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IN THE SUPREME COURT OF FLORIDA

CASE NO. 90-164

77,213

DAVID LEE GALLAGHER,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

The petitioner, David Lee Gallagher, was the appellant in the Third District Court of Appeal and the defendant in the trial court. The appellee, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the trial court. In this brief, the parties will be referred to as they stood in the trial court. The symbols R., T. and A. will be used to refer to portions of the record on appeal, transcripts of the lower court proceedings, and the appendix to this brief respectively. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

David Gallagher was charged by information with two (2) counts of second-degree murder, two (2) counts of manslaughter, two (2) counts of driving under the influence (DUI)-manslaughter, and eight (8) counts of DUI-serious bodily injury. (R. 1-14A). The State eventually nolle prossed the two second-degree murder counts and a DUI-serious bodily injury count. (T. 324, 1855).

A jury trial was conducted before the Honorable Arthur Rothenberg on August 15 through 24, 1989. The jury acquitted Gallagher on the two (2) manslaughter counts, convicted him on both DUI-manslaughter counts, four (4) counts of DUI-serious bodily injury, and, as a lesser, three (3) counts of DUI-bodily injury. (T. 2138-43, R. 447-57). On a guidelines sentencing range of seventeen (17) to twenty-two (22) years, the trial judge imposed a fifteen (15) year sentence on one DUI-manslaughter count and a seven (7) year consecutive sentence on the other DUI-manslaughter count. (T. 2251-53). The trial judge also imposed concurrent five (5) year sentences on the DUI-serious bodily injury counts, and one (1) year concurrent sentences on the DUI-bodily injury counts. (T. 2251-53).

The Third District Court of Appeal affirmed Gallagher's convictions, certifying to this court, as a question of great public importance, whether numerical blood alcohol test results are admissible where the test is done after the accident and the result cannot be related back to the time of driving. (R. 472-73; A. 2-3).

STATEMENT OF THE FACTS

The alleged incident occurred on August 12, 1988 at terminal 6 at the Port of Miami. (T. 945). One approaches the port by traveling east or southeast from Biscayne Boulevard over a narrow two-lane bridge. (T. 920-22, 1202-04). After crossing the bridge, a driver must continue to travel eastward for some distance and pass by a guardhouse before turning left and driving past terminals 1 through 5. (T. 921-22, 1202-04). There is another left turn just before arrival at terminal 6. (EXHS. 18-19). The distance from the guardhouse to terminal 6 is approximately one (1) mile. (T. 1203-04).

In front of terminal 6 are two (2) one-way travel lanes, called South America Way, bounded on each side by a parking lane. (T. 894-95, 1194, A. 1).[1] When SeaEscape cruise ships arrived at the port, a taxi cab feed line was formed in the parking lane on the right side of the travel lanes. (T. 1006-07, 1341-43, A. 1). The feed line was right next to the sidewalk which was just outside of terminal 6. (A. 1). The feed lane was separated from the terminal building by the sidewalk, which is approximately eight (8) feet wide. (T. 925, A. 1).

On August 12, 1988 the SeaEscape arrived at the port between 10:30 and 11:00 p.m. (T. 1187). Passengers began to exit termi-

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1. State's exhibit 1 was a diagram of the scene. A reduced copy of that diagram is in the appendix. (A. 1). On the diagram, vehicle # 1 is the first cab in the feed line, vehicle #2 is a lunch wagon, vehicle # 3 is a bus which was struck, and vehicle # 4 is the Central cab Gallagher was driving. (A. 1). The circled initials represent the approximate location of witnesses when the accident occurred. (A. 1).

nal 6 at around 11:30 p.m. (T. 959, 1016, 1448). There were a number of cabs in the feed line adjacent to the sidewalk. (T. 961-63, 1006).

A number of passengers and port personnel observed a red Central Cab station wagon traveling on the sidewalk between the cab feed line and the terminal building. (T. 964-65, 995-96, 1020-21, 1101-02, 1140-41, A. 1). The cab, which was approximately seven (7) feet wide, traveled a lengthy distance along the sidewalk to a point at the front of the feed line. (T. 926, 1020-25, 1140-43). There was some damage to the right side of the cab consistent with paint scrapings on the wall of the terminal building indicating that the cab grazed the wall while traveling on the eight (8) foot wide sidewalk. (T. 910, 925, 954-55).

The cab then swerved to the left, clipped the right front corner of the first cab in line, and then struck two port employees, a bus driver, and a passenger, injuring all four, two of them seriously. (T. 1020-25, 1140-43, A. 1). The cab then clipped the left rear corner of a lunch wagon which was parked in the right hand parking lane about 180 feet in front of the first cab, striking the man who was operating the lunch wagon and seriously injuring him. (T. 1020-25, 1140-43, 1112-33, A. 1). The Central Cab then ricocheted off the lunch wagon and, while crossing the two lanes of travel, hit two passengers, killing one and injuring the other. (T. 1020-25, 1140-43, 1236-43, 1813-39, A. 1). The front of the cab then struck the side of a bus which was parked in the left hand parking lane, striking two more passengers as it did, killing one and seriously injuring the

other. (T. 1020-25, 1140-43, 1220-35, 18831-36, A. 1). The cab rolled back away from the bus and came to rest across the two travel lanes. (T. 1020-25, 1140-43, A. 1). David Gallagher was identified by numerous witnesses, and in fact stipulated to his identification, as the driver of the Central Cab. (T. 1020-25, 1151-52).

There were tire scuff marks at the point where the cab drove onto the sidewalk. (T. 900-01, 1293-95, A. 1). Testimony established that scuff marks occur when the tires are rotating, but moving across pavement, while skid marks occur when brakes are locked and the tires are not rotating. (T. 900-01, 1293-95, 1433-35). It was also established that the lack of skid marks did not mean that Gallagher had not applied the brakes, but only that they did not lock. (T. 427-28).

Jean Bove was the driver of the first cab in the feed line. (T. 1342-43). He testified on direct examination that he did not see the Central cab that night before the accident. (T. 1343-45.). On cross and recross examination, Bove testified that he thought he saw the red Central cab parked in the feed line before the accident occurred and that he recalled telling defense counsel that in an earlier statement. (T. 1345-50, 1351-52).

Robert Cisrow was a Greyline bus driver who was standing on the sidewalk in the area between the first cab in the feed line and the lunch wagon. (T. 988-1005, A. 1). Cisrow was one of the persons hit by the Central cab. (T. 995-98). He testified that while he was not sure, he believed that the cab's engine began running more loudly and at a higher rate of speed at the point

when it struck the cab in the feed line. (T. 1007-10).

Gerardo Quintero was a port security officer on duty on the night of the accident. (T. 1098). Quintero heard a noise, turned, and saw the Central cab on top of him. (T. 1101-02). The cab struck Quintero and he testified to the extent of his injuries. (T. 1102-06).

Martina Meyer was one of the injured victims and testified at trial. (T. 1526-35). Ms. Meyer testified that she was waiting outside the terminal while her husband looked for their bus when something happened. (T. 1527-28). The following exchange then took place:

> PROSECUTOR: Do you know what that something was?
>
> MEYER: In retrospect I learned what it was.
>
> PROSECUTOR: What was it?
>
> MEYER: I was hit by a drunk driver.
>
> DEFENSE COUNSEL (Agnoli): Objection.
>
> DEFENSE COUNSEL (Smith): Objection, move to strike and ask for a sidebar. (T. 1528-29).

At the sidebar, the defense moved for a mistrial on the ground that Ms. Meyer had offered hearsay testimony regarding Gallagher's condition, which was the issue at trial. (T. 1529-30). The trial court sustained the objection, but denied the motion for mistrial. (T. 1530-31).

Jonathan Silvas, a California resident who had been certified as a police officer by that state, had been a passenger on the SeaEscape and was walking across South America Way when the accident occurred. (T. 1012-25, 1077-78, A. 1). Silvas' atten-

tion was caught by the sound of metal crashing and he turned and observed the accident. (T. 1020-25). He testified that the cab driver's left hand did not appear to be clenched on the wheel, but was more or less open. (T. 1022-23). Silvas noticed that the driver had no expression on his face as the cab hit people in its path. (T. 1023).

After the cab came to a rest, Silvas could not see the driver in the car. (T. 1024-25). Silvas went over to the cab, turned the key to the off position, and saw that the driver was on the passenger side floorboard, wedged between the seat and the dashboard. (T. 1027-28). Silvas removed Gallagher from the car and told him that he was placing him under citizen's arrest. (T. 1092).

Silvas noticed the odor of alcohol each time Gallagher exhaled, and testified that Gallagher's eyes were glassy and watery and his speech was slurred and difficult to understand. (T. 1059-60). He also noticed that Gallagher staggered some when he walked and had a blank expression on his face. (T. 1068-69). Silvas did not notice an injury to Gallagher's leg. (T. 1092). Silvas offered the opinion that based upon his observations he believed Gallagher was impaired. (T. 1071-72).

Frank Valiente, a California peace officer, was at the port of Miami to pick up his friend, Jonathan Silvas, and he also observed the accident. (T. 1134-81, A. 1). He recalled that as the cab was moving, the driver had both hands on the wheel and a scared look on his face. (T. 1147-48). He noticed that the driver's head was tilted back and moving side to side. (T. 1148).

After the accident, Valiente saw Gallagher in the same position on the floorboard in which Silvas had seen him. (T. 1150-51). He helped remove Gallagher from the car and noticed the odor of alcohol, that Gallagher's eyes were glassy, bloodshot, and watery, and that his speech was mumbled, although Valiente was able to understand Gallagher. (T. 1152-53, 1173). Valiente also noticed that Gallagher stumbled as he walked. (T. 1153-54). Valiente noticed that Gallagher had an injury to his forehead, but did not notice any leg injury. (T. 1168, 1173).

On direct examination, Valiente opined that he did not think Gallagher knew where he was or what was going on. (T. 1156). When he was asked his opinion of why Gallagher was unaware, defense counsel objected that the witness could not offer an opinion that Gallagher was impaired or under the influence, but only an opinion on drunkenness. (T. 1156-58). The objection was sustained and Valiente testified that he thought Gallagher was drunk. (T. 1158).

On cross-examination, Valiente testified that as a peace officer he had participated in some "DUI training". (T. 1170). Valiente acknowledged that he could not tell, from the smell of alcohol, how much Gallagher had had to drink or when he had his last drink. (T. 1170-72). He also acknowledged that if Gallagher had a leg injury that fact might affect his opinion regarding Gallagher's difficulty in walking. (T. 1173). Finally, he acknowledged that there are many things that can make one's eyes bloodshot and that he could not say that because Gallagher's eyes were bloodshot he was under the influence of alcohol. (T. 1175-

76).

On redirect examination, the prosecutor asked, "[b]ased upon that same thing that Mr. Nally asked you about, concerning your observations in DUI arrests, was the defendant impaired as you observed him?" (T. 1177-78). A defense objection was overruled and Valiente answered affirmatively. (T 1178).

Port security officer Bruce Goodman also assisted in removing Gallagher from the cab. (T. 1190-91). Goodman testified that when face to face with Gallagher, he could smell the odor of alcohol. (T. 1192-93, 1206-07). Goodman also noticed that Gallagher seemed a little incoherent and that his eyes were bloodshot. (T. 1192-93).

Goodman supervised the security officers who manned the guardhouse at the entrance to the port. (T. 1205). Goodman testified that the policy at the port was to wave taxi cabs through the gate without stopping them. (T. 1194-98). Goodman indicated that he did not receive any reports about Gallagher driving erratically through the security point, which was about one (1) mile from terminal 6. (T. 1203-04, 1205-06).

Andrew Drucker was at the Port of Miami on the night of the accident dropping his housekeeper off to meet her husband, who worked on the SeaEscape. (T. 959). Drucker witnessed the accident and observed Gallagher after the accident when he was seated in a police car. (T. 975-77). Drucker testified that Gallagher looked as if he were about to fall asleep, describing a pattern of moving his head from his chin resting on his chest to his head all the back on the seat of the car. (T. 977). Drucker recalled

wondering if Gallagher was drunk or had hit his head on the steering wheel and testified that "if I had to bet, I would have bet that he looked drunk to me". (T. 978).

Luis Oyola, a friend of one of the victim's, was a security guard working at the guardhouse on the night of the accident. (T. 1257-58, 1268). After the accident, Oyola went to the scene and observed Gallagher in the police car. (T. 1263-65). Oyola put his head in the police car and asked Gallagher what he had done. (T. 1265-66). When he did so, he noticed that Gallagher's head was leaned back, that his face was red, and that his eyes were bloodshot. (T. 1266). Oyola testified that Gallagher responded by smiling and saying, "Isn't it a beautiful night. It's wonderful isn't it". (T. 1266). Finally, Oyola testified that because of the way Gallagher looked and because he thought he smelled alcohol, he believed Gallagher was intoxicated. (T. 1266-67).

Metro-Dade Detective Scott D'heere was the lead investigator in this case. (T. 1303). D'heere testified that while en route to the scene he spoke to uniform officer Clark who told him that she believed alcohol had been involved in the accident. (T. 1304-06). It was noted that on deposition D'heere had testified that he did not not recall if the officer had said that alcohol or drugs were involved. (T. 1306-07).

At the scene, D'heere entered the front of Officer Clark's patrol unit and observed Gallagher. (T. 1288-89). D'heere testified that he noted an odor of alcohol, that Gallagher's eyes were bloodshot, and that Gallagher seemed unconcerned with what was going on around him. (T. 1289). On cross-examination, D'heere

acknowledged that on deposition he had testified that the only observation regarding alcohol which he had made was the odor of alcohol. (T. 1311-12). He also acknowledged that he did not note the observations in his report under the section specifically set aside for observations. (T. 1313).

After making those observations, he requested that a blood sample be taken to determine Gallagher's blood alcohol content. (T. 1290). D'heere testified that he asked Officer Crocker, who worked in a DUI unit and had specialized training, to supervise the drawing of blood. (T. 1290). Crocker testified that he volunteered to supervise the drawing of blood over the radio before either he or D'heere arrived on the scene. (T. 1366).

Officer Crocker approached Gallagher in the rescue wagon and told him that he was going to supervise the drawing of blood. (T. 1370). Crocker testified that while in the rescue van he smelled alcohol on Gallagher and noticed that his eyes were bloodshot. (T. 1370-71). On cross-examination, he acknowledged that in the one page report he filed he indicated that he had only noticed the smell of alcohol and the bloodshot eyes when he supervised a second blood draw inside the port terminal. (T. 1400-02).

Crocker observed while paramedic Fernandez accomplished the blood draw, at 12:21 a.m., and Crocker took possession of the two vials of blood which were drawn. (T. 1372-74). Later, Crocker learned that Detective D'heere wanted a second blood sample and Crocker supervised a second drawing of blood by paramedic Rodriguez, at approximately 1:05 a.m. inside the terminal, and took possession of those vials. (T. 1376, 1379-83). Crocker

testified that during the second blood draw Gallagher repeatedly made reference to the car having recently had work done on the transmission and brakes. (T. 1376-78). Crocker testified that he told Gallagher that the reason for him being there had more to do with the smell of alcohol on Gallagher and indicated that Gallagher responded by saying, "My drinking this evening had nothing to do with the accident". (T. 1378-79).

Officer Crocker followed Gallagher to Jackson Memorial Hospital, ward D, where he took possession of a third blood sample drawn by nurse Pachenko at 1:57 a.m. (T. 1383-88). All three samples were then placed into a locked drop box at the hospital for pick up by the laboratory. (T. 1388).

Crocker testified that based upon his observations of Gallagher, he formed the opinion that Gallagher was impaired due to alcohol. (T. 1390).

Crocker admitted that there could have been a number of medical reasons for Gallagher's bloodshot eyes and that he could not tell from the odor of alcohol how much Gallagher had had to drink or when he had stopped drinking. (T. 1395-96, 1415-17).

Paramedic Joseph Fernandez testified that he was qualified to draw blood and drew the first blood sample from Gallagher. (T. 1447, 1456-63). Fernandez testified that his report, which was prepared some four (4) hours after the incident, indicated that the blood was drawn at 12:34 a.m. rather than the 12:21 a.m. time indicated on the vials. (T. 1474, 1477).

Fernandez testified that he did not notice an odor of alcohol on Gallagher when he examined him and drew the blood. (T.

1473-74). Fernandez did recall noting that Gallagher was expressionless and thinking that Gallagher might have been drinking. (T. 1468, 1474).

Paramedic Hugo Rodriguez testified that he drew the second blood sample from Gallagher. (T. 1488-93). The paramedic report indicated that the blood was drawn at 1:08 a.m. rather than the 1:03 a.m. time indicated on the vials. (T. 1502). Rodriguez filled the vials, placed them in a box, and sealed the box. (T. 1495-97, 1503-05). Rodriguez' only observations about Gallagher were that he was very quiet. (T. 1498-99).

Over a defense objection, Jeffrey Nottebaum, a toxicologist, testified as a witness for the State. (T. 1535-37).[2] Nottebaum testified that he tested all three samples of Gallagher's blood, which he obtained from a locked box at ward D, for blood alcohol content. (T. 1540-52). The test of the first sample, drawn at 12:21 a.m., resulted in a blood alcohol level of .11. (T. 1548-49). The test of the second sample, drawn at 1:03 a.m., resulted in a blood alcohol level of .09. (T. 1549-50). The test of the third sample, drawn at 1:57 a.m., resulted in a blood alcohol level of .07. (T. 1550).

On cross-examination and recross examination, Nottebaum testified that retrograde extrapolation is a common procedure,

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2. The defendant moved to exclude all testimony regarding the blood tests on the ground that it was irrelevant and overly prejudicial where the State could not present testimony of retrograde extrapolation which calculated the defendant's blood alcohol level at the time of the accident. (T. 45-65). The motion was denied. (T. 65). The objection to Nottebaum's testimony was based upon that motion. (T. 1535).

but that without information regarding when the subject's last drink was consumed, it should not be done. (T. 1575). Nottebaum indicated that he did not have sufficient information to determine what Gallagher's blood alcohol content was at 11:35 p.m., when the accident occurred. (T. 1553-54). Nottebaum conceded that it was possible that the 12:21 a.m. reading of .11 was Gallagher's highest level of the evening and that his blood alcohol level was below .10 at the time of the accident. (T. 1554).

The State presented the testimony of Dr. Marceline Burns. (T. 1644). Dr. Burns is a research psychologist whose primary area of study has been the effects of alcohol and drugs on human's abilities to perform complex tasks like driving. (T. 1645-51). Over a defense objection, the trial court qualified her as an expert. (T. 1653). Prior to Dr. Burns' testimony, the defense objected to her offering an opinion on impairment on the ground that it was an issue the jury could decide on its own, based upon the testimony, without the aid of an expert opinion. (T. 1640-43). The objection was overruled. (T. 1643).

Dr. Burns testified that alcohol is a central nervous system depressant which slows the brain's ability to process information, impairs judgment and performance, and increases risk taking. (T. 1655-58). Dr. Burns defined impairment as that point at which alcohol degrades one's ability to perform a task as compared with one's ability to perform the task without the presence of alcohol. (T. 1658, 1695-96).

Dr. Burns testified that her studies consistently revealed significant or serious impairment in the driving ability of per-

sons with blood alcohol levels of .10. (T. 1658-64). Dr. Burns twice testified, over objection, that .10 is the blood alcohol level which legislatures across the United States had established as "the limit at which you are an unsafe driver" or "unsafe to drive". (T. 1665-71). The trial court denied defense counsel's motions to strike and for mistrial. (T. 1665-68, 1671).

Dr. Burns was asked by the prosecutor to assume the facts of the accident, that immediately after the accident the driver had bloodshot and glassy eyes and the odor of alcohol about him, that he was described as driving in a very relaxed manner, and that he had the three (3) blood alcohol levels obtained after the accident. (T. 1675-76). She was then asked whether she had an opinion regarding the driver's impairment at the time of the accident. (T. 1676). Over a defense objection, she offered the opinion that the driver was impaired by alcohol at the time. (T. 1676). Dr. Burns indicated that she based that opinion on the facts assumed, her experience in studying the effects of alcohol on people, and her knowledge of the way the body handles alcohol. (T. 1676-77).

Dr. Burns testified that metabolism is the process by which the body rids itself of alcohol. (T. 1679). After explaining that the rate of metabolism of alcohol can be measured, Dr. Burns testified that Gallagher, based upon the three (3) post-accident blood tests, was metabolizing alcohol at .02 percent per hour. (T. 1679-81).

Dr. Burns was later asked, and allowed to answer over objection, whether she had an opinion regarding Gallagher's physical

condition from the time just before the accident to the time of the last blood test. (T. 1683-84). She testified that it was her opinion that "his performance in general and his driving performance were impaired by alcohol". (T. 1684).

Lee Swanger, a mechanical and materials engineer, performed an examination on the Central cab which Gallagher was driving and testified as a witness for the State. (T. 1713). Swanger testified that the braking system, transmission, tires, and steering on the car were in good condition and working order. (T. 1713-64). Swanger indicated that it was his opinion that there was no malfunction of the car which caused the collision. (T. 1763-64).

Gallagher's motion and renewed motion for judgment of acquittal were denied. (T. 1857-58). The defendant also requested that the jury not be instructed that it could find Gallagher guilty of the DUI offenses if it found that he had a blood alcohol level of .10 or higher. (T. 1878-80, 1887-89). The defense argued that there was no evidence from which the jury could conclude that the blood alcohol level was .10 at the time of the accident. (T. 1878-80, 1887-89). The request was denied and repeated objections to the instructions were overruled. (T. 1878-80, 1887-89, 2021).

POINTS ON APPEAL

(I)

WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE RESULTS OF BLOOD ALCOHOL TESTS TAKEN AFTER THE ACCIDENT WHERE THE STATE COULD NOT RELATE THE BLOOD ALCOHOL LEVEL BACK TO THE TIME OF THE ACCIDENT, IN VIOLATION OF GALLAGHER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL?

(II)

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD CONVICT THE JURY IF IT FOUND THAT GALLAGHER DROVE THE CAB WITH A .10 OR HIGHER BLOOD ALCOHOL LEVEL WHERE THERE WAS NO EVIDENCE ESTABLISHING THE BLOOD ALCOHOL LEVEL AT THE TIME OF THE ACCIDENT?

(III)

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL MADE AFTER A VICTIM'S HEARSAY TESTIMONY THAT SHE HAD LEARNED THAT SHE WAS STRUCK BY A DRUNK DRIVER, IN VIOLATION OF GALLAGHER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONT WITNESSES AND TO A FAIR TRIAL?

(IV)

WHETHER THE TRIAL COURT ERRED IN ALLOWING DR. BURNS, A RESEARCH PSYCHOLOGIST, TO TESTIFY (A) TO THE OPINION THAT GALLAGHER WAS IMPAIRED IN HIS DRIVING ABILITIES WHEN THE ACCIDENT OCCURRED, AND (B) THAT THE LEGISLATURES OF THE UNITED STATES HAD ESTABLISHED A .10 BLOOD ALCOHOL LEVEL AS THE LEVEL AT WHICH ONE IS AN UNSAFE DRIVER, IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL?

(V)

WHETHER THE TRIAL COURT ERRED IN ALLOWING LAY WITNESSES TO EXPRESS OPINIONS THAT GALLAGHER WAS DRUNK, INTOXICATED, OR IMPAIRED WHERE (A) THE WITNESSES COULD HAVE ACCURATELY AND ADEQUATELY TESTIFIED TO THE FACTS THEY PERCEIVED WITHOUT OFFERING OPINIONS, AND (B) THE OPINIONS AMOUNTED TO EXPRESSIONS OF OPINIONS OF THE DEFENDANT'S GUILT, INVADING THE JURY'S PROVINCE AND DENYING GALLAGHER A FAIR TRIAL?

SUMMARY OF ARGUMENT

The trial court erred in admitting the numerical blood alcohol test results where the State could not relate the blood alcohol level back to the time of the accident because the probative value of the results was outweighed by their prejudicial effect, especially when considering the other erroneously admitted evidence.

The trial court erred in instructing the jury that it could convict Gallagher if it found he was driving with a bood alcohol level of .10 or higher because there was no evidence establishing Gallagher's blood alcohol level at the time of the offense.

The trial court erred in denying Gallagher's motion for mistrial when a victim testified that she learned she had been hit by a drunk driver because the testimony was hearsay testimony on the critical issue at trial and denied Gallagher his right to confront witnesses.

The trial court erred in allowing Dr. Burns to express the expert opinion that Gallagher was impaired by alcohol while driving his car because the question of intoxication is one of common knowledge not requiring any special training or experience and because the opinion was an expression of opinion on the defendant's guilt. The trial court also erred in allowing Dr. Burns to testify that the legislatures throughout the country had established a .10 blood alcohol level as the level at which one is an unsafe driver because she was not competent to render such testimony.

The trial court erred in allowing lay witnesses to express

opinions that Gallagher was drunk, intoxicated, or impaired because those witnesses could have readily and accurately testified to their observations of Gallagher without rendering opinions, and because the opinions were expressions of opinion of the defendant's guilt.

ARGUMENT

(I)

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE RESULTS OF BLOOD ALCOHOL TESTS TAKEN AFTER THE ACCIDENT WHERE THE STATE COULD NOT RELATE THE BLOOD ALCOHOL LEVEL BACK TO THE TIME OF THE ACCIDENT, IN VIOLATION OF GALLAGHER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

The Third District Court of Appeal affirmed on this issue, relying on its previous decision in State v. Miller, 555 So.2d 391 (Fla. 3d DCA 1989). As in Miller, the court certified to this court, as a question of great public importance, the following question:

> Whether the numerical result of the blood alcohol test taken [fifty (50) minutes] 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.

Miller, at 392.

In Miller, the Third District, following a majority of jurisdictions, held that under the circumstances described in the certified question, the numerical result is relevant, admissible evidence and the failure to extrapolate the blood acohol result back to the time of driving goes to the weight of the evidence, not its admissibility. Id. at 393.

Petitioner submits, however, that the better rule is that announced in Desmond v. Superior Court, 161 Ariz. 522, 779 P.2d

1261, 1265-67 (1989) and State v. Dumont, 499 A.2d 787 (Vt. 1985) which hold that when the State cannot relate the blood alcohol level back to the time of the accident, the fact that the test revealed the presence of alcohol is admissible, but the numerical result is not. That rule allows admission of evidence relevant to impairment, that is, the presence of alcohol in the blood and the logical inference that the defendant had consumed alcohol. The rule, however, prevents the possibility of prejudice by the jury erroneously using the numerical result, which cannot be related back to the time of the offense, as actual evidence of intoxication at the time of the offense. Dumont. This is especially true where the jury is instructed, as here, that it may convict the defendant if it finds that he was driving with a blood acohol level of .10 or above.

Section 90.403, Florida Statutes (1989) requires the exclusion of relevant evidence if:

> . . . its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.
> . . .

§ 90.403, Fla. Stat. (1989).

This court has noted, citing 1 C. Ehrhardt, *Florida Evidence* § 403.1 at 100-03 (2d ed. 1984), that it is proper for trial courts, in weighing the probative value of evidence against its unfair prejudice, to consider (a) the need for the evidence, (b) the tendency of the evidence to suggest an improper basis for resolving the case, (c) the chain of evidence necessary to establish the material fact, and (d) the effectiveness of a limiting instruction. State v. McClain, 525 So.2d 420, 422 (Fla.

1988). An application of that criteria to a blood alcohol test result which cannot be related back to the time of the offense demonstrates that the prejudicial effect of the test result outweighs its probative value.

Florida courts have repeatedly recognized the severe prejudice resulting from the improper admission of evidence of intoxication or the use of intoxicants. See, McClain, 525 So.2d at 422 (defendant "could have been seriously prejudiced in the eyes of the jury if it became known that he had ingested even a trace amount of cocaine"); West v. State, 553 So.2d 254, 255 (Fla. 4th DCA 1989) (evidence of trace amount of valium in defendant's blood unfairly prejudicial); Neering v. Johnson, 390 So.2d 742, 744 (Fla. 4th DCA 1980) (improbable that prejudicial effect of admission of evidence regarding sobriety test would be eliminated by instruction to jury to disregard it). Because of the widespread association of .10 or above blood alcohol levels with intoxication or impairment and the obvious danger that a jury will misuse an unextrapolated test result to find impairment at the time of driving, the prejudicial effect of the unextrapolated test result outweighs its probative value. See, Riggins v. Mariner Boat Works, Inc., 545 So.2d 430, 432 (Fla. 2d DCA 1989) (in tort action, prejudicial effect of toxicologist's testimony that relied on inadmissible laboratory report to conclude that plaintiff's blood alcohol level was .11% outweighed its marginal probative value).

The state may prove driving under the influence by establishing either (a) that the driver was affected by alcohol

to the extent that his normal faculties were impaired, or (b) that the person drove with a blood alcohol level of .10 or above. § 316.193(1), Fla. Stat. (1989). Therefore, in prosecuting for driving under the influence, the material facts which the state seeks to establish by admission of an unextrapolated blood alcohol test result are either (a) that the defendant was affected by alcohol to the extent that his normal faculties were impaired, or (b) that the defendant had a blood alcohol level of .10 or above when driving.

When the state attempts to prove that a driver was affected by alcohol to the extent that his normal faculties were impaired, evidence that a blood test showed the presence of alcohol, and the logical inference that the person had consumed alcohol, is obviously relevant. Under the rule in Dumont and Desmond the state would be permitted to establish those facts, along with other facts probative of impairment. While the numerical test result may have some probative value on the impairment issue, the additional probative value it offers is minimal. This is so because absent relation back evidence, it is impossible to determine the person's blood alcohol level at the time he was driving. Therefore, it is not possible to establish that the blood alcohol level at the time of driving was a level at which impairment normally occurs. Consequently, if any inference of impairment can be made from the unextrapolated test result, it is a weak one. Accordingly, the state's need for the evidence is slight and the marginal additional probative value is outweighed by the unfair prejudice resulting from the danger that the jury

will misuse the numerical test result as actual evidence of impairment at the time of the offense. Dumont, at 789.[3]

An unextrapolated test result obviously does nothing to prove a blood alcohol level of .10 or above at the time of driving; that is the entire point of extapolating the later result. Therefore, the unextrapolated result is not probative of driving with a blood alcohol level of .10 or above and is irrelevant. When an expert cannot extrapolate a blood alcohol test result, it is unfair and nonsensical to allow the jury to hear the numerical result and speculatively extrapolate it to the time of driving.

Because of the widespread association of a .10 blood alcohol level with intoxication or impairment, any instruction to the jury that the unextrapolated test result is not the equivalent of impairment at the time of driving, but may be considered in deciding the impairment issue, would likely be ineffective. Cf. Neering v. Johnson, 390 So.2d 742, 744 (Fla. 4th DCA 1980) (instruction to disregard answer probably ineffective to cure prejudicial effect of admission of irrelevant evidence regarding defendant's sobriety test).

Because the prejudicial effect of the numerical blood alcohol test result outweighs its marginal probative value, its

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3. This danger addresses criteria (b) above because the numerical result creates the risk that the jury will misuse the test result as evidence of impairment. Also, where, as here, the jury is instructed that it may convict the defendant if it finds that he was driving with blood alcohol level of .10 or above, there is a danger that they may actually do so even though there is no evidence of the blood alcohol level at the time that the defendant was driving. See, issue II.

admission deprived Gallagher of a fair trial and requires reversal.

(II)

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD CONVICT THE JURY IF IT FOUND THAT GALLAGHER DROVE THE CAB WITH A .10 OR HIGHER BLOOD ALCOHOL LEVEL WHERE THERE WAS NO EVIDENCE ESTABLISHING THE BLOOD ALCOHOL LEVEL AT THE TIME OF THE ACCIDENT.[4]

Only jury instructions which have support in the evidence should be given. Buford v. Wainwright, 428 So.2d 1389, 1390-91 (Fla.), cert. denied 464 U.S. 956, 104 S.Ct. 372, 78 L.Ed.2d 331 (1983). Here, the defense repeatedly objected, on the ground of lack of evidence, to any instructions which authorized the jury to convict Gallagher if it found that he was driving with a .10 or higher blood alcohol level. (T. 1878-80, 1887-89). The trial judge overruled the objections. (T. 1878-80, 1887-89). Because the evidence did not support the instructions, it was error to do so.

The accident occurred at approximately 11:35 p.m. (T. 969, 1016, 1448). The toxicologist testified that the results of the blood alcohol tests, the blood having been drawn at 12:21 a.m.,

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4.

Once this court acquires jurisdiction of a cause, it has jurisdiction over the entire cause and may, in its discretion, rule upon issues which do not specifically provide a basis for jurisdiction. Savoie v. State, 422 So.2d 308, 310 (Fla. 1982); Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977). Petitioner requests that this court exercise its discretion and review issues II through V. Those issues all go to the primary issue at trial, Gallagher's alleged impairment, and their individual and cumulative effect denied Gallagher a fair trial.

1:03 a.m., and 1:57 a.m., were .11, .09, and .07, respectively. (T. 1548-50). Based upon those readings, Dr. Burns testified that Gallagher was metabolizing the alcohol at .02 percent per hour. (T. 1679-81). The only witness to testify regarding Gallagher's blood alcohol level at the time of the accident was the State's toxicologist, Jeffrey Nottebaum. He testified that there was not sufficient information to determine Gallagher's blood alcohol level at the time of the accident and conceded that it was possible that his blood alcohol level was below .10 at that time. (T. 1553-54).

From that evidence, the jury could conclude only that Gallagher had alcohol in his system when driving, but could not possibly conclude that his blood alcohol level at the time of the accident was .10 or higher. The evidence established only that Gallagher had used alcohol; it did not establish his blood alcohol level at the time of the accident. Therefore, the evidence did not support the giving of the instruction. See, Lambrix v. State, 534 So.2d 1151, 1154 (Fla. 1988) (instruction on intoxication not required when evidence shows use of intoxicants but not intoxication); Gardner v. State, 480 So.2d 91, 92-93 (Fla. 1985) (same). Giving the instruction constituted prejudicial error because it could cause the jury to assume that evidence supporting the instruction had been supplied, State v. Knepper, 62 Or. App. 623, 661 P.2d 560, 562 (Or. App. 1983) (in driving under the influence prosecution, error to give instruction that defendant could be found guilty if he drove with .10 percent or more blood alcohol level where no substantive evidence of defendant's blood

alcohol level), or to determine the blood alcohol level at the time of driving by pure speculation.

Section 316.193(1) allows for conviction for driving under the influence by proof either (a) that the person was affected by alcohol to the extent that his normal faculties were impaired, or (b) that he drove with a blood alcohol level of .10 percent or higher. §316.193(1); Miller. The jury might have convicted Gallagher under the .10 theory, despite the fact that the evidence was insufficient to support such a conviction.[5] The error was aggravated by the erroneous admission of the blood alcohol test results and Dr. Burns' testimony regarding legislatures having established .10 as the limit at which one is an "unsafe driver" and requires reversal for a new trial. See, issues I and IV.

(III)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL MADE AFTER A VICTIM'S HEARSAY TESTIMONY THAT SHE HAD LEARNED THAT SHE WAS STRUCK BY A DRUNK DRIVER, IN VIOLATION OF GALLAGHER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONT WITNESSES AND TO A FAIR TRIAL.

The admission of hearsay testimony which implicates the defendant denies the defendant his constitutional rights to

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5. The defense request for a special interrogatory verdict which would have required the jury to delineate whether it was convicting Gallagher under the .10 theory or the impairment theory was denied. (T. 1904-07).

cross-examine and confront witnesses by allowing the jury to hear the out of court statement without the defendant having the benefit of testing the memory, perception, or bias of the maker of the statement. Collins v. State, 65 So.2d 61, 66-67 (Fla. 1953); Postell v. State, 398 So.2d 851, 854-56 (Fla. 3d DCA), review denied, 411 So.2d 384 (Fla. 1981).

In Collins, a law enforcement officer testified, in a prosecution for a lottery offense, that he had learned during his investigation that the defendants were involved in the lottery business. This court recognized the testimony as hearsay evidence of the defendants' guilt and reversed for a new trial, commenting that:

> In the authorities to which we have been referred we have found no support for the course followed in respect of admitting testimony that a defendant on trial was said by some anonymous person to have been engaged in the very criminal transaction for which he was being tried.

Collins, 65 So.2d at 67.

Here, Gallagher was on trial for DUI-manslaughter and DUI-serious bodily injury. (R. 1-14A). The only issue at trial was whether Gallagher was driving under the influence of alcohol (T. 877-80, 1924, 1928, 1959-60, 2009). A victim, Martina Meyer, testified that she was waiting for her husband outside the terminal when something happened to her. (T. 1527-28). When asked what that something was, she testified that "[i]n retrospect I learned what it was". (T. 1528-29). When asked what it was, she replied, "I was hit by a drunk driver". (T. 1528-29). The source of the information was never identified. Therefore,

the jury was allowed to hear about an anonymous person or persons' statements that Gallagher was driving while drunk. The truth of those statements depended, of course, upon the credibility of the person or persons who made them. Gallagher, however, was prevented from attacking the credibility of the makers of the statements by testing, through cross-examination, the makers' memory, intelligence, candor, bias, and opportunity to observe. He was, therefore, deprived of his constitutional right to cross-examination and confrontation and consequently denied his right to a fair trial. Collins; Postell.

(IV)

THE TRIAL COURT ERRED IN ALLOWING DR. BURNS, A RESEARCH PSYCHOLOGIST, TO TESTIFY (A) TO THE OPINION THAT GALLAGHER WAS IMPAIRED IN HIS DRIVING ABILITIES WHEN THE ACCIDENT OCCURRED, AND (B) THAT THE LEGISLATURES OF THE UNITED STATES HAD ESTABLISHED A .10 BLOOD ALCOHOL LEVEL AS THE LEVEL AT WHICH ONE IS AN UNSAFE DRIVER, IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAl.

(A)

Expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts. Johnson v. State, 438 So.2d 774, 777 (Fla. 1983) (no error in refusing to allow expert witness to testify regarding the reliability of eyewitness identification), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); Johnson v.

State, 393 So.2d 1069, 1072 (Fla. 1980) (same), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981). §90.702, Fla. Stat. (1987). Moreover, no witness may offer an opinion on the defendant's guilt. Glendening v. State, 536 So.2d 212, 221 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989); Lambrix v. State, 494 So.2d 1143 (Fla. 1986); Spradley v. State, 442 So.2d 1039, 1043 (Fla. 1983). Here, the trial court allowed Dr. Burns to express an opinion on an issue which is a matter of common knowledge and which amounted to an expression of opinion on the defendant's guilt.

Intoxication is a matter of common knowledge. Commonwealth v. Womack, 307 Pa.Super. 396, 453 A.2d 642, 648 (Pa. Super. 1982). Therefore, evidence of intoxication is not of such a nature as to require special knowledge or experience in order for the jury to form a conclusion on the question. The jury heard testimony that Gallagher had bloodshot, glassy eyes, a blank look, slurred speech, the odor of alcohol about him, and certain blood alcohol levels at various time after the accident. The jury was capable of concluding, without the aid of expert testimony, whether Gallagher was impaired by alcohol and the state should not have been allowed to bolster its case on that issue by the use of expert testimony. Cf. State v. Hudson, 152 Ariz. 121, 730 P.2d 830, 834 (1986) (expert could testify to effect of intoxication on defendant, but not extent of his intoxication at time of offense).

The most significant issue in the case was whether Gallagher was affected by alcohol to the extent that his normal faculties

were impaired. See, 316.193(1), Fla. Stat. (1987). The trial court allowed Dr. Burns to express the opinion, after having defined impairment (T. 1658), that Gallagher was impaired by alcohol at the time of the accident. (T. 1676). Later, Dr. Burns reiterated her opinion that Gallagher's "performance in general and his driving performance were impaired by alcohol". (T. 1684).

That opinion amounted to an expert opinion on the defendant's guilt and was impermissible. Glendening (allowing expert witness to express opinion that child's father committed sexual offense improper opinion on guilt of accused); Spradley (medical examiner's testimony that victim's death caused by homicide improper expression of opinion on defendant's guilt). See also, Garganus v. State, 451 So.2d 817, 821-22 (Fla. 1984) (proper to exclude psychologist's opinion about whether defendant's actions result of "depraved mind" or "premeditated plan" because question called for legal conclusion which was within jury's province and not suited to opinion testimony); Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121, 136 (1983) (in DWI prosecution, opinion which parrots words of statute and declares that defendant was driving while intoxicated amounts to impermissible opinion on guilt of accused). Cf. State v. Bingman, 745 P.2d 342, 345 (Mont. 1987) (expert without personal knowledge of incident could not testify to defendant's intoxication at time of offense); Hudson (expert could testify to effect of intoxication on defendant, not to extent of defendant's intoxication at time of offense). Accordingly, the trial court erred in allowing the admission of Dr. Burns opinion. Because the jury was likely to be impressed

by the credentials of the witness, the admission of that testimony, particularly when considered with the other errors committed, was prejudicial and requires a new trial.

(B)

Expert testimony is not admissible if the witness does not have expertise in the area in which the opinion is sought. United Technologies Communications, Co. v. Industrial Risk Insurers, 501 So.2d 46, 49 (Fla. 3d DCA 1987). Dr. Burns was a research psychologist who had studied the affects of alcohol on human performance. (T. 1645-51). She was not a legal expert and was not qualified to testify to the meaning and effect of the actions of legislature's across the country. Still, she was twice allowed to tell the jury that those legislatures had established .10 as the blood alcohol level "at which you are an unsafe driver". (T. 1665-68). Thus, the jury was told by an expert, without any instruction on the evidentiary effect of such legislation and in light of testimony that Gallagher's blood alcohol level was .11 fifty (50) minutes after the accident, that legislatures all across the country had declared driving with a .10 blood alcohol level to be unsafe. The admission of such testimony was error. See, United States v. Dyer, 752 F.2d 591, 593-94 (11th Cir. 1985) (proper to exclude psychiatrists opinion on whether defendant had accurately stated law, an issue on which the expert was not competent to testify); Cf. Garganus (proper to exclude psychologist's testimony calling for legal conclusion on defendant's state of mind which was for jury to decide). The admission of

such testimony, particularly in combination with the other evidentiary errors, requires reversal.

(V)

THE TRIAL COURT ERRED IN ALLOWING LAY WITNESSES TO EXPRESS OPINIONS THAT GALLAGHER WAS DRUNK, INTOXICATED, OR IMPAIRED BECAUSE (A) THE WITNESSES COULD HAVE ACCURATELY AND ADEQUATELY TESTIFIED TO THE FACTS THEY PERCEIVED WITHOUT OFFERING OPINIONS, AND (B) THE OPINIONS AMOUNTED TO EXPRESSIONS OF OPINIONS OF THE DEFENDANT'S GUILT, INVADING THE JURY'S PROVINCE AND DENYING GALLAGHER A FAIR TRIAL.

(A)

Lay witnesses may testify in the form of inferences or opinions when they can not readily, and with equal accuracy and adequacy, communicate what they have perceived without testifying in terms of inferences or opinions. § 90.701(1), Fla. Stat. (1987). See, Zwinge v. Hettinger, 530 So.2d 318, 323 (Fla. 2d DCA 1988) (proper to preclude lay witnesses from testifying that certain collision caused another accident because it was for jury to draw inferences and conclusions regarding causation from witnesses' testimony); Mills v. State, 367 So.2d 1068 (Fla. 2d DCA 1979) (error to allow lay witness to give opinion that defendant did not act in self defense), cert. denied, 374 So.2d 101 (Fla. 1979). The reason for the rule is that it is the jury's function to draw inferences and arrive at conclusions based upon the testimony and evidence and the jurors are as qualified as the lay witnesses to do so. Zwinge; Thomas v. State, 317 So.2d 450 (Fla.

3d DCA 1975) (proper to preclude lay witness from testifying to defendant's intent to rape as it was an issue for jury to decide), cert. denied, 333 So.2d 465 (Fla. 1976).

In this case, numerous lay witnesses were allowed to give their opinion that the defendant was drunk, intoxicated, or impaired. (T. 978, 1071-72, 1158, 1177-78, 1390). All of those witnesses could have, and in fact did, readily, and with equal accuracy and adequacy, communicate what they had perceived regarding Gallagher's condition and actions. The various witnesses noted Gallagher's bloodshot, glassy eyes, his difficulty walking, his slurred speech, his blank look, and the odor of alcohol about him. Additionally, the jury had before it the evidence of the blood alcohol levels taken after the accident. It was not necessary, and improper, for the witnesses to express opinions that Gallagher was drunk, intoxicated, or impaired. Intoxication is within the ordinary experience of jurors and the jury could have concluded or inferred from the witnesses' observations of Gallagher's condition and actions whether he was drunk, intoxicated, or impaired. Allowing the opinions invaded the jury's province to draw inferences and conclusions from the evidence, Zwinge; Mills; Thomas, and, particularly when considered with the other evidentiary errors in the case, constituted reversible error.

(B)

As noted above in the argument under point IV(A), it is impermissible to allow any witness to express an opinion on the

defendant's guilt. Glendening; Lambrix; Spradley; Here, numerous witnesses testified that Gallagher was drunk, intoxicated, or impaired. (T. 978, 1071-72, 1177-78, 1390). The only issue in the case was whether Gallagher was driving under the influence of alcohol. That fact can be shown by proof of driving with a blood alcohol level of .10 or higher or by proof that a person was affected by alcohol to the extent that his normal faculties were impaired. §316.193(1), Fla. Stat. (1987). The lay opinions given, particularly those indicating that Gallagher was impaired, amounted to expressions of opinion on the defendant's guilt and were impermissible. Glendening; Lambrix; Spradley; See also; Fuenning (in DWI prosecution, opinion which parrots words of statute and declares that defendant was driving while intoxicated amounts to an impermissible opinion on guilt of accused). The numerous expressions of such impermissible opinions, especially when viewed with the expert's and Ms. Meyer's impermissible testimony, prejudiced the defendant's right to a fair trial and require reversal.[6]

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6 An objection was made only to Frank Valiente's opinion that Gallagher was impaired. Appellant submits both (a) that the admission of that opinion, especially when considered with the impermissible testimony of Dr. Burns and Martina Meyer was sufficient to require reversal, and (b) that admission of the other witnesses' opinions, especially in combination with the impermissible testimony objected to, constituted fundamental error by going to heart of the case, an expression of opinion of Gallagher's guilt.

CONCLUSION

Based on the cases and authorities cited herein, the appellant requests this court to reverse the judgment of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 13 day of March, 1991.

Robert Burke

ROBERT BURKE
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO.

DAVID LEE GALLAGHER,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

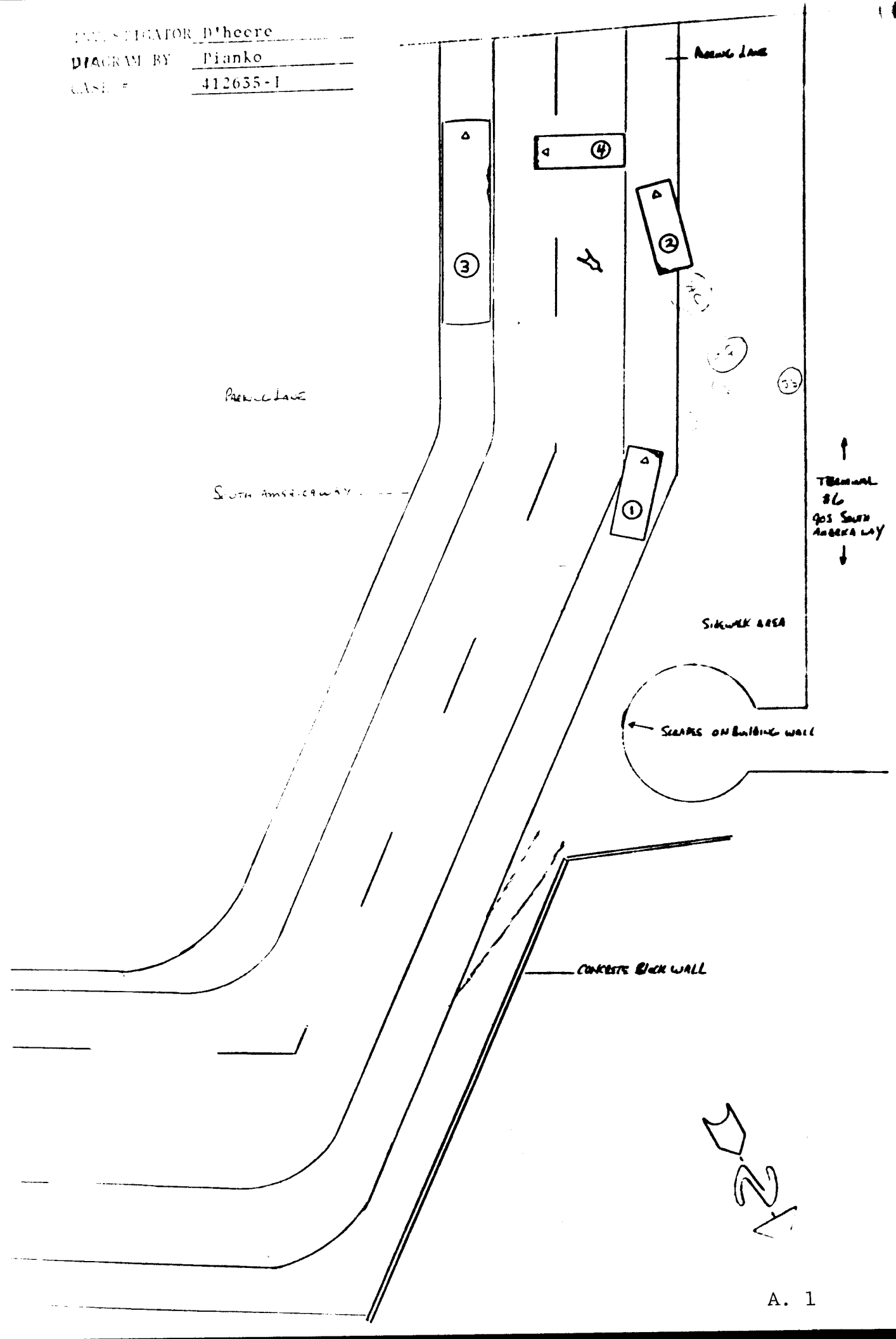
APPENDIX

INDEX

INVESTIGATOR D'heere

DIAGRAM BY Pianko

CASE # 412635-I



NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1990

DAVID LEE GALLAGHER,	**	
Appellant,	**	
vs.	**	CASE NO. 90-164
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed December 4, 1990.

An Appeal from the Circuit Court for Dade County, Arthur Rothenberg, Judge.

Bennett H. Brummer, Public Defender, and Robert Burke, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Jorge Espinosa, Assistant Attorney General, for appellee.

Before JORGENSON, LEVY, and GODERICH, JJ.

PER CURIAM.

Affirmed. Occhicone v. State, No. 71,505 (Fla. Oct. 11, 1990); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Duest v.

State, 462 So. 2d 446 (Fla. 1985); Jones v. State, 289 So. 2d 725 (Fla. 1974); State v. Miller, 555 So. 2d 391 (Fla. 3d DCA 1989); Peterson v. State, 505 So. 2d 16 (Fla. 3d DCA 1987); Wooten v. State, 464 So. 2d 640 (Fla. 3d DCA), rev. denied, 475 So. 2d 696 (Fla. 1985).

Regarding the issue of retrograde extrapolation of blood alcohol levels, we recertify to the Florida Supreme Court the same question of great public importance certified in Miller.

Affirmed.