IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

CASE NO: 78,568

ERIC NORSTROM,
Respondent.

ANSWER BRIEF OF RESPONDENT

On Appeal from the District Court of Appeal of the State of Florida, Fourth District.

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AMENDMENT TO
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AMENDMENT TO ANSWER BRIEF OF RESPONDENT

The Respondent, ERIC NORSTROM, hereby files this Amendment to his ANSWER BRIEF OF RESPONDENT previously filed with the Supreme Court of Florida. The amendment is a Summary of the Argument.

SUMMARY OF THE ARGUMENT

The Respondent would first maintain that the Fourth District Court of Appeal correctly held that the trial court erred in refusing to suppress statements given by Respondent to the police when these communications were made during the officer's investigation of the traffic accident. The accident report privilege states that "no such report shall be used in evidence in any trial, civil or criminal, arising out of an accident". F.S. 316.006. In the instant case, Officer LaVoie stated that when she spoke to the Respondent, she was investigating an accident and not a crime, (TMS 39), and that Respondent was the first person she spoke to. (TMS 38) Officer LaVoie further stated that for the first seventy-two hours she was investigating an accident,(TMS 39), and that the investigation lasted forty-five (45) days. (TMS 45) Finally, the Respondent testified that he gave a statement to the police to aid in the accident investigation, and that the police made it clear to Respondent that they were questioning him far the purpose of the accident investigation. (TMS *60-62)*

The Respondent would next maintain that this error was anything but harmless, and that the State in no way even arguably establishedthat this error was harmless beyond a reasonable doubt, in that it did not cause or contribute to the order under review. The Fourth District has already found that based on the evidence this error was not harmless. Additionally, it must be noted that this was an extremely sensitive and emotional case which caught the heart and emotion of the entire community. Without Respondent's statement he could have possibly been found guilty of only Reckless

Driving or Culpable Negligence, both misdemeanors.

The third argument by the Respondent relates to the State's reliance, for the first time, on a statutory amendment which took effect more then three years after the accident. This attempt by the State violates the prohibition against ex post facto legislation as guaranteed by both the United States and Florida Constitutions. It also violates almost two hundred years of established precedent which holds that every law that alters the legal rules of evidence, and receives different testimony than the law required at the time of the commission of the offense, in order to convict the offender, is ex post facto. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)

The Respondent's final argument is that the State's attempted reliance on the 1991 statutory amendment to the accident report privilege has not been preserved for review with this Court. This change took effect on July 1, 1991. The Fourth District rendered its opinion on August 7, 1991. At no time did the State ever file notice of supplemental authority nor did they seek a rehearing, but rather they raced to this Court crying foul. It is a fundamental principle of appellate practice that a claim of error must be preserved for review by the presentation of a specific issue in the lower tribunal at an appropriate stage of the proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a copy** of the foregoing **has** been furnished by U.S. **Mail** to Joan Fowler, Assistant Attorney General, **Office** of the Attorney General, 111 Georgia **Avenue, Room 204,** West Palm Beach, Florida, 33401, this 25th day of **October,** 1991.

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PRELIMINARY STATEMENT

Respondent was the Defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court, Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In this brief, the Respondent will be referred to as he appears before this Honorable Court, and the Petitioner will be refereed to as the State or Petitioner.

The symbol "R" will be used to designate the record on appeal.

The symbol "SR" will be used to designate the supplemental record on appeal.

The symbol "TMS" will be used to designate the transcript of the Motion to Suppress hearing conducted January 18, 1989.

QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT PROPERLY FOUND THAT THE RESPONDENT'S STATEMENTS WERE PRIVILEGED ACCIDENT REPORT COMMUNICATIONS?

II. WHETHER THE PRIVILEGED STATEMENT'S OF THE RESPONDENT ERRONEOUSLY INTRODUCED IN THE TRIAL WERE HARMLESS?

III. WHETHER THE ACCIDENT REPORT PRIVILEGE STATUTE, AS AMENDED IN 1991, IS A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LEGISLATION AS APPLIED TO THE RESPONDENT?

IV. WHETHER THE APPLICATION OF THE 1991 AMENDMENT TO THE ACCIDENT REPORT PRIVILEGE, AS APPLIED TO THE RESPONDENT, HAS BEEN PRESERVED FOR CERTIORARI REVIEW?

STATEMENT OF THE FACTS

While Respondent would generally accept as true the Petitioner's Statement of the Facts, it must be noted that many of those facts have absolutely no relevant bearing on the certified question. The extent of the victims' injuries have nothing whatsoever to do with the issue of the Respondent's accident report communications but was meant to inflame the conscience of this Court.

The Respondent would submit the following relevant facts: On March 25, 1988, after being involved in a motor vehicle accident, the Respondent, ERIC NORSTROM, a sixteen (16) year old high school student, was transported to the Boynton Beach Police Station by Officer Oliphant. (TMS 8,11) Officer Oliphant stated that he never told Respondent that he was conducting a criminal investigation. (TMS 11) He further stated that Officer LaVoie was in charge of the case and she would make the determination as to whether charges would be filed. (TMS 12) Officer Oliphant indicated that his report did not state why Respondent was being arrested. Also, that Sergeant Kuss told him to arrest Respondent and transport him to the police station. (TMS 14,18) Officer Oliphant further stated that when he spoke to Respondent's mother, he advised her that what had just occurred was an accident. (TMS 20)

Officer Marie LaVoie testified that she was dispatched to the scene of the accident and checked in with Sergeant Kuss who let her take over the accident scene. (TMS 22-24) Officer LaVoie came in contact with Respondent at the police station and asked

him if he would not mind speaking with her and that "we had to take a statement, at which time he granted that he would." **(TMS** 25) Officer LaVoie stated that by virtue of Officer Rieger, who signed the initial accident report and was present when Respondent gave his accident statement, indicating that the investigation was not complete, this paved the way for her to do the work she had to do. **(TMS** 25,36) Officer LaVoie stated that for the first seventy-two (72) hours she was investigating the accident and not a crime. (TMS 39) As this relates to the Respondent, Officer LaVoie indicated that she made it clear to him that she was investigating an accident and that when she sat down with him, this was for the purpose of an accident investigation. **(TMS 39)** Further, as far as she was concerned, Respondent was not in custody and could have gotten up and left if he has so desired. **(TMS** 39)

Officer LaVoie stated that the information communicated by Respondent assisted her in beginning her accident investigation. (TMS 42) In fact, Respondent gave her facts which she needed to begin what was to become a full-time job for the next forty-five (45) days. **(TMS 42)**

Officer LaVoie acknowledged that the driver of a vehicle has a duty to give information that he was involved in an accident along with other necessary information to a police officer. **(TMS 42)** She further acknowledged that this was one reason why she was asking Respondent the questions. Officer LaVoie stated that the reason it was important for her to talk to Respondent was because it was a serious accident, and the reason for him being

there was so that he could talk about what happened that night. (TMS 43) Offices LaVoie again stated that it was her position that up until a certain point in her investigation, Respondent was there for the purpose of an accident investigation.

Respondent testified that he recalled giving a statement to Officer LaVoie to aid in the accident investigation. (TMS 60) He stated that he felt he had to give a statement because he was a licensed driver and was in an accident. (TMS 60) Respondent testified that he was never placed under arrest that night, and that he was taken to the police station to give a statement for the accident investigation. (TMS 60-61) Respondent indicated that he did not have a problem talking to the officers because he was aiding in the accident investigation being something that he had to do. (TMS 62) When the officer told Respondent to hang in there and that everything will be okay (R. 1681), Respondent understood that to mean that if he cooperated and told them everything, things would be okay. (TMS 62) Respondent further testified that the police made it clear to him that they were questioning him for the purpose of the accident investigation. (TMS 62)

The trial court asked Respondent, "I know they read you your Miranda rights and that you signed it but did anybody say that?" The court repeated, "that they were conducting a criminal investigation and that you were not required to answer the question about the criminal investigation?" Respondent answered, "No". The trial court wanted to know if law enforcement distinguished that for Respondent and noted that Miranda says it but does not say it is a separate investigation. Respondent testified that he never heard that. (TMS 73)

POINT ON APPEAL

ARGUMENT

REGARDLESS OF MIRANDA WARNINGS BEING GIVEN, THE RESPONDENT'S STATEMENTS TO LAW ENFORCEMENT, WHICH WERE FOR THE SOLE PURPOSE OF CONDUCTING AN ACCIDENT INVESTIGATION, WERE PRIVILEGED COMMUNICATIONS UNDER THE ACCIDENT REPORT PRIVILEGE.

A. The District Court properly found that the Respondent's statements were privileged accident report communications.

As the Fourth District Court of Appeal properly held, the trial court erred in refusing to suppress the statements the Respondent gave to Officer LaVoie when said statements were made during the officer's investigation of the traffic accident. Norstrom v. State, 16 F.L.W. D 2063 (Fla. 4th DCA 1991).

The accident report privilege is a legislatively enacted form of immunity protecting statements made by persons involved in motor vehicle accidents and being introduced against them in court actions. The privilege provides in part that:

> All accident reports made by persons involved in accidents shall be without prejudice to the individual so reporting and shall be further confidentially used for the department or other state agency having use of the records for accident prevention purposes, . . . no such report shall be used as evidence in any trial, civil or criminal, arising out of an accident. Florida Statute 316.066 (Emphasis added.)

The courts have interpreted this statute as to make inadmissible as privileged communications any statement made by a driver to a police officer for purposes of completing an accident report.

This Court, in Brackin v. Boles, 452 So.2d 540 (Fla. 1984), addressed this issue. Brackin began as a personal injury action arising from an automobile accident. Boles, the driver of one car, sued Brackin, the driver of the other. At trial, Boles testified that he stopped at a three way intersection. He saw headlights approaching from both directions but judged that he had enough time to make a left turn and proceed down the highway. As he proceeded through the intersection, the car on his left, driven by Brackin, rammed him broadside. Boles received severe injuries. The defense attempted to call the Highway Patrol officer who investigated the accident and proffered the officer's testimony as to the blood alcohol content of Boles' blood. The trial court ruled this inadmissible under Florida Statute 316.066 (1981). Boles attempted to submit evidence that Brackin had been ticketed and fined for violating a restriction on his driver's license. Id. at 542. Boles appealed the verdict that Brackin was not negligent. Brackin cross-appealed arguing that the trial court erred in not allowing him to introduce into evidence testimony concerning Boles' blood alcohol content. This Court, in noting other decisions inconsistent with the position taken in Brackin, receded from those decisions to the extent that they prohibited admissibility of the results of the blood alcohol test. Brackin at 542. This Court noted the wealth of case law holding that taking of blood samples does not violate the due process clause of the Fourteenth Admendment nor is it testimonial in nature. See: Schmerber v. California, 384 U.S. 757 (1966) and Breithaupt v. Abram, 352 U.S. 432 (1957). The Brackin Court noted the

distinction between an accident report investigation and a criminal investigation based on a construction of F.S. 316.066, The most important section being subsection (4), which provides that "accident reports made by persons involved in accidents shall be without prejudice to the individual so reporting" and that "no such report shall be used as evidence in any trial . . ." Brackin at 544. This Court noted that:

> We now see no need for a distinction between the accident report investisation and the criminal investisation except as it pertains to a defendant's individual communications to a police officer or in a report submitted by a defendant in accordance with the statute. Id. at 544. (Emphasis supplied.)

The issue comes down to what statements given by Respondent were privileged under the statute. The lesson in Brackin is quite important because it recognizes that there still is a distinction between accident report investigation and criminal investigation as it pertains to an accused's individual communications. Id. at 544. Although Brackin dealt with a blood alcohol test and whether or not it was privileged, its holding was important to the facts in the instant case. The Court maintained that:

> The statute only Prohibits the use of communications "made by persons involved in accidents" in order to avoid a Fifth Amendment violation. The distinction this Court has previously made between investigations for accident report purposes and investigations for purposes of making criminal charges is artificial, is not a proper interpretation of the statute, and must be eliminated. We clearly and emphatically hold that the purpose of the statute is to clothe with statutory

> immunity only such statements and communications as the driver, owner, or occupant of the vehicle is compelled to make in order to comply with his or her statutory duty under Section 316.066(1)(2). Id. at 544. (Emphasis supplied.)

In Thomas v. Gotlieb, 520 So.2d 622 (Fla. 4th DCA 1988), the court held that an officer could not testify that a motorist failed to complain to the investigating officer of injuries he sustained in the accident. In Yost v. State, 542 So.2d 419 (Fla. 4th DCA 1989), the court found reversible error where an accused advised an investigating officer at the scene of an accident that he had consumed six (6) or seven (7) beers but was not impaired nor at fault. The court determined "that such testimony violates F.S. 316.066(4), making such statement privileged," Brackin v. Boles, supra. In Alley v. State, 553 So.2d 354 (Fla. 4th DCA 1989), the court, in reversing another conviction, had to address whether a statement made by an accused at the scene and later at a medical clinic was given during the accident report phase of an investigation and whether or not they were inadmissible. The statement in that case was the accused indicating to investigating officers that she had been drinking all night, all day and the night before and she knew that a blood test would "nail" her. The court indicated that "there is substantial competent evidence to conclude the accident investigation phase continued until the officer gave Appellant her Miranda warnings at the medical clinic." Id. at 355. The court determined, based upon the facts of Alley, supra, that the reading of Miranda rights triggered the start of a criminal

investigation phase. The Alley court went on to note that once the accused was advised of her Miranda rights there were no further statements made. That is a distinctly different scenario than the instant case, but the case is important because it is yet another recognition that statements made by an accused during the accident investigation phase shall be privileged.

In the instant case, Officer LaVoie indicated that she asked Respondent if he wouldn't mind speaking with her and Detective Bean and "that we had to take a statement, at which time he granted that he would." (TMS 25) At the beginning of the statement, Respondent's rights were read to him. (TMS 25) Officer LaVoie was both the statement taker and the accident investigator. She put the case together. (TMS 37) Respondent was the first person she spoke to as it concerned her investigation. (TMS 38) She was clear when she indicated that when she spoke with the Respondent, she was investigating an accident and not a crime. (TMS 39) She did acknowledge that a driver has a duty to give information with respect to an accident, and that was why she was asking the questions to Respondent regarding the acident. (TMS 42) Up until a certain point in Officer LaVoie's investigation, the questions asked were solely for the purpose of an accident investigation. (TMS 43) The best indicator of that occurs during the portion of the transcribed statement (R. 1691) where Officer Lavoie says the following:

> "Okay, Eric, at this point we're going to kind of change hats here, okay. It's an accident with serious injuries and we do have a fatality so pending on the results of the blood test that was taken from you

> at the hospital, if it comes back that you were under the influence of alcohol at the time then charges will be filed. I have to let you know that so I'm just going to ask you a few questions that would cover that aspect as far as the D.U.I charge, Driving Under the Influence charge. Do you understand?" (Also S.R. of actual tape).

From this point on, Officer Lavoie asked the Respondent questions about drinking relative to a possible crime.

Following Respondent's statement, Officer LaVoie indicated to her fellow officer that, "I can't think of anything else to ask him that we did not do in the accident investigation." (R. 1692) [Emphasis supplied.] Officer LaVoie's comment certainly solidifies Respondent's position, that up until a certain point in time, it was an "accident" investigation. Officer LaVoie herself, stated repeatedly that what they were doing was an accident investigation. Respondent was placed in a position where he had no choice but to testify in an effort to explain his taped statement. When Respondent was answering questions during the accident investigation phase, he admitted that he was speeding. By answering the questions, he was doing what any motorist is required to do. Reading the Respondent his rights in the beginning did not eliminate the accident report privilege. The trial court was evidently concerned with what the officer had done based on the court's own explanation to the officer of the text book way that this matter is supposed to be handled. What the officer meant is not as important as what was conveyed to Respondent and what Respondent understood.

As far as Respondent was concerned, he gave a statement to

Officer LaVoie to aid in the accident investigation. (TMS 60) Be felt he had to give that statement because he was a licensed driver and he was in an accident. (TMS 60) Of equal importance was Officer LaVoie's candid testimony on direct examination that she indicated to Respondent that we had to take a statement. (TMS 25) Respondent was unequivocal that his understanding as to why he was taken to Boynton Beach was to give a statement in an accident investigation. (TMS 61) He was under the impression that if he cooperated with the officers, everything would be okay. (TMS 62) They had made it clear to him they were questioning him for purposes of an accident investigation. (TMS 62) Respondent indicated that he did not know if a criminal investigation was going on. (TMS 69) Respondent put it most succinctly when he indicated to the prosecutor on cross-examination that "she said there was an accident and they had to ask me some questions. She never said criminal." (TMS 69).

The trial court apparently had some concern over this in its questioning of Respondent. The trial court was concerned with whether or not the officers ever distinguished what was a criminal investigation versus what was an accident investigation. (TMS 73) Even though Miranda was read, the trial court noted that even though Miranda may say it, it does not discuss it as a second investigation. Respondent indicated he never heard that. (TMS 73).

In the trial court's order denying the Motion To Suppress, the court indicated that "the changing hats language dates back to case law now clearly and emphatically rejected as artificial and

not a proper interpretation of the statute." (R. 1706) Citing Brackin v. Boles, supra. What the trial court overlooked was Brackin's language that there is a distinction between the accident report investigation and the criminal investigation when it pertains to a defendant's individual communications to a police officer. Id. at 544. The trial court, most respectfully, overlooked the fact that Brackin dealt with a blood alcohol sample versus communications. That is precisely why the language is contained within Brackin that there still is a distinction that pertains to an accused's communications to a police officer. Brackin at 544. It is precisely this reason that courts around the state have continued to recognize the accident report privilege as it results from statements made by an accused. See: Alley, supra; Yost, supra; and Kornegay v. State, 520 So.2d 681 (Fla. 1st DCA 1988). Lastly, Pastori v. State, 456 So.2d 1212 (Fla. 2nd DCA 1984) goes through an analogy and utilizes Brackin, and involves a situation where the accused was read Miranda twice and then questioned. Brackin is cited in Pastori and indicates that the statute applies to the communications made by a person involved in an accident. In citing Brackin as well as F.S. 316.066, the case indicates that "moreover, any statements made by a petitioner to a police officer for purposes of completing an accident report would be privileged, and thus inadmissible." Id. at 1213.

Respondent's mental condition is of as much importance to what occurred that morning as anything else. Officer LaVoie indicated at the Motion To Suppress hearing that Respondent was

quite upset and that when they first got to the room they had to try and calm him down a little. (TMS 41) He was crying and he was upset. (R. 692) In fact, Officer LaVoie indicated that there are portions on the tape where you hear sounds indicative of crying and how upset Respondent was. (R. 694) Respondent wanted to know what the situation was with Amber Hunter and Charles Hamby. (R. 694-695) In considering this, this Court should be mindful of two cases. The first is Porter v. Pappas, 368 So.2d 909 (Fla. 3d DCA 1979). This case centered on the question of whether a trial court committed reversible error in admitting into evidence a written and signed statement made by a minor operator of an automobile to officers at the scene of an accident to the effect that the minor did not have permission of the owner or primary user of the automobile to drive it at the time of the accident. Id. at 910. The case involved Lori Boehn and Helen Pappas. The vehicle in question was owned by Lori's father, Frederick. Lori testified that the day of the accident, she and her friend, Helen, along with some others had gone to the beach. They returned to Helen's home to take showers. While Lori was showering, Helen took the ignition keys that Lori had left in the bathroom and drove away in Lori's vehicle. She drove only a short distance but was involved in an accident causing serious injuries to another party. Lori told the jury that when she came out of the shower she didn't realize her keys were gone and then she learned that her friend had been in an accident. She indicated that she never gave permission for her friend to use the vehicle, Shortly after the accident occurred, a park police officer

apprehended Helen and took her back to the scene of the accident, turning her over to an investigating officer. The investigating officer testified at trial that it was his responsibility to prepare the traffic report. When he arrived, a traffic homicide investigator was sent because of the possibility that a death may have occurred. This officer testified that once he appeared at the accident site, he was in charge and directed the other officer to assist him. Once this second officer arrived, in the presence of the park officer, he gave Helen her Miranda rights and then took a written statement from her. He did not advise Helen that he was investigating for a possible homicide or that the report would not be made part of the traffic report to be filed in Tallahassee. He did not advise her that his report was any different than any other police officer's report. The report contained the statement made by Helen that she took the vehicle without permission notwithstanding her testimony to the contrary. Id. at 910-911. Over objection, her statement was admitted at trial. She contended on appeal that it was reversible error for the trial court to admit the written statement into evidence because she was never informed that the statement was not being taken as part of the traffic accident report. In reversing the judgment and holding that the statement was privileged, the Porter court relied on Nash Miami Incorporated v. Ellsworth, 129 So.2d 704 (Fla. 3rd DCA 1961). In that opinion, the Third District Court of Appeal noted as follows:

> That Appellee urges that the second report given to Officer Fontana was not an accident report within the meaning of the statute, He

> argues that the statement given to Officer Fontana was not for the purpose of making an accident report but for discovery and possible criminal charges which might arise from the accident. From the viewpoint of the person interrosated there is little difference. The distinction, to have meaninq would require realization bv a person charaed with doing such a report that one officer was reporting the accident while the second who asked the same questions was not reportinq the accident. Supra, at 129 So.2d 706. Id. at 911. (Emphasis supplied.)

The importance of this goes to the fact that even though the Miranda rights were read, it made no difference. The person interrogated is the one whose viewpoint needs to be considered.

Elder v. Ackerman, 362 So.2d 999 (Fla. 4th DCA 1978), presented a similar situation. This case also involved the admissibility of a statement by a driver of a vehicle given to a police officer at the scene of an accident. Ackerman was a sixteen (16) year old high school boy who was involved in an accident in which two (2) individuals were killed. Following the accident, a deputy sheriff arrived and proceeded with a traffic accident investigation. Thereafter, a detective arrived to assist in the investigation. The traffic accident investigator interrogated Ackerman to obtain information for the accident report. Ackerman was then interrogated further by the same officer who did the accident investigation and also read him his Miranda rights. After the accident investigator received sufficient information for the accident report, the second officer proceeded to interrogate Ackerman further about the accident. Ackerman apparently told this second officer that

he was not sure what color the traffic light was when he entered the intersection, yet at trial, Ackerman testified that he had a green light. Id. at 1000. The trial court refused to admit the testimony which Ackerman gave to the officer investigating a possible homicide. Id. at 1000. There was no showing that Ackerman knew when the accident investigation ended and the criminal investigation began. The Elder court noted that the only possible indication of a different character of the investigation was the fact that Walsh advised Ackerman of his constitutional rights. But so did McDonough during his interrogation for the accident report. Id. at 1002.

In the instant case, Officer LaVoie was both the accident investigator and the criminal case investigator. Her reading Respondent his rights at the beginning of the statement is similar to the rights being read in Elder, supra; Porter, supra; and Pastori, supra. It makes no difference in this case because there was only one officer. One must also consider the emotion of the situation and the terrible injuries to individuals who were Respondent's friends, as well as the fact that Respondent was sixteen (16) years old. The Fourth District Court of Appeal put the problem in its proper perspective when it indicated:

> "How is a sixteen (16) year old boy at the scene of a serious auto accident and the emotional upset which usually accompanies such an experience supposed to discern the nuances that the dichotomy existing between investigations for automobile accident reports and investigations for the criminal aspects of automobile accidents?" Ackerman, supra, at 1002.

Respondent's uncontradicted testimony was that he understood he was providing information for the accident investigation.

In West v. State, 553 So.2d 254 (Fla. 4th DCA 1989), the court again took up the question of the accident investigation privilege. West was subjected to express questioning both before and after being informed of his Miranda rights. The District Court held that "because the police never apprised West of the distinction between the accident and criminal phases of the investigation, we hold that the statements at issue fall within the accident investigation privilege and are thus inadmissible pursuant to F.S. 316.066(4)." In reaching this decision the court notes:

> "Recognizing that it may be difficult for a defendant to realize when an accident investigation has ended and a criminal investigation has begun, courts have held that unless a defendant has been apprised by Police that the questions being asked ate Part of a criminal investisation, the statements made in response to those questions will be deemed privileged pursuant to F.S. 316.066 (4)." Id. at 256. (Emphasis supplied,)

In reversing the instant case, the Fourth District, reviewing the various records on appeal, reviewing legal precedent, and considering arguments from both parties, held the following:

> "We conclude that it was an abuse of discretion to admit Appellant's statement at trial. The officer's reading Appellant Miranda warnings, alone, does not change the nature of the investigation. West v. State. Not only did the officer testify that she was conducting an accident investigation after the warnings were given, but the remarks she made at the time of the warning suggest that is precisely what she

> was doing. For example, she commented that she reads the rights 'anytime we talk to anybody involving an investigation . . .' and that 'it doesn't mean anything other than it is important to us that you understand what your rights are.' The officers should have apprised Appellant that their questions were part of a criminal investigation, if in fact they were, and because they did not do so, those statements Appellant made while at the police station prior to the point at which Officer LaVoie 'changed hats,' even though informed of his Miranda rights, fell within the accident investigation privilege. West. Norstrom v. State, supra.

Axiomatically, "litigation must, at some point, come to an end." Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied 449 U.S. 1067 (1981). The Fourth District's thorough and unequivocal decision in Norstrom v. State, supra, clearly indicates that the Court firmly believes that the law relating to the accident report privilege was violated, so as to mandate a new trial.

The Respondent would further assert that the Fourth District correctly applied the controlling law to the facts of this case.

B. The privileged statements of the Respondent erroneously introduced in the trial were **not** harmless.

The admission of Respondent's statements **could** hardly be considered harmless error. This was an extremely sensitive and emotional case which caught the heart and emotion of the entire community. Without Respondent's statements, he could have possibly been found guilty of only Reckless Driving or Culpable Negligence. Respondent, besides discussing speed, admitted, when explaining what happened, that he had also had some beer to drink at the house party as well as a **sip** of **liquor** out on High Ridge Road. The **State** had no problem in reminding the jury of this. Numerous witnesses **who** claimed to have information regarding the accident either heard **it** or **saw** only part of **it.** Some of them were also feeling the effects of alcohol. Respondent's statements **enabled a** jury to convict him of **Vehicular** Homicide. The ramifications of the trial **court's ruling** in the context of this case can hardly be considered harmless. This Court cannot overlook that on top of this evidence, there was testimony regarding victim injury, which even the **State** conceded **may** have invoked sympathy.

In the instant appeal, the Fourth District **addressed** this **very issue** when **it held** that:

> Additionally, on remand, **we** caution the trial court to use care to restrict the introduction of unnecessary inflammatory evidence concerning the victim's physical condition and the details of surgical procedures, and to **use** particular caution against prejudicial **use** of family member witnesses for identification where

> other credible witnesses are available, (Cites omitted) Norstrom v. State, supra.

Respondent's statements were hardly harmless. The Respondent gave his statements pursuant to an accident investigation. The law enforcement officers involved in the instant case, themselves, acknowledged this fact. Based on the foregoing as well as the previous facts and arguments presented herein, Respondent maintains that the State has not even arguably met its burden of demonstrating beyond a reasonable doubt that the error was harmless beyond a reasonable doubt.

Both this High Court and the United States Supreme Court have held that the party who is the beneficiary of the error has the burden of demonstrating beyond a reasonable doubt that the error was harmless in the sense that it did not cause or contribute to the order under review. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) and Chapman v. California, 386 U.S. 18 (1967), rehearing denied, 386 U.S. 987 (1967).

The Fourth District, in the instant case, held that:

> Consequently, the court's admitting the statement was error. It is also apparent that the error was not harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Norstrom v. State, supra.

This Honorable Court must affirm the Fourth District's holding that the introduction of the Respondent's confidential communications were privileged and that the error was not harmless.

C. The accident report privilege statute as amended in 1991 is a violation of the Prohibition against ex post facto legislation as applied to the Respondent.

The State's attempted use of Florida Statute 316.066 as amended and effective July 1, 1991, to introduce evidence in a criminal prosecution stemming from an alleged offense occurring in 1988, violates the constitutional ban against ex post facto legislation. U.S. Constitution, Article I, Section 9 (federal) and 10 (state), and Article I, Section 10, of the Florida Constitition. Every law that alters the legal rules of evidence, and receives different testimony than the law required at the time of the commission of the offense, in order to convict the offender, is ex post facto. Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798). More recently, the U.S. Supreme Court in Weaver v. Graham, 450 U.S. 24, 67 L.Ed. 17,23 (1981), held that:

> Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. Id.

Ex post facto prohibition is concerned with retroactive changes in evidence and procedure which operate to the disadvantage of an accused by making a conviction easier. Calder v. Bull, supra. A statute which changes the burden of proof on the prosecution from the usual rule of beyond a reasonable doubt to one of the preponderance of the evidence is ex post facto if retroactive. Thompson v. Missouri, 171 U.S. 380 (1898). A

retroactive statutory change in the rules of evidence is ex post facto, when it admits formerly inadmissible evidence which is favorable to the prosecution. Walker v. State, 433 So.2d 469 (Ala. 1983), repeal of law making inadmissible statement by child while in custody of police officers; Plachy v. State, 91 Tex. Crim. R. 405, 239 S.W. 979 (1922), change from a rule requiring corroboration of the testimony of an accomplice to one abolishing the corroboration requirement is ex post facto as to past offenses; and, State v. Johnson, 12 Minn. 476, 12 Gilf. 378 (1867), change from a rule requiring conviction only on direct evidence to one allowing conviction on either direct or circumstantial evidence.

In the instant appeal, the State is attempting to utilize legislative changes to the accident report privilege which took effect July 1, 1991, when the accident and statements resulting from said accident occurred three years earlier, in 1988. The Fourth District held that the Respondent's statements were inadmissible as privileged communications based on Florida Statute 316.066 (1988). Norstrom v. State, supra. The result sought by the State would clearly violate the prohibition against ex post facto legislation.

A similar situation occurred in Alabama when the state utilized, in a criminal prosecution, statements made by a child that when made were inadmissible. Through legislative change, these statements became admissible, and the state used them to obtain a conviction. The Alabama Supreme Court reversed this

conviction holding that such legislation as it pertained to statements made prior to its enactment violated the prohibition against ex post facto laws. **Walker** v. **State**, supra.

Sub judice, the 1991 statutory amendment as applied to the Respondent is clearly an *ex* post facto application. Most respectfully, this Honorable Court should either affirm the holding of the Fourth District Court or deny certiorari review altogether.

D. The application of the 1991 amendment to the accident report privilege as applied to the Respondent bas not been Preserved for certiorari review.

Review should also be denied because the issue of whether the 1991 statutory amendment applies to the Respondent is not properly before this Court. The Fourth District issued its opinion on August 7, 1991. The statutory amendment took effect on July 1, 1991; however, the State never supplied this legislative change to the District Court by either supplemental authority or by way of rehearing. This issue is now being raised for the first time before this Honorable Court; as such, the Respondent would submit that this issue has not been preserved for review, and has effectively been waived,

It is a fundamental principle of appellate practice that a claim of error must be preserved for review by the presentation of a specific issue in the lower tribunal at an appropriate stage of the proceedings. See generally: Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983). In the absence of fundamental error, this Court should not grant its discretionary review of this issue which is being presented now for the first time, It is well established that a party may not argue a claim or defense based on one theory at the trial level and then assert a different theory on appellate review. Palm Beach Aviation, Inc. v. Kibildis, 423 So.2d 1011 (Fla. 4th DCA 1982); and Mt. Sinai Hospital of Greater Miami v. Steiner, 426 So.2d 1154 (Fla. 3rd DCA 1983).

Respondent vehemently maintains that the same logic must apply to the instant appeal, Even though the 1991 amendment to the accident report privilege statute was in effect prior to the Fourth District rendering its opinion, the State never filed supplemental authority, nor did the State file fox a rehearing after the opinion was filed. Rather, the State sought immediate review with this Court raising for the first time the application of a new statute. Thus, this particular argument by the State is not properly before the Court and should not even be considered.

CONCLUSION

For the reasons and arguments set forth herein and based on the well reasoned and correct holding by the Fourth District, which was based on logic, precedent and statutory authority, the Respondent respectfully prays this Honorable Court to affirm the District Court's opinion. Additionally, based on the various arguments raised herein, the Court should deny certiorari review altogether.

Respectfully submitted,

MICHAEL SALNICK, ESQUIRE
Florida Bar No: 270962

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery, to Joan Fowler, Office of the Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, this the 24th day of October, 1991.

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