based wholly upon circumstantial evidence, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. (citation omitted). The basic proposition of our law is that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt, and it is the responsibility of the state to carry its burden. (citation omitted). It would be impermissible to allow the State to meet its burden through a succession of inferences that required a pyramiding of assumptions in order to arrive at the conclusion necessary for conviction. (citations omitted).

Torres v. State, 520 So.2d 78, 80 (Fla. 3d DCA 1988). See Posnell v. State, 393 So.2d 635, 636 (Fla. 4th DCA 1981) ("Where the state fails to meet its burden of proving each and every necessary element of the offense charged beyond a reasonable doubt the case should not be submitted to the jury and a judgment of acquittal should be granted."); Kickasola v. State, 405 So.2d 200, 201 (Fla. 3d DCA 1981) ("[E]vidence which furnished nothing stronger than a suspicion, even though it tends to justify the

suspicion that the defendant committed the crime, is insufficient to sustain a conviction.") (emphasis added). It is well established in Florida that a case that rests exclusively on circumstantial evidence must exclude all reasonable hypothesis of innocence.

> It is the responsibility of the State to carry its burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. (citations omitted).
>
> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, an one of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Davis v. State, 90 So.2d 629, 631-32 (Fla. 1956) (emphasis added).

The instant case against Petitioner is entirely circumstantial. As to count II, the State failed to carry its burden as to two of the necessary elements: 1 and 3. [status as the driver and that he willfully left the accident scene.] (Item

3 will be discussed first and item 1 will be discussed when considering count I.)

Even if the Petitioner was the driver, the State has not established that Petitioner left the scene. Although Vincent observed Petitioner walking away from the accident scene, he did not have any knowledge nor was any testimony offered to show that Petitioner continued walking away. Interestingly, the other two fellows clearly ran a great distance from the scene and were located approximately two hours later. Petitioner on the other hand was found 50-100 feet from the accident scene and a mere 20 feet from the road. Again since there is no direct testimony concerning Petitioner's action throughout, it is equally reasonable to believe that Petitioner did not leave the scene as he could have with his companions

In State v, Hepburn, 460 So.2d 422 (Fla. 5th DCA 1984) the defendant was convicted of leaving the scene of the accident when she as the driver, hit three pedestrians and continued in her travels. In a similar case, the conviction was sustained where a driver of an automobile drove into the side of another car. Damage was extensive and a person was injured. Without making any investigation, the driver drove away. Martin v. State, 323 So.2d 666 (Fla. 3d DCA 1976).

In Murray v. State, 425 So.2d 661 (Fla. 2d DCA 1983) on a motion to dismiss the court held that because Murray left the scene of the accident with injuries before the police arrived , those circumstances presented a prima facie case of guilt.

In the case at bar, Tooper Duncan characterized location as being a short distance from the scene. All of the State's evidence can be believed and still the proof is consistent with Petitioner's innocence because there is not competent, substantial proof showing that Petitioner left the scene. Accordingly, the conviction as to count II must be reversed because it relies purely on speculation.

As to count I, the DUI manslaughter conviction must fall because the evidence does not demonstrate beyond a reasonable doubt that Petitioner was the driver of the truck. The conclusion is reached based on Petitioner's injuries and placement of paint on his clothing. Yet, the injuries and paint are also consistent with Petitioner's claim of being the passenger. Specifically, Petitioner exhibited characteristics of a person who had received trauma to the head. (incoherent; unconscious; delirious; blank stare) Although his head was not bleeding, the testimony from the medical technician confirmed that one could sustain serious trauma to the head without visible signs of injury. (R121) Trauma to the skull can occur without the display of blood. (R121)

The State places great emphasis on comparing the location of the paint in the truck with that found on Petitioner, and on the two other men. Interestingly, all of the men involved in this case are commercial painters and worked together on the same project that day. (R213) Unique to Petitioner, however, is the presence of blue paint on his left arm and elbow which was

similar to blue paint found on the steering column. (R71,77) When the officer described the location of blue paint he referred to the 12 o'clock to 9 o'clock positions; the steering column and on the steering wheel rim. The State however, did not make any tests to confirm that the blue paint observed on Petitioner was in fact the blue paint allegedly transferred on to the rim or column. This evaluation could easily have been accomplished by taking a chip from the rim/steering column and making a scientific comparison with a paint chip removed from Petitioner's arm. Without this simple comparison, the State cannot and did not prove that the blue paint had been transferred that evening. It is just as reasonable to conclude that the blue paint was already there, especially where Petitioner paints for his living.

Trooper Peck observed that the two other fellows sustained injuries to their knees. One fellow's was more noticeable. (R70) Peck opined that the knee injuries were the result of forceful contact between the dashboard and the knees. It is just as equally reasonable to believe that the driver's knees forcefully impacted with the metal steering column, causing no dent but injury to the knees.

The presence of red paint on each of the men seems to establish both guilt and innocence of Petitioner. Specifically the two fellows had red paint on the knee area of their clothing. The red paint however, was found in the truck in only one of the two occupant's positions. (R73) Petitioner had red paint on his shirt and red paint was located in the center occupant's position

of the truck. This is consistent with Petitioner's testimony placing him in the center. Admittedly, a knee impression was also seen but it is just as reasonable to believe that after the forceful impact that Petitioner's shirt came into contact with the dashboard.

Thus, as to the identity issue, the State's case boils down to tissue, proportedly human tissue, located on the exposed brake pedal. Additionally, blood and hair were lodged within it. Trooper Peck remembered that the area under the dash board was full of debris yet he testified the substance he observed on the brake pedal was human tissue. Peck is not qualified as an expert to render such opinion.

Petitioner should not be penalized for the State's failure to examine available evidence. The State could have easily removed the substances and submitted them to their testing laboratories in Orlando. A simple examination of the tissue hair and blood and comparison with Petitioner's tissue, blood and hair would have ameliorated the obvious deficiencies in the State's case.

Pursuant to McArthur v. State, 351 So.2d 972 (Fla. 1977), as a matter of how the State's evidence is insufficient to support the verdict because it fails to exclude the possibility that one of the two other fellows was the driver. The convictions cannot be sustained because the evidence was not competent and substantial evidence inconsistent with any reasonable hypothesis of innocence. Reversal is required.

POINT III

THE STATE'S VIOLATION OF THE DISCOVERY RULES OF DISCLOSURE SUBSTANTIALLY PREJUDICED PETITIONER IN THE PREPARATION OF HIS CASE BY PRECLUDING HIS FILING OF PRETRIAL MOTIONS TO EXCLUDE EXPERT TESTIMONY AND RELATED TEST RESULTS WHICH WERE KEY TO THE STATE'S CASE.

During the middle of Petitioner's trial the State announced that amendment of its witness list to include Wayne Duer was necessary. Apparently, during the lunch break, Dr. Lynn Bowman (a listed expert witness) advised the State that although he had signed the chemical analysis report in Petitioner's case, he in fact had not conducted the test or analysis to determine Petitioner's blood/alcohol content but merely supervised at a distance. Counsel objected. Thereafter, the court conducted a Richardson inquiry. Richardson v. State, 246 So.2d 771 (Fla. 1971). Defense counsel was permitted to depose each of the witnesses before continuing the trial. At the conclusion of the hearing, the court determined the violation was not willful; Petitioner was not prejudiced because he had the opportunity to depose the witnesses; that the results were not varied and that the question was who signed the document and who was whose understudy. (R154)

Florida Rules of Criminal Procedure 3.220(5) requires the State to promptly disclose to the defense any witness who has information relevant to the case and to any defense thereto.

Because the State failed to disclose, the trial court made inquiry as to: 1) whether the State's violation was intentional or inadvertent; 2) whether the violation was substantial or trivial; and most importantly 3) whether the violation affected Petitioner's ability to prepare for trial. Brown v. State, 515 So.2d 211, 213 (Fla. 1987).

In the instant case, defense counsel had subpoenaed Dr. Bowman to attend a pretrial deposition. Dr. Bowman acknowledged that he had received proper notice but for some unexplained reason the event was not placed on his calendar; he failed to appear. Nevertheless before trial, the State provided defense counsel with the chemical analysis finding of a blood/alcohol reading of .163. It was not until Dr. Bowman advised the prosecutor at lunch and before Dr. Bowman's scheduled appearance at trial that the State learned that Wayne Duers actually performed and analyzed the specimen. Petitioner does not dispute the trial court's finding that as to the prosecutor, the omission or failure to disclose Duer's name as a witness was inadvertent and not willful. On the other hand, Petitioner contends that his preparation of the case was extensively prejudiced and that the undisclosure was a substantial violation.

In Smith v. State, 500 So.2d 125 (Fla. 1986), the court reiterated, "prejudice in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the fact finder but rather on the impact on the defendant's ability to prepare for trial: ..." Smith, 500 So.2d at 126, citing, Wilcox

v. State, 367 So.2d 1020, at 1023, (Fla. 1979). Preparation for trial includes the filing of motions to exclude the testimony of a witness or test results. Wilcox, 367 So.2d at 1023.

In this case, defense counsel had well founded arguments to exclude Wayne Duer's expert testimony. Duer admitted that when he conducted the tests on Petitioner's blood specimen, he did not possess a valid license issued by the Department. As one of its requirements, Section 316.1933(2)(b), Florida Statutes (1987) states that the test must be conducted by a professional who holds a valid license. See, State v. Gillman, 390 So.2d 62, 63 (Fla. 1980). Gulley v. State, 501 So.2d 1388 (Fla. 4th DCA 1987) Case law supports the position that without the valid license or even a temporary license, the test results would be inadmissible. Admittedly, the State could proceed with their case, however, it would have been seriously undermined. The State would have been forced to rely solely on the showing of impairment of Petitioner's normal facalties. (R290,293) Clearly in this case where Petitioner was involved in the accident (head injuries), impairment could have attributed to his physical injuries.

Another aspect which demonstrates the prejudicial impact on counsel's ability to prepare the case is the questionable reliability of the blood/alcohol findings. According to the State, the results from the chemical analysis ranged from .20 down to .163. (R133-134) Admittedly the results were gathered from two separate tests. Nevertheless counsel

could have argued by analogy that such a variance exceeded the ± .02% standard dictated by the Department. (See form 1033 pronulgated October, 1984). According to the Department, the variance in two consecutive breath test tests cannot exceed ± .02%. Such findings are unreliable and result from a systemic error.

Counsel could have enlisted an expert in toxicology to explain the significance of the range in blood/alcohol results. By using the ± .02% as a standard, a toxicologist could have testified that the results were wholly unreliable or at the very least, scientifically unacceptable.

The inability to develop and pursue the two frontal attacks on the reliability of the blood/alcohol results and the status of the individual performing the tests demonstrate the substantial prejudice inured to the Petitioner. Especially in the case where the evidence was not overwhelming as to Petitioner's guilt.

The court should have declared a mistrial, suppressed the evidence or in the alternative, availed the Petitioner a continuance so that he could effectively develop and present the legal and factual arguments. Reversal is required.

POINT IV

THE TRIAL COURT ERRED WHEN IT ALLOWED THE JURORS TO HEAR STATEMENTS MADE BY PETITIONER DURING THE TRAFFIC INVESTIGATION WHICH WERE PRIVILEGED.

Section 316.066(4), Florida Statutes (1987) provides in part, as follows:

> Each accident report made by a person involved in an accident shall be without prejudice to the individual so reporting ... no such report shall be used as evidence in any trial, civil or criminal arising out of the accident.

It is well settled that the oral statements made by a person (occupant) involved in an accident to an investigating officer following an accident, relating to his version of the accident and forming the basis for the investigating officer's report are privileged. Elder v. Robert J. Ackerman Inc., 362 So.2d 999 (Fla. 1978); State v. Mitchell, 245 So.2d 618, 623 (Fla. 1971). Although the protection does not apply to a voluntary statement, made during the criminal investigation of an accident, the person making the statement must nontheless be apprised of the distinction between a traffic investigation and a criminal investigation. Elder, supra. See also, State v. Coffey, 212 So.2d 632 (Fla. 1968).

In the instant case, Trooper Peck visited Petitioner in the ambulance. He did not advise Petitioner that he was

conducting a criminal investigation. Consistent with a traffic investigation, Peck asked about Petitioner's injuries and if he would be seeking treatment at the hospital. Petitioner, who had become belligerent and confused, indicated that he was just walking and was hit. (R63)

Petitioner as a person involved in the accident, or as an occupant, or even as the driver, as the State contends, was entitled to have his statements made to the Trooper excluded from the trial proceedings. The prosecutor disagreed and argued that State v. Hepburn, 460 So.2d 422 (Fla. 5th DCA 1984) controlled.

In Hepburn, supra, a police officer was investigating a criminal traffic case; hit and run of three pedestrians. The day after the accident, the officer still did not know the identity of the driver, however he met with an individual who claimed that she was a victim of an unrelated alleged hit and run accident. In other words, she was not reporting the accident in which she was the driver. Rather, she claimed that she was the victim of a hit and run. During that encounter she made incriminating statements. Because Hepburn was not reporting her version of the hit and run involving the pedestrians but rather a completely unrelated event, her statements were not privileged. This Court held, "appellee was not reporting the accident to which her incriminating statements related when she made those statements. Hepburn, 460 So.2d at 425. The statements were admitted.

In the instant case, Petitioner reported the events to the traffic incident currently being investigated. The

legislature has expressed an intent to free the reporting person from having his own version of an accident used against him in a civil or criminal trial. State v. Ferguson, 405 So.2d 294, 296 (Fla. 4th DCA 1981). As such, Petitioner's comments were privileged. Petitioner was not disavowing any knowledge of the accident, as in Hepburn, rather he merely offered another version of the accident. State v. Ferguson, 405 So.2d 294, 296 (Fla. 4th DCA 1981). Moreover no logical distinction exists to disallow the privilege statements from being presented to the jurors in the State's case-in-chief and then permit it to be presented during cross-examination of the Petitioner as a means of impeachment. Ippolito v. Brener, 89 So.2d 650 (Fla. 1956). (incriminating statements made to police officer by driver at scene of the accident and during the investigation is privileged. No error to disallow statements in either the State's case-in-chief or when offered as impeachment, applying older version of privilege, Section 317.17, Florida Statutes).

Ferguson, is another hit and run accident in which the driver and sole occupant of a truck collided with a bicyclist resulting in his death. The driver left the scene and returned to her residence. The police officers pursued their investigation and located the suspected driver at her residence. Unlike Petitioner's situation, the officers immediately advised the suspect Ferguson of her constitutional rights. Ferguson made statements related to the ownership of the truck as well as the identity of the driver; someone else. She denied any involvement

in any accident at the time and place. At trial, Ferguson claimed her statements were privileged. The court correctly rejected the claimed privilege because there was no question that Ferguson had fled the scene and as such, she was suspected of the crime and had received adequate constitutional warnings before giving her statements.

In the instant case, the prosecutor argued that because Petitioner was a criminal suspect (leaving the scene of the accident) he waived his constitutional rights. As authority for the waiver proposition, the prosecutor cited Ferguson, supra. (R60-61) Although Petitioner contends that the evidence is woefully lacking to prove or even establish probable cause of the crime of leaving the scene of an accident. (See Point I) Nonetheless, if the officer interrogated Petitioner believing him to be a criminal suspect, then the statement should equally be inadmissible because no constitutional warnings were given to assure that the statements were given freely and voluntarily. It appears Ferguson would require such a warning and if absent, the statement should have been suppressed.

Petitioner's statement was improperly admitted in the State's case-in-chief and as a means to attack Petitioner's credibility on cross-examination. The prejudice inured to the Petitioner was not harmless. The circumstantial case presented by the State was weak with Petitioner's credibility being a key and central issue. The State as the beneficiary of the error cannot demonstrate beyond a reasonable doubt that the statement

did not contribute to the guilty verdict. State v. Diguilio, 491 So.2d 1129 (Fla. 1986).

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, the Petitioner requests that this Honorable Court answer the certified questions in the negative, quash the decision of the Fifth District Court of Appeal and remand the cause with instructions to grant Petitioner a new trial. In the alternative, Petitioner requests this court to reverse his convictions and remand with instructions to discharge him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Ste 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: Willard Carl Robertson, No. 0-137512, P.O. Box 10099, Brooksville, FL 34601, this 9th day of January, 1991.

Michael S Becker
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

WILLARD C. ROBERTSON, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO.: 77,021

A P P E N D I C E S

A. Robertson v. State, 15 FLW D2721 (Fla. 5th DCA November 8, 1990)

B. Section 316.1933, Florida Statutes (1987)

C. HRS Rules